

Response by the Department for Education to the issues raised by Defenddigitalme

We welcome the considerations of the Committee regarding their scrutiny of the Higher Education and Research Act (Further Implementation (etc.) Regulations 2019 (“the draft Regulations”), which were laid in draft on 29 April 2019.

You have asked a series of questions on regulations contained in Part 3 of the draft Regulations. As explained in the explanatory note these amendments to secondary legislation are made as a consequence of the commencement of provisions in the Higher Education and Research Act 2017 (HERA) and are made under s116(1) and (2) and 119(2)(h) of that Act. HERA replaced the system of grant funding of higher education previously administered by the Higher Education Funding Council for England (HEFCE) with a system of registration overseen by a new regulator, the Office for Students (OfS). The OfS carries out grant funding functions previously performed by HEFCE and access functions previously carried out by the office of the Director of Fair Access (OFFA), in addition to new functions. This new regime has been introduced over a period from 1st January 2018 and will be completed in August this year.

As the new regulator for higher education, the OfS needs to be empowered to do its job well. Under transitional arrangements, the Office for Students has been undertaking the functions of HEFCE and OFFA since their abolition in April 2018. These transitional arrangements will end on 31st July this year as the OfS functions will all be in force from 1st August 2019.

To carry out its functions, the OfS requires pupil-level information to, among other things, assess whether registered providers are fulfilling their obligations to widen access to higher education, as set out in their Access and Participation Plans (a core requirement of OfS-registered institutions wishing to charge the higher tuition fee).

Q1: Have the statutory obligations of GDPR Article 36(4) assessment been met, as set out in DCMS guidance on policy making and legislative changes? The processing that will result from Part 3 (32) and (28) changes to Education Acts, includes mandating for new or revised sharing of existing data sets, and additional disclosure of personal information (from the Department for Education to the OfS, and as a result from the OfS to third-parties). Government Departments and relevant public sector bodies are subject to the requirement to consult with the Information Commissioner’s Office (ICO) on such policy proposals for legislative or statutory measures relating to the processing of personal data. Further information is provided in Recital 96, which states that: “A consultation of the supervisory authority should also take place in the course of the preparation of a legislative or regulatory measure which provides for the processing of personal data, in order to ensure compliance of the intended processing with this Regulation and in particular to mitigate the risk involved for the data subject.” This is a legally binding requirement on all public sector organisations with responsibility for legislative or statutory measures, and failure to adequately consult with the ICO would constitute a breach of the GDPR. Paragraph 2.19 in DCMS guidance states: “although there is no fixed timeframe in which consultation should take place, it is recommended policy leads allow a minimum of 12 weeks from initial contact with the ICO to finalisation of their policy proposals. A failure to allow sufficient consultation time could unduly delay timescales for laying legislative measures in Parliament.”

Department for Education: We are grateful to “Defenddigitalme” for raising the need to consult with the ICO, which we have now done. As these consequential amendments do not extend the scope of the datasets that are the subject of the amended regulations but only substitute one body (OfS) for another (HEFCE) consequential on the OfS assuming a role previously performed by HEFCE we do not consider a full consultation of the kind referred to by Defenddigitalme is required. We have, however, fulfilled the consultation requirement by notifying the ICO of the amendments in the draft Regulations in the format requested by the ICO.

The data processing is needed to support many of the OfS's functions. Access to the national pupil database and individual pupil data, including in relation to prior attainment, disability, and racial and ethnic background, is needed to support the OfS's functions including its administration of the access & participation plan regime and general duty to have regard to the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers. The data processing also supports the OfS in its registration, information and funding functions.

Q2: *In particular, the GDPR (Article 25) requires data protection by design and default (sometimes also called 'privacy by design'). That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage, and their accessibility. In particular, "such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons." How is this requirement complied with? Does Government recognise what happens in practice? It is an abdication of accountability by the Department for Education as the current data controller, to suggest, as it did in the 2018 Regulation, that such considerations are for the OfS.*

Q3: *What assessment has been made of the human rights impact of the Regulations? Although the Explanatory Memorandum paragraph 5.1 states that the Minister for Universities, Science, Research and Innovation believes that the provisions of the Higher Education and Research Act 2017 (Further Implementation etc.) Regulations 2019 are compatible with the Convention rights, there is no available evidence of it.*

Q4: *What assessment has been made of adding this new Regulation to existing powers? These new powers open up what data can be given to the OfS. It comes after new OfS powers were awarded in 2018 in the Higher Education and Research Act 2017 Cooperation and Information Sharing Regulations 2018 to whom the OfS may distribute identifying, personal confidential data, including a further thirteen third parties that include commercial as well as public bodies. There is no clear restriction of purposes for data sharing on the face of the Act in s633 nor in either Regulation. For example, the purposes of use for one of the thirteen, Pearson Education Limited, are defined not by the State, but the company Memorandum and Articles of Association. The combination of both Regulations therefore creates a high risk to the rights and freedoms of the individuals in the databases, and their privacy and family life.*

Q5: *Is it necessary and proportionate for the Office for Students to have new Prescribed Person powers to access every child's named school records from age 2-18 across mainstream and Alternative Provision education forever, as this Regulation would enable? Could the same objectives be fulfilled with safeguards on identifying data?*

Department for Education: As explained above, the amendments in regulations 28 and 32 of the draft Regulations substitute the bodies involved in the sharing of existing datasets, and do not extend the scope of those datasets. The regulations being amended limit the information shared with the OfS to personal data required to undertake the responsibilities as outlined in the regulation, and therefore this is in fact setting the parameters of information sharing, rather than opening up additional access to data.

As the provisions in Parts 2 and 3 of the draft Regulations are consequential, we consider there is no impact on human rights. To explain in more detail, these provisions are drafted to maintain the original scope and intention of the underlying legislation, whilst reflecting the changes introduced by the Act. In relation to the right to privacy, the information being shared has not changed, only the bodies between which that data might be shared. That is HEFCE, which no

longer exists, is replaced by OfS. Accordingly there is no change in the assessment of the ECHR compliance of the provisions amended

“Defenddigitalme” refers to the Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018, which were debated in the House of Lords on 24 July 2018. Lord Watson of Invergowrie, tabled a motion of regret on the grounds that this would “create significant powers for the Office for Students to grant access to students’ confidential data to a single commercial provider.” This referred to Pearson Education Limited who are responsible for awarding Higher National Diploma qualifications, and Lord Watson called on this government to carry out a privacy impact assessment. We respectfully remind the Committee, that the motion was withdrawn following the debate. It is also important to note that these Cooperation and Information Sharing Regulations were made under section 63 of HERA and create gateways for information sharing and cooperation to facilitate the OfS’s performance of its functions or the performance of functions of a body listed in the regulations. The scope of the gateway is limited in relation to these other bodies as set out in the regulations. Defenddigitalme sets out the limit of the gateway for Pearson in question 4.

The amendments in regulations 28 and 32 of the draft Regulations do not create new gateways; they amend existing gateways in regulations made under the Education Act 1996 to enable or require information sharing with the OfS in place of HEFCE. Our amendments do not directly relate to Pearson or sharing information with third parties, and indeed it is for the Office for Students to ensure that it controls and processes data in a way that is compliant with data protection laws. The OfS data protection and privacy statement is available on its website and through the link below. The OfS also sets out information on how it uses data in performing its regulatory functions on that website.

<https://www.officeforstudents.org.uk/media/ee9a7e38-a245-4ec5-b9c4-ab94314089a4/ofs-data-protection-and-privacy-policy-appropriate-policy-document.pdf>

These regulations also allow but do not specifically require the Department to share data. The consequential amendments to the Education (Information About Children in Alternative Provision) Regulations 2007, the Education (Individual Pupil Information) (Prescribed Persons) (England) Regulations 2009 and the Education (Student Information) (England) Regulations 2015 amend legal gateways to enable, rather than require, the Department to share the data necessary to allow the OfS, in place of HEFCE, to fulfil its functions as the independent regulator of higher education in England.

Any data sharing by the Department with OfS, as with any other prescribed person, will be subject to a robust approvals process to ensure information is only shared where it is both lawful and proportionate to do so. As part of this approvals process, senior data and legal experts, as part of the DfE Data Sharing Approval Panel (DSAP), assess the share for public benefit, proportionality, legal underpinning and strict information security standards. The DSAP panel also includes external members who scrutinise the ongoing decision making in order to increase public trust and transparency. This ensures that we are able to consider the data sharing ramifications at the point of each data share by the department, rather than only considered at the start of the data sharing process. In addition, we are supporting the OfS so that they are fully compliant with all data sharing requirements, including the management of data at an individual-level.

Q6: *How will the public be informed? When families provide information to a school setting, there is no general expectation that it will be passed to the Office for Students, or their third party prescribed persons. There is a legal obligation to fairly process, that is, for the DfE as current data controllers, to tell people that it plans to use their personal information for a new purpose, or by new users, by passing it*

on to the OfS. What has been put in place to guarantee this happens prior to release of the data from the DfE to the OfS under this Regulation? Who will be accountable for fair processing and communicating the new purposes and new users to the public? N.B. This would include communication to all referred to in the pre-existing records of the ~25 million who have left school, and whose records this Regulation also affects.

Department for Education: We respectfully note that the Department publishes details of all data shares on [gov.uk](https://www.gov.uk). We also provide educational establishments with recommended wording for privacy notices, and this wording includes a note that information may be shared by the Department with third parties (see <https://www.gov.uk/government/publications/data-protection-and-privacy-privacy-notices>).

The OfS data protection and privacy statement is available on its website, as described above.

Q7: *Unconnected, additional separate powers in Part 3(14) will be given to the OfS through amendment of the Digital Economy Act, Part 5 for vaguely defined purposes associated with fraud. This Regulation adds them into the list of Prescribed Persons. There is no published recognised route of redress for errors made in fraud accusations, which have had significant consequences for individuals and government and institutional risk in recent years. Why has a gateway been opened up to more fraud investigation by the OfS, or its prescribed persons including the Home Office and SLC since SI 2018/607, without first having adequate working mechanisms in place, to protect students from errors as a result? More investigations will likely lead to more errors and more harm.*

Department for Education: The amendments being made in regulation 14 of the draft Regulations are consequential in nature, made under s116(1) and (2) and 119(2)(h) of HERA. The "specified persons" currently listed in Schedule 8 to the Digital Economy Act 2017 include HEFCE (at paragraph 27) and the Research Councils (at paragraphs 32-40). These bodies have all been subsumed into the OfS and UKRI respectively, and the consequential provisions merely substitute the new bodies for the old. These substitutions are purely consequential changes, which are considered appropriate in consequence of the abolition of HEFCE and the Research Councils, in order to ensure that the scope of Schedule 8 is unchanged. These consequential amendments should not be regarded as opening up a new gateway.

The fraud power in section 56 of the Digital Economy Act 2017 creates a permissive gateway that enables specified persons (listed in Schedule 8) to share information to take action in connection with fraud. All information sharing under section 56 will be initially operated through pilots. Pilots can range from identifying fraud through to preventing fraud and will not necessarily result in increased investigations. To use the powers specified persons must submit a business case for review by the DEA Review Board, which includes ICO representation, prior to Ministerial sign-off. Business cases must be explicit on the purpose of the proposed pilot: the nature of the fraud that the data share relates to, the data to be shared and the intended outcome. It is incumbent upon specified persons submitting a business case that they manage the impact of the pilot upon members of the public in keeping with their own processes.

Q8: *Did this process comply with the Cabinet Office Debt and Fraud Information Sharing Review Board Code of Practice passed by the House in November 2018? At the time of writing, we have not seen publications required in parts 5.1 and 5.2 (in particular paragraphs 144 or 145). Applications to amend Schedules should be made through the secretariat, but since it does not publish minutes, this is an unknown.*

Department for Education: It appears that "Defenddigitalme" is referring to paragraph 119 of the relevant Code of Practice: "If a public authority wishes to use the fraud power but is not listed in Schedule 8, it may be added through regulations -- provided it meets the conditions in

section 56(7) to (9). Applications to amend the Schedules should be made through the secretariats for the relevant review board...". The amendments made through the draft Regulations are consequential amendments which are not being made under the Digital Economy Act 2017, and so these are not a matter for the Review Board, which oversees the exercise of powers in the Digital Economy Act 2017. These amendments therefore do not require an application to the Review Board. However, the Review Board will be notified of these changes as a matter of courtesy.

DCMS and Cabinet Office have published and continue to update the register of information sharing agreements in accordance with parts 5.1 and 5.2.

17 May 2019