

The extent of Government control in the Higher Education and Research Act

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The White Paper *Success as a Knowledge Economy*,¹ published on 16 May 2016, proposed a radical reduction of the numbers of 'sector bodies'. The detailed arrangements were published on 19 May in the Higher Education and Research Bill, the first comparably comprehensive piece of higher education legislation since the Further and Higher Education Act 1992. History demonstrates a longstanding need for vigilance about the creeping powers of Secretaries of State and the enthusiasm of Governments for greater state control of higher education. Since early in the twentieth century that was exercised through control of public funding, with the protections of the 'Haldane principle' and the autonomy of universities. Replacing public funding of teaching by tuition fees and reorganising the public funding of research now throws this tested machinery into question. How direct may future Government interference be, with the new or continuing 'sector bodies' and with institutions themselves? What do these two documents have to say?

The 'Government bodies' which are to be rearranged for merger are untidily clustered in two ways in the White Paper. 'Ten arms'-length Government bodies operating in the higher education and research space' are listed.² These are the seven Research Councils, Innovate UK (formerly the Technology Strategy Board, an executive non-departmental public body (NDPB) sponsored by BIS),³ and two statutory bodies, HEFCE (created by the Further and Higher Education Act (FHEA) 1992) and OFFA (created by the Higher Education Act 2004).

Among these are both bodies which have had 'educational' or 'teaching' funding responsibilities, and bodies which were set up to deal with the funding of research. The ten are to be reduced to two, 'the Office for Students (OfS) and a single 'research and innovation funding body (UKRI)'. Dividing oversight of these responsibilities in this way represents a significant departure from the underlying principle of the FHEA, which set up the four UK funding councils in an era when all universities were engaged in both teaching and research. The legislation states that public funding for higher education should be for 'the provision of education and the undertaking of research' and activities and the provision of facilities needed to support 'education' and 'research' (FHEA s.65(2)(a)). This clause is to be amended by the new Bill, to limit reference to the funding councils to HEFCW only. HEFCE 'ceases to exist' under the Higher Education and Research Bill s.73. The proposed title of the new legislation (Higher Education and Research Act) recognises this fundamental separation of activities. The Bill merely provides for 'cooperation and information sharing between

¹ *Success as a Knowledge Economy*, White Paper, May, 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

² *Success as a Knowledge Economy*, White Paper, May, 2016, 36, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

³ <https://www.gov.uk/government/organisations/innovate-uk>.

OfS and UKRI' (s. 103). They 'may' cooperate in exercising any of their functions. They 'must' cooperate if required to do so by the Secretary of State.

For the '7 Research Councils', a 'single body' is proposed, to be called UK Research and Innovation (UKRI).⁴ The existing Research Councils are non-departmental public bodies, established under the Science and Technology Act 1965 and Higher Education Act 2004. They are principally funded through the Science Budget by the Department for Business, Innovation and Skills. Research Councils UK, a 'strategic partnership' of these existing Research Councils, published a terse statement on the publication of the White Paper.⁵ It would disappear on the creation of UKRI, and Innovate UK would be added alongside the Research Councils but not quite as one of them. The White Paper proposes to 'integrate Innovate UK within this body, but in recognition of its specific mission will keep its distinctive business focus and separate funding stream.'

⁶ An executive non-departmental public body is overseen by a Board rather than directed by a Minister, though the Minister appoints to the Board and an executive NDPB is allocated its own budget. They are not independent of Government. As a new body, Research England would take over the duty to allocate infrastructure funding for research at present carried out by HEFCE through the 'block grant' which also covers some remaining teaching funding.

The proposed detailed arrangements for UKRI suggest a degree of strengthened Government control. The Secretary of State is to have a duty to 'consider the need for both academic and business representation and expertise on the Board of UKRI'. The 'nine councils' within UKRI will have only 'delegated autonomy and authority'. The Secretary of State will 'set budgets for each of the nine Councils through an annual grant letter' thus remaining free in principle to support one area of research more generously than another.⁷ There is a promise - but no detail as to how it would be achieved - to protect the dual support principle, formerly embodied in the distinction between infrastructure funding granted to HEFCE for distribution and project funding identified by the separate research councils. No method or principle of hypothecation is identified.⁸

The mechanisms set out in the Bill establish UKRI (s. 83) and its Councils (s. 84). UKRI is to be a body corporate, with 9 'committees' ('referred to' as 'the Councils'). To the former 7 are added Innovate UK and Research England. The Secretary of State

⁴ *Success as a Knowledge Economy*, White Paper, May, 2016, 35, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

⁵ <http://www.rcuk.ac.uk/media/news/160516/>

⁶ *Success as a Knowledge Economy*, White Paper, May, 2016, 35, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

⁷ *Success as a Knowledge Economy*, White Paper, May, 2016, Executive summary,, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

⁸ *Success as a Knowledge Economy*, White Paper, May, 2016, 21, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

may 'by regulations' add to or remove any of these or change its name except the last two (s. 84 (2)). Research England is to disburse public funding for research infrastructure (s. 89), though there seems to be no provision in the Bill beyond the general expectation of 'cooperation' between UKRI and OfS (s.103) for resolving the need to fund libraries and laboratories which are needed for both teaching and research purposes. This need was formerly conveniently accommodated in the 'block grant' awarded for both, to be divided by institutions as they saw fit .

The 'activities' of this group of 'committees' are to be 'carried out' and their 'functions' to be 'exercised' by UKRI; grants and loans are to be made by UKRI (s. 86), with terms and conditions worded in a closely similar manner to FHEA s.68. This seems to amount to a downgrading of the present Research Councils to mere 'committees' of UKRI. It offers no protection to their present division of disciplines or to their future continuance. This is in accordance with the White Paper's stated objective of fostering interdisciplinary research but it also gives the Secretary of State direct powers to rebalance broad funding preferences for political rather than academic reasons.

On the 'teaching' side of higher education, an Office for Students is to be created, merging OFFA and HEFCE, which will both disappear (ss.73 and 74). Its functions and responsibilities are sketched as 'bringing together the expertise and shared agenda of HEFCE and the Office for Fair Access (OFFA)', but the reason for the merger is specified in only one area, namely 'to streamline their widening participation functions and give the OfS the responsibility for all spending on access.'⁹ The 'OFFA' element is covered in ss. 28-36 of the Bill and also in the inclusion of the duty to have a mandatory approved 'access and participation plan' as a condition of Registration as a provider (ss. 8-12), with sanctions for breaches (s.15). An OfS 'duty to protect academic freedom' in this connection is outlined at s.35, though it is not clear how this is to be balanced against some of its other duties or the powers of the Secretary of State to give guidance 'framed by reference to particular courses of study' (s.2 (4)).

There is a general statement in the White Paper that the OfS 'will be a consumer focused market regulator with new statutory powers'.¹⁰ It will have 'an extended remit', which is sketched in the White Paper. In the Bill it is set out in detail. In the White Paper the OfS is described as 'a Non-Departmental Public Body at arms' length from Government'.¹¹ The Bill creates the OfS as a body corporate (s.1 (1)). Its members are to be its Chair, its Chief Executive, the new Director for Fair Access and Participation, and between seven and twelve other members to be appointed by the Secretary of State (Schedule 1 (2)). They must have among them not only persons

⁹ *Success as a Knowledge Economy*, White Paper, May, 2016, 38, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

¹⁰ *Success as a Knowledge Economy*, White Paper, May, 2016, 39, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

¹¹ *Success as a Knowledge Economy*, White Paper, May, 2016, 39, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

with higher education experience but employers of graduates, persons with experience of 'promoting choice' for consumers, persons with financial management or auditing experience, persons with experience of 'creating, reviewing, implementing or managing a regulatory system in industry or another section of society', and persons with experience of 'a broad range of the different types of English higher education providers'. No civil servant may be a member of OfS. The OfS may appoint employees but their terms and conditions of employment and their remuneration will require the approval of the Secretary of State (Schedule 1 (7)). This should be compared with the much less prescriptive requirements for the involvement of the Secretary of State in the initial and continuing appointment of the Boards of the Funding Councils in Schedule 1 of the FHEA.

The first extension of the powers formerly exercised by HEFCE is to include for OfS regulation of registered alternative providers. 'HEFCE's purpose, role and powers have become outdated, and have led to the anomalous situation whereby alternative providers are part of a separate regulatory system operated directly by BIS,'¹² says the White Paper. Extension beyond the 'publicly-funded' sector whose spending of public money HEFCE and the other statutory funding councils must monitor will empower OfS 'to regulate all registered HE providers'. That will include the 'alternative' or 'private' providers, but only those on the new Register, namely 'providers that want their students to receive student support or have a Tier 4 licence' with others with 'accredited courses' joining on a 'voluntary basis', in return for 'compliance with the Office of the Independent Adjudicator for Higher Education (OIA)' but not in receipt of public funding. The Bill devotes clauses 3-22 to Registration of providers, including the arrangements for imposing 'monetary penalties' (15), replacing the 'conditions of grant' of FHEA, and suspension of registration(16,7) or de-registration by the OfS, both with a statutory procedure and provision for appeal (18.19). There is also provision for 'voluntary de-registration' (22).

A similar extensive list of provisions deals with the access and participation duty transferred in to the OfS from OFFA. The Secretary of State has powers to make regulations setting out matters to which the OfS must have regard in exercising its powers (for example s.21 (3)). If a provider applies for a review of a provisional decision against it over its access and participation plan, the Secretary of State will appoint a person or panel to consider it (s.21 (4)). There are several mentions of a First-Tier Tribunal to consider appeals against removal from the Register but the constitution and creation of this entity does not seem to be explained in the Bill. Nor is there mention of the Tier 4 provision touched on in the White Paper.

Extension in another direction, as set out in the White Paper, will enable the OfS to 'monitor' not only institutions' 'financial sustainability' but also their 'efficiency' (undefined). It will take over HEFCE's responsibility for 'distributing teaching grant funding to eligible institutions'. It will additionally 'work closely with the new

¹² *Success as a Knowledge Economy*, White Paper, May, 2016, 44, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

Institute for Apprenticeships¹³ and other regulatory bodies' apparently uniting supervision of 'quality across academic and technical education'.¹⁴ So there is to be a further extension of powers and responsibilities, but into an area where the Enterprise Act does not make it clear whether the Apprenticeships included are at Degree Apprenticeship level or even at vocational 'higher' education level. The Bill contains no reference to this White Paper promise about apprenticeships.

OfS, UKRI, their independence from Government and the question of 'academic freedom'

The intended degree of independence of the OfS and UKRI from Government is partly set out in the White Paper. The Haldane principle that there should be no direct state control of matters which lie within the proper sphere of academic decision-making gets several mentions, but only in connection with research funding. Nothing is said about the future of the hard-won principle in FHEA 1992 s.68 that the Secretary of State may not set terms and conditions in relation to public funding ('grants'):

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.

That had the effect of making the funding councils into buffers between the grant of public money by Government and the way institutions which received it would spend it. At s. 2 (2) (2) the Bill states that the OfS must have regard more broadly in discharging its functions to guidance given to it by the Secretary of State. At s.2 (4) 'the guidance may, in particular, be framed by reference to particular courses of study'. This is followed by a rough paraphrase of the points in 1992 s.68 seeking to limit intrusion into academic decision-making on such matters, identified as having 'regard to the need to protect academic freedom'. 'Academic freedom' is further defined at s.14 (7) in the list of 'public interest governance conditions', in wording repeated from Education Reform Act 1988 s.202.

This appears to extend a protection formerly limited to academic staff at pre-1992 universities to all 'academic staff at an English higher education provider'. It does not make it clear whether it is to apply to the senior managers currently sharing this protection as 'academic-related' staff. This remains in essence an employment protection, and does not include the phrase 'academic freedom'. It still leaves English law without any formal definition of 'academic freedom' except perhaps as set out in the list s to be found at s.14 (7) and s.15.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503151/bis-16-138-enterprise-bill-apprenticeships-institute.pdf. The Enterprise Act received Royal Assent on 4 May 2016.

¹⁴ *Success as a Knowledge Economy*, White Paper, May, 2016, 39,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

A definition of the Haldane principle limited to funding for research is provided in the White Paper: 'that decisions on individual research proposals are best taken by researchers themselves through peer review' with 'strong and autonomous leadership' to enable the research councils surviving within UKRI 'to make the best decisions in relation to individual allocations'.¹⁵ 'The peer review assessment and decision making will, as now, be undertaken by discipline experts.'¹⁶ But the unclarity about the extent to which the Secretary of State will be able to intervene in the allocation of research funding through UKRI remains a concern.

The relationship of OfS and UKRI with other 'sector bodies'

There remains the important question of the relationship of the OfS with the remaining sector bodies and the institutions themselves.

In the White Paper's explanation of the rationale for the creation of OfS many of the continuing sector bodies, both statutory and non-statutory, are left out of account, although the ways in which they are to work in future with OfS and UKRI will clearly need to be determined. The Student Loans Company is expressly excluded in a White Paper footnote, though the SLC is 'Government-owned'¹⁷ by the UK administrations. Omitted without comment from the White Paper's list of bodies to be brought within the new OfS and UKRI structure are other and various 'sector bodies' such as the continuing statutory Office of the Independent Adjudicator (OIA) (established under the Higher Education Act 2004), the Quality Assurance Agency (QAA), an independent charity hitherto funded by institutions and HEFCE, and the continuing Universities and Colleges Admissions Service (UCAS), a charity run as a company.

Of these by far the most important is the Quality Assurance Agency. In 2014 the HEFCE Board initiated a 'review' of Quality Assessment, notionally in collaboration with the Welsh and Northern Irish Funding Councils.¹⁸ The statutory authority on which it relied in for doing so was FHEA s.70, under which it was required to 'secure' that 'provision was made' for 'assessing the quality of education provided' in publicly-funded or potentially publicly-funded institutions and to establish a Quality Assessment Committee to advise it on the discharge of this duty. Since 1997 the Quality Assurance Agency, an independent body co-funded by the institutions and the funding councils, had carried out the functions deemed to be required under HEFCE's duty to 'secure provision'. It took over the former functions of the Higher Education Quality Council and HEFCE and HEFCW's own quality assessment arrangements.

¹⁵ *Success as a Knowledge Economy*, White Paper, May, 2016, 45, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

¹⁶ *Success as a Knowledge Economy*, White Paper, May, 2016, 46, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

¹⁷ <http://www.slc.co.uk/about-us.aspx/>

¹⁸ <http://www.hefce.ac.uk/reg/review/>.

HEFCE's review proceeded without reference to the QAA or consultation with it during 2015 and 2016. QAA's HEFCE funding was to be ended from July 2016. HEFCE identified six separate 'quality assessment' tasks, not all uncontroversially covered by its statutory 'quality assessment' duty, and put out a call for tenders, letting it be known that it was interested in bids from various commercial providers. These were to cover 'Gateway into the higher education system'; 'Verification of a provider's approach to its own review processes'; 'Support for governing bodies'; 'Unsatisfactory quality investigations'; 'Degree standards'; 'International activities'. On the Friday before the publication of the White Paper on Monday 16 May 2016 HEFCE announced the 'preferred bidders'.¹⁹ The tender to ensure that governing bodies had a better understanding of 'quality' matters went to the Leadership Foundation for Higher Education (a charity funded by the Funding Councils and its institutional members). 'Standards' was to go to the Higher Education Academy (another charity funded by the Funding Councils and institutions). The QAA was 'preferred bidder' for everything else, and was already experienced in these areas of work.

On the face of it this appeared an embarrassing outcome for HEFCE, days before its dissolution was formally announced in the White Paper. But the proposed changes now published left a number of questions unresolved about the way the continuation of the work of the QAA was to be organised and its future relationship to the OfS, not all of which are fully addressed in the Higher Education and Research Bill.

'Quality and standards' are covered in ss.23-7. The first significant change from FHEA s. 70 provision for the Funding Councils is the addition of 'standards' to the 'assessment of quality' responsibilities provided for in FHEA s.70. The second is to allow OfS not only to 'secure' that provision is made for assessment but also potentially to do the 'assessing' itself. S. 23(1) allows the OfS to 'assess or make arrangements for the assessment of the quality of and the 'standards applied to' higher education provided by registered providers. 'Standards' are as defined in s.13 (1)(a), though that clause adds only the phrase 'particular standards to be applied' and does not make it clear whether the standards relate to the provision of education or the assessment of student performance, most importantly the setting of 'degree standards'. The White Paper's promise of a 'high quality bar' for new providers to surmount is not followed up or clarified in the wording of the Bill although it gives OfS powers to grant degree-awarding powers.

S.24 and Schedule 1 require OfS to establish a Quality Assessment Committee analogous to the one required in the Funding Councils under FHEA s.70. New in s.25 is the OfS power to 'make arrangements for a scheme to give' quality and standards 'ratings' to providers if they apply for them. With s.26 the Bill comes to the question of the 'designated body' which is to perform either or both of the 'assessment functions', the second being identified with the new 'rating' function. The term 'assurance' does not appear in the Bill which speaks only of 'assessment'.

If a body is designated under these provisions it appears to exercise only delegated powers, for 'the function does not cease to be exercisable by the OfS' (s. 26

¹⁹ <http://www.hefce.ac.uk/news/newsarchive/2016/Name,108839,en.html>

(3). A designated body may charge a provider fees for a service or any specific activity (s.27) which appears to remove the need for OfS funding for such a body.

Schedule 4 sets out the process of designation of the body by the Secretary of State in more detail. There must be extensive consultation by OfS as specified. OfS 'must' then decide whether to recommend a body to the Secretary of State or not to do so, and publish its decision. The actual decision to designate a body rests with the Secretary of State. He must apply stated criteria and if he decides not to designate he must publish that decision. The Secretary of State may not designate a body the OfS has not recommended. The OfS must make arrangements to hold the designated body to account for the performance or its functions and inform the Secretary of State of any concerns. The Secretary of State may remove the designation, after specified consultation, publishing the decision as a Notice. The Secretary of State must have regard to the advice of the OfS in this matter. If this occurs, the quality duty would revert to the OfS. There appears to be no provision in the Bill for holding the OfS itself to account.

Once a body has been designated, it will gain a statutory duty to design and operate the quality assessment system, reporting to the OfS. This might make possible a co-regulatory approach to the detailed quality reviews, to be carried out by academic experts. . The present intention seems to be to identify the QAA as the designated body at least for the time being. However, the primary quality duty will remain with the OfS, which will have a duty to ensure that the designated body is carrying out the duty effectively. The designated body will be obliged to provide the OfS with any information it requires to inform its use of sanctions and interventions to address quality concerns, as well as to carry out its monitoring function.

An important aspect of the work carried out by the Quality Assurance Agency under the previous legislative provisions was to conduct an advisory and scrutiny process for applicants for degree-awarding powers and university title, overseen by its Advisory Committee on Degree Awarding Powers, and preparatory to making recommendations to the Privy Council.²⁰ The White Paper's expressed intention is to change the ways in which new providers may get through the 'Gateway', including the award of probationary degree-awarding powers and speedier grant of university title;²¹ and to make unprecedented provision for provider 'exit' if a provider failed would all come under the remit of the new OfS. This is so that 'anyone who [*not* 'any provider which'] demonstrates they have the potential to offer excellent teaching and clears our high quality bar can compete on a level playing field'. The nature and ownership of that 'high quality bar' is therefore to be of the first importance. 'We will expect a clear demonstration of quality'. 'Entry to the funded system will continue to be subject to meeting the Expectations of the UK Quality Code; and, by establishing the new register, we will bring currently unknown providers into the purview of the

²⁰ <http://www.qaa.ac.uk/assuring-standards-and-quality/daput/guidance-and-criteria>

²¹ We will simplify the granting of DAPs and UT for English institutions by transferring responsibility for the process from the Privy Council to the Office for Students (OfS).

regulator.' The Quality Code is QAA owned so it is not clear how this can be incorporated in the legislation.

The HE Bill devotes ss. 40-50 to the grant of degree-awarding powers and ss. 51-5 to authorisation to use university title. Both move from the Privy Council to OfS and it is not clear whether the designated quality assessment body is to continue to have a role in any process of preliminary assessment of suitability for either.

Under the Bill, the consideration of an applicant's suitability for the grant of degree-awarding powers rests with OfS which must 'consider' that an applicant's 'proposals' are satisfactory (s. 40 (4)). The OfS's power to make an order granting degree-awarding powers 'is exercisable by statutory instrument; and the Statutory Instruments Act 1946 is to apply to such an instrument as if the order had been made by a Minister of the Crown' (s.40 (10)). A provider authorised to grant degrees may also authorise other providers to grant degrees on its behalf (s.41). The OfS may revoke the authorisation, even in the case of providers with previous indefinite degree-awarding powers, with a right of appeal (ss.42, 43, 44). Validation arrangements are reframed (s.45) and the OfS itself becomes a body with powers to enter into validation arrangements or grant its own degrees (s.47), though only taught and foundation degrees. Consequential amendments to present legislation making all this lawful and changing existing requirements are covered in ss.48-50. OfS will apparently here exercise ministerial powers without reference to the Secretary of State.

s.51 amends FHEA 51 to move the power to consent to the use of university title to the OfS. This appears (s.52) to cover cases where approval may be granted by Companies House or still requires Companies House approval under Companies Act 2006. Universities already granted the right to use the title are not affected though the Act introduces for the first time the possibility of revocation of that authorisation, with a procedure and provision for appeal (s.53, s.54, s.55).

The QAA is to retain responsibility for 'unsatisfactory quality investigations' and its method has hitherto been to seek to help failing institutions mend their ways. HEFCE too, until very recently, took a 'light touch' approach, developed in recent years, which concentrated on supporting a failing institution to mend its ways and do better. The closeness of OfS supervision is to vary from institution to institution as seems to be needed but 'the OfS will have the powers to intervene rapidly if it has reason to believe that quality in any institution is failing'.²² This wording hints at a change of expectation. The new policy is not to seek to avoid 'provider exit' but to regard it, robustly, as a good thing if it clears the way for new 'challenger providers' to enter:

The OfS and BIS will have the power to enter and inspect providers (with a court warrant) if there is suspicion of serious breaches, such as fraud or malpractice, to safeguard the interests of students and the taxpayer and protect the reputation of the sector,

²² *Success as a Knowledge Economy*, White Paper, May, 2016, 40, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

though 'a court warrant would be required before the power could be exercised'. These provisions are set out in the Bill at s.56.

The importance of better definition of the dimensions of 'quality' and 'standards' and of the relationship of OfS to the QAA and to the Secretary of State is clear again and again throughout the White Paper and the Bill, both of which fall down badly on this point. It is relevant to the Teaching Excellence Framework too, though that does not require new legislation and is consequently conspicuously absent from the Bill. Indeed an advertisement for the post of Chair of the Teaching Excellence Framework appeared in the week of the publication of the White Paper and the Bill, with a closing date of 6 June. This is a Ministerial appointment (on advice from a recruitment panel made up of the CEO of HEFCE, a BIS representative to Chair it and including an independent member who is Director of the Social Market Foundation (as listed in the Applicant Pack). The postholder is to 'lead' Years Two and Three of the TEF Assessment, 'working with' both HEFCE and the QAA. He or she will chair the 'assessment panel that will make decisions on TEF awards' and 'lead the calibration of judgements'. The panel is to be 'independently of Government', though the post is not to be regulated by the Commissioner for Public Appointments.²³

Conclusion

Between the White Paper and the Bill, the Bill and the Act, and the Act's coming into force, must lie a period of perhaps as much as two years, during which the present bodies can be expected to continue in their present roles.²⁴ HEFCE was created primarily to be a funding body, not a regulator, yet there has been significant mission-creep, to the point where it describes itself as 'principal regulator' on its website.²⁵ The OfS is to 'prepare and publish a regulatory framework' from time to time (s.67) and the Secretary of State may confer 'supplementary functions' upon it under primary or secondary legislation (s.68). Much of the change the Government intends 'to implement through future primary legislation',²⁶ but experience has shown that a good deal can be changed by statutory instrument, ministerial fiat, custom and practice and there is clearly scope in the Bill for much to be worked out in detail by the use of statutory instruments.

Outlining the parameters of the new quality assessment body, there is White Paper promise of a co-regulatory approach', of 'co-ownership or governance by the HE sector, commanding the confidence of the sector' and of 'independence from Government or any Government body'. Protections against Government interference will need to be strong and there is little in the Bill about 'independence'. The

²³ <https://publicappointments.cabinetoffice.gov.uk/appointment/tef-chair/>

²⁴ <http://www.hefce.ac.uk/news/newsarchive/2016/Name,108842,en.html>

²⁵ <http://www.hefce.ac.uk/reg/charityreg/approach/>.

²⁶ *Success as a Knowledge Economy*, White Paper, May, 2016, 47, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523396/bis-16-265-success-as-a-knowledge-economy.pdf.

'designated provider' must be 'independent of any particular higher education provider' (Schedule 6 (4)) but that is a very different thing from independence of state control and a key feature of the QAA has been its independence.