

Equality impact assessment: Time-limited condition of registration on the stability and integrity of the English higher education sector

Background to this equality impact assessment

1. Higher education providers are currently dealing with a range of unprecedented challenges as a result of the coronavirus pandemic. The Office for Students (OfS) has made clear its commitment to reducing regulatory burden¹ and supporting providers² in the interests of students during this period. As part of our regulatory approach during the pandemic, we have decided to amend the regulatory framework by creating a new time-limited general ongoing condition of registration (condition Z3) preventing any registered provider from engaging in conduct which, in the reasonable opinion of the OfS, could be expected to have a material negative effect on the stability and/or integrity of the English higher education sector.
2. Condition Z3 addresses providers' offer-making practices for UK-domiciled students and certain advertising and marketing activities. More specifically, it identifies unconditional offers in a range of circumstances as having a material negative effect on the stability and integrity of the English higher education sector. Making false or misleading statements about other higher education providers is also considered to have such an effect. Condition Z3 therefore prohibits this conduct.
3. In reaching a decision to impose condition Z3, and in determining the scope of that condition, we have had regard to our general duties under section 2 of HERA and to the Regulators' Code. We have also had regard to Schedule 1, paragraph 21 of the Higher Education and Research Act 2017 (HERA), which extends the Equality Act 2010, and therefore the Public Sector Equality Duty (PSED), to the OfS.
4. The new general ongoing condition of registration, and associated elements of the regulatory framework, is published as Regulatory notice 5.³ Our consultation document containing the

¹ See www.officeforstudents.org.uk/advice-and-guidance/coronavirus/provider-guide-to-coronavirus/regulatory-requirements/.

² See, for example, our briefing notes at www.officeforstudents.org.uk/advice-and-guidance/coronavirus/briefing-notes/.

³ Regulatory notice 5 is available at www.officeforstudents.org.uk/publications/regulatory-notice-5-condition-z3-temporary-provisions-for-sector-stability-and-integrity/.

original proposals⁴ and our analysis of the responses received to that consultation⁵ are both available on the OfS website.

5. This assessment is concerned primarily with the equality impact of this new condition Z3 which is designed to address the following issues:
 - a. The short-term stability of English higher education providers
 - b. Recruitment practices that are not in the interests of students
 - c. Providers seeking to obtain an unfair advantage over other providers
 - d. The wider interests of students and the public.
6. The OfS has determined that, during the pandemic, the interests of students are likely to outweigh the autonomy of providers in a way that in more usual times might not be the case. However, we also consider that condition Z3 as implemented, when compared to the original proposals set out in the consultation, has significantly less of an impact on providers' autonomy.
7. We are particularly concerned about the impact of the pandemic on students who may be especially vulnerable during this period, or who have protected characteristics.⁶ We discounted several proposals at an early stage (these are explored in Annex D of the consultation) and we judge this to have increased the likelihood that our actions will have a positive impact across the diverse student population.
8. Having considered consultation responses, we have reduced the scope of the condition to focus specifically on the issues we consider to represent the greatest risk to the stability and integrity of the sector, and to the interests of students. Some respondents raised concerns that the broad-based nature of the proposals could lead providers to change their conduct in ways that would be detrimental to interests of vulnerable students and students from underrepresented groups. The more limited scope of the condition gives clarity to providers about conduct that is prohibited or permitted.

How have we conducted this assessment?

9. Due to these extraordinary circumstances, this assessment has been undertaken in parallel with the publication of the new condition and analysis of the consultation responses. The consultation document committed us to '*publish an equality impact assessment when we announce the outcome of this consultation, taking into account the responses to consultation question 4 and other relevant matters.*' (Consultation, paragraph 15).

⁴ See www.officeforstudents.org.uk/publications/consultation-on-the-integrity-and-stability-of-the-english-higher-education-sector/.

⁵ See www.officeforstudents.org.uk/analysisresponsesz3/.

⁶ There are nine 'protected characteristics': age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

10. This assessment highlights where we judge there to be a differential impact on students with protected characteristics at sector, provider and individual level, and whether or not this has affected the decisions we have taken.
11. This assessment also considers where the interests of different groups of students may be in tension with each other. For example, the interests of current students may sit in tension with the interests of the cohort of applicants making choices about what and where to study in the 2020-21 and 2021-22 academic years as, for some of these applicants, less regulatory oversight of the admissions system might provide greater choice.
12. In conducting this assessment, we have drawn on:
 - a. Data and other regulatory information held by the OfS, including our modelling of the likely financial impact of the pandemic on providers, information reported to us by providers, and notifications from students and others. However, the historical data we have on providers' financial and student recruitment forecasts are highly likely to change.
 - b. Intelligence about the impact of the pandemic and providers' behaviour in response – for example from sector representative bodies, students and Government.
 - c. Previous analysis and research in related areas, for example on student decision making, admissions, and unconditional offers⁷.
13. For the purposes of this assessment, we have taken account of all responses received to the consultation, in particular responses to questions 3 and 4 which asked for comments about:
 - a. any unintended consequences of these proposals, for example ... for any particular types of student (Question 3)
 - b. the potential impact of these proposals on individuals on the basis of their protected characteristics (Question 4).

Observations about protected characteristics

14. Condition Z3 is not focused on advancing equality of opportunity specifically, unlike other aspects of the OfS's regulation, particularly access and participation plans. There is no immediate data or intelligence that would suggest students with the following protected characteristics would be affected in a positive or negative way by the new condition itself (as opposed to the impact of the pandemic⁸), other than where they intersect with other characteristics⁹ discussed in detail below:

⁷ See www.officeforstudents.org.uk/advice-and-guidance/student-information-and-data/providing-information-advice-and-guidance-for-students/our-research/.

⁸ There is significant emerging evidence that students who identify as LGBT+, or women and men in unsafe domestic arrangements, may suffer as a result of the pandemic.

⁹ It is important to acknowledge the association between characteristics and to consider intersectionality (an analytical framework that attempts to identify how interlocking characteristics affect an individual or group).

- a. gender reassignment
 - b. marriage and civil partnership (though not covered by the PSED)
 - c. pregnancy and maternity
 - d. religion or belief (except where this intersects with race)
 - e. sex
 - f. sexual orientation.
15. This is supported by consultation responses, which have not identified information that would cause us to reassess this position. This assessment therefore primarily focuses on the characteristics for which we anticipate there is potential for negative impact, and which is borne out by consultation responses:
- a. disability
 - b. age (mature students, or where there is an intersection with disability and/or race)
 - c. race.
16. It also considers the potential impact on a wider, more diverse range of students that are known to be disadvantaged in higher education or especially vulnerable during the pandemic. This includes those from lower socio-economic groups, care-experienced students and international students.

Assessment of impact

Summary

17. Overall, we have concluded that the amended condition will have a **neutral impact** on students with protected characteristics, and other vulnerable learners. There may be a differential impact across and within providers, and for students at different stages of their higher education experience. This means there is likely to be **some positive impact on some types of individual learners**, and some **negative impact on others**.
18. There is potential for a **positive impact for some individual prospective students** if they are driven to greater attainment in their Level 3 qualifications in 2020-21 than may have been the case without the new condition (though the evidence for this is mixed). However, there is a need to balance this against the potential **negative impact** if an individual student is discouraged from attending a course they are suitable for because a provider is not able to make an unconditional offer which may have encouraged them to progress on to the course. This negative impact is mitigated by the provisions in the condition that permit some offer-making practices that are designed to support access and participation.
19. Each aspect the condition seeks to address is explored below. It includes a summary of the issues considered in determining the likely level of impact, and any mitigations applied as part of our final decision-making.

Supporting the short-term stability of English higher education providers

Positive impact

20. The condition should have a positive impact at a sector level since it is specifically designed to prevent instability in the sector. This means that current students are less likely to find that their provider is faced with closure, or a need to make significant cost reductions that would have a negative impact on students. Students who have protected characteristics and are underrepresented in higher education may be most vulnerable to the consequences of these types of financial impact of the pandemic on providers and so the impact of the condition should be positive for these students, for example where those students are less able to travel as a consequence of disability or caring responsibilities.
21. Where a provider's closure cannot be avoided, it is in the interests of students, particularly those with protected characteristics, that the provider's exit from the market is orderly. The OfS would be more able to intervene to deliver such an orderly exit if the number of providers in this situation is reduced through the imposition of condition Z3. The imposition of the condition would therefore have a positive impact on current students.
22. Ensuring the stability of providers in the short term will likely preserve the diversity of the sector in the longer term, providing future students with access to a wide range of opportunities and choices. This will likely avoid a negative impact on students that would otherwise occur, including for those with protected characteristics and more vulnerable students who may be more likely to benefit from a wider range of choices to ensure their particular needs can be met.
23. **Mitigations and decisions:** No specific mitigations have been applied. The decision to impose condition Z3 generates a positive impact.

Recruitment practices that are not in the interests of students

Positive impact

24. The scope of the condition includes the use of unconditional offers in a range of circumstances. There is likely to be a **positive impact** through preventing recruitment practices that are not in the interests of students and by reducing the scope for providers to introduce new recruitment practices of this type. There may also be potential areas for negative impact as set out below.

Unconditional offers

Both positive and negative impact

25. Used appropriately, unconditional offers have a legitimate and useful place in the admissions system. The new condition of registration permits the use of unconditional offers¹⁰ in some circumstances:

¹⁰ 'Unconditional offer' is defined within condition Z3 to include offers which are conditional but with very low attainment requirements, such that it is tantamount to an offer without conditions.

- a. Where applicants have already attained Level 3 (A-levels or equivalent) qualifications
- b. For creative courses, such as art, music and drama, where the aptitude and potential of applicants is assessed by audition or portfolio, or similar
- c. Where applicants are able to provide evidence of prior (experiential) learning
- d. For private A-level (or equivalent) candidates who will not receive calculated grades in respect of the summer 2020 examinations which have been cancelled
- e. Contextual offer-making practices.

26. This means that these types of offers will remain available to all students, including those with protected characteristics. This will have a neutral impact.

27. Other types of unconditional offers are not in the interests of students. The new condition expressly prohibits 'conditional unconditional' offers that require an applicant to make a provider their first or only choice. These place particular pressure on students to make choices that may not be appropriate for them. This will have a positive impact.

28. Under condition Z3, other types of unconditional offers fall to be considered under the overarching principles-based prohibition on conduct which, in the reasonable opinion of the OfS, could be expected to have a material negative effect on the stability and/or integrity of the English higher education sector (and therefore not be in the interests of students). This prohibition would also allow us to take action if a provider **changed** conditional offers to unconditional offers before applicants are awarded their Level 3 qualifications in circumstances where, in our reasonable opinion, such a change could be expected to have a material negative effect on the stability and/or integrity of the English higher education sector.

29. In taking this approach to unconditional offers, the condition aims to minimise the risk of distorting student decision-making and taking advantage of their behavioural biases at a time when established models of face-to-face information, advice and guidance for students are not available. Some of this behaviour was observed immediately after the outbreak of the pandemic in the UK and was only stopped by the moratorium announced by the Minister of State for Universities on 23 March 2020. The condition should therefore protect students from the widespread and inappropriate use of unconditional offers.

30. However, for some individual students there could be a negative impact if unconditional offers are no longer an option. For some learners this might make a difference to their confidence and preparation time (affecting student success); for some it might affect their decision to attend higher education at all (affecting access). For example:

- a. Disabled students with particular learning needs, or where their mental health will be significantly improved by the certainty of an offer.
- b. Younger students without family experience of higher education or mature students with or without caring responsibilities (particularly women), where early confirmation of a place would make transition to higher education easier to plan and adapt for in a context where there are many other demands.

- c. Those students who historically have been underpredicted through systematic bias in assessment – such as black, Asian and minority ethnic students from low socio-economic backgrounds.¹¹ Unconditional offers allow for some balance to this potential bias but this is limited in comparison to the positive impact of contextual offers.¹²

31. We are mindful of previous OfS data and analysis on unconditional offers. Our insight briefing and data analysis¹³ shows that, whilst higher numbers of disadvantaged learners are normally in receipt of unconditional offers this is because they are used disproportionately by some low-tariff universities, and not because of focused targeting of individual learners. Therefore, universities and colleges may not, in general, be directing their unconditional offers towards disadvantaged students; rather, those that take a greater proportion of disadvantaged students tend to use more unconditional offers.¹⁴ This is an important distinction. It suggests that unconditional offer-making to disadvantaged students may be driven more by the circumstances of universities and colleges than the needs of the students. Condition Z3 addresses that behaviour. To make contextual offers, a provider will need to assess the circumstances applying to applicants, including by giving consideration to their prior educational attainment and potential future educational attainment in the context of those circumstances.

32. Mitigations and decisions: we have concluded that unconditional offer-making to UK-domiciled students may have a material negative effect on the stability or integrity of English higher education providers (and that certain categories of unconditional offer should always be prohibited). The condition provides for some unconditional offers to be permitted and these are set out above.

33. We also make clear that we continue to support the use of contextual offers and these are likely to be relevant to students with protected characteristics and from underrepresented groups.

¹¹ Research shows that higher attaining students from lower socio-economic groups are more likely to have their final grades under-predicted compared to higher attaining students from more advantaged backgrounds, and that this will be exacerbated during the coronavirus crisis. This is based on well-evidenced and robust research by Dr Gill Wyness (see <https://www.suttontrust.com/wp-content/uploads/2017/12/Rules-of-the-Game.pdf>). Given that over a quarter of black and minority ethnic (BME) GCSE students (including much higher proportions of Gypsy, Roma and Irish Traveller students) receive Free School Meals, it is likely that this issue of under-predictions in grades for students from lower socio-economic backgrounds will impact on BME students disproportionately. The Runnymede Trust has highlighted that “teachers expectations of black students and their working class peers tend to be systematically lower than warranted by their performance in class” as highlighted by Professor David Gillborn (see <https://www.runnymedetrust.org/blog/predicted-grades-bme-students-letter-to-ed-sec>). Research has shown that lowering advertised grades at high-tariff providers would broaden the pool of available applicants without a marked fall in academic standards (see Boliver, Vikki, Stephen Gorard and Nadia Siddiqui, ‘How can we widen participation in higher education? The promise of contextualised admissions’, in Rosemary Deem and Heather Egging (eds), *The university as a critical institution?*, 2017).

¹² See www.officeforstudents.org.uk/publications/contextual-admissions-promoting-fairness-and-rethinking-merit/.

¹³ See www.officeforstudents.org.uk/publications/unconditional-offers-serving-the-interests-of-students/.

¹⁴ See www.officeforstudents.org.uk/publications/unconditional-offers-serving-the-interests-of-students/.

34. The way in which we have narrowed the scope of the condition to focus on particular types of unconditional offers means that any negative impact that may be caused by reduced availability of unconditional offers is, itself, reduced.

Financial support

Neutral impact

35. The consultation proposals were broad in scope. They were written with the intention that providers would be able to respond flexibly to exceptional (unpredictable) circumstances. As a principles-based regulator, this is in line with our normal regulatory approach. However, the consultation did not set out a comprehensive list of conduct that was permitted or prohibited, and as some respondents to the consultation commented, this could have led to a negative impact on vulnerable learners if a provider misinterpreted the OfS's requirements. For example, a provider may have believed that it should not offer financial support as part of normal access and participation activity, and students may not have had access to clear and impartial information, advice and guidance to challenge this. This could have had a direct effect on those students planning to start higher education courses in 2020-21 or in 2021-22.

36. For currently registered students, the concerns were similar. Any students who rely on financial support (including disabled students, those from ethnic minorities and lower socio-economic groups) may incorrectly have believed that this support was at risk. For any students currently furloughed from employment, this may have compounded any concerns about financial support, and this might have had a negative impact on their wellbeing or have risked them deciding to withdraw from study.

37. **Mitigations and decisions:** The decision to impose the new condition was accompanied by a decision to reduce its scope to address conduct we consider poses the greatest risk to the integrity and stability of the English Higher Education sector, and to the interests of students. The published condition eliminates any uncertainty that providers may otherwise have had about whether conducting outreach activities, making contextual offers, providing financial support and/or providing free equipment to promote equality of opportunity are permitted. This means that providers will be clear that they can support underrepresented students in these ways. In addition, the OfS has been clear that providers should deliver in full the financial commitments made to current and future students under a 2019-20 or 2020-21 access and participation plan.¹⁵ There may also be circumstances where providers may wish to increase this financial support in light of the impact of the pandemic on their students.

¹⁵ See www.officeforstudents.org.uk/advice-and-guidance/coronavirus/provider-guide-to-coronavirus/provider-faq/. Our update to accountable officers on 26 March 2020 sets out our regulatory requirements in relation to condition A1: access and participation plans. This makes clear that we expect providers to deliver in full the financial commitments to current and future students under their plans.

Contextual offers

Neutral impact after mitigation

38. There was no specific mention of contextual offer-making in the consultation document. There was however criticism of offers which ‘are not subject to criteria based on prior educational attainment at a particularly low level and therefore could reasonably be considered to be tantamount to having no criteria at all, or to represent criteria that are not consistent with the normal academic requirements of the course’.¹⁶ The reference to lower educational attainment meant there could have been a potential negative impact if:

- a. the condition had been misinterpreted by providers with the effect that they reduced ambitious approaches to contextual offer-making to students with lower attainment from underrepresented groups and disadvantaged communities
- b. the condition was to penalise providers (e.g. conservatoires) that routinely offer places based on audition rather than formal educational qualifications.

39. Mitigations and decisions: The OfS views contextual offers as a positive intervention in support of access and participation.¹⁷ The decision to limit the scope of the condition to unconditional offers, and to expressly permit contextual offers, resolves any uncertainty about whether the condition is consistent with our ongoing commitment to the appropriate use of contextual offers. Providers will continue to be able to make such offers as they have in the past. This fully mitigates the potential negative impact set out above.

Providers seeking to obtain an unfair advantage over other providers

Positive impact

40. By minimising admissions practices that could have a destabilising effect on the sector in this period, the condition reduces the likelihood of provision for current and future students not being available and accessible. This should have a positive impact on learners from an equality, diversity or inclusion (EDI) perspective because it will mean some providers will not have to exit the market as they might have done as a result of other providers’ unchecked admissions practices.

41. Making false or misleading statements about other higher education providers is prohibited by the condition. This will minimise the risk of distorting student decision-making and taking advantage of their behavioural biases at a time when established models of face-to-face information, advice and guidance for students are not available. Students with protected characteristics and from disadvantaged backgrounds are less likely to have access to effective

¹⁶ See Consultation, page 14.

¹⁷ For a more extensive discussion on contextual admissions, and the role of contextual offer-making practices, see www.officeforstudents.org.uk/publications/contextual-admissions-promoting-fairness-and-rethinking-merit/.

information, advice and guidance in the current environment – for example, because they may have less easy access to technology and to advice from schools.

42. Mitigations and decisions: no changes.

The wider interests of students and the public

Neutral impact

43. Given the speed and timing of this consultation as a result of the exceptional circumstances of the pandemic, it has been more difficult than normal to ensure the level of student engagement we would expect with providers, stakeholders and the OfS. However, we have proactively engaged for example with the NUS, facilitating it to make a response to the consultation. We discussed the policy issues arising from the consultation at a meeting of the OfS board, whose membership includes the chair of the OfS's student panel.
44. Feedback from students and others, both in responses to the consultation and as routine notifications to the OfS, suggests a significant concern about the proposals related to the ability of the OfS to require a provider to withdraw offers that had already been made to students. In our final decision about the scope of condition Z3 we have not required providers to withdraw offers made to students before the imposition of the condition and we have previously encouraged students to contact their providers to discuss the status of their offers.

45. Mitigations and decisions: no changes.

Other areas of potential impact

Access and participation

Neutral impact after mitigation

46. Consultation respondents set out a broad set of concerns about the cumulative impact of the proposed condition on existing access and participation commitments. The OfS is clear that despite the pandemic, providers should seek to deliver their access and participation plans and that we will monitor the decisions they make in relation to this. There was a risk that providers did not understand how the OfS would judge whether a provider had made 'reasonable decisions' about implementation of its plan, and there could be a negative impact for learners as a result.
47. Information to date suggests that the pandemic itself is likely to have a negative impact on the groups of students supported through access and participation plans, for example due to the particular vulnerability of some groups during the pandemic, the effect of home study on educational inequality, and the obstacles to the normal conduct of outreach and student support activity.¹⁸ The condition does not address these factors beyond the extent to which

¹⁸ There is widespread agreement that the pandemic will impact disproportionately on certain vulnerable groups. For examples, see ongoing information produced by the Government Equalities Office Observatory, National Union of Students, and Office for Students briefing notes and case studies (www.officeforstudents.org.uk/advice-and-guidance/coronavirus/briefing-notes/).

stability of the sector supports the continued interests of students in being able to access courses that suit their needs.

48. Mitigations and decisions: The narrowed scope of the condition removes any uncertainty for providers about how to balance their access and participation commitments with compliance with the condition. We do not expect providers to reduce activity or ambition in relation to their longer-term access and participation plans. We will ensure providers' access and participation contacts are included in our communication of the decision to impose the condition. The published condition provides clarity that contextual offers are permitted. The new scope also makes clear that conducting outreach activities, providing financial support and/or providing free financial equipment to promote equality of opportunity may continue as planned, or be extended to address the circumstances surrounding the pandemic.

49. We are using our broader functions, including but not limited to those under section 35 of HERA, to ensure that effective practice in supporting students is widespread. We are also utilising the Uni Connect partnerships to ensure that coherent, high quality information and advice is provided to learners who might otherwise be misinformed.

Recruitment of international students and postgraduate students

Positive impact

50. By acting to protect the stability and integrity of the sector in this period the condition is reducing the likelihood of provision for current and future students not being available and accessible. This means that current international and postgraduate will also experience a positive impact because the imposition of the condition will mean that they are less likely to find that their provider is faced with closure, or a need to make significant cost reductions that would have a negative impact on students. Future international and postgraduate students will similarly experience a positive impact because a wider range of providers is likely to be available to support student choice.

51. Mitigations and decisions: no changes.

Opportunities to further promote or enhance equality, diversity or inclusion for people with protected characteristics

52. The condition is designed to protect students through protecting the stability and integrity of the higher education sector. It is not designed to specifically eliminate discrimination, advance equality of opportunity or build good relations between different groups of students. Furthermore, given the lack of opportunities for widespread stakeholder engagement during the coronavirus pandemic, the proposed condition provides only a small number of opportunities to enhance EDI.

53. We are using our broader functions, including but not limited to those under section 35 of HERA, to ensure that effective practice in supporting students is widespread.

Ongoing monitoring of impact

54. We will monitor the impact in the short term in several ways:

- a. Ongoing regulatory activity, including by monitoring reportable events from providers (particularly for providers at financial risk) and notifications from third parties (particularly from students or their representatives about providers' conduct that may constitute a breach of this or other ongoing conditions of registration).
- b. Emerging data analysis on applicant behaviour.
- c. General provider and stakeholder engagement.

55. In the longer term we will embed monitoring and evaluation into our broader activity including that for access and participation plans and condition A1 (access and participation plan).

56. During the period affected by the pandemic, the interests of future students are likely to be served by regulatory interventions to preserve the stability and integrity of the sector so that a wide range of providers continue to exist to support student choice and quality. This assessment focuses on the impact of the implementation of condition Z3, acknowledging the broader context in which the condition is being introduced. The OfS will continue to monitor the impact of the pandemic more broadly in the context of changing market conditions, including the government's student number controls.

Conclusion

57. We consider that the imposition of condition Z3 is a necessary and proportionate means to ensure the stability and integrity of the higher education sector, which protects the interests of current students and preserves diversity of providers and choice for students over the longer term. Our framing of condition Z3 provides clarity to providers about the conduct that could lead to regulatory action being taken in relation to certain admissions and marketing activities in the context of coronavirus.