

Regulation of providers during the transition period

The annexes of this paper are exempt from publication because they will be superseded by the final regulatory notices published after the board meeting.

Purpose

1. The purpose of this paper is to approve the approach we will take to the regulation of current and new providers in the transition period from 1 April 2018 to 31 July 2019.
2. The board is asked to:
 - (a) Approve the following regulatory notices:
 - i. Regulatory notice 2: Regulation up to 31 July 2019 of providers that were previously funded by the Higher Education Funding Council for England.
 - ii. Regulatory notice 3: Regulation up to 31 July 2019 of providers currently designated for student support by the Secretary of State.
 - iii. Regulatory notice 4: Regulation of newly registered providers up to 31 July 2019.
 - (b) Delegate authority to the chief executive to finalise these documents before their publication.
 - (c) Delegate authority to the chief executive to approve:
 - i. The terms and conditions of OfS funding that will apply up to 31 July 2019.
 - ii. The Agreement on Institutional Designation that will apply up to 31 July 2019.
3. For the context to this paper see:
 - the regulatory framework at https://www.officeforstudents.org.uk/media/1047/ofs2018_01.pdf
 - the consultation document published in October 2017 that related to transition arrangements at https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework/supporting_documents/C%20Regulatory%20Framework%20consultation%20transition%20FINAL%202018%20October.pdf

Background

4. The regulatory framework published in February 2018 will not come fully into force until 1 August 2019. This is because many of our regulatory powers apply to 'registered providers' and we will not have completed the registration process for all current providers, or the preparation needed to monitor them, before the beginning of the 2018-19 academic year. During the period 1 April 2018 to 31 July 2019 providers will therefore be subject to some 'old' regulatory requirements and some 'new' requirements that are in place from the point at which a provider is first registered. We are calling this the 'transition period'.
5. Because different types of providers are currently subject to different regulatory regimes— operated by HEFCE, by DfE, indirectly by the Home Office, or by none of these – the requirements during the transition period will also be different:
 - a. The OfS will assume responsibility on 1 April 2018 for those providers currently funded by HEFCE and will use the 'old' powers and approaches under the 1992 Act to regulate these providers.

- b. The DfE will retain responsibility for those providers that are currently designated for student support (often referred to as 'alternative providers') and the 'old' conditions of designation will continue to apply.
6. In both of these cases, from the point at which an individual provider is first registered by the OfS, some 'new' regulatory requirements are also in place.
7. In addition we need to put in place regulatory arrangements for those providers that are currently not regulated by HEFCE or by DfE but that choose to register: from the point at which an individual provider is first registered, some 'new' regulatory requirements will be in place.
8. We need to set out how we will perform our regulatory functions in relation to these three groups of providers and propose to do so by publishing three separate regulatory notices that are provided as Annexes A-C:
 - a. Regulatory notice 2: Regulation up to 31 July 2019 of providers that were previously funded by the Higher Education Funding Council for England.
 - b. Regulatory notice 3: Regulation up to 31 July 2019 of providers currently designated for student support by the Secretary of State.
 - c. Regulatory notice 4: Regulation of newly registered providers up to 31 July 2019.
9. This constitutes material published under section 75 of HERA and has the same status as the regulatory framework.
10. The general approach set out in the three regulatory notices was subject to consultation by the DfE as part of the regulatory framework consultation in the autumn of 2017. Responses were broadly positive with comments focusing on requests for more detailed information and concerns about regulatory burden during the transition period. For more information see the analysis of responses to question 25 in the 'narrative response to the RF consultation' (OfS 2018.10) published at https://www.officeforstudents.org.uk/media/1043/ofs2018_10.pdf.

The OfS's general duties

11. When the board considered and adopted the regulatory framework at its meeting on 29 January 2018 it had regard to its general duties under section 2 of HERA. Those considerations continue to apply to the transition arrangements and the following are particularly significant here:
12. In performing its functions, the OfS must have regard to—
 - (d) the need to promote value for money in the provision of higher education by English higher education providers;
 - (f) the need to use the OfS's resources in an efficient, effective and economic way; and
 - (g) so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be—
 - (i) transparent, accountable, proportionate and consistent; and
 - (ii) targeted only at cases in which action is needed.
13. The approach that we have taken to the transition period is designed to deliver an equivalent level of regulation for providers subject to different regulatory regimes: all providers will be subject to some OfS conditions of registration from the date that they are registered and these are more extensive for those providers that are not currently regulated through other means. This will allow us to minimise the duplication of regulatory requirements where providers are regulated under both the 'old' and the

'new' system. Throughout the transition period we will regulate to protect the interests of students, including through the imposition on all providers of the general ongoing condition of registration requiring a student protection plan.

Providers that are currently funded by HEFCE

14. The secondary legislation that enacts HERA makes provision for the powers and duties of HEFCE (under the Further and Higher Education Act 1992 (FHEA)) and the Director for Fair Access to Higher Education (under the Higher Education Act 2004 (HEA)) to be exercised by us until all of our new powers are commenced. This means that providers currently funded by HEFCE will be funded and regulated by us from 1 April 2018 to 31 July 2019 through a combination of the powers and duties 'carried forward' from the previous legislation and the new HERA powers and duties. These are:
 - a. 'Carried forward' requirements:
 - i. The terms and conditions of OfS funding that apply to funding received from the OfS from 1 April 2018 to 31 July 2019.
 - ii. The terms and conditions for payment of grants to higher education institutions by UK Research and Innovation (UKRI) administered through Research England (RE) that apply to funding received from 1 April 2018 to 31 July 2019.
 - iii. The requirements set out in the Agreement on Institutional Designation (AID) that apply to the receipt of student support finance.
 - b. New requirements:
 - i. A set of general ongoing conditions of registration that will be applied from the date of registration for a provider, one of which applies for the transition period to link a breach of the 'old' requirements to the use of the OfS's new sanction powers to suspend a provider's registration or deregister it.
 - ii. Any specific conditions of registration that are applied when a provider is registered.

Exercising the carried forward powers for HEFCE-funded providers

15. The 'carried forward' requirements replicate and replace those that have been in place for HEFCE-funded providers during 2017-18. This means that they provide the same regulatory effect as the HEFCE Memorandum of Assurance and Accountability (MAA). We have adopted the same core approach with the following adjustments:
 - a. Some of the language has changed to bring the 'old' requirements into closer alignment with the approach set out in the OfS regulatory framework.
 - b. We will implement the 'carried forward' requirements in a more risk-based way during 2018-19, again to smooth the transition to the full implementation of the OfS approach.
16. One consequence of (b) is that we are proposing to make changes to the way in which we trigger a requirement for a provider to seek approval for additional financial commitments. Currently, a calculated threshold triggers the requirement for all providers, regardless of our view of risk. We are proposing to remove this automatic trigger and instead to require providers that are considered to be 'at higher risk', or with which we are engaging on the basis of 'focused dialogue', to seek approval regardless of the level of proposed borrowing. For other providers, we would expect planned borrowing to be included in the financial forecasts that inform our risk assessment. Where this is not the case, we would expect a provider to report material changes to its financial forecasts and position and we would consider whether we wished to impose conditions as a result of this new information. This replicates the practical effect of the current HEFCE arrangements whilst removing regulatory burden for those providers that we do not consider present risks in this area.

Providers that are currently designated for student support by the Secretary of State

17. Providers that are currently designated for student support by the Secretary of State will continue to be designated and regulated by the DfE under the Secretary of State's powers until 31 July 2019. We will provide advice to the DfE about providers' compliance with the criteria and conditions of specific course designation during this period on the same basis as HEFCE has done. In addition, each provider will be regulated by us under the new HERA powers and duties from the date of its registration. The regulation of these providers therefore will be through:
 - a. DfE requirements:
 - i. The criteria and conditions of specific course designation that will continue to apply to 31 July 2019.
 - b. New requirements:
 - i. A set of general ongoing conditions of registration that will be applied from the date of registration for a provider, one of which applies for the transition period to link a breach of the 'old' requirements to the use of the OfS's new sanction powers to suspend a provider's registration or deregister it.
 - ii. Any specific conditions of registration that are applied when a provider is registered.

New providers

18. Providers that were not funded by HEFCE, or regulated by the DfE, immediately prior to their registration with the OfS will be required to satisfy a more extensive set of ongoing conditions of registration from the date of their registration and throughout the transition period. These additional conditions are intended to deliver the same overall regulatory effect for these providers as is delivered for those subject to 'old' regulatory arrangements and are as follows:
 - a. New requirements:
 - i. A set of general ongoing conditions of registration that will be applied from the date of registration for a provider, including conditions relating to:
 - Quality and standards
 - Consumer protection law and student complaints
 - Financial sustainability
 - Management and governance
 - ii. Any specific conditions of registration that are applied when a provider is registered.

Next steps and recommendations

19. We need to publish the three regulatory notices on or before 1 April 2018. We also need to publish at the same time the underpinning terms and conditions of OfS funding and the Agreement on Institutional Designation.
20. The board is therefore asked to:
 - a. Delegate authority to the chief executive to finalise the three regulatory notices before their publication.
 - b. Delegate authority to the chief executive to approve:
 - i. The terms and conditions of OfS funding that will apply up to 31 July 2019.
 - ii. The Agreement on Institutional Designation that will apply up to 31 July 2019.