

Developing the OfS's approach to consumer protection: student information, contracts and complaints

Issue

1. The regulatory framework places a number of obligations on registered providers in respect of the rights of students as consumers. These obligations are designed to provide the regulatory context within which students can benefit from protections that consumer rights legislation offers them so that whatever their background they can have a fulfilling experience of higher education that enriches their lives and careers. However, we are concerned that the current consumer protection arrangements are not sufficient to deliver fully the outcomes we would wish to see for students.
2. When the board agreed the regulatory framework in January 2018, it signalled that further work would be necessary to understand the benefits of more explicit requirements in relation to student contracts. In addition, the 2019-20 business plan sets out activities relating to consumer protection, including evaluation of the advice available to students about their rights as consumers, reviewing practice in relation to student contracts, and issuing guidance on information about individual providers to support student choice.¹
3. More recently, we received statutory guidance from the Secretary of State under section 2(3) of HERA which asks the OfS to prioritise work supporting students as empowered consumers.² This included the following points:
 - students should have clear information on which to base their choices;
 - students should receive what is promised to them by providers;
 - contractual terms are clear and fair;
 - students have access to effective complaints procedures.
4. The current paper seeks to bring these issues together to support an initial strategic discussion about how the OfS should develop its approach to consumer protection. We plan an open discussion on these issues at the November 2019 board meeting, followed by more detailed proposals for the January 2020 meeting.

¹ See <https://www.officeforstudents.org.uk/about/our-business-plan/>

² See <https://www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/>

Recommendations

5. The board is invited to consider the issues and questions set out in this paper, and in the presentation we will make at the board meeting, and provide advice on the strategic development of the OfS's approach to consumer protection.

Further information

6. Available from Susan Lapworth, susan.lapworth@officeforstudents.org.uk.

Background

8. The regulatory framework is designed to deliver the OfS's regulatory objectives: we are seeking to deliver significant improvements in access and participation for particular groups of students and a high quality higher education experience and good outcomes for all students. The primary regulatory tools we use to do this are access and participation plans, and the baseline conditions of registration for quality and standards (the B conditions). We also use the TEF to incentivise excellence and improvement beyond the regulatory baseline.
9. We see other conditions of registration, and interventions at a sector-level, as necessary to underpin the delivery of these outcomes. For example, to achieve these outcomes, a provider must be financially viable and sustainable, with adequate and effective management and governance arrangements.
10. The regulatory framework also contains conditions of registration that relate to consumer protection and we consider that these too are necessary to underpin the delivery of our regulatory objectives. This framing is important because it means that the consumer protection mechanisms need to be appropriate and sufficient to underpin the delivery of the regulatory objectives. That is, they need to work effectively in support of those objectives, rather than as ends in and of themselves.
11. This paper sets out a series of questions about the that we should develop our consumer protection tools to work in this way.

Discussion

What outcomes are we seeking for students?

12. The OfS's primary regulatory objective are:

All students, from all backgrounds, and with the ability and desire to undertake higher education:

1. Are supported to access, succeed in, and progress from, higher education.
2. Receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure.
3. Are able to progress into employment or further study, and their qualifications hold their value over time.
4. Receive value for money.

13. The first of these includes the support needed for all students to access higher education and we would see this as extending to the information, advice and guidance they need to make good choices about what and where to study.
14. The second regulatory objective has two elements. The first relates to a high quality academic experience and the second to protecting students' interests while they study. We see the

second of these as underpinning for the first. In other words, the outcomes we are seeking for students relate to their higher education experience and the tools we might use to deliver these outcomes include (but are not limited to) those that relate to consumer protection. This means that we need to determine the outcomes we are seeking – in terms of the academic experience – before deciding whether and how to use the tools available to us.

15. Bringing these two regulatory objectives together we might seek, for example, to deliver these outcomes:
- a. In relation to their choices about higher education:
 - i. Students have the information, advice and guidance they need to make good choices about what and where to study.
 - b. In relation to their academic experience:
 - i. The quality of teaching students receive is appropriate and as they had expected.
 - ii. The contact time students receive is appropriate and as they had expected.
 - iii. The academic support and feedback students receive is appropriate and as they had expected.
 - iv. The learning resources (IT, library etc) to which students have access are appropriate and as they had expected.
 - v. Students are equipped to succeed in their lives and careers.
 - c. In relation to their experience beyond the curriculum:
 - i. The direct costs of higher education are as students had expected and are fair and transparent.
 - ii. The indirect costs of higher education are as students had expected and are fair and transparent.
 - iii. The financial support available, particularly for the most disadvantaged, is as students had expected and is fair and transparent.
 - iv. The support students receive outside the curriculum is appropriate and as they had expected.
 - v. The social facilities and resources to which students have access, including for those using non-traditional study routes, is appropriate and as they had expected.

Question 1: Does the board agree that these are the outcomes we should seek to deliver for students? If not, what should those outcomes be?

What tools are available to deliver these outcomes for students?

16. The regulatory framework is designed to deliver the regulatory objectives through a number of mechanisms. For example, the B conditions directly relate to the quality of courses, the support available to students, and the outcomes achieved by students. The B conditions are therefore the primary mechanism through which we seek to deliver these things for all students.
17. The focus of this paper, however, is on the extent to which consumer protection tools can support our other regulatory mechanisms to deliver our regulatory objectives. That is, do the consumer protection tools currently work effectively in support of students when, for example, the requirements of the B conditions are not being delivered in practice.
18. The regulatory framework places the following obligations on individual registered providers in relation to consumer protection:
 - a. Providers are required to provide information to the OfS that is published via Discover Uni³ and other routes to support students' decisions about what and where to study (Condition F4 requires providers to submit such information).
 - b. Providers are required to demonstrate that they have had regard to relevant guidance on how to comply with consumer protection law, with the Competition and Markets Authority's (CMA) 2015 guidance⁴ suggested as a source of 'relevant guidance' (Condition C1).
 - c. Providers are required to cooperate with the requirements of the student complaints scheme run by the Office of the Independent Adjudicator for Higher Education (OIA)⁵ and are expected to have fair and transparent procedures for handling complaints and appeals which are accessible to all students (Condition C2).
19. Taken together, these requirements cover informed student choice, fair trading practices, including terms and conditions, and effective redress mechanisms, and provide the framework within which students' consumer protection rights can be protected.
20. We could identify ways in which these current provider-level requirements could develop, for example, by improving the range and structure of information available to support student choice, or moving beyond a 'have regard to guidance' obligation in relation to consumer protection law. We could also adopt new tools, for example, the use of a standard student contract. However, before we make decisions about evolution or more substantive change of regulatory requirements, we should be clear about the issues we are seeking to address and be confident that doing so would deliver our regulatory objectives and the outcomes set out in paragraph 14 above.

³ See <https://discoveruni.org.uk/>

⁴ See <https://www.gov.uk/government/publications/higher-education-consumer-law-advice-for-providers>

⁵ See <https://www.oiahe.org.uk/>

How should we develop our consumer protection tools to underpin delivery of the regulatory objectives?

21. We know that our consumer protection tools, as currently configured and implemented, are not allowing us to intervene when we see evidence that our regulatory objectives and the outcomes in paragraph 14 are not being delivered for students. For example:
- a. The information currently available to support student choice is inadequate because it is not always sufficiently detailed about the things that matter to students, and is not always structured in a way that allows students to make meaningful comparisons between different providers and courses. This means that students do not consistently have the information, advice and guidance they need to make good choices about what and where to study, and this is particularly the case for students from disadvantaged backgrounds who may not have access to the same levels of support and guidance as their peers, and also for other groups of students such as mature learners.
 - b. The contractual relationship between students and providers is unequal and we continue to see cases where terms and conditions are unclear or unfair. The CMA's enforcement work supports this view. This means that students are not clear about what they are buying, in terms of quality, contact time, support, and so on, and are not clear about the direct and indirect costs of their purchase. It also means that students are placed at a disadvantage because terms are designed to favour the provider.
 - c. It is not easy for students to identify instances where they have not received the service they were promised and to seek redress. This means that students' consumer protection rights are not enforced when what they have been promised, in terms of quality, contact time, support, and so on, is not delivered. We should, however, also consider whether a model that relies primarily on individual students challenging a provider for a breach of contract places a burden on students in an undesirable way.
22. Directors have considered the way in which the complex issues relating to consumer protection for students could be disaggregated to provide focus to development of our regulatory tools. Our view is that we could usefully focus on the following:
- a. Improvement of the granularity and structure of the information provided by the OfS and providers to support informed student choice.
 - b. Requiring greater clarity about the substance of the contractual offer from a provider to a student so that a student is clear about what the provider has committed to deliver and the direct and indirect costs of this.
 - c. Setting out clear expectations about terms that the OfS would consider to be unfair and that should not therefore be used in a student contract.
 - d. Setting out clear expectations about the features of effective complaint handling processes within providers and the support students should expect when they use such these processes.

Question 2: Does the board agree that these are the ways in which we should develop our consumer protection tools? Will development in this way deliver the regulatory objectives and the outcomes set out in paragraph 14?

How should we develop our consumer protection tools and approaches?

23. Our current view is that we could deliver the changes in paragraphs 22(a)-(d) above by amending ongoing condition C1 to require providers to comply with OfS guidance and developing new OfS regulatory guidance that would set out both mandatory regulatory requirements and broader expectations for providers on consumer protection matters. The guidance would ensure that providers could be held to account in relation to students' consumer protection rights. This would replace the current CMA guidance as 'relevant guidance' and would allow us to set our own expectations as the regulator of the higher education sector. This would also mean that we could extend the guidance beyond undergraduate students. The guidance would set clear expectations about:
- a. The information that providers must make available to students before they chose a course and a provider and in pre-contract information.
 - b. The way in which providers must set out their commitment to students, specifically promoting the use of a 'student contract' as a single document containing a consistent set of information to ensure that students know and understand what they are buying and the direct and indirect costs of this.
 - c. Contractual terms that the OfS considers to be unfair and so must not be used in student contracts
 - d. The features of a complaints handling process that would operate in the interests of students.
24. Because the new guidance would be published by the OfS we would be able to update it periodically, subject to any necessary consultation, to ensure it was effective in delivering the outcomes we want to see. This would allow us to ensure that our requirements were proportionate and targeted on areas that require regulatory intervention on an ongoing basis.
25. It would also mean that the enforcement of consumer protection rights would not fall to individual students to enforce, which in many cases would be unrealistic and undesirable, but to the OfS to enforce on their behalf.
26. As part of our IAG strategy, we have discussed this broad approach with a sample of marketing officers with responsibility for producing information for students within providers, and they consider that clearer guidance from the OfS would help them to improve the timeliness and accuracy of information on their websites.

Question 3: Does the board have any views about this suggested approach? Are there other options we should consider?

Recommendation:

27. The board is asked to consider the issues set out in this paper, and in the presentation we will make at the board meeting, and provide advice on the strategic development of the OfS's approach to consumer protection.

Risk implications

28. The current paper provides policy context for an initial discussion about consumer protection issues and so does not raise any particular risks. Any more detailed proposals that are subsequently made to the board will be accompanied by an appropriate assessment of risk.

Communications and engagement

29. None required for the current paper. Any detailed proposals for changes to our regulatory tools or the way that they are used in practice is likely to require consultation and we will consider communications and engagement at that stage.

Paper publication date

30. This paper will be published with the routine publication of the December 2019 board papers.