

**Consultation**

**Office for  
Students**

The logo for the Office for Students, featuring a dark blue square with a yellow square in the top right corner containing the letters 'OfS' in white.

**OfS**

# **Consultation on student protection directions**

This consultation runs from **17 July 2020**  
to **11 September 2020**.

**Reference** OfS 2020.35

**Enquiries to** [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk)

**Publication date** 17 July 2020

# Consultation on student protection directions

The Office for Students is consulting on a new approach to enable us to intervene more quickly and in a targeted way when we consider that a registered provider is at increased risk of leaving the higher education sector. Our interventions are designed to protect students and we would like to hear your views on the proposals in this consultation.

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Timing of consultation	Start: <b>17 July 2020</b> End: <b>11 September 2020</b>
Who should respond?	Anyone with an interest in the regulation of the higher education sector.
How to respond	Please respond by <b>11 September 2020</b> .  Use the online response form available at <a href="https://survey.officeforstudents.org.uk/s/consultation-on-student-protection-directions/">https://survey.officeforstudents.org.uk/s/consultation-on-student-protection-directions/</a>
Enquiries	Email <a href="mailto:regulation@officeforstudents.org.uk">regulation@officeforstudents.org.uk</a>  Alternatively, call our regulation helpline on 0117 931 7305.

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The Office for Students is the independent regulator for higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.

### **Our four regulatory objectives**

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

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

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## About this consultation

- This consultation sets out proposals which strengthen the OfS's ability to ensure students have the necessary protections where a higher education provider is at risk of exiting the market. The use of this additional regulatory power would be focused only on those providers at material risk of such an exit.
- Our proposals form part of the OfS's wider work on student protection. They link to our regulatory objective of ensuring that all students receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure.
- The purpose of the proposals in this consultation is to ensure that the OfS can intervene quickly and in a targeted way when we consider that a registered provider is at increased risk of leaving the higher education sector. We call these 'market exit' cases. They are a routine part of the way the sector operates but may be more likely than normal as a result of the coronavirus (COVID-19) pandemic. We are therefore consulting now because the risk to students arising from market exit cases is currently increased, but we would have consulted on these proposals in any case to ensure that we can protect the interests of students as a matter of routine.
- The consultation sets out the background to the proposals, the reasons we are proposing to intervene and what we expect those interventions to achieve. It constitutes our consultation for the purposes of sections 5(5) and 75(8) of the Higher Education and Research Act 2017 (HERA). In formulating these proposals, we have had regard to our general duties under section 2 of HERA, as set out in Annex B.
- The consultation questions are listed in full in Annex D.

For more information about our approach to regulation, including our requirements to ensure students are protected when a course, campus or provider closes, see the regulatory framework at [www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/).

## Who should respond to this consultation?

- We welcome responses from anyone with an interest in the regulation of English higher education.
- We are particularly (but not only) interested in hearing from **students and their representatives, and higher education providers that are registered or applying for registration**. These are the groups that may be most affected by our proposals. We welcome the views of all types and sizes of provider.

## How to respond

The consultation closes at **2359 on 11 September 2020**.

Please submit your response by:

- Completing the online form at <https://survey.officeforstudents.org.uk/s/consultation-on-student-protection-directions/>

If you require this document in an **alternative format**, or need assistance with the online form, please contact [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk). **Please note:** this email address should **not** be used for submitting your consultation response.

## Consultation principles

- We are running this consultation in accordance with the government's consultation principles<sup>1</sup>.
- At the OfS we are committed to taking equality and diversity into account in everything we do. We have a legal obligation to show due regard to the Public Sector Equality Duty.

## How we will treat your response

We will summarise and/or publish the responses to this consultation on the OfS website (and in alternative formats on request). This may include a list of the providers and organisations that respond, but not personal data such as individuals' names, addresses or other contact details. If you want the information that you provide to be treated as confidential, please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

The OfS will process any personal data received in accordance with all applicable data protection laws (see our privacy policy<sup>2</sup>).

We may need to disclose or publish information that you provide in the performance of our functions, or disclose it to other organisations for the purposes of their functions. Information (including personal data) may also need to be disclosed in accordance with UK legislation (such as the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

## Next steps

Subject to the representations received as a result of this consultation, we intend to make a decision on whether and how to implement the proposals in October 2020.

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<sup>1</sup> See <https://www.gov.uk/government/publications/consultation-principles-guidance>.

<sup>2</sup> Available at [www.officeforstudents.org.uk/ofs-privacy/](http://www.officeforstudents.org.uk/ofs-privacy/).

## Introduction

1. Providers registered with the OfS must have in place a student protection plan which sets out what students can expect should a course, campus or provider close. This consultation sets out proposals to address issues we have identified as we have assessed provider's compliance with this requirement. We signalled in our key themes and analysis of registration<sup>3</sup> that we intended to consult on revised guidance for student protection plans during 2019-20 and had expected to propose requirements in relation to course, subject, campus and whole provider closure. We announced in March 2020 that we were pausing planned consultations because of the impact of the coronavirus pandemic on higher education providers.
2. We expect to return to the broader issues of student protection at a later date and will, in particular, consider matters of regulatory burden and proportionality as we do so. However, we consider it necessary to bring forward consultation on one aspect of student protection plans. This is because the existing risks to students arising from the potential market exit of a provider are increased by the disruption caused by the pandemic. The current consultation, therefore, focuses on student protection issues that may arise where there is a material risk that a provider will, or will be required by the operation of law to, exit the English higher education sector. We are proposing to amend the regulatory framework which regulates providers registered with the OfS. The changes would mean that providers are required to comply with 'student protection directions' issued by the OfS as a result of a new general ongoing condition of registration.<sup>4</sup>
3. The OfS needs to be able to intervene quickly and in a targeted way in response to likely market exit cases. Our view is that the existing ongoing condition of registration C3 (student protection plans) does not allow the rapid intervention needed in these circumstances. This is because condition C3 is underpinned by a provider's own assessment of the risk of various student protection events occurring and the measures necessary to mitigate the impact of those risks on students' continuation of study. A provider's assessment of the risk of market exit does not always reflect the OfS's assessment, and such situations can escalate quickly requiring immediate action that a provider may be unable or unwilling to take. The mechanism in condition C3 is not therefore adequate to respond to the type of student protection event that creates the most risk for students.
4. The proposals relate specifically to providers that the OfS judges to be at material risk of market exit. The regulatory burden associated with the condition would not, therefore, apply to other providers. We see this as a more proportionate approach than requiring all providers to set out in their student protection plans the actions they would take in response to an increased risk of market exit. The proposals do not apply to further education colleges and sixth form colleges that are subject to the special administration regime in place for further education.

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<sup>3</sup> Available at [www.officeforstudents.org.uk/publications/registration-key-themes-and-analysis/](http://www.officeforstudents.org.uk/publications/registration-key-themes-and-analysis/).

<sup>4</sup> The OfS's current regulatory framework and conditions of registration are available at: [www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/](http://www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/).

## The issues

### Current approach to student protection

5. The OfS determines and publishes the initial conditions of registration and the general ongoing conditions of registration for providers registered with the OfS.<sup>5</sup> As set out above, one of the OfS's regulatory objectives is that 'all students, from all backgrounds, receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure'. These student protection matters are addressed in the OfS's regulatory framework. The regulatory framework includes an initial and general ongoing condition of registration that requires a provider to have in place a student protection plan. This plan sets out the actions a provider will take to ensure that students can continue their studies when a student protection event, such as the closure of a course, campus of provider, occurs.<sup>6</sup>
6. The current wording of initial and general ongoing condition C3 ('condition C3') is:

#### **Condition C3: Student protection plan**

The provider must:

- i. Have in force and publish a student protection plan which has been approved by the OfS as appropriate for its assessment of the regulatory risk presented by the provider and for the risk to continuation of study of all of its students.
- ii. Take all reasonable steps to implement the provisions of the plan if the events set out in the plan take place.
- iii. Inform the OfS of events, except for the closure of an individual course, that require the implementation of the provisions of the plan.

7. Guidance on the purpose, structure and content of student protection plans was published in February 2018.<sup>7</sup> The guidance stipulates that plans should be written with students as the key audience. They should set out a provider's approach to protecting its students' interests transparently and clearly. They should be tailored to the provider's specific circumstances and be based on its own assessment of the extent of the risks to the continuation of study for its students. They must include the actions a provider would take to ensure continuation of study.
8. The guidance requires a student protection plan to cover the following main areas:
  - a. An assessment of the risks to continuation of study for students.

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<sup>5</sup> In accordance with section 5 of HERA.

<sup>6</sup> In accordance with section 13 of HERA.

<sup>7</sup> See [www.officeforstudents.org.uk/publications/regulatory-advice-2-registration-of-current-providers-for-2019-20/](http://www.officeforstudents.org.uk/publications/regulatory-advice-2-registration-of-current-providers-for-2019-20/) for current providers and [www.officeforstudents.org.uk/publications/regulatory-advice-3-registration-of-new-providers-in-2019-20/](http://www.officeforstudents.org.uk/publications/regulatory-advice-3-registration-of-new-providers-in-2019-20/) for new providers.

- b. The actions a provider will take to preserve the continuation of study for students for any risks identified that are reasonably likely to crystallise.
  - c. Refunds and compensation arrangements for students.
  - d. Communication with students about the provisions of the plan and the implementation of these provisions.
  - e. Involvement of students in the review of the plan.
9. A registered provider is required to notify the OfS when events take place that require the implementation of its student protection plan. Over the past year, we have been notified by a significant number of providers that they need to implement the provisions of their student protection plan. These notifications related to a range of circumstances, including:
- a. The closure of international campuses and teaching locations in the UK and overseas.
  - b. The termination, or proposed termination, of partnership arrangements, including where partner organisations are closing.
  - c. The closure of departments and/or subject areas.
  - d. Key staff being unable to deliver courses.
  - e. The loss of accreditation or approval from third parties meaning courses can no longer be delivered.
10. We have also required a small number of providers to update their student protection plans because our assessment of the risk to continuation of study for students suggested that this was necessary.

## **The issue identified**

11. Since April 2018, we have made detailed assessments of student protection plans submitted as part of the registration process. Subsequently, we have overseen implementation by some providers of the provisions contained in their plans. In 2019 we were also closely involved in overseeing the management of the consequences for students of market exit for an unregistered provider. This has informed our understanding of the steps that are required in such circumstances.
12. We have also assessed in detail the financial viability and sustainability of individual providers. These assessments relate to conditions of registration with the OfS.<sup>8</sup> We have drawn on these assessments in forming our views about the appropriate next steps to best protect students where there is a material risk that a provider will exit the market.

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<sup>8</sup> Conditions C3 and D.

## Issues with the financial viability and sustainability of providers

13. Higher education providers are currently dealing with a range of unprecedented challenges because of the coronavirus pandemic. For a significant number of providers this is likely to include a substantial loss of income. In some cases, this may result in a material risk that a provider will exit the market. These challenges underscore the importance of regulatory intervention by the OfS, to protect students, at the earliest opportunity.
14. Issues relating to the financial viability and sustainability of higher education providers are not, however, limited to the pandemic. Most registered providers have demonstrated their ongoing financial viability and sustainability since they registered with the OfS. A very small number of providers have experienced financial challenges, which we judged placed them at a material risk of market exit. In these circumstances the OfS has recognised the significant risks for students and has required such providers to undertake more detailed student protection planning.
15. The purpose of student protection planning is to ensure that any market exit is managed and orderly because this is the best way to protect the interests of students. This approach is necessary because the OfS's normal policy position is that it will not intervene to prevent a provider from exiting the market. It will, however, intervene to ensure that students are protected as far as possible from the consequences of a disorderly exit.
16. This highlights that student protection plans must protect students in an effective way, and where they no longer do so, the need for other effective regulatory measures.

## Issues in the development of student protection plans

17. Some student protection plans submitted during the registration process were excellent and demonstrated a real engagement with the requirements. This resulted in plans that had made a comprehensive assessment of risks and were clear about how they protected students. However, many plans submitted were of poor quality on first submission and we had to ask a significant number of providers to resubmit their plans because they were not approvable. Many of these plans were submitted multiple times before they could be approved.
18. We set out in our key themes and analysis of registration<sup>9</sup> the common weaknesses we had seen. A number of these weaknesses would have had a significant impact on the credibility of a plan for circumstances in which a provider was judged to be at material risk of market exit. For example:
  - a. Some plans took an overly optimistic view of the likelihood of whole-provider exit, assessing such likelihood as very low in circumstances in which we considered such optimism was not justified. This led to those plans containing insufficient information about how a provider would respond to such issues.
  - b. In some cases, there was a difference between the OfS's risk assessment and that set out by the provider, particularly in relation to financial viability and sustainability and the potential risk this posed to continuation of study.

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<sup>9</sup> Available at [www.officeforstudents.org.uk/publications/registration-key-themes-and-analysis/](http://www.officeforstudents.org.uk/publications/registration-key-themes-and-analysis/).

- c. Proposed mitigations in student protection plans often lacked detail. They contained broad statements, and it was often not clear how mitigations would be implemented if they were needed, nor how they would be implemented for students with protected characteristics or with different needs.
- d. Plans were not student-facing. This meant that students were unlikely to understand the protection that was offered and the actions that a provider would take in the event of provider closure.
- e. Some student protection plans demonstrated a misunderstanding of the guidance. They focused on an assessment of business risks rather than risks to continuation of study for students. Mitigations were framed as the actions a provider was taking to prevent the risks crystallising, rather than the actions it would take if the risks were realised.
- f. Refund and compensation policies were weak because they were not always clear that refunds and compensation would be available to students where the provider could no longer deliver a course as advertised. Many student protection plans reflected providers' existing policies, which only referred to refunds in the event of a student choosing to withdraw from their course.
- g. Information about the compensation offered was also limited in detail and scope. Some providers tried to restrict the circumstances in which compensation might be available.

## **Issues in the implementation of student protection plans**

19. As set out above, we have required a very small number of providers to undertake more detailed student protection planning because we judged there to be a material risk of market exit. In general, such providers have failed to identify that their financial situation is one in which their student protection plan would be applicable and have therefore not initiated effective student protection planning in a timely way.
20. In each of these cases, the content of the existing student protection plan has been the starting point for discussion, rather than something that sets out, in advance, well-judged actions that could be taken. This means that there is a general risk that student protection measures would be less effective because providers have been attempting to develop detailed measures while considering the practical challenges of implementation. It has also reduced the range of measures that might be available to providers because of time constraints and their attention being focused on resolving their financial position.
21. The approach providers have taken has been variable. Some providers have engaged constructively with the OfS in their more detailed student protection planning. Others have been unable to provide the focus and expertise needed to develop credible student protection measures and taken considerable time to develop a plan which we deem adequate. Our experience is that events can move very quickly for providers experiencing financial difficulties and sudden changes can happen. This means that we are more likely to have used regulatory tools beyond those in condition C3, primarily specific conditions of registration, to achieve credible student protection planning at the pace necessary. But even the use of these tools

brings undesirable delay in these circumstances because there is a statutory consultation period for the imposition of a specific condition.

22. The approval of a student protection plan under condition C3 triggers an automatic requirement for that plan to be published. Providers at material risk of market exit have expressed concerns about the consequences of this publication requirement. They have sought to avoid publication of information they consider could further damage their financial position by seeking approval for plans that are not sufficiently clear on all relevant points. This creates a tension between the need to initiate early planning to ensure students can be protected if an exit were to occur, and the need to avoid precipitating an exit that would otherwise not happen. It is likely to be the case that the view of the OfS differs from that of a provider about when information about a potential market exit should be made available to students and others. But the current requirement to automatically publish an approved student protection plan under condition C3 is hindering our ability to ensure that detailed planning takes place in a timely way because a provider may prefer to delay publicly setting out student protection measures that suggest an exit is likely.

## **Our proposals**

### **What are we proposing?**

23. We consider, in this context, that the OfS needs stronger regulatory levers to ensure students have the necessary protections, where there is material risk of a provider exiting the market. This need for stronger regulatory tools is particularly relevant in the context of the coronavirus pandemic.
24. The use of this additional regulatory power would be focused only on those providers at material risk of exit. Our experience is that there is little value in requiring all providers to set out the approach they would take because credible market exit planning needs to respond to the particular circumstances that arise, and often to fast-moving events. We also wish to avoid placing regulatory burden on providers where this is not necessary.
25. We propose to:
  - a. Impose a new general ongoing condition of registration that requires compliance with student protection directions issued by the OfS where the OfS reasonably considers that there is a material risk the provider will exit the English higher education sector. This would be a permanent addition to the OfS's regulatory framework.
  - b. Include within the scope of that student protection direction the ability for the OfS to require a provider to put in place or implement student protection measures. This would include producing (and implementing) a special type of student protection plan called a 'market exit plan' for approval by the OfS and/or taking (or refraining from taking) such additional steps to ensure that the market exit plan or those student protection measures are effective.
  - c. Define student protection measures as being measures relating to:
    - i. teach out

- ii. student transfer
- iii. exit awards and unit certification
- iv. information, advice and guidance (IAG) for students
- v. complaints
- vi. refunds and compensation
- vii. archiving arrangements enabling students to access evidence of their qualifications in the future.

26. The proposals do not apply to further education colleges and sixth form colleges that are subject to the special administration regime in place for further education.

27. The proposed wording for the new general ongoing condition of registration, as well as the associated revisions to the regulatory framework, is set out at Annex A to this consultation.

28. We consider that the proposed new condition is a necessary and proportionate means to:

- a. Give the OfS powers to act swiftly and ensure students are adequately protected where the OfS reasonably considers that there is a material risk the provider will exit the English higher education sector.
- b. Ensure that student protection planning addresses the needs of all students, particularly those with protected characteristics, in vulnerable groups, or from outside the UK and subject to migration sponsorship arrangements.<sup>10</sup>
- c. Ensure that the regulatory burden on those providers that are not at material risk of market exit is not increased by focusing a requirement for more detailed student protection measures where it is most needed.
- d. Provide a clear mechanism through which information can be made available, as appropriate, to students and others about market exit, and the protections in place for students, where the OfS judges this to be reasonably likely to occur.
- e. Further deter providers from taking an approach to student protection planning that replicates the issues set out in paragraphs 17-22 above that we have seen in the development and implementation of student protection plans and measures. The proposed condition will assist in:
  - i. ensuring providers comply with the OfS's guidance on the content of student protection plans
  - ii. ensuring that the risks providers grapple with are those most relevant to them and likely to arise in practice, to best ensure students are protected in relation to such risks, including risks relating to whole provider failure

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<sup>10</sup> As a student's sponsor would need to be changed in the event of a transfer to a different provider.

- iii. ensuring student protection plans will be understandable to students, which will provide them with reassurance about the measures in place and the process to be followed
- iv. ensuring that measures in student protection plans are of sufficient detail to be of practical use to students
- v. providing clarity for students about the provider's key student protection measures.

29. A detailed explanation of the effect of and reasons for our proposals, as well as how they address our regulatory concern, is set out below.

**Mandate, as a general ongoing condition of registration, compliance with directions issued by the OfS, concerning the protection of students where the OfS reasonably considers that there is a material risk the provider will exit the English higher education sector**

#### **Effect:**

30. The effect of this proposal is that the OfS would be able to direct a provider to take action where the OfS reasonably considers that there is a material risk the provider will exit the English higher education sector. This would mean that the OfS could ensure that the necessary measures to protect students in those circumstances, particularly students with protected characteristics or from vulnerable groups, were implemented. This would reduce the risk that a provider would not respond quickly and effectively to a material risk of market exit.
31. Breach of the direction would constitute a breach of general ongoing condition C4 and could therefore be subject to the same consequences as a breach of any other condition of registration,<sup>11</sup> including suspension of registration (or suspension of certain entitlements relating to registration, for example the availability of student support for eligible students on eligible courses).

#### **Reasoning:**

32. In circumstances where the OfS judges that a provider is reasonably likely to exit the higher education sector, there is likely to be a need to act quickly to ensure students are sufficiently protected. In some circumstances, following the terms of the student protection plan as required under condition C3, may mitigate risks to students and mean no further regulatory intervention is necessary. But there may be other situations where consideration of the circumstances of, and background to, the provider's position suggests a further targeted regulatory intervention is necessary.
33. Our view is that condition C3 does not allow the rapid intervention needed in these circumstances. This is because condition C3 is underpinned by a provider's own assessment of the risk that various student protection events will occur and sets out the measures

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<sup>11</sup> As set out in sections 15-18 of HERA and The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019.

necessary to mitigate the impact of risks that are reasonably likely to occur. A provider's assessment of the risk of market exit does not always reflect the OfS's assessment, and such situations can escalate quickly requiring immediate action from a provider that it may be unable or unwilling to take. The mechanism in condition C3 is not therefore adequate on its own to respond to the type of student protection event that creates the most risk for students.

34. We consider that a bespoke power to direct providers to take action, rather than imposing specific conditions under section 6 of HERA, significantly benefits students. Use of our existing power would require a consultation with an individual provider of at least 28 days to take place. This would greatly reduce our ability to intervene in a scenario where risks to students may be imminent or a provider had been unable or unwilling to engage in timely and effective student protection planning.
35. The OfS's primary concern is to protect the interests of students and the proposed new condition reflects this regulatory focus. In the circumstances to which it relates – that is, where the OfS reasonably considers that there is a material risk of market exit – our current judgement is that the interests of students are likely to outweigh the autonomy of providers, in a way that might not be the case when a provider first produces a student protection plan for the purposes of condition C3. There are a number of different student interests and in reaching this provisional view we have considered the interests of past, present and prospective students (as reflected in the proposed definition of Student Protection Measures in condition C4 and set out in full in Annex A).
36. The regulatory burden of this condition is likely to be limited for most providers. First, the circumstances in which the OfS could use the proposed power are restricted by the need for it to reasonably consider whether there is a material risk that the provider will exit the market. This means that in practice, it is likely that the power of direction would only be used in respect of a limited number of providers (for example, those with material financial viability and/or sustainability issues). Furthermore, the scope of what can be directed is also limited by the definition of Student Protection Direction and the specific measures we have identified as constituting Student Protection Measures.
37. Where it is appropriate to consult with an individual provider (for a reasonable period in the circumstances) on the content of a direction, we would do so.

**Include within the scope of that direction the ability for OfS to require a provider to put in place or implement student protection measures. This would include producing (and thereafter implementing) a special type of student protection plan for approval by the OfS or taking (or refraining from taking) such additional steps to ensure that the student protection plan or those student protection measures are effective**

#### **Effect:**

38. The effect of this is to set the scope of what the OfS can require a provider to do under the student protection direction. Specifically, it means that the OfS can require a provider to produce a market exit plan. It also means that the OfS may direct the provider to undertake

further actions, but limits this to the defined 'Student Protection Measures' (discussed in further detail below).

39. This provision also ensures that OfS can set the timescales for completion of either the special student protection plan or the other student protection matters.
40. The effect of this provision is also to allow the OfS to direct a provider to take such consequential, ancillary or incidental actions as it considers reasonably necessary to ensure the market exit plan and Student Protection Measures are put in place and/or implemented in an effective and expedient manner. It also makes clear that publishing information, including the market exit plan, and deploying human resources **would** be included as such consequential, ancillary or incidental actions.

### **Reasoning:**

41. These provisions are included to ensure transparency both for students and providers about the scope for the OfS to intervene in the interests of students, where necessary. It (together with the definition of Student Protection Measures) provides a limit to the scope of the OfS's powers and the regulatory burden such directions could place on a provider. We consider this degree of specificity is particularly important to avoid any confusion in circumstances where the OfS needs to rely on the powers, particularly given the urgency with which any directions may need to be issued and complied with. However, it is also important that the OfS retains sufficient flexibility in terms of what it can direct (including by way of directing additional steps to ensure the effectiveness of measures) to be able to respond to the particular circumstances of the provider and ensure its use of the power of direction is targeted and proportionate.
42. Consistent with the rationale for specificity, the ability to mandate timescales is important. In market exit scenarios there will often be a need to act swiftly and for the OfS, the provider and its students to have a degree of certainty about the actions that will take place to mitigate the risks to students.
43. These proposals mean that the OfS would be able to require a provider to produce a market exit plan and, when the OfS judges it to be necessary, publish that plan to ensure that students and others are aware of the provider's position and the protection it has put in place. We recognise that a provider may consider that the publication of its market exit plan would be likely to further damage its financial position if current or future students were to decide to study elsewhere because of the information contained in the plan. The OfS will need to balance the needs of students for accurate and timely information with the interests of a provider that may be seeking to remain in business. We are seeking views in this consultation about the factors the OfS should consider in deciding whether and when to require a provider to publish its market exit plan, or information about other student protection measures.

**Define student protection measures as being measures relating to teach out, student transfer, exit awards and unit certification, information advice and guidance (IAG) for students, complaints, refunds and compensation, and archiving arrangements.**

### **Effect:**

44. The effect of this is to further set the scope about what the OfS can require of a provider under the student protection direction by reference to the kinds of measures that may be necessary to protect students.

### **Reasoning:**

45. Students should have confidence that, where there is a material risk of their provider exiting the sector, necessary measures are in place to protect them. This list of Student Protection Measures (which contains the measures previously identified by the OfS in guidance as key measures for inclusion in a provider's student protection plan) is intended to cover the most significant risks to students, which could arise in that scenario. Setting out this definition provides transparency both for students and providers about the scope for the OfS to intervene in the interests of students, where this is necessary. It also makes clear that the scope of the direction is tied to the risks to students associated with market exit. This is intended to provide reassurance to providers about the limits of the regulatory burden that can be placed on them because of this power of direction.

### **Proposed implementation**

46. The OfS is mindful of the context within which higher education providers are currently operating, because of the coronavirus pandemic. The OfS has made clear its commitment to reducing regulatory burden and supporting providers in the interests of students during this period.<sup>12</sup> This includes by limiting the number of consultations and requests for information to which providers are subject.

47. Nonetheless, given the significance of the risks to students stemming from the issues identified in this consultation and the increased likelihood of these risks coming to fruition because of the coronavirus pandemic, it is important not to delay seeking views on our proposals. As such, we are departing from our general policy to pause consultations in the current period in this instance.

48. Subject to the representations received as a result of this consultation, we intend to make a decision on whether to create a new general ongoing condition C4 and revise the regulatory framework, as set out in these proposals, in October 2020. The new condition would come into effect on the date of publication of that decision.

49. In developing this consultation, we have considered alternative options for securing our objectives. These options, and the reasons why we do not propose to take them forward, are set out in Annex C.

50. The consultation questions are listed in full in Annex D.

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<sup>12</sup> See our letter of 25 March 2020: [www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/](http://www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/).

# Annex A: Proposed amendments to the OfS's regulatory framework

We propose to amend the regulatory framework to include the following from page 103. We also intend to make a complementary amendment to Annex A to reflect the wording of the new condition.

## Condition C4: Student Protection Directions

i. The provider must comply with any Student Protection Direction in circumstances where the OfS reasonably considers that there is a material risk that the provider will, or will be required by the operation of law to, exit the English higher education sector.

ii. For the purposes of this condition:

“Student Protection Direction” means, irrespective of whether or not an approved student protection plan exists, a direction requiring a provider to:

- a. produce a special type of plan setting out Student Protection Measures for approval by the OfS and thereafter implementation by the provider (both in timescales specified in writing by the OfS) (“Market Exit Plan”);
- b. instead or in addition to a), put in place and/or implement any Student Protection Measures which are specified in writing by the OfS (in timescales specified in writing by the OfS); and
- c. do (or refrain from doing) such other consequential, ancillary or incidental actions, as the OfS considers is reasonably necessary, for ensuring that a Market Exit Plan or Student Protection Measures are put in place and/or implemented in an effective and expedient manner (including, but not limited to, publishing information, deploying human resources, and consulting a registered insolvency practitioner on the feasibility of the Market Exit Plan (all in timescales specified in writing by the OfS)).

“Student Protection Measures” means measures (including supporting arrangements and procedures) relating to:

- a. Teach out: ensuring students are able to complete their intended course of study and achieve their expected qualification with little or no tangible difference between their expectations at the start of the course and their actual experience in light of the circumstances of the provider, or complete their current academic year or term (and receive an exit award or credit to recognise their academic achievement at the provider);
- b. Student transfer: ensuring students are able to transfer to another higher education provider to continue and complete their studies, including providing students with appropriate support to understand their options and make an informed choice, and to ensure that administrative arrangements are in place to facilitate such transfers;
- c. Exit awards and unit certification: providing students with a formal record of their achievement at a provider;
- d. Information, advice and guidance for students: ensuring all students receive effective information, advice, guidance and support in relation to any likely market exit event;

- e. Complaints: ensuring that robust arrangements are in place for handling and responding to complaints from students; and
- f. Refunds and compensation:
  - i. offering students refunds of tuition fees and other costs (for example accommodation costs and other living costs) incurred by students for whom continuation of study has been disrupted;
  - ii. offering students compensation to cover any financial costs incurred by the student as a result of the provider's situation;
- g. Archiving arrangements: ensuring that arrangements are in place to enable students to access evidence of their academic achievements in the future, including arrangements with third parties to store records if necessary.

This condition does not apply to Further Education Bodies (as defined in section 4 of the Technical and Further Education Act 2017).

## Summary

**Applies to:** all registered providers, except Further Education Bodies (as defined in section 4 of the Technical and Further Education Act 2017) as these can be subject to the special administration regime in place for further education (detailed in Part 2 chapter 4 of that Act).

**Initial or general ongoing condition:** general ongoing condition

**Legal basis:** section 5 of HERA

## Guidance

### Condition C4(i)

1. Matters that might cause the OfS to reasonably consider that there is a material risk of a provider exiting the higher education sector include, but are not limited to:
  - a. where a provider asks to be removed from the OfS's Register;
  - b. where a provider cannot demonstrate that it is likely to have access to sufficient funds to meet its day-to-day costs within the next twelve months, including where a provider's ability to meet its day-to-day costs is likely to be reliant on specific factors and the OfS judges that there is material uncertainty about whether these will be delivered in practice. These specific factors might include, but are not limited to:
    - i. securing additional borrowing or investment;
    - ii. delivering significant business restructuring or other cost saving measures;
    - iii. the decision or actions of a third party.

2. For the avoidance of doubt, any assessment of the risk of market exit would need to be considered on its own facts and matters other than those in paragraph 1 above may also lead the OfS to conclude that a provider is at a material risk of exiting the market.
3. The reference to the provider being “required by the operation of law” to exit the English higher education sector includes any relevant law which might have that effect.

#### **Condition C4(ii)**

4. ‘Student protection plan’ means a document or documents approved by the OfS under initial and general ongoing condition C3, imposed pursuant to sections 5 and 13(1)(c) of HERA.
5. Where a Student Protection Direction requires the production of a Market Exit Plan, or requires a provider to put in place and/or implement any Student Protection Measures, the OfS may or may not direct the publication of that plan or of information about those measures. The OfS’s expectation is that, if the OfS judges that a provider is reasonably likely to exit the market, it **will** require the provider to publish its Market Exit Plan and/or information about Student Protection Measures.
6. For the avoidance of doubt, a direction can be issued and notified in any written form or manner, including by notifying a provider electronically. Likewise, notification of other matters under this condition, for example of timescales and approvals, can be issued and notified in any written form or manner.

# Annex B: Section 2 of the Higher Education and Research Act 2017

## 2. General duties

- (1) In performing its functions, the OfS must have regard to—
- a. the need to protect the institutional autonomy of English higher education providers,
  - b. the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers,
  - c. the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers,
  - d. the need to promote value for money in the provision of higher education by English higher education providers,
  - e. the need to promote equality of opportunity in connection with access to and participation in higher education provided 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.
- (2) The reference in subsection (1)(b) to choice in the provision of higher education by English higher education providers includes choice amongst a diverse range of—
- a. types of provider,
  - b. higher education courses, and
  - c. means by which they are provided (for example, full-time or part-time study, distance learning or accelerated courses).
- (3) In performing its functions, including its duties under subsection (1), the OfS must have regard to guidance given to it by the Secretary of State.
- (4) In giving such guidance, the Secretary of State must have regard to the need to protect the institutional autonomy of English higher education providers.
- (5) The guidance may, in particular, be framed by reference to particular courses of study but, whether or not the guidance is framed in that way, it must not relate to—

- a. particular parts of courses of study,
  - b. the content of such courses,
  - c. the manner in which they are taught, supervised or assessed,
  - d. the criteria for the selection, appointment or dismissal of academic staff, or how they are applied, or
  - e. the criteria for the admission of students, or how they are applied.
- (6) Guidance framed by reference to a particular course of study must not guide the OfS to perform a function in a way which prohibits or requires the provision of a particular course of study.
- (7) Guidance given by the Secretary of State to the OfS which relates to English higher education providers must apply to such providers generally or to a description of such providers.
- (8) In this Part, “the institutional autonomy of English higher education providers” means—
- a. the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way,
  - b. the freedom of English higher education providers—
    - i. to determine the content of particular courses and the manner in which they are taught, supervised and assessed,
    - ii. to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and
    - iii. to determine the criteria for the admission of students and apply those criteria in particular cases, and
  - c. the freedom within the law of academic staff at English higher education providers—
    - i. to question and test received wisdom, and
    - ii. to put forward new ideas and controversial or unpopular opinions,
- without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.

# Annex C: Consideration of alternative proposals

## Matters to which we have had regard in reaching our proposal

1. Since April 2018, the OfS has undertaken detailed assessment of student protection plans submitted as part of the registration process, including the way in which the provisions contained in plans have been implemented by individual registered providers. We have also undertaken detailed assessment of the financial viability and sustainability of individual providers and the sector more broadly and have required some providers to undertake student protection planning because we have considered there to be a material risk of market exit. We have drawn on these assessments in forming our views about the appropriate next steps to best protect students where there is a material risk that a provider will exit the market or cease trading.
2. In formulating these proposals, the OfS has had regard to its general duties as set out in section 2 of HERA – these are reproduced in Annex B. We consider that the proposals in this consultation are particularly relevant to general duties (a), (b), (d), (e) and (g), which relate to institutional autonomy, quality and choice, value for money, equality of opportunity and best regulatory practice. In formulating these proposals, we have given particular weight to (a), (b) (e) and (g).
3. Section 2 of HERA requires the OfS to have regard to the need to protect institutional autonomy. It does not, however, impose an absolute obligation on the OfS to protect the autonomy of providers and the OfS is required to balance each of its general duties, giving more or less weight to each in a particular context. In these proposals we are giving weight to autonomy insofar as the requirements set out in condition C4 would only apply to a provider that was at material risk of market exit. All other providers would not be subject to this regulatory measure. Where a provider is at material risk of market exit, its autonomy is likely to carry less weight than the interests of students.
4. In formulating these proposals, we have given particular weight to promoting choice and opportunities for students. In the circumstances where a provider is at material risk of market exit, it is important that the OfS can intervene to ensure that steps are taken to protect the interests of students. Our judgement is that the interests of students, including in relation to having information about a provider's financial position, outweigh the interests of a provider in this situation.
5. In considering these issues we have considered the interests of current students, which are likely to be served by effective student protection planning so that choices about how and where to continue their studies are available in a timely way. The interests of future students making choices about what and where to study are likely to be served by the availability of information about the fact that a provider is at material risk of market exit.
6. The proposals would also allow the OfS to ensure that a provider's student protection planning takes into account the needs of all of its students, particularly those from disadvantaged backgrounds or with equality characteristics.

7. We consider the proposed approach set out in this consultation to be proportionate and appropriate in ensuring that the OfS can balance the interests of students and the regulatory burden placed on providers.
8. In considering proportionality, we have provisionally concluded that the proposals should not apply to further education colleges and sixth form colleges that are subject to the special administration regime in place for further education. This is because that regime contains a mechanism to ensure that the interests of students, including a college's higher education students, are protected in the event of insolvency.
9. We have also had regard to Schedule 1, paragraph 21 of HERA, which extends the Equality Act 2010, and therefore the Public Sector Equality Duty, to the OfS. This requires the OfS to have due regard to eliminating unlawful discrimination, foster good relations between different groups and take steps to advance equality of opportunity. Related to this, we have had regard to our published equality and diversity objectives and action plan<sup>13</sup>, in particular objective 4, which relates to ensuring students receive a high quality higher education experience and in particular sets out the OfS's priority to ensure that any provider that implements its student protection plan in the event of course, campus or provider closure mitigates against differential impacts of the closure on students with protected characteristics. We consider that use of a power of direction, as proposed, will best enable the OfS to focus on the specific student population of an individual provider at the time of closure and act in a manner which has due regard to those characteristics.
10. We have also had regard to guidance issued to the OfS by the Secretary of State under section 2(3) of HERA, and specifically the following guidance:
  - a. *Statutory Guidance to the Office for Students - Priorities for the Financial Year 2018-19*, dated 20 February 2018, stating that when risk-assessing providers for registration, the OfS should consider whether the feasibility of the provider's student protection plan is affected, for instance where funds are held overseas;
  - b. *Statutory Guidance to the Office for Students - Priorities for the Financial Year 2019-20*, dated 27 February 2019, requesting that the OfS evaluate and report publicly on the strength of student protection plans and advice available on students' consumer rights;
  - c. *Statutory Guidance to the Office for Students - Ministerial priorities*, dated 16 September 2019, commending the work the OfS is taking forward on ensuring extensive student protection in the event of a provider closing and urging action in this area to be as ambitious as possible.
11. We have specifically had regard to the emphasis here on ensuring extensive protection in the event of a provider closing. We consider that given the issues identified and the failure for these to be addressed through less intensive regulatory means, the proposal to create a new general ongoing condition of registration with a view to protecting students in these

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<sup>13</sup> Our equality and diversity statement and objectives, and our equality and diversity action plan, are available at [www.officeforstudents.org.uk/about/equality-and-diversity/](http://www.officeforstudents.org.uk/about/equality-and-diversity/).

circumstances is consistent with the Secretary of State's guidance that the OfS act with ambition in this area.

12. We have also had regard to the Regulators' Code. Section 3 of the Code is particularly relevant, which discusses the need to base regulatory activities on risk:
  - a. Paragraph 3.1 provides for regulators to use an evidence-based approach to determine priority risks and allocate resources where most effective.
  - b. Paragraph 3.2 provides for regulators to consider risk at every stage of the decision-making process and choose the most appropriate type of intervention, using a targeted approach.
  - c. Paragraph 3.5 provides for regulators to review the effectiveness of their activities and make necessary adjustments accordingly.

We consider that our proposal particularly encapsulates these aspects of the Code.

### **Use of informal mechanisms and the OfS's information powers**

13. One alternative to our current proposals is the use of a less formal approach to set out our expectations for effective student protection planning for providers at material risk of market exit and the use of our information powers to gather information about the plans a provider has put in place. Under this approach we would not impose regulatory requirements to require compliance, but rather rely on providers' voluntary efforts to mitigate the risks to students.
14. As a result of the pattern of weaknesses in student protection plans submitted to the OfS, we have already imposed a significant number of regulatory interventions in relation to condition C3. We also signalled a requirement for providers to resubmit improved student protection plans following the publication of revised guidance. By 30 October 2019 we had imposed 94 regulatory interventions in relation to student protection plans (67 formal communications and 27 enhanced monitoring requirements).
15. Examples of the interventions applied include:
  - a. Formal communication requiring providers to publish their refund and compensation policies on their websites.
  - b. Formal communication requiring providers to send the OfS updated documentation where they had informed us they would be making changes to policies.
  - c. Enhanced monitoring requirements where we had concerns relating to a provider's financial position and its ability to fund the measures set out in its student protection plan.
  - d. Enhanced monitoring requirements where a provider told us that a policy associated with its student protection plan was due to be reviewed, to submit to us details of changes to the plan following this review.
16. As such, we have already attempted this route as a means of resolving the identified concern. Further use of these approaches may be used in advance of the OfS reasonably considering

that there is a material risk of market exit. They may also be used where such a risk has been identified, in advance of, or in conjunction with, a formal direction under the proposed general ongoing condition C4. The OfS would have regard to the proportionality of its intervention in any use of the power of direction. But relying solely on informal mechanisms and the OfS's information powers is unlikely to be sufficient to effectively mitigate the risks identified. For example, while under this method we can mandate information from providers about their voluntary plans for market exit (using condition F3) we cannot require other specific actions unrelated to the provision of information. As such, there could be no regulatory consequence (as there would be under a power of direction) should the provider not comply with this type of regulatory intervention.

17. More specifically, in relation to the small number of providers that we have required to undertake more detailed student protection planning because of concerns about financial viability and sustainability, none of these providers had initiated effective planning before the OfS's intervention and extensive intervention was often necessary to secure effective planning.

### **Updating guidance regarding student protection plans**

18. Guidance on the purpose, structure and content of student protection plans was published in February 2018. We reported on the outcomes of the registration process in October 2019.<sup>14</sup> That document set out our intention to consult on revised guidance on the purpose, structure and content of student protection plans. We intend to consider our approach to the guidance further in an upcoming consultation. This will look at whether there is a need for further regulatory intervention to mitigate the risks to students associated with student protection events that do not involve a market exit, including for example, course, subject or campus closure.
19. However, in terms of the current proposals, for the same rationale as set out above regarding using informal mechanisms, we do not consider that solely updating our guidance would sufficiently mitigate the risks.

### **Imposing specific conditions**

20. Another alternative to the proposals, which the OfS has considered, is making use of targeted specific conditions for particular providers, rather than creating a new general condition of registration and power of direction. The OfS is empowered by section 6 of HERA to impose such specific conditions on a provider as it may determine, at the time of a provider's registration or later. The benefit of this approach would be to reduce the regulatory burden on providers that are not at material risk of market exit.
21. We have provisionally discounted this approach as:
  - a. Our experience is that relying on the use of specific conditions causes delays to students receiving the benefit of the proposed reforms, including clarity about how the risks to them of a student protection event occurring will be mitigated. Any such specific condition is subject to a statutory consultation period and running that process hinders the OfS's ability to respond quickly to market exit risks. That is

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<sup>14</sup> See Office for Students registration process and outcomes 2019-20, which is available at: [www.officeforstudents.org.uk/publications/registration-key-themes-and-analysis/](http://www.officeforstudents.org.uk/publications/registration-key-themes-and-analysis/).

because the OfS would not necessarily be taking steps to impose a condition until after a specific risk relating to a provider had arisen.

- b. Attempting to predict which providers are more likely to be at risk of market exit and imposing specific conditions on them in advance of that risk actually materialising is unlikely to provide the reassurance that the OfS will have the powers to intervene when necessary. It could also risk undue discrimination between different types of provider operating under different, but valid business models. All types of provider can experience financial viability and sustainability difficulties and providers' financial positions can change significantly (as is evident in the current circumstances of the coronavirus pandemic).
- c. We consider that a general ongoing condition and the possibility that **any** provider could in theory be subject to the power of direction (should the circumstances allowing for it arise) will act as an incentive for higher quality development and implementation of student protection plans. In contrast, a specific condition would run the risk of continuing the varying approach between providers, whereby some students are afforded better protection than others on account of the more granular planning their providers undertake in their student protection plan.

# Annex D: Consultation questions

## Consultation questions

**Question 1:** Do you agree or disagree with the proposed introduction of a new ongoing condition of registration and associated changes to the OfS's regulatory framework as set out in Annex A?

**Question 2:** The proposed guidance for inclusion in the regulatory framework (see Annex A) states in paragraph 5 that the OfS expects to require the publication of a market exit plan or student protection measures where it judges that a provider is reasonably likely to exit the market. What factors should the OfS take into account in deciding whether and when to require a provider to publish its market exit plan, or information about other student protection measures?

**Question 3:** Do you agree or disagree with the proposals for implementation of the proposed new general ongoing condition of registration (in paragraphs 46-49 above)?

**Question 4:** Do you have any comments about any unintended consequences of these proposals, for example, for particular types of provider or for any particular types of student?

**Question 5:** Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

**Question 6:** Do you have any other comments?



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