

**Office for  
Students**



# **Consultation on quality and standards conditions**

**Analysis of responses to consultation  
and decision**

**Reference** OfS 2022.12

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# Contents

<b>Introduction</b>	<b>3</b>
What we were consulting on	3
Background	4
Final decision and implementing our approach	4
<b>Overall comments about the proposed conditions</b>	<b>7</b>
Our response	9
Conclusion	14
<b>Proposal 1: impose three general ongoing conditions of registration relating to the quality of a provider's courses</b>	<b>15</b>
Responses relating to condition B1: academic experience	15
Our response	19
Conclusion	26
Responses in relation to condition B2: resources, support and student engagement	27
Responses relating to condition B4: assessment and awards	40
Our response	43
Conclusion	50
<b>Proposal 2: imposing one general ongoing condition of registration relating to the standards of a provider's courses</b>	<b>51</b>
Introduction	51
Sector-recognised standards	51
Degree classification descriptors	52
Alternative suggestions	53
Evidence gathering, assessment and enforcement	54
Our response	55
Conclusion	59
<b>Proposal 3: impose two initial conditions of registration, one relating to the quality of, and one relating to the standards applied to, a provider's courses.</b>	<b>60</b>
Comments about proposed conditions B7 (Quality) and B8 (Standards)	60
Our response	62
Conclusion	65
<b>Proposal 4a: commission the designated quality body to provide evidence about compliance with the initial conditions for a provider seeking registration</b>	<b>66</b>
Introduction	66
Using the DQB to gather evidence on quality and standards for providers seeking registration	66
Other comments regarding proposal 4a	68
Our response	68
Conclusion	71
<b>Proposal 4b: operate a flexible risk-based approach to evidence gathering and investigation for registered providers (question 8)</b>	<b>72</b>
Introduction	72
Engagement, evidence gathering and investigations	73
Role of the DQB and use of expert academic judgement	75
Our response	75
Role of the DQB and use of expert academic judgement	78
Conclusion	79

<b>Proposal 4c: Take account of a provider’s compliance history in relation to the quality and standards conditions for the purpose of determining eligibility for other benefits of OfS registration</b>	<b>80</b>
Overview	80
Our response	81
Conclusion	83
<b>Proposal 5: External quality assurance of integrated higher and degree apprenticeships</b>	<b>84</b>
Our response	85
Conclusion	85
<b>Unintended consequences and other comments (Questions 12 and 14)</b>	<b>86</b>
Regulatory burden	86
Our response	87
Other matters relating to courses and online delivery	91
Our response	91
Transnational higher education courses	92
Our response	94
Partnership arrangements	97
Our response	98
Alignment of proposals with approaches across the UK	101
Our response	102
The UK Quality Code	103
Our response	104
Use of external review and reference points	104
Our response	105
Working with PSRBs	105
Our response	105
Students and our proposed approach to quality and standards	106
Our response	106
Consultation approach	107
Our response	108
<b>Equality considerations</b>	<b>109</b>
Our response	109
<b>Proposed implementation</b>	<b>112</b>
Overview	112
Impact of the pandemic	112
Timeline for implementation	112
Other comments	113
Our response	113
<b>Annex A: Quantitative analysis of responses</b>	<b>116</b>
Proposal 1	117
Proposal 2	120
Proposal 3	121
Proposals 4a, 4b and 4c	123
Proposal 5	126
<b>Abbreviations used in this document</b>	<b>127</b>

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.

## **Introduction**

### **What we were consulting on**

1. During the winter of 2020-21, we undertook a preliminary consultation on a range of quality and standards issues.<sup>1</sup> Following consideration of the responses to that consultation we developed proposals for new quality and standards conditions and guidance (the phase two consultation).<sup>2</sup> The phase two consultation took forward some aspects of the preliminary consultation and made more detailed proposals about new regulatory requirements. The phase two consultation set out proposed revised quality and standards conditions and accompanying guidance, the reasons we were proposing these and what we expected the changes to achieve. We sought views on these proposals between 20 July 2021 and 27 September 2021.
2. We have undertaken a qualitative analysis of the responses we received to the phase two consultation. In this document we identify and discuss the most significant issues raised in responses to the consultation, whether or not these have led to changes to the proposals we made. In Annex A, for additional context, we have also set out a quantitative analysis of responses received overall and of questions where an 'agree' or 'disagree' answer was sought.

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<sup>1</sup> See [www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education/](http://www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education/).

<sup>2</sup> See [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/).

## Background

3. This was a public consultation and stakeholders were invited to share their views on 14 questions covering five proposals by using an online survey to submit written responses.
4. The proposals were:
  - a. Proposal 1: for registered providers, three ongoing conditions of registration relating to quality and covering:
    - i. Academic experience
    - ii. Resources, support and student engagement
    - iii. Assessment and awards.
  - b. Proposal 2: for registered providers, one revised ongoing condition of registration relating to standards that extends the definition of 'sector-recognised standards' to allow the regulation of undergraduate degree classifications.
  - c. Proposal 3: for providers seeking registration, two new initial conditions of registration that set evidence requirements in a way that is clearer and easier for high quality new providers to meet.
  - d. Proposal 4: revised guidance for each of these conditions that includes our approach to gathering evidence, assessment and compliance.
  - e. Proposal 5: the OfS will use its role as the body responsible for External Quality Assurance for integrated higher and degree apprenticeships to inform its judgements about condition B4.
5. We received 157 responses to the consultation, the majority of which were from higher education providers, their staff or sector mission groups. We also received a small number of responses from students, student representative groups and other interested parties. A small number of respondents submitted their responses by email. A small number of responses were submitted after the deadline. We considered all responses received.

## Final decision and implementing our approach

6. We have decided to implement our proposals in substantially the same form that we consulted on. Alongside this document, we are publishing amendments to the regulatory framework, which implement our revised quality and standards conditions and accompanying guidance; these are set out in the document *Quality and standards conditions*.<sup>3</sup> We have also set out in a separate document a summary of changes to the version of the conditions on which we consulted.<sup>4</sup> We have made a series of changes to our proposals as a result of our

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<sup>3</sup> 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/).

<sup>4</sup> The summary of changes will be available on our website shortly.

consideration of responses to the consultation and these are explained in this document. The amendments to the regulatory framework also contain some minor wording changes to better reflect both the original policy intent and any changes to the policy that have resulted from this consultation, and stylistic changes for readability. We intend to update other published guidance documents to ensure they are consistent with the outcomes of this consultation. We will also publish consequential amendments to the regulatory framework as signalled in the consultation, to reflect the outcomes of this consultation.

7. The new<sup>5</sup> ongoing conditions of registration B1, B2, B4 and B5 will come into effect from 1 May 2022. This date was set to provide a grace period before the introduction of the new conditions to allow providers time to familiarise themselves with the new requirements and make any necessary changes, while also recognising the interests of students in the OfS taking prompt regulatory action under the new requirements. We think it is in the interests of students to impose conditions that bring clarity and enable us to take action where that is appropriate as soon as possible. We also note that the conditions we have decided to impose cover the same broad areas as the previous conditions. We acknowledge that the amended requirements may mean that some providers need to make changes to some areas of their provision, and, where relevant, we intend to consider timing matters in our approach to any investigations. Further detail is set out in paragraphs 518-521.
8. The new initial conditions of registration B7 and B8 will apply to applications for registration made on or after 1 May 2022. Transitional arrangements will apply to applications for registration which are live at any time between 1 March 2022 and 30 April 2022. The implementation arrangements are set out in the Notice we have published alongside this document.<sup>6</sup>
9. We have made some changes to the proposals on which we consulted, taking into account the feedback we received from the consultation. These are reflected in drafting changes to either the conditions or guidance in the regulatory framework and are highlighted throughout this document along with the rationale for the changes as part of our discussion of the consultation responses.
10. In reaching our final decision about these matters, we have had regard to the OfS's general duties in section 2 of the Higher Education and Research Act 2017 (HERA). We have given particular weight to the duties under sections 2(1)(b), (d) and (e), in light of the reasons set out in the phase two consultation document. These relate to quality, choice and opportunities for students; value for money; and equality of opportunity. We have considered the general duty relating to institutional autonomy and have taken the view that this should be given less weight for the reasons set out in the phase two consultation document.
11. We have given weight to the general duty relating to best regulatory practice, including the principle that our regulatory activities should be transparent, accountable, proportionate and

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<sup>5</sup> Note that where we refer to 'new' conditions in this document in the context of conditions B1, B2, B4 and/or B5, we are referring to revisions to existing conditions contained in the regulatory framework.

<sup>6</sup> 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/).

consistent and targeted only at cases where action is needed. In reaching our final decisions, we have also had regard to the Regulators' Code.

12. We have also had regard to relevant statutory guidance issued to the OfS by the Secretary of State<sup>7</sup> under section 2(3) of HERA, including guidance dated 14 September 2020 and 8 February 2021. The February guidance includes requests for the OfS to drive up quality and standards in higher education (including by progressing rapidly 'to ensure that a robust enhanced regulatory regime can be operational as soon as possible') and to minimise bureaucracy (including by taking 'a risk-based approach to quality assessment and regulation, focusing its efforts on lower quality providers').
13. We have also had due regard to our obligations under the public sector equality duty in the Equality Act 2010 and our consideration of relevant issues is set out in more detail in the section on 'Equality considerations' below. We have concluded that, overall, our revisions to the quality and standards conditions and associated guidance will have a positive impact on individuals with protected characteristics.
14. For the reasons set out in this document, we consider that the revised conditions of registration and guidance will enable us to regulate quality and standards more effectively in practice and offer better protection for students, in a manner that is proportionate to our policy aims. The revised conditions provide greater clarity about our minimum requirements for quality and standards while offering the significant latitude to providers in line with the OfS's principles- and risk-based regulatory approach. As we set out in our phase two consultation document,<sup>8</sup> we expect the highest quality providers should normally expect to meet our minimum requirements comfortably and should not need to expend significant effort to demonstrate that the requirements are satisfied. This approach will allow us to focus regulatory attention where it is needed and to minimise regulatory burden that is not adding significant value for providers or students.

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<sup>7</sup> Available at: [www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/).

<sup>8</sup> See paragraph 11 of the consultation on quality and standards conditions, available at [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/).

## Overall comments about the proposed conditions

15. A number of comments were received in responses that related generally to the approach we had proposed in the conditions. This section considers a number of those overarching points which were either made by respondents about all the conditions (B1, B2, B4, B5, B7 and B8) in general, or that related specifically to one of the conditions but which we have identified as having more general relevance to the proposals.
16. Several respondents broadly supported the principles-based approach used for the proposed conditions.
17. A small number of respondents commented on the term 'high quality', which is used in the wording of proposed conditions B1 and B2, which contain references to ensuring students receive a 'high quality academic experience'. Some respondents commented that any definition of a high quality academic experience would 'remain open to interpretation, in the UK and internationally'. It was also suggested that the word 'high' is removed, because the conditions seek to set minimum requirements for quality and the term 'high' sets this minimum in a more ambitious place than appropriate.
18. With reference to the proposal to include a provider's transnational education (TNE) courses within scope of the conditions, some respondents commented that what was appropriate in the UK, in terms of skills, curriculum, resources, technical proficiency in English, outcomes, student engagement and digital delivery, may not be appropriate where a course was being delivered outside the UK.
19. One respondent had concerns about the use of the phrase '[the provider] must ensure' in the conditions, and how the criteria for meeting the conditions might be interpreted by individual students. The respondent speculated that this could negatively affect student satisfaction.
20. There was some support for the use of illustrative examples set out in the guidance underpinning each condition. Further responses on the use of illustrative examples included:
  - Requests for clarification about whether the guidance forms part of the OfS's regulatory requirements or whether it is only advisory.
  - Whether providing illustrative examples to help providers to interpret the conditions in practice was overly prescriptive, in particular in light of the reference in HERA to protecting providers' freedom 'to determine the content of particular courses and the manner in which they are taught, supervised and assessed'. Respondents had incorrectly interpreted this part of HERA as an absolute obligation rather than as part of the OfS's general duties to which it must have regard.
  - Whether the illustrative examples could be extended to cover a wider range of types of course, as a small number of respondents considered the examples to be too focused on taught degree courses.
21. Several respondents commented on the importance of using expert academic judgement to inform decisions about compliance with the requirements set out in the conditions. Several respondents considered that the OfS should always seek expert academic advice. For example, under the proposed guidance for condition B1, it was suggested that the wording in

paragraph 6 should be changed from 'the OfS would expect to draw on expert academic judgement' (before reaching a view that B1 was not satisfied in relation to curriculum and pedagogy matters) to 'the OfS will draw on expert academic judgement'.

22. Further comments on the OfS's use of expert academic judgement in making compliance decisions included:

- Requests for information about how subject experts would be identified and the weight that their judgements would be given.
- To ensure transparency and confidence in its decision making, the OfS should ensure academic experts are selected from a range of providers reflecting the diversity of the sector.
- Requests for information about how the OfS would avoid conflicts of interest in subject areas which have a limited pool of experts.
- Requests for information about how the OfS's use of expert academic judgement would align with providers' established use of external examiners and whether providers could continue to choose their own external examiners.
- Alongside expert academic judgement, the OfS should draw on appropriate employer or professional body expertise to understand, for example, the extent to which a course is 'up-to-date' or the extent to which it equips students with relevant skills (as part of compliance decisions under condition B1).

23. Other overarching points raised about the proposed conditions included that:

- Respondents were unclear whether the onus would be on a provider to prove that it had complied with (or was complying with) the ongoing conditions (B1, B2, B4 and B5) or whether the onus was on the OfS to establish non-compliance.
- Terms such as 'effectively', 'sufficient' and 'appropriate' did not clearly convey the requirements and it was not clear how a decision about compliance with some requirements, such as the requirement to ensure that 'each higher education course is effectively delivered' (B1.3.d)<sup>9</sup>, would be established or how a provider's context would be taken into account.
- Integrated elements of courses that are not at Level 4<sup>10</sup> or above should not fall within the scope of the proposed conditions, for example a course leading to a Level 3 award, where the awarding body is regulated by Ofqual, which is embedded in a course leading to a higher education level award such as a Higher National Certificate. We understand that the view being expressed by this comment is that the OfS either doesn't have jurisdiction to regulate, or shouldn't otherwise seek to regulate, elements of courses that are not at

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<sup>9</sup> Unless otherwise indicated, references in this document to paragraphs in the conditions and associated guidance will be to the consultation version set out in Annexes A to C of the phase two consultation.

<sup>10</sup> For an explanation of qualification levels, see: <https://www.gov.uk/what-different-qualification-levels-mean/list-of-qualification-levels>.

Level 4 or above, especially where integrated element of courses below Level 4 could be offered as a standalone qualification.

- It was not clear how microcredentials fitted into the definitions of 'course of study' or 'module' (a 'course of study' and 'any module that forms part of a higher education course' are both listed under the definition of 'higher education course' and fall within scope of the OfS's regulation under the proposed conditions).
- The presentation of the conditions was not user-friendly since it required the reader to reconstruct the meaning of any requirement through a trail of definitions and subsidiary definitions.

24. A number of points were made about the proportionality of the scope of the conditions and OfS's approach, for example views were expressed that professional or vocational courses where a provider is not the awarding body, or courses that are not eligible for funding by the OfS (often described as 'non-prescribed' courses), should be excluded from the scope of (in particular) conditions B1, B4 and B5. Respondents suggested that where a provider would not otherwise, in practice, hold responsibility for the matters covered by these conditions, or where the course is not eligible for OfS funding, it should not be held accountable.

25. There were also comments about the overlap between the requirements set out in proposed conditions and some professional statutory and regulatory bodies (PSRB) requirements with the potential for duplication and burden, or conversely that requirements of the OfS might be in conflict with those of some PSRBs. Further information was sought about how the two sets of requirements would interact.

## Our response

26. On our use of the term 'high quality' (in conditions B1 and B2), in response to points that this term is open to interpretation, we included a non-exhaustive definition of what is required for a 'high quality academic experience' for the purposes of condition B1 in paragraph B1.3. We have also included guidance to assist providers in understanding how the OfS may interpret conditions B1 and B2. We do not consider it appropriate or desirable to include an exhaustive definition of 'high quality' in these conditions, as to do so would undermine the principles-based nature of our quality requirements, which would risk leading to a compliance culture that stifles diversity and innovation, could unnecessarily curtail providers' autonomy, and could limit our ability to apply the conditions to the diverse range of courses in the sector.<sup>11</sup>

27. On the suggestion that the conditions should refer to 'quality', rather than 'high quality', the use of the term 'high quality' is consistent with the policy aims behind these proposals, namely our view that all students are entitled to a high quality academic experience, and that taxpayers' investment in higher education should fund the provision of high quality courses. This reflects the OfS's primary regulatory objectives set out in the regulatory framework, which include that

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<sup>11</sup> For an explanation of the reasons for our principles-based approach, see pages 98-99 of the phase two consultation.

the experience of all students under our regulation will be 'high quality'.<sup>12</sup> Our conditions are designed to deliver this objective, in that they provide a clear and detailed statement about what the 'high quality' minimum requirements for higher education courses are for English providers, whether those courses are delivered in the UK or overseas. Where the minimum requirements set out in those conditions are met, it ensures that the overall academic experience that a student will receive will be high quality.

28. Through both consultations we have heard views from respondents about the high performance of the sector, its international reputation and standing and the importance of maintaining this. We consider that reducing our minimum requirements from 'high quality' to 'quality' would potentially undermine public confidence in our regulatory requirements.
29. In response to comments that aspects of TNE courses are not comparable with courses delivered in the UK, we recognise that there is significant diversity in courses and their delivery, both within the UK and where courses are delivered outside the UK. The conditions are drafted in a principles-based way to take this variation into account, in that a provider is free to choose how it meets our minimum requirements in respect of each course, taking account of the particular course context. For example, a provider can choose to deliver an otherwise identical course within and outside the UK in different ways, in order to meet the needs of different students, provided that it can demonstrate that each course is 'effectively delivered' (as required by B1.3.d). For the avoidance of doubt, the conditions do not create any expectation that, where multiple versions of a course are offered in different contexts, those versions should be exactly the same. Each version of a course must continue to meet our conditions and we have deliberately ensured that there is flexibility for a provider to determine how best to design and deliver its courses.
30. We have considered the comment about the use of the phrase '[the provider] must ensure' and points about how the criteria for meeting the conditions might be interpreted by students. We have interpreted the underlying concern to be that the phrase 'must ensure' places onerous obligations on a provider, and that students could become dissatisfied if they perceive the provider not to be meeting these. 'Must ensure' is used in the conditions to describe the various obligations placed on a provider, for example, a provider 'must ensure' that students receive a high quality academic experience (B1.2). We consider that the use of 'must ensure' is appropriate, given the flexibility that a provider has to determine how to meet the requirements set out in conditions B1, B2, B4 and B5. Our principles-based approach to setting requirements maximises the scope for a provider to develop its courses in line with its mission, context, and the interests of other parties such as PSRBs. Further, the OfS would have regard to the proportionality of any regulatory intervention taken in respect of a provider's compliance with these conditions. We do recognise that it will be important for students to understand what the conditions mean, and how we will use them in our regulation. To support students' understanding we intend to continue to publish information directed towards student audiences on our requirements and approach to quality and standards on our own website.
31. On the status of the guidance that underpins the conditions, the conditions constitute binding regulatory requirements, and these requirements are set out in the yellow boxes in the

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<sup>12</sup> See the regulatory framework, paragraph 3: 'all students, from all backgrounds, and with the ability and desire to undertake higher education... 2. Receive a high quality academic experience...'

regulatory framework. The guidance that accompanies each condition, includes illustrative examples and statements of policy that support these. In particular, the guidance is designed to help providers understand the main features of a condition, how the principles-based approach is likely to be applied in practice and how the OfS would be likely to approach decisions about compliance. Separately, we do not consider that our use of non-exhaustive examples is overly prescriptive or restricts a provider's autonomy, as the examples do not limit a provider's freedom to decide how to meet the principles-based requirements contained in the conditions; they simply provide suggestions about how compliance might be achieved or illustration of where the OfS might have regulatory concerns. We have made use of feedback received in responses to develop the guidance to better reflect the range of courses offered by providers. The specific amendments made are explained in the relevant parts of this document.

32. With reference to comments about the role of expert academic judgement, we would draw on expert academic judgement wherever we consider that to be appropriate to inform a decision about compliance with the conditions. We set out in the proposed guidance that, as required under section 27 of HERA, we would seek advice from the designated quality body (DQB) in areas relating to standards; our expectation is that the designated body would itself draw on expert academic judgement in formulating its advice. We also set out in the guidance for condition B1, paragraph 6, that 'the OfS would expect to draw on expert academic judgement' before reaching a view that B1 is not satisfied in relation to 'matters that relate to the curriculum and pedagogy'. In other areas relating to quality, the proposed guidance stated that we may ask the DQB, or another appropriate body or individual, to gather further evidence (which could involve commissioning expert academic advice). In line with this, and in order to avoid unnecessary regulatory burden and to be able to act urgently in the interests of students where that is needed, we intend to make decisions about when expert academic judgement is and is not required (in areas relating to quality) on a case-by-case basis. Our selection of academic (and other) expertise will take account of relevant factors, such as the nature of our regulatory concerns, the subject or subjects covered by a course, the methods of delivery used by the provider, or particular considerations that might arise from the assessment of TNE courses.
33. The use of expert academic judgement to inform our regulatory decisions is separate and distinct from the role of external examiners. External examiners form part of a provider's own arrangements for assuring quality and standards, and providers can choose to use external examiners if they consider this will enable them to comply with conditions of registration. Where we consider it appropriate to draw on academic expertise, we will ensure that the expertise deployed is appropriate to the particular assessment that needs to be undertaken. Any potential conflicts of interest arising from the allocation of academic expertise to the assessment of an individual provider will be identified, and where prior connections with the provider cannot be entirely avoided these will be appropriately mitigated on a case-by-case basis. More generally, it is our intention that the pool of academic expertise we draw on reflects the diversity of the sector, and we intend to consider whether this requires us to take any steps to encourage participation from any types of provider. Finally, we would be able to seek advice from employers and professional bodies where we consider this appropriate in a particular case.
34. On the question of whether the onus would be on the OfS to prove non-compliance or on a provider to prove compliance with conditions, as explained in paragraph 16 of the consultation

version of the B1 guidance (and equivalent paragraphs in the B2, B4 and B5 guidance), where we have identified potential non-compliance with the ongoing conditions of registration, we would set out our provisional view for the provider and give our reasons for reaching that view, as well as the evidence used to reach that view. We would then give the provider an opportunity to make representations, including an opportunity to explain why it considers that it is compliant with that condition, before reaching a final decision about compliance.

35. On comments about terms such as ‘effectively’, ‘sufficient’ and ‘appropriate’, our use of these terms should not be considered in isolation from the other material we have provided. We have included definitions of important terms in the conditions themselves (for example, we have explained the meaning of ‘appropriately informed’ and ‘effectively delivered’ in B1.5). We have also provided non-exhaustive illustrative examples in the guidance that accompanies each condition that can be used to understand how we might interpret the requirements of a condition in practice. This is in line with our principles-based approach to regulation.<sup>13</sup> Over time we intend to supplement this material with case studies that show how we have made decisions in individual cases.
36. As it develops and delivers its courses, a provider needs to make its own judgements about the approach it takes to satisfy our regulatory requirements. We will take into account the context in which a provider is operating where this is relevant to our decisions about compliance.
37. On the scope of our regulation of elements of a course where those elements are not at Level 4 or above, our proposals set out that a ‘higher education course’ within the scope of the proposed conditions would include ‘any further education course that forms an integrated part of a higher education course’. We consider that the OfS has clear legal jurisdiction to regulate any activities of providers that are directly or indirectly connected with higher education and, in any event, consider that the scope of our proposals remains appropriate because students would be registered on a higher education course, regardless of whether all the elements of that course are at Level 4 or above. Where a course falls within the regulatory ambit of another regulator, we would give consideration to that in our approach to monitoring and intervention.
38. On the question of whether ‘microcredentials’<sup>14</sup> fall within the scope of the conditions, the conditions would cover these. The conditions cover higher education provided ‘in any manner or form’ (see the first paragraph of each condition) and, as explained in the guidance, this includes higher education courses with any volume of learning. To make this clear we have added a reference to ‘microcredentials’ in the guidance underpinning the conditions. We have made amendments to paragraph 1 of the final version of the B1 guidance so that it now reads ‘This means, for example, that [...], the study of modules *or courses leading to microcredentials*, [...] are included within the scope of this condition.’ This change has also been made in the final version of the guidance at paragraph 22 of the B2 guidance, paragraph

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<sup>13</sup> For an explanation of the rationale for our principles-based approach, see pages 98-99 of the phase two consultation.

<sup>14</sup> ‘Microcredential’ is a term gaining currency for courses of short or relatively short duration that typically have a professional or career-building focus.

45 of the B4 guidance, paragraph 68 of the B5 guidance, paragraph 85 of the B7 guidance and paragraph 99 of the B8 guidance.

39. On the readability of the proposed conditions, we gave considerable thought to how the proposed conditions should be structured. It was important to ensure that the conditions were written in a way that would avoid ambiguity about our requirements so that, wherever appropriate, these can be enforced in the interests of students. We do, however, recognise that this means that it can take some time for a reader to identify the different sections that relate to a particular requirement. We will consider further whether it would be helpful to develop a guide that pulls together all the relevant content by key term, which could be used by readers as a way of finding more quickly the material relevant to that term. In taking this approach we would need to ensure that we did not place any ambiguity about the requirements placed on providers. This 'reference guide' would not have any legal status but would be designed to assist readers in navigating the conditions and the regulatory framework.
40. In relation to the proportionality of the scope of the conditions and OfS's approach, we see no valid argument for professional or occupational courses for which a provider is not the awarding body, or courses which are not eligible for OfS funding, to be excluded from the scope of any of the quality and standards conditions. We have framed the scope of the conditions in a way that is inclusive of the wide range of courses that are to be found in English higher education. It remains in the interests of students for a provider to be accountable for the requirements set out in the ongoing conditions whenever it is involved in higher education provision, even where it is not the awarding body or not eligible for OfS funding. Our view is that all students should benefit from a minimum level of regulatory protection where a registered provider is involved in their higher education course, regardless of the type of course they choose, or who delivers that course. This is consistent with ensuring both quality and equality of opportunity. We do not consider that it is appropriate for a provider to seek to generate income, or gain other benefits, through provision of higher education while abrogating responsibility for the quality of those courses and the standard of awards.
41. The alternative approach suggested by some respondents – that conditions or parts of conditions should not apply to certain providers or courses would provide uncertainty for students and, given the significant variation in the contractual arrangements that exist between providers and awarding organisations as well as variation in the responsibilities assigned within those contracts, not imposing some conditions or aspects of them in some circumstances would risk creating regulatory gaps and exposing students to unnecessary risk. We therefore consider that the simplest and clearest approach is for all conditions to apply to all providers. However, as we set out in the consultation document,<sup>15</sup> we are required to have regard to proportionality considerations in any regulatory intervention we make, which means that we would take into account the context of any relevant partnership arrangement before deciding whether to investigate a provider, find a breach of a condition, or take enforcement action against a provider. This would apply in the context of partnerships between registered providers, as well as to circumstances where a registered provider was working with an awarding organisation that was not a registered provider. The question of whether or not a

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<sup>15</sup> See paragraph 37 of the phase two consultation.

course is eligible to be funded by the OfS is unlikely to be relevant to our decisions about regulatory interventions for the reasons explained in the phase two consultation.<sup>16</sup>

42. We recognise that some requirements of PSRBs may overlap with the requirements set out in condition B1 (and also other OfS conditions). We set out our general position on this matter in our phase one consultation analysis and we are satisfied that the policy position outlined in that document remains appropriate.<sup>17</sup> As we stated in our phase one analysis, the inherent flexibility in our principles-based approach gives a provider scope to minimise the overheads incurred in meeting our requirements and maximise the opportunity for it to meet our requirements in an efficient way that aligns with the expectations of other bodies. Paragraphs 478 478-481481 discuss more broadly our approach to working with PSRBs.

## Conclusion

43. We have therefore decided to make the amendments to the guidance as set out in this response, as set out in the final text for the regulatory framework in the document Quality and standards conditions.

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<sup>16</sup> See paragraph 33 of the phase two consultation.

<sup>17</sup> See the Consultation on regulating quality and standards in higher education: analysis of responses, especially paragraphs 195, 252, 292, 302-304.

# Proposal 1: impose three general ongoing conditions of registration relating to the quality of a provider's courses

44. Proposal 1 sets out three new ongoing conditions of registration relating to quality, covering:
- a. Academic experience (condition B1)
  - b. Resources, support and student engagement (condition B2)
  - c. Assessment and awards (condition B4).

## Responses relating to condition B1: academic experience

45. Question one of the consultation sought respondents' views on proposals for a new ongoing condition B1, which would set out requirements relating to the academic experience of students, as detailed on pages 18-19 and 42-50 of the phase two consultation.
46. Half of respondents agreed with the proposal to impose condition B1, just over a quarter of respondents neither agreed nor disagreed and just under a fifth of respondents disagreed with the proposal.
47. A wide range of detailed comments were also received on the proposals.
48. Several respondents commented in general terms on the level of detail set out in proposed condition B1. Some respondents commented that the principles-based approach set out in the proposed condition was broadly effective. Other general comments included that:
- The level of detail provided for proposed condition B1 was excessive and so did not align with principles-based regulation and might become used by providers as a 'compliance checklist'.
  - Despite the explanations provided in the consultation document, definitions of the kind proposed are highly subjective and open to interpretation.
  - The definition of 'relevant award' that applied to other proposed conditions should be restated in proposed condition B1 to ensure there was no ambiguity about the scope of the condition.

## Institutional autonomy

49. There were several responses that made points about proposed condition B1 and institutional autonomy. Many of these comments concerned the requirements of B1.3 (namely, requirements to ensure that higher education courses are up-to-date, coherent and effectively delivered, and that they provide educational challenge and require students to develop relevant skills) and expressed the view that these concerned matters for individual providers to determine and should not be subject to OfS regulation. One respondent further stated that, in stipulating how a course must be taught, proposed condition B1 contravened HERA, which the respondent stated protects the freedom of English higher education providers 'to determine

the content of particular courses and the manner in which they are taught, supervised and assessed' (HERA section 2(8)(b)(i)).

### **'Up-to-date' (B1.3.a)**

50. Several respondents commented on the proposed requirement in condition B1.3.a, which requires a provider to ensure that 'each higher education course is up-to-date'. Views expressed included that:

- It was not clear how frequently a course needed to be updated.
- Such a requirement may incentivise a provider to make many small incremental changes rather than undertake more fundamental reviews.
- What 'up-to-date' means in different subjects could be open to debate.
- Some requirements for courses are set out by PSRBs or other bodies (in the case of higher technical qualifications (HTQs) and the Institute for Apprenticeships and Technical Education (IfATE)) which could restrict a provider's ability to act to ensure a course is up-to-date.
- Where a provider is not the awarding body for a course it may not have the authority to change the content of that course itself.
- It was unclear how the requirement to ensure that courses are 'up-to-date' would align with consumer law requirements.
- Providers 'should not teach tools that are currently used within an industry, but rather they should teach the overarching principles', because the overarching principles generally 'stay the same over a long time' whereas industry tools will have changed by the time a student graduates.
- Updates of a course on a five-yearly cycle would be sufficient in a research-active provider.

51. Several respondents also commented on the definition of 'appropriately informed', that underpins the requirement for courses to be 'up-to-date' (B1.4.a). Views included that the definition should take account of whether a course was informed by internal or external expertise, which could include external examiners, external advice or advice from PSRBs.

### **'Educational challenge' (B1.3.b)**

52. Several respondents commented on the proposed requirement in B1.3.b, which requires a provider to ensure that 'each higher education course provides educational challenge'. Views expressed included that:

- 'Educational challenge' might be better expressed as 'intellectual challenge'.
- Appropriate levels of educational challenge are different for students with different levels of prior attainment or learning experience and this can align with socioeconomic status.

- It was not clear how educational challenge would be demonstrated, particularly in the case of microcredentials.
- It was not clear what criteria would be used to determine whether a research question was 'too narrowly defined' (proposed condition B1 guidance paragraph 9.c).
- The example relating to integrated masters' degrees does not recognise that educational challenge changes from level to level (proposed condition B1 guidance paragraph 9.a).

### **'Coherent' (B1.3.c)**

53. Several respondents commented on the proposed requirement in B1.3.c, which requires a provider to ensure that 'each higher education course is coherent'. Views expressed included that:

- The proposals relating to 'coherent' could be interpreted as requiring all courses to include optional modules, when there are good reasons not to include optional elements in the course structure of some courses.
- Adjustments are sometimes necessary to deliver courses to different cohorts of students, for example international students. The respondent asked whether the OfS would consider these necessary adjustments in assessing the coherence of a course.
- The proposed requirement for courses to be 'coherent' would be in tension with arrangements that allow students to build degrees flexibly over time to meet their professional development needs, where the coherence of a course is determined by the professional setting of the individual student and the knowledge and skills that students need to succeed in that setting.
- Coherence, as defined in proposed B1, is generally the responsibility of the lead provider in subcontractual relationships (because the lead provider designs the course) and its delivery partners would therefore struggle to demonstrate compliance.
- The definition of 'coherent' needs to take account of the practical availability of facilities or some types of specialist training, and possible disruption by factors outside the control of a provider, such as lockdowns or damage to facilities.
- One example used in proposed guidance on the term 'coherent', namely that 'appropriate research skills courses not being available for research students before they begin their research programme, would be likely to be of concern' (B1 guidance, paragraph 10.e), should be altered, as this implies a requirement for research skills courses to be provided before students embark on their course, rather than as a key part of a research course.

### **'Effectively delivered' (B1.3.d)**

54. Several respondents commented on the proposed requirement in B1.3.d which requires a provider to ensure that 'each higher education course is effectively delivered'. Views expressed included that:

- What constitutes 'an appropriate balance' of activities in the definition of 'effectively delivered' might differ depending on whether a course was delivered entirely online or in

person, and depending on the subject of the course, and the requirement needs to support innovation in delivery. It was further suggested that, instead of the list of delivery methods in B1.4.d.i, (which sets out that effective delivery includes but is not limited to an appropriate balance between lectures, seminars, group work and practical study, as relevant to the content of the course) which presupposed that these were the only delivery methods in use, it would be better to refer to 'delivery methods' in general.

- B1.4.d.i and B1.4.d.ii should include reference to learning outcomes. B1.4.d.i should read '...as relevant to the content *and learning outcomes* of the course' and B1.4.d.ii should read '...as relevant to the level *and learning outcomes* of the course' because this was a terminology familiar to the higher education sector.

### **'Relevant skills' (B1.3.e)**

55. Several respondents commented on the proposed requirement in B1.3.e which requires a provider to ensure that 'each higher education course, as appropriate to the subject matter of the course, requires students to develop relevant skills'. The inclusion of professional competencies within the definition of 'relevant skills' received support from some respondents. Other views expressed included that:

- References to knowledge and understanding should be more prominent in the condition than skills (as opposed to being a subset of the definition of 'relevant skills'), and 'relevant skills' should be defined more narrowly as an ability or proficiency acquired through training and practice.
- References to 'relevant skills' should include the concept of skills 'relevant to graduate level employment'.
- The definition of the term 'relevant skills' should signpost to requirements of PSRBs, which specify the knowledge, skills and attributes which must be fully met by individuals wishing to join a professional register.
- One respondent considered that in B1.3.e the word 'requires' should be replaced with 'enables' in relation to students developing relevant skills to reflect the role of students as active partners in their learning.

56. Several comments were received on the reference to English language proficiency, which appears in the proposed guidance for the term 'relevant skills' (B1 guidance, paragraph 12.c). The relevant paragraph of the guidance says that 'a course in which students are not required to develop and consistently demonstrate technical proficiency in the use of written English, where the OfS, employers and taxpayers would reasonably expect such proficiency, would be likely to be of concern'. Comments received included:

- Suggestions that it was not appropriate for the OfS, as a principles-based regulator, to prescribe how a provider should assess a student's language proficiency beyond the course learning outcomes, and whether it was possible 'to infer what employers' and taxpayers' specific expectations might be in any particular circumstance'.

- Views that English language proficiency receives disproportionate attention in the proposed guidance, with respondents questioning whether it is a priority for non-UK partners or appropriate for all TNE courses.
- Disabled students or students for whom English is a second language may be disproportionately affected by an approach that expect proficiency in the English language as a relevant skill. For example, one respondent commented that the ‘focus on proficiency in written English has potential implications for institutional approaches to inclusive assessment, which are designed to ensure that students with specific disabilities are not disadvantaged during assessments, and to thereby comply with the Equality Act’.
- The level of English proficiency required would be better considered on a subject or course basis, based on academic judgement about whether mistakes in written English are material or not.

## Our response

### General comments on condition B1

57. On the level of detail set out in proposed condition B1, we consider that the approach it takes is principles-based. The requirements of the condition do not prescribe the content of courses that a provider should teach or how its courses should be structured or delivered (for example, condition B1 requires a course to be ‘up-to-date’, allowing a provider to meet this requirement however it chooses) and set only minimum requirements that a provider can exceed. Where detailed examples are given in the guidance, these are clearly labelled as illustrative and non-exhaustive examples, so do not detract from the principles-based nature of the condition and a provider’s freedom to determine how to comply with it. We also take the view that the principles-based approach we have adopted will guard against providers using the content of the condition, and the illustrative non-exhaustive guidance, as ‘compliance checklists’.
58. On the opposing point, that the minimum requirements in proposed condition B1 are presented in a way that is too general and therefore open to multiple interpretations, we consider that a more prescribed and rules-based approach would not be appropriate, given the diversity of courses and approaches to their delivery across the sector.<sup>18</sup> In a principles-based approach a provider will always need to determine how to apply the requirements set out in the conditions to its own context but the rigorous processes through which we would reach regulatory decisions about a provider’s compliance would have regard to proportionality considerations and fair treatment in our interpretation of whether those requirements have been met. We do, however, expect to publish case studies, to provide examples of the approach we have taken to determining compliance. We remain of the view, therefore, that the level of detail in which the requirements for condition B1 are set out is appropriate.
59. On the suggestion that we include the defined term ‘relevant award’ in proposed condition B1 (to match the definition of that term in other proposed conditions), we did not include this in the proposed wording for condition B1 because we do not consider this definition necessary to

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<sup>18</sup> For further explanation of the rationale for our principles-based approach, see pages 98-99 of the phase two consultation.

provide clarity about the meaning of the operative requirements in that condition, noting that the requirements relate to academic experience, rather than to the granting of awards.

## **Institutional autonomy**

60. On the points raised relating to institutional autonomy, while the OfS is required to have regard to the need to protect institutional autonomy, we are firmly of the view that we do not have an absolute obligation to protect autonomy (as appears to have been suggested in consultation responses). In considering whether and how to regulate in the interests of students, we must balance our various general duties, including requirements to have regard to the need to protect institutional autonomy, the need to promote the quality of higher education courses, and the need to promote equality of opportunity. By adopting a principles-based approach to the requirements in condition B1, we have sought to maximise the latitude that each provider has to decide its own approach to its courses. For example, the condition requires a course to be ‘up-to-date’, rather than defining what the content of that course should be. If we were to define our requirements in a more generalised way and so place greater weight on institutional autonomy, this would limit our ability to enforce minimum quality requirements in the interests of students and taxpayers. We remain of the view that the requirements set out in condition B1 appropriately balance institutional autonomy considerations with our other considerations covered by relevant duties, in particular our duty to have regard to quality and equality considerations.<sup>19</sup>

## **‘Up-to-date’ courses**

61. We note the comments received in relation to the proposed requirement that courses are ‘up-to-date’ (B1.3.a). Paragraph B1.4.g in the consultation version, which defines ‘up-to-date’, expects a provider to ensure that its courses are representative of current thinking and practices, including being ‘appropriately informed’ by subject matter developments, research, industrial and professional developments, and developments in teaching and learning. This does not require a provider to respond to each and every potential opinion concerning what up-to-date means for a particular course at a particular point in time. Rather, a provider needs to use its judgement to ensure that it updates courses where this is required due to changes that are occurring in the relevant discipline (and in doing so it should have proper regard for the requirements of any relevant PSRBs). We would consider any concern about whether a course was ‘up-to-date’ carefully against the definition of ‘appropriately informed’ set out in B1.4.a, which involves an assessment of the importance of the disciplinary (or pedagogical) developments in question to the subject matter of the course. We would also ensure that any action we took in relation to non-compliance with B1.3.a. would have regard to proportionality. We would therefore be unlikely to take regulatory action against a provider where our conclusion was that, although the course would benefit from some minor updating, the changes required had only limited importance to the subject matter.

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<sup>19</sup> As we set out in paragraph 279 of our analysis of comments to our phase one consultation, our view is that regulating minimum requirements for quality and standards is a safeguard for both quality and equality because it ensures that all student groups (including those with protected characteristics) do not receive an education where the quality or standards are below a minimum acceptable level. For further discussion of institutional autonomy in the context of the phase two proposals, see page 102 of the phase two consultation.

62. We recognise that notions of what ‘up-to-date’ means will vary from course to course and discipline to discipline. In some disciplines, essential knowledge and understanding can develop quickly in ways that will be relevant to higher education courses and more rapid action may be required by a provider. In other disciplines, changes relevant to higher education courses may not happen as quickly or frequently. Rather than setting an expectation that providers will either adopt a particular frequency of updating of courses or be drawn towards unnecessary incremental updating of courses – not least because those approaches would lead to an unnecessary regulatory burden – a provider needs to exercise judgement in relation to the frequency with which a particular course or discipline needs updating.
63. On the points made about scenarios where other providers or bodies have an interest in the content of a course, in a partnership arrangement we consider that it is appropriate for multiple partners (if registered providers) to be responsible for ensuring that course currency is maintained, regardless of the nature of their role in the partnership, as explained at paragraph 40 above. Condition B1 guidance (paragraph 8.e) sets out that a course that does not contain content that is required by a PSRB, whether or not that course has recently been updated, would likely be of concern to us. However, the principles-based approach to our conditions is also intended to give a provider considerable scope to meet both our requirements and those of any PSRB or other relevant bodies such as IfATE.<sup>20</sup>
64. We do not think it is appropriate to add into the definition of ‘up-to-date’ consideration of whether a course has been informed by internal or external expertise. In line with our principles- and outcomes-based approach to quality, we do not intend to prescribe how a provider should ensure its courses are up-to-date. Nor would we want to place reliance on a process (the process of a provider seeking internal or external advice) in the place of setting a requirement that a course is, in fact, ‘up-to-date’.
65. We consider that our proposed requirement that courses must be ‘up-to-date’ is not incompatible with the requirements of consumer protection law. We recognise that there are requirements in consumer protection law which would oblige providers to seek consent from students before making changes to courses in some circumstances, depending on the nature of the changes being proposed and the terms of the contract between the provider and its students. We also note that a provider may be able to remove the need to seek student consent in some circumstances, for example via the inclusion of a contract term which allows for updates to course content (provided that the term meets relevant consumer law requirements). If the situation were to arise where a provider was able to demonstrate that it was genuinely unable to make changes to a course that were needed to ensure it is ‘up-to-date’ due to the constraints of consumer protection law, we would take this into account in reaching any decision about the provider’s compliance with condition B1. If this was the case, we would expect to see that the provider had not taken any action with the aim of evading compliance with condition B1 and there is no alternative course of action reasonably available which would enable the provider to comply with consumer protection law and condition B1. However, we expect this situation to be rare; a provider should normally be able to take steps, where there is a need to do so, to ensure that its courses remain up-to-date while also being compliant with consumer law.

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<sup>20</sup> See also paragraphs 478-481 for our broader consideration of how our proposals would align with the requirements and activities of PSRBs.

## **‘Educational challenge’**

66. With reference to the requirements relating to educational challenge, we have considered whether this would be better described as ‘intellectual challenge’. We have concluded that there is a diverse range of activities conducted in the higher education sector, many of which include practice-based skills (for example, many courses in the performing arts), and therefore the broader term ‘educational challenge’ is more appropriate to cover the diversity of courses that the OfS regulates. Further, we consider that the proposed definition of ‘educational challenge’ (B1.4.c), namely ‘a challenge that is no less than the minimum level of rigour and difficulty reasonably expected of the higher education course, in the context of the subject matter of the course’, is as valid for microcredentials, courses comprised of a single module or other short courses as it is for a more extended course. Nor do we accept, for reasons of quality and equality, that the ‘minimum level of rigour and difficulty’ that should be accepted in a higher education course should vary depending on prior educational attainment or other circumstances of the students on the course.<sup>21</sup> We do agree, however, with the comments that what would constitute ‘educational challenge’ may vary depending on the level of the course. We have therefore amended the definition in the final version of condition B1.5.c to read ‘in the context of the subject matter *and level* of the course’.
67. On the guidance associated with this requirement, we consider that the amendment to B1.5.c of the final version, set out in paragraph 66 above, clarifies that the example relating to an integrated masters’ course (at 9.a of the guidance) is designed to show that educational challenge may vary at different stages of a course. We have also redrafted the non-exhaustive illustrative example in condition B1 guidance paragraph 9.c to clarify that the cause for concern relating to ‘educational challenge’ in that example would be the limited scope offered to explore original ideas not that the research question was narrowly defined. The guidance at paragraph 9.c in the final version now reads: ‘A research degree course that is focused on a ~~narrowly defined~~ research question that provides limited scope for original ideas would likely be of concern.’

## **‘Coherent’**

68. Some respondents took the view that the requirement that a course must be ‘coherent’ (B1.3.c) means that all courses need to have at least some optional elements. The requirement set out in the condition does not require the provision of optional course elements or any particular configuration of core and optional course elements. The requirement can be met, or not met, by a course with a high degree of optionality or by a course with no options, because the requirement is concerned with the course being coherent by ensuring an appropriate order in which subjects and skills are taught and an appropriate breadth and depth of the content of the course, rather than the need to follow a particular structure.
69. On the point about the need to make adjustments to courses for different cohorts of students, our requirement does not prevent a provider from delivering the same course content in different ways for different student groups where that better reflects the context for that course, provided that each version delivered would meet our requirement of being coherent. For example, the best order in which to teach particular skills might differ depending on the educational background of different student cohorts. We have concluded that the examples in

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<sup>21</sup> See Analysis of phase one consultation responses, paragraph 279.

paragraphs 10.a and 10.f of the guidance did not assist readers' understanding of this, and in the case of paragraph 10.a also the point about options discussed in paragraph 68 above, and have replaced paragraph 10.a with a new example, and revised the example in paragraph 10f. We have amended paragraph 10.a in the final version to read: 'The content of a course is too narrow. For example, a three-year undergraduate degree that does not provide appropriate opportunity, in light of the course content, for students to study optional subjects beyond a mandatory core, either because the course was designed without such options, or because options are not in practice available, would likely be of concern'. We have amended 10.f in the final version to read: 'Module choices do not ensure students are able to construct a coherent pathway. For example, a course that offers students a wide choice of modules but where choices do not result in a coherent learning experience, would likely be of concern'.

70. In response to the comment that the proposed requirement for courses to be 'coherent' would be in tension with arrangements that allow students to build degrees flexibly over time, we consider that the requirement does not prevent a provider from providing courses in which students can select the elements they study with a high degree of flexibility. This is because our proposed definition of 'coherent' (B1.4.b) recognises that what is required for course coherence may vary depending on the nature of the course (the word 'appropriate' captures this). There is nothing preventing a provider from applying a high degree of flexibility in how it organises courses and still meeting the requirement in B1.3.c. We remain of the view that it is in the interests of students that all types of course are coherent, because this ensures that their learning is designed effectively, whether that learning is designed for a whole cohort or an individual student. Further, we note that our requirements do not preclude a student taking a series of separate short courses or modules, in which each of these would need to be coherent.
71. On the responsibility of lead partners for requirements relating to course coherence, while we recognise that the contractual roles of providers differ in partnership arrangements, the responses we have set out in paragraph 40 would apply.
72. On the suggestion that the definition of 'coherent' should take account of the practical availability of resources and impact of possible disruptions that may be outside a provider's control, we recognise that there may be circumstances where a provider needs to adjust its arrangements for delivery of a course, but we would expect those adjustments to ensure that our minimum quality and standards requirements continue to be met. If a provider determines that, for whatever reason, it is unable to comply with any of our conditions of registration, it is required to report this to us.<sup>22</sup> As with all our conditions, we would give consideration to all circumstances drawn to our attention by a provider before we reached a final regulatory decision on its compliance.
73. We have amended paragraph 10.e of the proposed B1 guidance to clarify that it is the appropriateness of the timing of research skills training that is relevant to a possible concern about the coherence of a research programme. This is to avoid any implication (as was suggested by a respondent) that we would generally expect research skills courses to be provided before students begin a research programme. Paragraph 10.e now reads (changes

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<sup>22</sup> See paragraph 11 of Regulatory advice 16: reportable events, available at [www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events/](http://www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events/).

in italics): Skills are not taught at the right time. For example, research skills courses not being available for research students *at the appropriate time before or during* their research programme, would be likely to be of concern.

### **‘Effectively delivered’**

74. On comments received regarding the proposed requirement for providers to ensure that ‘each higher education course is effectively delivered’ (B1.3.d), we recognise that the framing of this requirement needs to clearly support diversity and innovation in delivery. In support of this we have amended part of the definition of ‘effectively delivered’, paragraph B1.5.d.i, to read (changes in italics): ‘an appropriate balance between *delivery methods*, for example lectures, seminars, group work or practical study, as relevant to the content of the course’. We also considered the suggestion that we include reference to learning outcomes within the definition of ‘effectively delivered’, but we concluded that quality of a course was safeguarded in a clear and principles-based way by the provisions already set out in condition B1 and that a requirement relating to learning outcomes would place an unnecessary and duplicate burden on providers.
75. On reflection we have also added an additional illustrative example to the B1 guidance at paragraph 11.b: Learning activities are not delivered effectively. For example, insufficient opportunities for students to engage directly with teaching staff, including where parts of a course are delivered remotely, would likely be of concern.
76. We recognise that effective delivery will take account of the needs of students, and the educational traditions with which they are familiar, but we do not consider that these are factors that should be taken into account in setting minimum quality requirements such that different requirements would be in place for students with different characteristics. The requirements relating to effective delivery, and the requirements of condition B1 more generally, have been framed to set a minimum requirement applicable to all courses and all students in a way consistent with our principles-based approach. Where we consider it appropriate, we will draw on relevant expert academic or other advice in reaching a decision about whether a particular approach to delivery is effective or not. As we set out with reference to our requirements relating to coherence, with regard to our requirements relating to effective delivery, we would consider all circumstances drawn to our attention by a provider before we reached a final regulatory decision on its compliance.

### **‘Relevant skills’**

77. We have considered the comments received regarding the requirement that providers must ensure that ‘each higher education course, as appropriate to the subject matter of the course, requires students to develop relevant skills’ (B1.3.e).
78. We have considered the points made in relation to the prominence that our requirements give to skills, as compared to knowledge and understanding. We recognise that there are different views about the relationship between knowledge, understanding and skills, and that these form part of broader educational and philosophical debates about the purposes that higher education should serve. While it would be possible to formulate our definition of ‘relevant skills’ in B1.5.f in other ways, we are satisfied that there is sufficient and appropriate coverage of knowledge, understanding and skills in the definition for our requirements to be clear and to

enable knowledge, understanding and skills to be appropriately combined in different ways within a higher education course.

79. On the suggested inclusion of a reference to skills ‘relevant to graduate level employment’, we note that not all higher education courses lead to qualifications at first degree level and the term ‘graduate’ is sometimes used specifically to mean graduates from a first degree. The use of the term could therefore create confusion in our definition. We also recognise that the ways in which the knowledge, understanding and skills gained through a higher education course are relevant to employment can vary from course to course. For example, some courses prepare students directly for a specialised profession; others are primarily a preparation for further study or research. Our view is that, without further amendment, our proposed definition of ‘relevant skills’ would enable us to assess whether, in the context of the subject matter and level of the course, the knowledge, understanding and skills gained through a course have appropriate regard for the employability of holders of the qualification.
80. On the suggestion that we signpost to relevant PSRB requirements in our definition of ‘relevant skills’, our requirements relating to ‘relevant skills’ would not only relate to relevant PSRB requirements. However, to make it clear that the requirements of a PSRB might be one of the points we would consider when assessing compliance with this requirement, we have strengthened the example in the guidance at paragraph 12.b to make the potential connection between ‘relevant skills’ and PSRB requirements more explicit. The amended text reads (changes in italics): ‘a course designed to lead to a particular profession that does not require students to develop the skills necessary for success in that profession (*for example, where specific skills are required for a relevant PSRB accreditation*) would likely be of concern.’
81. On the suggested amendment of ‘requires’ to ‘enables’ in B1.3.e, we have considered whether this would be appropriate in light of the view expressed that it would reflect students’ role as partners in their learning. We accept that students have a role to play in engaging with any higher education course, and that students may not always engage. However, we have concluded that ‘requires’ is appropriate in this context. This is because a course must require ‘students to develop relevant skills’ in the sense that the course must provide for the acquisition of relevant skills. The provision of this within the content of the course is a separate matter from the engagement or otherwise of students with the content of the course.
82. In relation to comments that it is not appropriate for the OfS to prescribe how a provider assesses proficiency in the English language and that the level of English proficiency required would be better considered on a subject or course basis, we consider that technical proficiency in the use of the English language is a legitimate skill that students should be expected to develop where this is appropriate to the subject matter and level of the course, for the reasons set out at paragraph 186. However, we agree with comments that we should make allowances for the possibility of conflicts with a provider’s obligations under equality law. We have therefore added an exception that provides a mechanism in the event that the requirement under B1.3.e creates an unreconcilable conflict with provisions in equality legislation that relate to discrimination. The effect of the revised drafting is that a provider does not have to comply with the requirement for ‘relevant skills’, where these include English language proficiency, to the extent that it can demonstrate (on the balance of probabilities) that this is strictly necessary for it to comply with obligations under the Equality Act 2010 relating to discrimination and therefore it is not possible to comply with both sets of obligations. The new drafting at B1.4 reads:

Insofar as relevant skills includes technical proficiency in the English language, the provider is not required to comply with B1.3.e to the extent that it is able to demonstrate to the OfS, on the balance of probabilities, that its English language proficiency requirements, or failure to have English language proficiency requirements, for one or more students, are strictly necessary as a matter of law because compliance with B1.3.e in respect of that student, or those students:

- a. would amount to a form of discrimination for the purposes of the Equality Act 2010; and
- b. cannot be objectively justified for the purposes of relevant provisions of that Act; and
- c. does not fall within an exception or exclusion provided for under or by virtue of that Act, including but not limited to provisions of the Act that relate to competence standards.

83. This exception is mirrored in the requirements for the assessment of English language proficiency in condition B4, and a more detailed discussion of the exception is contained in that section in paragraphs 190-192. Note that we have also included guidance on the B1.4 exception at paragraphs 13-14 of the B1 guidance.
84. In respect of comments about whether it is possible ‘to infer what employers’ and taxpayers’ specific expectations might be [about English proficiency] in any particular circumstance’, this reference was not intended to require a provider to meet specific expectations – our intention was to refer to the general expectation that taxpayers and employers have about the skills students should have to study at higher education level and to develop as a result of their higher level study. However, noting the scope for different interpretations of this example, we have removed paragraph 12.b from the guidance.

## Conclusion

85. We have therefore determined to adopt condition B1 as set out in proposal one of the consultation, subject to the amendments set out in this response and as set out in the document Quality and standards conditions.

## Responses in relation to condition B2: resources, support and student engagement

86. The phase two consultation proposed that we would impose condition B2 on all registered providers. Condition B2 would require a registered provider to ensure that each cohort of students receives the resources and support to ensure a high quality academic experience for those students, and their success in, and beyond, higher education. The condition would also require registered providers to ensure effective engagement with each cohort of students, also to ensure a high quality academic experience for those students, and their success in, and beyond, higher education.
87. Almost half of all respondents agreed with the proposal to impose condition B2; the remaining respondents neither agreed nor disagreed, or disagreed, with the proposal. The balance between neutral responses and responses that disagreed were approximately equally split.
88. Some respondents who supported the proposal recognised that it was important that providers deliver support and resources for students so that they can succeed in and beyond higher education and were of the view that the proposed condition set out a reasonable expectation for providers delivering higher education. Some respondents who agreed with the proposal also welcomed the inclusion of effective engagement with students as a feature of a high quality academic experience and there was support for recognition that acting on student feedback must be done in a way that maintains academic rigour.
89. Several respondents sought further information about how compliance with condition B2 would be monitored, the data that would be used, and how judgements about compliance would be made. One respondent asked for clarification about how success beyond higher education would be assessed for courses delivered outside the UK where there are different expectations for progression and contextual factors that affect employment. Another suggested that the use of the term 'cohort' of students would present challenges for providers because there would be students with a range of abilities within a particular cohort.
90. A small number of respondents suggested that any investigation of compliance with condition B2 should involve expert academic judgement and this should be set out explicitly as it is for condition B1. Another asked how the OfS intends to identify breaches in relation to student engagement.
91. A number of comments made in disagreement with the proposal focused on what respondents saw as the possible effect on access to higher education for students from underrepresented groups, and for providers that recruit large numbers of students from such groups and which therefore may need to provide more support. Some respondents suggested that because students from underrepresented groups often need a greater level of support, providers may choose not to recruit them. However, a large number of the comments about the possible effects in this regard mentioned the broader support needs of students from underrepresented groups, such as pastoral support rather than academic support, the latter being the focus of condition B2.
92. Linked to the potential impact on access to higher education, a couple of respondents commented that some providers recruit heavily from their local communities. They stated that needing to 'ensure' success without recognition of contextual factors such as the conditions in

local labour markets may disincentivise those providers from recruiting from their local communities. These respondents suggested this could also have negative consequences for the government's levelling up agenda.

93. A few respondents commented that providers that focus on access and participation do not receive extra resources such as pupil premium to assist them. There was some suggestion that more funding would be necessary to ensure that prior disadvantages and deficits in students' skills or knowledge can be fully addressed.
94. Another theme from respondents who disagreed with the proposal related to the requirement in the condition to support students to ensure success 'beyond' higher education. Respondents argued that student success beyond graduation is influenced by many factors outside of a provider's control and that providers should not be held accountable for this. Other respondents suggested that the proposal focused on the success of graduates in gaining employment and this failed to recognise the wider societal benefit of higher education and that some students, particularly mature students, may not study with the aim of securing a particular employment outcome.
95. There were several respondents who suggested that the wording of the condition should therefore be changed to 'enable students to succeed' [in and beyond higher education], or 'facilitate' or 'support' students to succeed, rather than requiring providers to 'ensure' success, because this would take account of factors influencing success in and beyond higher education which respondents considered to be outside of a provider's control. Another suggestion was that rather than the condition requiring that students 'receive' resources and support, it should require students to be 'offered' resources and support. This comment was based on a view that providers have obligations to offer resources and support but that responsibility for receiving resources and support is shared with students.
96. Other drafting changes were suggested, such as a request for a definition to be provided for 'academic support', to clarify, for example, whether it would cover mentor support that is needed to enable a disabled student to access their learning. Other suggestions were:
- The OfS should consider adding 'in accordance with the academic experience advertised' (which appears in B.3.k.iii) to the definitions of both 'support' and 'resources'.
  - Providers need to have enough financial resources not only for the recruitment but also the retention of a sufficient number of staff and that the word 'retain' should therefore be added to B.3.k.i.
  - B.3.k.iv, which states 'the impact on students of changes in staffing is minimised/minimal', should be amended because minimised and minimal mean different things.
97. Many of the respondents who disagreed with the proposal made comments based on their interpretation of parts of the condition or the illustrative examples given in the proposed guidance, stating that these would not work for particular courses, providers or circumstances. For example, it was suggested that short and professional courses that are not eligible for funding by the OfS are different in nature from other types of courses, and requirements for support and student engagement would therefore not be the same. Other examples were that the requirements for physical resources would be different for providers delivering distance

learning and that the 'sufficient number of staff' was likely to vary depending on the context of the course.

### **Academic misconduct (B2.3.a)**

98. Some respondents made comments about the reference to academic misconduct in proposed condition B2. This is included via the requirement to provide 'support', which is defined as encompassing 'support relating to avoiding academic misconduct'. Several respondents suggested that the reference to 'academic misconduct' should be removed from condition B2 because it was more appropriately covered in condition B4 (which relates to assessments and awards, and which contains a requirement that assessments be designed to minimise opportunities for academic misconduct and facilitate its detection).
99. Another respondent suggested that the definition of academic misconduct in B2.3.a is too narrow and should include falsification of research results as well as moving away from a research design agreed through ethical approval.

### **Physical and digital learning resources (B2.3.g)**

100. A few respondents commented on the proposed guidance in relation to the definition of 'digital learning resources', which says students should have appropriate hardware and software that enables them to effectively access all course content. They suggested changing this to 'have reliable and consistent access to', or 'simply have access to', because it might not always be practical or necessary for students to 'have' hardware or software.
101. The proposed condition B2 guidance (at paragraph 32.d) lists 'reliable internet connection' and at paragraph 32.f 'an appropriate study place. Students have consistent access to a quiet space that is appropriate for studying' as examples of matters that would fall within the definition of 'digital learning resources'. A small number of respondents suggested amending paragraph 32.d and 32.f to state that this aspect of the guidance specifically refers to students on campus or in university accommodation. This would then avoid implying that providers are responsible for providing reliable internet connection and a quiet space for students studying by distance learning.
102. One respondent commented that B2.3.g.i, which defines 'physical and digital learning resources' to include 'physical locations, for example teaching rooms, libraries and laboratories', should include some reference to creative spaces such as a 'studio' in addition to 'teaching rooms, libraries and laboratories' to better reflect the physical resource needs of students studying on creative arts courses.
103. A few respondents requested further information about expectations of providers to support students who are unable to provide their own resources, such as laptops. They suggested that it is not made clear in B2 whether it is reasonable for a provider to impose a requirement for students to provide their own standard laptop, which respondents say that many providers do, and whether alternative methods of provision would meet the condition's expectations, for example if a provider enabled access to a facility with computers such as a library, or a laptop loan scheme.

### **Student engagement (B2.3.e)**

104. While there was no disagreement with the proposal to include a requirement to provide effective student engagement within the OfS's regulatory requirements relating to quality, a

small number of comments and suggestions were made in relation to the proposed student engagement requirement in B2.2. These included the suggestion that the non-exhaustive list of examples relating to student engagement provided in the proposed guidance (at paragraph 35) should be revisited to focus on the outcomes attached to engagement rather than whether engagement processes, such as having student representation on a committee, are in place or not. One respondent, in relation to the example at paragraph 35.a, noted that having students on committees may not in itself guarantee effective engagement.

105. Several respondents suggested that the wording of the condition should include a reference to 'collective and individual' student engagement and guidance should include explicit reference to course representatives. Other respondents were of the view that students were partners with their providers in their higher education experience and that this should be reflected in the OfS's regulatory requirements.
106. Other comments suggested that the definition of student engagement in B2.3.e is too narrow, in that it is only relevant to a higher education course, rather than to all elements of the educational experience. It was suggested that it did not cover, for example, engagement relating to careers support and non-academic, pastoral support which respondents were of the view affect students' success.
107. There was also a suggestion that membership of the governing body may not always be appropriate depending on the legal form of the provider (for example a private company) and that this might be made clearer by amending the wording in B2.3.e to say that examples of engagement 'may include, but not be limited to, through membership of a provider's committees including its governing body'.
108. A small number of respondents also suggested more generally that student engagement should feature more prominently in the proposals. A couple of respondents contrasted the proposals with the UK Quality Code which they stated placed more emphasis on student engagement in quality assessment. It was also suggested that there generally needed to be more detail about student engagement showing what 'good' engagement looked like.

## **Our response**

109. In response to questions about how we would monitor compliance with condition B2, including how we would identify breaches in relation to student engagement, we do not intend to routinely collect data from all registered providers in relation to student engagement or other specific parts of the condition. Instead, we intend to use the data already available to us. For example: National Student Survey (NSS) data may provide an indication about students' views of academic support and student engagement; data relating to continuation may provide an indication of the extent to which students are supported in the early stages of their course; and data relating to employment and further study may provide an indication about the effectiveness of careers support.
110. The intelligence we gain from these existing data sources will be used in combination with information from notifications and reportable events to identify providers for which further investigation may be warranted to determine whether there is an increased risk of a breach, or a breach, of condition B2. The approach to assessing compliance with condition B2, would be the same as for other conditions. We would gather appropriate information and make an assessment in relation to the requirements set out in the condition. Our approach would be

consistent with the general approach set out in our response to comments on proposal 4b, set out in paragraphs 341-358. We would draw on expert academic judgement wherever we consider that to be appropriate to inform a decision about compliance with the condition. We do not consider that every part of condition B2 would require academic judgement and, in order to avoid additional regulatory burden and to be able to act urgently in the interests of students where that is needed, we intend to make decisions about where expert academic judgement is and is not required on a case-by-case basis. In this respect our approach to condition B2 sits within our general approach to monitoring and engagement with providers for conditions B1, B2, B4 and B5.

111. In response to the question about how we would measure success [in and] beyond higher education, the purpose of condition B2 is not to measure student success – this is an aspect of condition B3 and we are currently consulting on our approach to this. The requirements of each condition are distinct and it could be possible for a provider to be in breach of condition B3 (relating to student outcomes) but to be compliant with condition B2, and vice versa. The purpose of condition B2 is to ensure students have the resources, support and engagement such that they are able to succeed. In other words, the focus of the condition is on the resources, support and engagement themselves, rather than on any particular measure of student outcomes. However, as explained in paragraph 109, data relating to employment and further study may provide an indication about the effectiveness of the resources, support and engagement students have received, including in relation to careers matters. This could lead to further engagement with or investigation of a provider. Our judgements about whether students are receiving sufficient resources, support and engagement will draw on the information that a provider supplies as a result of that engagement or investigation.

112. In light of the responses that interpreted the purpose of condition B2 as measuring student success, we have further reflected on whether it would be appropriate to change the wording in B2.2 from ‘ensure’ [a high quality academic experience and success in and beyond higher education] to ‘enable’ (or other drafting suggestions such as ‘facilitate’ or ‘support’) as suggested by some respondents. We agree that a change to wording would be helpful to make it clear that condition B2 does not set an absolute requirement that cohorts of students must succeed. We have therefore decided to amend the drafting of the condition at B2.2 to include an ‘all reasonable steps’ measure of compliance. B2.2 now reads (changes shown in italics):

...the provider must *take all reasonable steps to ensure*:

- a. each cohort of students registered on each higher education course receives resources and support *which are sufficient for the purpose of ensuring*:
  - i. a high quality academic experience for those students; and
  - ii. those students succeed in and beyond higher education.
- b. effective engagement with each cohort of students *which is sufficient for the purpose of ensuring*:
  - i. a high quality academic experience for those students; and
  - ii. those students succeed in and beyond higher education.

113. This drafting clarifies that the requirement under condition B2 is to take ‘all reasonable steps’ to ensure students receive sufficient resources, support and engagement for the purpose of ensuring their success (and a high quality academic experience). These wording changes build a particular concept of reasonableness into the condition, which allows the OfS to consider what is required from a provider in light of the particular academic needs of the students it recruits and other relevant circumstances, while also ensuring that condition B2 does not place an overly onerous burden on providers.
114. We have also added wording which explains how we will interpret whether a provider has taken ‘all reasonable steps’. The wording appears as a new part of the condition at B2.3 and reads:
- B2.3 ...‘all reasonable steps’ is to be interpreted in a manner which (without prejudice to other relevant considerations):
- a. focuses and places significant weight on the:
    - i. particular academic needs of each cohort of students based on prior academic attainment and capability; and
    - ii. principle that the greater the academic needs of the cohort of students, the number and nature of the steps needed to be taken are likely to be more significant;
  - b. places less weight, as compared to the factor described in B2.3.a, on the provider’s financial constraints; and
  - c. disregards case law relating to the interpretation of contractual obligations.
115. This explains that, in assessing whether a provider has taken ‘all reasonable steps’, we would place significant weight on the particular academic needs of each cohort of students (based on their prior academic attainment and capability) and that, the greater the needs of a cohort, the more effort is likely to be required to satisfy condition B2. In practice, this means that a provider needs to understand the particular academic needs of each ‘cohort’ of students (ie. each group of students registered on a course) and tailor its resources, support and engagement to match those needs, rather than providing ‘generic’ academic support that may not be appropriate to the type of students it recruits.
116. B2.3.b also explains that, in assessing ‘all reasonable steps’, we will place less weight on a provider’s financial constraints, as compared to the academic needs of its students. This is because we take the view that, while a provider may recruit any type of student it chooses, it must be in a position to provide sufficient resources and support consistent with the needs of those students, even where this would incur costs beyond those that would be incurred if the provider’s students needed more limited resources and support. B2.3.c clarifies, for the avoidance of doubt, that case law relating to contractual obligations will not be applied when assessing ‘all reasonable steps’.
117. In response to comments that proposed condition B2 may have a detrimental impact on access to higher education by causing providers to decide to reduce recruitment of students from underrepresented groups or from their local communities, we set out in the phase two consultation that the proposed quality and standards conditions are designed to promote

equality of opportunity in connection with access to, and successful participation in, higher education.

118. This means that we are concerned with ensuring that students from all backgrounds, including those from underrepresented groups, are able to access higher education, and also to succeed on and beyond their courses. We consider it important that students from underrepresented groups are able to succeed when they enter higher education, and to do so at the same rates as students from more represented groups. The cost in financial and personal terms of being exposed to a low quality course or receiving inadequate support, and failing to succeed in employment beyond their course, is significant for any student. For students from underrepresented groups, the cost may be more significant because there may be fewer choices available to them. Our view is that a provider that recruits students from such backgrounds is obliged to ensure that they have a high quality academic experience, including receiving sufficient resources and support.
119. Condition B2 requires a provider to specifically cater for students from different backgrounds if it recruits them; it requires the provider to understand the capabilities, potential and needs of each particular cohort of students, and take steps to ensure that they have sufficient resources, support and engagement for the purpose of ensuring a high quality academic experience and success. We have considered whether our proposals are likely to create disincentives for providers to recruit some types of students (such as those from underrepresented groups or from local communities) and therefore reduce student choice for some groups. The changes to the wording of the condition, which now require a provider to take 'all reasonable steps', make clear that there is not an absolute requirement to ensure the success of students.
120. Further, the wording changes build the concept of reasonableness into the condition, which sets condition B2 at a level which does not place an overly onerous burden on providers, regardless of the type of students they recruit and the extent of their academic needs. We consider that these changes substantially mitigate the concerns raised about the disincentives that the proposed condition might have created. However, we recognise that the requirements of the condition mean that providers that recruit students with greater academic support needs will have a greater burden in ensuring those students receive sufficient resources, support and engagement, and it is possible this will act as a disincentive to some providers to recruit students with greater academic support needs if they are unwilling or unable to provide that support. However, we take the view that it is the OfS's role to protect students from courses where the resources, support and engagement are insufficient for the academic needs of the students. No student from any group should study on a course that does not meet minimum requirements for quality and standards, as such courses would not amount to meaningful student choice, and it is the role of the regulator to ensure that such courses are not available for students to choose.
121. The incentive we intend to create through our quality conditions is for providers to ensure that their courses meet our minimum requirements such that all students have meaningful choices of high quality courses and are supported to succeed. We do not consider that extending equality of opportunity for underrepresented groups (or other student groups) could or should be achieved by reducing our minimum requirements for quality and standards for any student groups.

122. In relation to comments that some providers need more funding to provide additional resources and support to their students, we were clear in paragraph 48 of the phase two consultation that a provider that chooses to provide courses to students less well-prepared for higher education, perhaps because they have lower levels of prior attainment, would need to ensure sufficient resources and support, even if this may require investment that would not be necessary for a provider that has well-prepared students. We recognise that this might mean additional investment is necessary, but our view is that it is not acceptable to recruit students who a provider knows, or should know, need more resources and support and then fail to deliver this. It should also be noted that the requirement for support in condition B2 is focused on academic support provided to students and many of the comments made in relation to condition B2 and the support that students require were related to wider personal welfare support matters which are not within the scope of the condition.
123. In response to the suggestion that the condition should require students to be 'offered' resources and support (rather than requiring that students 'receive' resources and support), while we agree that students have some responsibility for accessing resources and support that are made available, we consider that a provider has a greater responsibility to ensure that students are accessing the right resources and support. We have therefore decided to retain the proposed wording.
124. In relation to the question about whether mentor support that is needed to enable a disabled student to access their learning would count within 'academic support', our view is that it would – because it relates to a student's ability to access their learning. We have not included a definition of academic support but have included this as an example in paragraph 35.a of the final B2 guidance to support providers' interpretation of the condition.
125. We have not amended drafting to include a reference to 'in accordance with the academic experience advertised' to the definitions of both 'support' and 'resources' because condition B2 is concerned with providers taking all reasonable steps to ensure sufficient resources and support to ensure a high quality academic experience and student success, rather than what support or resources are advertised – which is covered by consumer law. On reflection we have therefore also removed the reference to 'in accordance with the academic experience advertised' from B2.3.k.iii (reference in final condition is B2.4.k.iii) so that it now reads: 'sufficient in number [.....] in the context of staff team [means] higher education courses have an adequate number of staff, and amount of staff time'. We agree with the comment that a provider needs to have sufficient financial resources to retain as well as recruit staff and have amended B2.3.k.i so that it now reads (addition in italics and reference in final condition is B2.4.k.i): 'there is sufficient financial resource to recruit *and retain* enough staff'.
126. In relation to B2.3.k.iv, and the use of both minimal and minimised in relation to the impact of staffing changes we agree with the respondent that there are different meanings and have removed the word 'minimised'. The amended wording now reads: 'the impact on students of changes in staffing is minimal'. The original drafting was intended to set a requirement that providers should take action to minimise the impact of staff changes on students. However, in taking such outcomes we would expect the impact to be minimal and this is a better expression of the outcome we are seeking to achieve through the requirement of the condition.
127. In relation to the point that the use of the term 'cohort' will cause challenges because of the varying needs of students within a cohort, in responses to the phase one consultation many

respondents had interpreted the proposals in that consultation as placing a requirement on a provider to identify the support needs of individual students. This had not been the intention and we agreed with respondents who suggested this would be impractical and burdensome. Using the term 'cohort' of students is intended to ensure that there is clarity for providers that we do not require support plans for individual students. While we recognise that students within a cohort will have individual academic support needs, the requirement of the condition is for a provider to understand the main needs of the cohort of students recruited for each course and to respond to these (see the definition of 'cohort' at B2.3.d). For example, if an economics course recruited a large proportion of students without A-level maths or equivalent this 'cohort' of students would be likely to need additional academic support to ensure they could succeed on the course, although not every student would require this support. This is a minimum requirement and, of course, a provider is able to respond to the needs of individual students beyond this.

128. In response to comments that some parts of the condition and the illustrative examples given in the proposed guidance do not work for short or professional courses or in particular circumstances, as we have set out in both consultations, the analysis document, and the regulatory framework – the conditions (with the exception of conditions B5 and B8) are designed to be principles-based. They are not rules that specify, for example, the number of staff a particular course must have. Similarly, the guidance which is associated with the condition is guidance to assist providers in understanding the approach the OfS is likely to take to interpreting the condition. The examples given are illustrative – they are not rules that must be met in all circumstances and not all examples provided will be relevant to all courses or all providers. There may also be circumstances where the example provided in the illustrative guidance does apply to a provider but, because of its particular context, it might still be compliant with the condition.

### **Academic misconduct**

129. We have considered the suggestion that the reference to academic misconduct should be removed from condition B2 because this is more appropriately covered by condition B4. The requirements relating to academic misconduct in each condition are different and we consider that both are necessary given the seriousness of academic misconduct for students and the need to safeguard public confidence in higher education. Condition B4 relates to reliable assessment and requires providers to ensure that assessments are designed to minimise academic misconduct and facilitate its detection. Condition B2 requires providers to support students to avoid academic misconduct. In particular, this requirement is aimed at ensuring that students understand what may constitute academic misconduct, its consequences, and how it can be avoided. Points made by respondents in relation to condition B4 signalled agreement with our view that providers should have responsibility for supporting students' understanding of these matters. Reflecting on these comments, and the need to provide clarity about our expectations in this area, we have made a drafting amendment to the condition, so that B2.3.i.iii now reads (additions in italics and referenced B2.4.i.iii in the final condition) 'support relating to *understanding, avoiding and reporting* academic misconduct'.
130. In relation to the comment that the definition of academic misconduct in B2.3.a is too narrow and should include a reference to misconduct relating to research design and results, the wording in B2.3.a is that 'academic misconduct means any action or attempted action that may result in a student obtaining an unfair academic advantage in relation to an assessment,

*including but not limited to [...]* (emphasis added). The term 'assessment' is also defined in B2, as 'any component of a course used to assess student achievement towards a relevant award, including an examination and a test'. These definitions are broad and would capture academic misconduct in relation to research. We have therefore decided the suggested amendment is not necessary.

### Physical and digital learning resources

131. We have considered the suggestion for drafting changes to paragraph 32.a and 32.b of the proposed guidance and have amended this as suggested, so that they now read (changes in italics and in paragraphs 34.a and 34.b of final guidance) that 'students must have or *have reliable and consistent access to* the hardware [and software] that allows them to effectively access all course content', because we agree that it might not always be practical or necessary for students to 'have' hardware or software. In relation to comments regarding the proposed guidance at paragraph 32.d and 32.f and its applicability to students studying by distance learning, paragraph 32 sets out an illustrative non-exhaustive list of matters that would fall within the definition of 'digital learning resources', including at 32.d reliable internet connection and 32.f. appropriate study space. We consider that these are prerequisites for the effective delivery of digital learning and therefore apply to a course delivered by distance learning (as set out in the report of the digital teaching and learning review<sup>23</sup>) as well as on-campus courses. We have therefore not made the suggested changes to the guidance.
132. Under condition B2, a provider is able to recruit any students it wishes, but in doing so must also provide sufficient resources and support. A provider that delivers distance learning courses should be making applicants aware that reliable internet and an appropriate study space are things that will be required for effective learning. We anticipate that the majority of students considering distance learning will be prepared for and able to access these things but if they are unable to do so the provider will need to ensure that, if recruited, students have access to these resources.
133. We have included 'studio' in B2.3.g.i, as was suggested, so that it now reads (change in italics): 'physical and digital learning resources' includes, as appropriate to the content and delivery of the higher education course, but is not limited to: physical locations, for example teaching rooms, libraries, *studios* and laboratories. While the guidance and illustrative examples are not intended to be exhaustive, we think if these clarifications make it easier for providers to understand our requirements it is helpful to incorporate them.
134. In relation to requests for information about expectations for a provider to support students who are unable to provide their own resources, such as laptops, under condition B2, a provider must take all reasonable steps to ensure that each 'cohort' of students receives resources and support which are sufficient to ensure a high quality academic experience and success in and beyond higher education. As part of this obligation, we would expect a provider to fund the provision of resources, without additional charge beyond the course fee, where this is a 'reasonable step' to take in accordance with its condition B2 obligation. Accordingly, whether it is reasonable to ask students to provide their own laptop would depend on the

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<sup>23</sup> See Gravity assist: propelling higher education towards a brighter future, available at [www.officeforstudents.org.uk/publications/gravity-assist-propelling-higher-education-towards-a-brighter-future/](http://www.officeforstudents.org.uk/publications/gravity-assist-propelling-higher-education-towards-a-brighter-future/).

specific course and cohort of students. Paragraph 32 of the condition B2 guidance makes it clear that a provider may determine the approach it takes to making resources available and that this might include the loan of resources. We have updated paragraph 32 of the guidance to reflect this position, which stems from the changes to the condition B2 requirement regarding ‘all reasonable steps’.

## Student engagement

135. We acknowledge the comments that the illustrative non-exhaustive list of examples in the guidance do not focus on the outcomes attached to student engagement activities, but on the activities themselves. The condition requires a provider to take all reasonable steps to ensure effective engagement which is sufficient to ensure a high quality academic experience. Therefore, our interpretation of compliance would be based on the effectiveness of any engagement activities and not just the existence of opportunities for students to engage. The guidance provides only illustrative and non-exhaustive examples of how we are likely to interpret compliance. We have reflected on the wording in the first example and have changed this so that it now reads (changes in italics): ‘membership of, *and effective contribution to*, the provider’s committees. An absence of student membership of, *or effective contribution to*, a provider’s governing body may be of concern, depending on the size and corporate structure of the provider. An absence of student membership of, or effective contributions to, a provider’s committees responsible for academic governance and learning and teaching would be likely to be of concern. An absence of student membership of, *or effective contribution to*, learning and teaching committees, or course-level committees, in a subject area, or department, would be likely to be of concern.’ This is to be clear that membership of committees on its own may not be effective engagement.
136. We have considered whether we should make drafting changes to refer to individual and collective student engagement and course representatives in the condition. These points were also made in response to the phase one consultation, and we considered then that the broader framing of ‘effective student engagement’ encompassed these suggestions. We explained in the phase two consultation that our role is to regulate minimum requirements that are applicable to all providers and all courses and, in an increasingly diverse sector, we did not think it would be appropriate to set expectations that may not be appropriate for all contexts. For example, a student who chooses a short, professionally-oriented course may have different views about the need for student engagement activities than a student beginning a three-year, campus-based undergraduate course, and providers need to be able to respond to both views.
137. We have therefore not included student representatives within the drafting of the condition or guidance. We have, added a reference to ‘collective and individual student engagement’ to the guidance as an example of our likely interpretation of compliance, to be clear that we consider both to be part of effective engagement. Paragraph 37.b of the condition B2 guidance now reads (changes in italics): ‘Student feedback. Students not given *a range of opportunities, either individually or collectively*, to provide feedback on their course and the way it is delivered would likely be of concern.’
138. In relation to comments that the condition should be drafted to identify students as partners in their educational experience, while we recognise that providers may choose to treat students as partners (and, if this does not compromise academic rigour, this may help

maintain and improve the quality of the academic experience), we consider that ultimately it is the provider that has responsibility for the quality of its courses and the drafting of the condition reflects this. As set out in paragraph 136, our role is to regulate minimum requirements and we do not think it would be appropriate to set expectations that may not be appropriate for all contexts. We have therefore not amended the drafting of the condition or the guidance to refer to students as partners.

139. We agree with comments that students should be effectively engaged in all elements of their academic experience, and this was the intention of the proposed drafting. We acknowledge that the proposed definition of engagement within condition B2 relates to opportunities for students to contribute to the future development of the 'higher education course' and that this could be interpreted, as some respondents suggested, as narrowly defining requirements to engage with students. We have therefore amended the definition of engagement to ensure it encompasses effective student engagement in relation to students' academic experience, to clarify the policy intention behind this requirement. The definition at B2.4.e in the final version reads: 'engagement' means routine provision of opportunities for students to contribute to the development of their academic experience and their higher education course, in a way that maintains the academic rigour of that course. including, but not limited to, through membership of the provider's committees, opportunities to provide survey responses, and participation in activities to develop the course and the way it is delivered.
140. We have removed 'membership of the governing body' from the definition of engagement because we agree with the comments that this may not always be appropriate depending on the legal form of the provider. Rather than caveating the requirement in the condition itself we have amended paragraph 37.a of the condition B2 guidance so that it reads: 'An absence of student membership of, or effective contribution to, a provider's governing body may be of concern, depending on the size and corporate structure of the provider.'
141. We recognise that there are other elements of a student's experience, beyond the academic experience, which may affect their success in and beyond higher education, and that students should be engaged with these; however, we are not seeking to regulate wider elements of the student experience through the quality conditions.
142. On the responses received in relation to the broader treatment of student engagement in our proposals, we set out the reasons for the scope of our requirements relating to student engagement in paragraph 51 of the phase two consultation document. Generally, we have taken the view that our role is to regulate minimum requirements that are applicable to all providers and all courses and, in an increasingly diverse sector, it would not be appropriate to set requirements – regarding student engagement or other aspects of quality, in a way that may not be appropriate for all contexts. It is also important to recall that our requirements are intended to be minimum requirements and providers may go further than those in order to deliver an above-the-minimum academic experience for students or offer services and other benefits to students that are broader in scope than the quality and standards of courses. Separately, we use the TEF to incentivise performance above our minimum requirements and we are currently consulting on proposals in relation to how the TEF would operate in future.<sup>24</sup>

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<sup>24</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/).

## **Conclusion**

143. We have therefore determined to adopt condition B2 as set out in proposal one of the consultation, subject to the amendments set out in this response and as set out in the document Quality and standards conditions.

## Responses relating to condition B4: assessment and awards

144. The phase two consultation proposed that we would impose condition B4 on all registered providers. Condition B4 would require a registered provider to ensure that students are assessed effectively, there is rigour and consistency in assessment practices and that the awards and qualifications granted to students are credible and hold their value.
145. More than half of respondents agreed with the proposal to impose condition B4 (and associated changes to the OfS's regulatory framework), nearly a quarter of respondents neither agreed nor disagreed, with a similar proportion of respondents disagreeing with the proposal.
146. Respondents who supported the proposal agreed it was important to ensure that students are assessed effectively, there is rigour and consistency in assessment practices and that the awards and qualifications granted to students are credible and hold their value.
147. Some respondents sought clarity about how condition B4 would be monitored, the use of historic data in assessing compliance with condition B4 and at what point a concern would trigger an investigation into compliance with the condition. A number of respondents asked what evidence would be used in the OfS's consideration of changes in the classifications attached to 'relevant awards' over time.
148. There were several comments about institutional autonomy in relation to condition B4. Some respondents suggested that judgements about assessment and the credibility of awards should be reserved to a provider as matters of academic judgement, and that these were not matters for the OfS. Some respondents suggested the phrase 'in the reasonable opinion of the OfS' within the definition of 'credible' (an award is 'credible' if 'in the reasonable opinion of the OfS', it reflects students' knowledge and skills) is too broad and may result in regulatory over-reach and interference in academic judgement. Some respondents suggested that the detail given in the guidance on condition B4 is too prescriptive and does not align with a principles-based approach to regulation.
149. One respondent suggested that 'relevant skills' (as defined in B4.3.h) for an academic programme should be those skills articulated in programme specifications, that have been determined and assessed by academic experts and were not matters for OfS assessment.
150. Several respondents suggested that the investigation and assessment of cases relating to condition B4 should always be conducted by academic experts because they will concern matters of academic judgement, and that the guidance should refer to the DQB's role in this.
151. A small number of respondents requested more information about how condition B4 would work in respect of some 'non-prescribed'<sup>25</sup> courses, such as accountancy qualifications, where the delivery provider has less control over student assessment. Similarly, there were also comments that a provider may not have control over how awards are assessed where assessments are carried out by external awarding bodies and that it should not be held accountable for the quality of assessments in those circumstances. Similarly, some

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<sup>25</sup> These are courses that are not eligible for public grant funding from the OfS.

respondents commented on the role of PSRBs in setting requirements for assessments and asked for clarity about how these would interact with the requirements in condition B4.

152. One respondent commented that the definition of 'assessed effectively' in B4.3.c, which is defined as 'assessed in a challenging and appropriately comprehensive way, by reference to the subject matter of the higher education course...', should include reference to 'professional standards where appropriate', as well as to course subject matter.
153. One respondent stated that the inclusion of the word 'classifications' in the definition of 'credible' (B4.3.e) suggests that the focus of condition B4 is on undergraduate courses, rather than postgraduate taught or research courses which thereby undermines the scope as specified in B4.1.
154. In addition to the above, some respondents asked how the work of the UK Standing Committee for Quality Assessment (UKSCQA) on degree outcomes will interact with the OfS's work to tackle grade inflation.
155. A large number of responses commented on the definition of 'credible' (in B4.3.e) and its relationship to grade inflation, as well as the requirement within the definition of 'assessed effectively' that providers assess students for technical proficiency in the use of the English language (B4.3.c.iii). These are covered in more detail in the sections that follow.

## **Grade inflation**

156. The majority of respondents agreed that the same level of student achievement should not be rewarded with higher degree classifications over time. However, there were a large number of comments about condition B4 and its role in tackling unexplained grade inflation, and some respondents were of the view that increases could be explained by a number of reasons and may not be an indication of any issue with the credibility of awards.
157. For example, several respondents suggested that improvements in degree attainment could be the result of improved pedagogy, support for students, innovation in assessment practice and course design, and that the OfS should prioritise interventions in cases with differential outcomes for students with different characteristics rather than apparent grade inflation.
158. Other respondents suggested that in implementing condition B4 the context of the pandemic should be taken into account. They took the view that approaches providers took to ensure students were not disadvantaged during the pandemic were atypical in respect of grade inflation. One respondent asked for more information about how the OfS would monitor grade inflation for providers without degree awarding powers (DAPs), such as colleges that teach at Levels 4 and 5 and do not use degree classification algorithms.
159. Several respondents commented on a perceived tension between the proposed requirement in condition B4 that providers must ensure the credibility of their awards and commitments to narrow attainment gaps for underrepresented groups of students. They suggested that the drive to reduce attainment gaps through access and participation plans will, if successfully implemented, have a positive impact on degree classifications, and suggested that any analysis of trends over time needs to bear this in mind.

160. A small number of respondents were of the view that any investigation by the OfS into how awards were calculated would be an encroachment on institutional autonomy, while another respondent was concerned that the condition may result in the sector being forced to agree a common algorithm for awards.

### **Proficiency in the English language**

161. There were a large number of comments on the obligation on providers to require ‘technical proficiency in the use of the English language’ when assessing students (this is part of the definition of ‘assessed effectively’; see B4.3.c.iii), and associated guidance (paragraphs 50.e and 52.c of the proposed B4 guidance).

162. Several respondents, while acknowledging that an ability to effectively use the English language is an important outcome of higher education in general terms, suggested that requirements for English language proficiency should vary depending on the type of course, its learning outcomes and the ‘graduate destinations’ of the course (for example, one respondent stated that apprentices are not required to have Level 2 English until they undertake their end point assessment and that this is a lower requirement than some other types of higher education course).

163. A small number of respondents pointed out that not all assessments are written or delivered in English, for example for courses in modern foreign languages. Another commented that many courses for international students have English language tuition as a core component delivered with a diverse range of approaches. Respondents were of the view that this part of the condition sent a message internationally that England does not welcome students from overseas who combine learning English with their chosen subject.

164. There were comments that the aspects of the condition and guidance relating to English language proficiency appeared to be in contravention with the public sector equality duty and the Equality Act 2010. Respondents who commented asked whether a provider that has already made adjustments to its assessment policies with a view to complying with these requirements would be penalised for those adjustments and what the implications would be for students with a learning disability, with dyslexia mentioned several times. Other respondents commented on the implications for those for whom English is a second language (including those studying at overseas institutions), those from more disadvantaged backgrounds or those who have come to higher education through less conventional routes and who have less ‘cultural capital’.

165. Paragraphs 50.e and 52.c of the proposed B4 guidance made reference to the OfS’s regulatory concerns about English language proficiency being informed by whether ‘the OfS, employers and taxpayers’ would reasonably expect English language proficiency in an assessment. Some respondents asked why employers and taxpayers were included as a group who would have expectations about a student’s proficiency in English generally, and in particular in relation to international students and students studying on TNE courses – given that these students are not funded by English taxpayers and are not likely to seek employment with English employers. Others suggested that English language skills required by employers – each of which will have its own requirements and expectations – is a separate issue to the English language requirements of a particular course.

166. Some respondents suggested that the guidance should explicitly refer to spoken and written English, to account for courses that are not assessed with written work.

### **Academic misconduct**

167. Several respondents agreed with the proposed requirement, within the definition of 'assessed effectively', that assessments be designed in a way that minimises opportunities for academic misconduct and facilitates its detection (B4.3.c.iv). However, some respondents sought further information about how the OfS would assess this.

168. There were some comments about the example in paragraph 50.g of the proposed guidance that states: 'A provider not taking reasonable steps to detect and prevent plagiarism, advertising by essay mills, or other forms of academic misconduct by students, would be likely to be of concern'. Respondents commented that essay mills target students directly, with providers being unaware of these communications. Respondents stated that providers can only seek to ensure that students are made aware of the penalties of cheating and the importance of academic integrity. It was therefore suggested that the reference to advertising by essay mills should be removed from the example in 50.g and should instead reflect a requirement that a provider should raise awareness of essay mills, and the consequences of using them.

### **Retention of student work**

169. Paragraph 57 of the proposed guidance states that, in order to assess compliance with condition B4, the OfS is likely to need access to students' assessed work, and that the OfS expects that a provider will retain appropriate records for such regulatory purposes. This paragraph also says that, in the absence of such records, the OfS may consider making negative inferences about compliance and/or may take targeted regulatory action.

170. Several respondents were concerned about, or wanted clarity about, the retention of students' assessed work in terms of the practicality and proportionality of storage and expected timescales for keeping work. One respondent was of the view that the condition implied an expectation of indefinite retention of assessed work. Others wanted clarity on sample sizes and who would be given access to students' assessed work.

171. A small number of respondents were concerned about compliance with GDPR legislation and the impact of requirements to store assessed work on their current retention schedules and policies.

172. One respondent took the view that it would be unfair to penalise providers for gaps in their records created prior to the introduction of the proposals. No direct link was drawn to the proposals but we have taken this comment to refer to paragraph 57 of the proposed guidance (we note that it could also refer to paragraph 10 of the proposed B5 guidance).

### **Our response**

173. In response to the questions about monitoring, we intend to monitor compliance with condition B4 on the basis set out in the regulatory framework. We have provided further information in paragraphs 341-358. The analysis we have previously published on grade

inflation<sup>26</sup> sets out an analysis of changes in the proportion of first and upper second class degrees awarded over time. It reports on how graduate attainment has changed over the period of the analysis, and the extent to which these changes can be statistically accounted for by changes in certain characteristics of the graduate population. We intend to continue to develop our approach to the analysis of data relating to student attainment and to publish information on this over time. We will also use this data as part of our broader approach to monitoring in order to identify providers for which further investigation may be warranted to determine whether there is an increased risk of a breach, or a breach of, condition B4.<sup>27</sup> For example, we will consider whether trends in a provider's data over time, or comparison of its data with wider sector patterns of attainment, signal that we should engage with that provider with regard to its compliance with condition B4.

174. In relation to comments that condition B4 is an infringement of institutional autonomy and matters of academic judgement, the OfS is required to have regard to the need to protect the institutional autonomy of higher education providers, but it does not, however, have an absolute obligation to protect the autonomy of providers. Further, our proposals support the exercise of institutional autonomy by adopting a principles-based approach, which minimises the extent to which our minimum requirements affect the autonomy of providers (for example, by requiring that students be 'assessed effectively', rather than prescribing what assessments must look like). If we were to define the minimum requirements in a more generalised way or by reference to a provider's own academic judgement, giving more weight to institutional autonomy, we would not be able to enforce a clear minimum requirement which protects the interests of students.
175. We remain of the view that the requirements set out in condition B4 appropriately balance our duty to have regard for institutional autonomy with our other relevant duties, in particular relating to quality and equality. There are other approaches – for example a more rules-based approach that prescribes common algorithms for all providers – that would represent a significantly greater encroachment on institutional autonomy. We have not proposed such approaches, not least because we understand the importance of institutional autonomy in relation to quality and standards.
176. In relation to the suggestion that investigations and assessments relating to condition B4 should always be conducted by academic experts and the guidance should refer to the DQB's role in this, we do not consider that all aspects of the condition will necessarily require academic judgement. For example, an expert academic opinion could be required regarding methods of assessment of a particular course but would not necessarily be required to determine whether changes in academic regulations have an impact on the classifications awarded to students. We will draw on expert academic judgement wherever we consider that to be appropriate in order to gather the evidence needed to reach a decision about compliance with the quality conditions. Where we consider this appropriate, we may ask the DQB, or another appropriate body or persons with relevant expertise, to gather evidence and undertake an assessment to inform our decisions.

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<sup>26</sup> See [www.officeforstudents.org.uk/publications/analysis-of-degree-classifications-over-time-changes-in-graduate-attainment-from-2010-11-to-2018-19/](http://www.officeforstudents.org.uk/publications/analysis-of-degree-classifications-over-time-changes-in-graduate-attainment-from-2010-11-to-2018-19/).

<sup>27</sup> See our responses to proposal 4b.

177. A registered provider is responsible for compliance with B4 in relation to all its higher education courses, irrespective of where or how courses are delivered or who delivers them – this is the case for courses that are not eligible to be funded by the OfS and where the registered provider is not the awarding body. We have explained our position on the scope of the conditions at paragraph 40.
178. In response to questions about the interaction between B4 and PSRB requirements, we have drafted the requirements of B4 in a broad and flexible manner, to give a provider scope to meet our requirements in a way that aligns with the arrangements it needs to meet the expectations of other bodies. We have not heard from any PSRB that our proposed requirements conflict with its own requirements for assessment. We have added an additional example to the guidance at paragraph 52.d that failure to meet the requirements of a PSRB would be likely to cause concern. The example reads: ‘A course that is accredited by a PSRB and does not meet the requirements for assessment set by that body would likely be of concern.’ However, we have not included a reference to ‘professional standards’ within the drafting of the condition because not all courses will have professional standards.
179. In response to the comment that the inclusion of the word ‘classification’ in the definition of ‘credible’ (B4.3.e) suggests that requirements of the condition are targeted at undergraduate courses, rather than postgraduate taught or research courses, B4.3.e explains that the factors that the OfS may take into account in determining whether an award is credible (which is where the references to ‘classification’ are found) ‘include, but are not limited to’ those factors listed. Therefore, while B4.3.e (B4.4.e in the final version) uses the term ‘classifications’, which often relates to undergraduate degrees, this does not preclude us regulating the credibility of awards at other levels, for example taught masters’ awards that are often classified.
180. UKSCQA has agreed the need for further action on grade inflation to protect the value of UK degrees and announced new initiatives, including degree outcome statements in October 2019.<sup>28</sup> In England, sector-representative bodies agreed that providers should publish on their websites, where possible by the end of academic year 2019-20, a degree outcomes statement to provide clearer assurance to students and stakeholders about how they ensure the value of their qualifications is protected. Publication of a degree outcome statement is voluntary, and we would not expect it to, in itself, provide evidence of compliance with condition B4.

## Grade inflation

181. We have considered comments that improvements in degree attainment may be the result of improved teaching, support for students or improvements in assessment and course design – we acknowledge that this is possible and, where a provider can provide credible evidence that this fully accounts for any increase over time, we are unlikely to have regulatory concerns. Our concern is where actions have been taken, or not taken, which allow students to receive a higher classification than previous students without an increase in their level of achievement. Paragraph 55 of the guidance for condition B4 is clear that we are more likely to place weight on evidence explaining an increase in awards or award classifications if it pre-dates the OfS’s interest and demonstrates that a provider has routinely satisfied itself that its approach has not

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<sup>28</sup> See <https://ukscqa.org.uk/2019/10/10/higher-education-sector-announces-new-initiatives-to-protect-value-of-uk-degrees/>.

resulted in increased awards or award classifications, regardless of whether or not the achievement of students has increased. It is not the case that any increase over time would necessarily cause concern.

182. In relation to comments that the OfS should focus on differences in attainment between students with different characteristics – we agree that it is not appropriate for students with particular characteristics to have lower levels of attainment than those with different characteristics. We consider that it is important to tackle unwarranted grade inflation, for all students, and would be concerned about a pattern of increases that suggests that student achievement is rewarded with higher classifications whatever the characteristics of the students with higher classifications.
183. We recognise that the approach a provider has taken to ensure students are not disadvantaged during the pandemic may have been atypical and we will be able to take account of this context when considering data analysis that includes awards made during the pandemic. However, we set out our expectations of providers in relation to grade inflation during the pandemic in guidance published in April 2020.<sup>29</sup> The guidance says that ‘if an awarding body is considering making changes to its degree classification algorithm as a direct response to the disruption caused by the pandemic, it must ensure such changes are reasonable. It should ensure that classifications are reliable and command public confidence and that students this year are treated equitably when compared with students from previous years’. We were also clear that we would be likely to take regulatory action if a provider has deliberately or recklessly taken advantage of the exceptional circumstances of the pandemic. Under condition B4, which supersedes this guidance, a provider is required to ensure that the awards it grants to students are ‘credible’ at the point of being granted and when compared to those granted previously. Awards are ‘credible’ if, in the reasonable opinion of the OfS, they reflect students’ knowledge and skills. This means that a provider must be able to demonstrate that awards granted during the pandemic nevertheless reflect the recipients’ knowledge and skills, at the point of being granted and as compared to awards granted outside of the pandemic.

### **Proficiency in the English language**

184. We note that there was not strong objection to the principle that proficiency in the English language should be assessed and comments focused on the appropriate standard of proficiency within different courses and subjects.
185. While we note points about the potential implications for students from more disadvantaged backgrounds and who may have less cultural capital – our view is that an approach which does not assess these students in terms of their technical proficiency in the English language does not benefit them and only serves to entrench their disadvantage further.
186. If a cohort of students on a course are from particular backgrounds and need greater academic support to succeed, a provider should be taking all reasonable steps to support them in accordance with its condition B2 obligations. Assessment is part of the learning process for students and delivers pedagogical benefits. If it is done poorly, or not at all,

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<sup>29</sup> See [www.officeforstudents.org.uk/publications/guidance-on-quality-and-standards-during-coronavirus-pandemic/](http://www.officeforstudents.org.uk/publications/guidance-on-quality-and-standards-during-coronavirus-pandemic/).

students lose out on the educational development provided by effective assessment. We are also of the view that it is important for higher education students to be able to demonstrate an ability to engage with and convey complex arguments and this cannot be done without English language proficiency. Further, employers rely on the qualifications awarded to students to ensure that potential employees have the capabilities they need. If graduates are not proficient in the use of the English language, and so are unable to communicate effectively, then employers must either recruit from a smaller pool, spend time and money training graduates in basic English, or operate with a less capable workforce.

187. We therefore continue to consider that it is appropriate to include a requirement for the assessment of proficiency in the English language within condition B4. We do however agree with comments that this requirement should make allowances for the fact that the appropriate level of proficiency will vary depending on the course, the fact that some courses may not be assessed in the English language, and for the possibility of conflicts with a provider's equality obligations. Having reflected on these points we have made a number of revisions to the drafting of the condition that address the points raised. The condition now contains the following components:
- a. A requirement that providers must have academic regulations in place for the effective assessment of proficiency in the English language, which appropriately reflect the level and content of each higher education course.
  - b. An exception that deals with circumstances in which a course is assessing a language other than English.
  - c. An exception that provides a mechanism to deal with any conflict that could arise in respect of equality legislation.
188. The revised drafting requires a provider to ensure its academic regulations (as defined in condition B4) are designed to ensure the effective assessment of technical proficiency in the English language in a manner which appropriately reflects the level and content of each higher education course. In order to comply with this requirement, we would expect a provider to be able to demonstrate that it has regulations in place for assessing English language proficiency both at a provider level and at a subject level and that these regulations cover all of its courses. The amended drafting at B4.2.d now reads: subject to paragraph B4.3, in respect of each higher education course, academic regulations are designed to ensure the effective assessment of technical proficiency in the English language in a manner which appropriately reflects the level and content of the applicable higher education course.
189. We have considered the points raised by respondents about courses where assessment is not conducted in English and have decided to include an exception in the revised drafting of the condition (see B4.3.a). The effect of the exception is that the requirement to have academic regulations for the effective assessment of English language proficiency will not apply where a higher education course is assessing proficiency in a language other than English. The amended drafting at B4.3 now reads: The provider is not required to comply with B4.2.d to the extent that a higher education course is assessing a language that is not English.
190. The Equality Act 2010 and the public sector equality duty play an important role in supporting and promoting equality in higher education. However, we are concerned that some

providers have interpreted the Act and duty in a way which has led them to decide not to assess technical proficiency in English for all, or many, of their students. We do not consider this is appropriate or justified. At the same time, we agree that it is important that our regulatory requirements should not create a conflict with equality legislation for providers, and we have therefore decided to amend the drafting of the condition to include an exception which will act as a backstop mechanism in the event that the requirement relating to English language proficiency creates an unreconcilable conflict with provisions in equality legislation that relate to discrimination.

191. In summary, the effect of the revised drafting is that there is an exception to the requirement relating to English language proficiency to the extent that a provider can demonstrate (on the balance of probabilities) that it is strictly necessary for it to comply with obligations under the Equality Act 2010 relating to discrimination and therefore it is not possible to comply with both sets of obligations. This means that there is an onus on a provider to demonstrate all of the following:
- a. That compliance with the assessment of English language proficiency would amount to a form of discrimination captured by the Equality Act 2010.
  - b. That such discrimination is incapable of being objectively justified under relevant provisions of the Equality Act 2010.
  - c. That there are otherwise no exclusions or exceptions contained in the Equality Act 2010 on which the provider could rely.
192. Given our views on the importance of the assessment of English language proficiency for students from all backgrounds and in relation to the wider public interest, we consider it is appropriate to place the onus on a provider to demonstrate that the exception in B4.3.b applies and that there is a high hurdle to meet for the exception to apply. This therefore means that the nature of the evidence a provider would need to put forward would go beyond articulating potential legal concerns or matters it has had regard to in its decision-making and would require compelling evidence and reasoning on matters of law. As the exception in B4.3.b only applies ‘to the extent’ that a provider can demonstrate a conflict with equality law, it would not be sufficient for a provider to put forward evidence and reasoning about its academic regulations in general terms; rather, a provider would need to address the particular aspects of its academic regulations which it is seeking to justify under the exception, and the particular courses and assessments to which these aspects relate.
193. To give an example, citing this exception, a provider could seek to demonstrate that it is obliged, in order to avoid discrimination under the Equality Act 2010, to design its academic regulations in a manner which makes certain allowances for students with dyslexia or other learning disabilities on some courses. If this was the case, the OfS would expect the provider to demonstrate, in the context of the particular courses and assessments at issue, that any allowances made were strictly necessary to avoid discrimination under the Equality Act 2010, with reference to compelling evidence and reasoning which supports this. We expect that potential conflicts between requirements relating to English language proficiency and the Equality Act 2010 will only arise in rare cases, and therefore that this exception is likely to be invoked only in limited circumstances, for example in relation to students with particular learning disabilities.

194. The overall effect of our original proposals and revised condition is that a provider may be found in breach of condition B4 if it has adjusted its assessment practices for all students for example through a blanket policy that proficiency in the English language should not be assessed in some or all circumstances, or for students with certain protected characteristics and is unable to provide compelling evidence and reasoning to support reliance on the exception for conflicts with equality legislation. Our report on assessment practices<sup>30</sup> identified practices that are likely to be of regulatory concern and set out an expectation that providers should adjust their policies and practices as necessary in response to our findings. By publishing that report, we expected providers to take notice and adjust their practice, to ensure the quality of students' education and the reliability of the qualifications they award are not undermined. We recognised that some providers may need time to review and revise their approaches to the assessment of technical proficiency in English and set out that we would revisit this issue from October 2022, at which point we would expect to take action. We expect that our initial focus for enforcement action will be on providers that have blanket policies that proficiency in the English language should not be assessed for all students.

195. In relation to comments that the guidance should refer to spoken as well as written English, the condition has been drafted to refer to proficiency in the English language and is not limited to written English', so this would cover courses not assessed through written work.

### **Academic misconduct**

196. In relation to how we will consider matters relating to academic misconduct in relation to whether students are being assessed effectively (B4.2.a), as for other aspects of the condition we would gather evidence about a provider's practices and assess this against the requirements of the condition, drawing on expert academic judgement where we consider that appropriate.

197. We have reflected on the comments about the inclusion of the reference to advertising of essay mills within the condition B4 guidance. While we recognise that essay mills target students directly, the reference to providers preventing advertising of essay mills was intended to set out our expectation that a provider should take actions to prevent this, for example blocking URLs and removing physical advertising such as flyers and posters. However, we have amended paragraph 50.g of the guidance so that it now reads: 'a provider not taking reasonable steps to detect and prevent plagiarism, students' use of essay mills, or other forms of academic misconduct by students, would likely be of concern'.

### **Retention of student work**

198. In relation to points made about the retention of students' assessed work we have clarified in guidance our expectations that assessed work for a student should be kept for a period of five years after the end date of the course.

199. Under the UK GDPR, a provider must have a lawful basis for storing personal data, and data must be kept 'for no longer than is necessary for the purposes for which the personal data are processed' (articles 5 and 6 UK GDPR). In line with these requirements, where

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<sup>30</sup> See [www.officeforstudents.org.uk/publications/assessment-practices-in-english-higher-education-providers/](http://www.officeforstudents.org.uk/publications/assessment-practices-in-english-higher-education-providers/).

possible we would expect providers to retain records of student assessments in an anonymised form by removing the personal data from the records. However, in doing so, the provider should ensure that removal of the personal data would not limit the OfS's ability to assess the provider's compliance with condition B4 (or condition B5), including by ensuring that all of the work of an individual student can be identified from the records.

200. Where records of student assessments can be retained in a form that contains no personal data (as defined in UK GDPR), this removes the need for a provider to ensure compliance with UK GDPR when holding this record of assessment. Where personal data cannot be anonymised as described above, we would still expect providers to retain this data for a five-year period. We note that article 6(1)(c) of the UK GDPR provides a lawful basis for storing personal data where this 'is necessary for compliance with a legal obligation to which the controller is subject'. We also note that the UK GDPR provides a lawful basis for holding personal data where the data subject has given consent.
201. If the situation were to arise where a provider was able to demonstrate that it was genuinely unable to retain information in line with the expectations set out in our guidance due to constraints in UK GDPR (we would expect this situation to be rare), we would take this into account before drawing any negative inferences about compliance or taking regulatory action against a provider. If this was the case, we would expect the provider to be able to credibly demonstrate that there was no lawful basis available which would have enabled retention of the information at issue.
202. A provider's own retention schedule would need to be amended to reflect the OfS's requirements as set out in paragraph 61 of the B4 guidance. Any individual from the OfS, or working on its behalf, may need to have access to this material.
203. In relation to questions about the implementation of the condition and the fairness of penalising a provider for gaps in its records that predate the imposition of the condition, we confirm that we would only consider drawing negative inferences against a provider in respect of assessments which post-date the introduction of the new conditions.

## **Conclusion**

204. We have therefore determined to adopt condition B4 as set out in proposal one of the consultation subject to the amendments set out in this response and as set out in the document Quality and standards conditions.

# Proposal 2: imposing one general ongoing condition of registration relating to the standards of a provider's courses

## Introduction

205. Proposal 2 was to impose a new general ongoing condition B5, requiring a provider to ensure that standards set for its courses comply with certain sector-recognised standards, namely 'threshold standards'<sup>31</sup> currently referred to in the OfS's regulatory framework and new degree classification descriptors for bachelors' degrees with honours. The condition would also require providers to ensure that awards are only granted to students who meet these standards.
206. The proposal extended the definition of 'sector-recognised standards' currently included in the regulatory framework to include standards for the classifications for Level 6 (bachelors' degree with honours) qualifications. Because these standards have been developed by the sector and we were proposing to adopt them unchanged, proposed condition B5 would necessarily be more rules-based than the approach we proposed for the conditions relating to quality.
207. Almost half of the respondents to the consultation agreed with our proposed introduction of ongoing condition B5 and associated changes to the regulatory framework. The remainder of respondents 'neither agreed nor disagreed' or disagreed with the proposal.

## Sector-recognised standards

208. A number of respondents supported the requirement of the proposed condition that individual providers should ensure the standards of their courses are consistent with sector-recognised standards.
209. There was broad agreement that the threshold standards, drawn from the Frameworks for Higher Education Qualifications (FHEQ) are well established and have the confidence of the sector.
210. However, a few respondents commented that imposing a condition related to standards encroached on institutional autonomy, and that this was in contradiction to the OfS's general duty in relation to institutional autonomy. Where reasons were given for this view, they included that respondents thought that the OfS would be able to unilaterally alter sector-recognised standards in the future, and that the rules-based nature of the condition set an expectation of absolute alignment with these standards and therefore impeded autonomy.
211. While not disagreeing with the proposal, a number of respondents asked for further information about how any additional or changed sector-recognised standards would be

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<sup>31</sup> A 'threshold standard' is the minimum acceptable level of achievement that a student has to demonstrate to be eligible for an award.

agreed in the future as a result of the introduction of condition B5 and sought assurances these would be subject to consultation.

212. Linked to autonomy, several respondents were of the view that a more rules-based condition B5 on sector-recognised-standards was not compatible with the OfS's principles-based approach to regulation. One respondent took the view that the rules-based nature of this condition could also impede the development of microcredentials and short courses. A number of respondents also asked for further information about how the OfS would assess consistency with the sector-recognised standards.
213. A number of respondents made comments that the proposal represented a divergence from approaches in the devolved nations and a move away from 'co-regulation' of standards with the sector. Both of these things were considered to have the potential to harm the reputation of UK higher education.
214. Several respondents made comments on sector-recognised standards and TNE courses. These included views that the OfS should take account of the expectations of other jurisdictions when assessing alignment of a course with sector-recognised standards.
215. One respondent asked for further information about the scope of the condition, including how it would align with other standards relevant to providers: for example, apprenticeship standards and approval of higher technical qualifications by the Institute for Apprenticeships and Technical Education.

## **Degree classification descriptors**

216. Some respondents expressed support for the proposed adoption of degree classification descriptors for bachelors' degrees with honours (sourced from UK Standing Committee for Quality Assessment (UKSCQA)) as sector-recognised standards. Respondents who supported the proposal noted that these standards were developed through consultation with the higher education sector, that they would facilitate more consistency and transparency in how providers award classifications, and that they are already used to train staff, support external examiners, and form part of providers' regulations, and reviews of marking schemes, assessments, and course design.
217. A minority of respondents did not agree with the use of the degree classification descriptors for the purposes of condition B5. Disagreement with the use of the degree classification descriptors was largely on the basis that respondents considered that degree classifications are a matter of academic judgement and their inclusion as a regulatory requirement represents an infringement on provider autonomy. Three respondents questioned whether the degree classification descriptors met the definition of sector-recognised standards set out in HERA, suggesting that they did not command the confidence of the sector (with one suggesting that further consultation should be undertaken). However, a larger number of respondents recognised that these were standards that had been developed by UUK, GuildHE and the Quality Assurance Agency for Higher Education (QAA) for UKSCQA (via a full consultation that tested the content of the standards and their status as 'sector-recognised standards') and as such agreed with the OfS's view that they meet the definition in HERA of a sector-recognised standard.

218. Other respondents suggested that the descriptors were designed as a reference point rather than for regulatory purposes and should remain voluntary. Other respondents suggested that there would be burden for the sector in ensuring alignment with the descriptors and this was disproportionate to the policy aim.
219. Some respondents commented that the proposed descriptors were generic or vague because they covered a wide range of courses and providers and they therefore questioned whether the use of the descriptors will give clarity to students or help the OfS achieve its policy aims. Several respondents commented that providers should be able to develop classification descriptors that are appropriate to their institutional, faculty or course context. One respondent suggested that there would be an increased burden if the condition were to apply to more than one provider in a partnership arrangement and this could disincentivise validation agreements, and lead to more partnerships with Pearson, as Pearson itself is not regulated by the OfS.

## Alternative suggestions

220. The consultation asked whether respondents had alternative suggestions to the proposed introduction of condition B5 (and associated changes to the OfS's regulatory framework). Some alternative suggestions reflected comments that disagreed with the introduction of degree classification descriptors as sector-recognised standards. For example, alternative suggestions were that the descriptors should not be adopted as sector-recognised standards but instead used as a reference point for good practice and that the OfS should rely on existing quality mechanisms such as external examiners to safeguard classification standards.
221. A small number of respondents suggested condition B5 and the regulatory framework should cross refer to these documents rather than adopting the content directly (as is currently the case for the FHEQ). They suggested this would allow flexibility in the development of sector-recognised standards.
222. Some respondents suggested that the FHEQ should continue to be maintained by the QAA to ensure that standards are maintained with input from the sector. Similarly, there was a suggestion that UKSCQA should be responsible for any future development of the degree classification descriptors.
223. Alternative proposals also included:
- A specific comment that the proposed definition of 'sector-recognised' in B5.3.d of the condition should be amended to include HERA's definition of sector-recognised standards, as set out in section 13(3) of HERA, which defines the term as 'standards that apply to higher education and accord with guidance which is determined by persons representing a broad range of registered higher education providers and commands the confidence of registered higher education providers'.
  - The OfS should rely on existing internal quality mechanisms such as external examiners in relation to standards.
  - Degree classification descriptors should only be in place for providers seeking New degree awarding powers (New DAPs) who are operating in a probationary period.

- There should be clearer links to the requirements of PSRBs as important reference points for certain disciplinary areas.
- The OfS should include subject benchmark statements for technical qualifications in the condition, which could be updated to maintain quality and the value of awards.

## **Evidence gathering, assessment and enforcement**

224. We set out in the guidance that underpins proposed condition B5 the approach we would take to the evidence gathering, assessment and enforcement of the condition. In summary, we would use our general risk-based approach to monitoring as set out in the regulatory framework. In the context of condition B5, this would be likely to include: engaging with a provider to ensure it was aware of any issues, gathering further evidence from a provider and elsewhere to clarify if a breach of one or more conditions is likely, and using our investigatory powers in cases where we have serious concerns.

225. We set out that, where we considered it appropriate to use our investigatory powers, we would ask the DQB to gather further evidence and that an investigation would normally involve a visit to the provider and interviews with relevant staff and students. It would also likely include the need to access students' assessed work, including for students no longer registered on a course. Providers would be expected to retain appropriate records of students' assessed work for such purposes and, in the absence of such records, the OfS could consider making negative inferences about compliance or may take targeted regulatory action.

226. Several respondents wanted further information about how the OfS would assess compliance with condition B5. This included comments that there was a lack of clarity for those providers operating in partnership arrangements because delivery partners may not have DAPs, including where the OfS has concerns about grade inflation and questions about the basis on which monitoring activity might lead to an investigation by the OfS.

227. Several respondents were of the view that the proposal to use students' assessed work in judging compliance with the condition interfered with academic judgement and institutional autonomy and duplicated existing mechanisms such as moderation and external examiners.

228. Additionally, several respondents made points about the implementation and perceived burden of a requirement to store students' assessed work. Respondents' comments included: that the proposal did not take account of assessment of non-written work such as performances and made assumptions that such assessments would not be considered; that there were questions about the GDPR implications of retaining student work and the compatibility of this with a provider's own retention schedules; and the logistical challenges of storing assessments and accessing them. A number of respondents also asked for further information about how long work should be retained. One respondent commented that 'It would be inappropriate for the OfS to draw negative inferences or take regulatory action in the absence of these records without having specified the period for which they should be retained'. Similarly, one respondent took the view that it would be unfair to penalise providers for gaps in their records created prior to the introduction of the proposals.

229. Several respondents made comments relating to the role of the DQB in the assessment of this condition. These included suggestions that the DQB should rely on expert academic

judgement or peer review in order to make an assessment against sector-recognised standards and questions about how advice from the DQB would inform a decision by the OfS, including what would happen if the OfS did not agree with the DQB's recommendations.

## Our response

230. In relation to points that the requirements of condition B5 encroach on institutional autonomy, while the OfS is required to have regard to the need to protect institutional autonomy, we are firmly of the view that we do not have an absolute obligation to protect autonomy. Further, we must also have regard to our other general duties, for example the requirement to have regard to the need to promote quality of higher education. We have described condition B5 as more rules-based because the requirements are more specific; however, we consider that the threshold standards and the degree classification descriptors set out a broad description of standards. This means that a provider has some flexibility in implementing them appropriately for its courses, provided its approach appropriately reflects the sector-recognised standards. We take the view that higher education providers are familiar with this long-established approach to the interpretation of sector-wide standards.
231. As set out in our phase two consultation, we accept that seeking to regulate standards may represent an intrusion on providers' autonomy, including because degree awarding bodies have historically exercised their ability to set standards and award degrees independently. Responses to the phase two consultation have not set out arguments which change our view that the need to protect standards is likely to outweigh considerations of institutional autonomy. The sector-recognised standards that have been consulted on set out minimum standards and are an important mechanism to protect students and ensure public confidence in the qualifications awarded by providers. Our interventions will be focused on cases where there is evidence that standards are not consistent with (or do not 'appropriately reflect' – see paragraph 236 below) sector-recognised standards and so would be a proportionate response to a legitimate regulatory concern.
232. Section 13 of HERA says that a condition of registration regarding standards may relate only to the standards applied in respect of matters for which there are sector-recognised standards. HERA is clear that the OfS determines the requirements that are imposed in a condition of registration, and we therefore need to decide which, if any, sector-recognised standards to adopt to meet our regulatory objectives. While we recognise that other standards may exist in the sector, we do not consider that these would meet the definition in HERA of 'sector-recognised standards' – for example, the requirements of PSRBs, or the use of subject benchmark statements. Providers are able to choose to adopt these as reference points if they wish, and many do so, but we do not consider it to be appropriate to include them in our regulatory requirements. This is because we wish to adopt requirements that provide a minimum baseline of protection for all students (and taxpayers) rather than to adopt standards that may relate to some subject areas or types of provision and that would serve to narrow a provider's scope for innovation. For this reason, we have also discounted suggestions that there should be baseline standards for different types of courses.
233. In relation to points made by some respondents that the OfS would be able to unilaterally change sector-recognised standards – we can provide assurance that the OfS is prevented from doing this by section 13 of HERA. Section 13(3) sets out that sector-recognised standards must accord with guidance which a) is determined by persons representing a broad

range of registered higher education providers and b) commands the confidence of registered higher education providers. The effect of this is that sector-recognised standards could only be adopted and used by the OfS following consultation with the sector. Because this is a requirement that is set out in HERA, we consider that it is not necessary to repeat the wording of section 13 within the drafting of the condition.

234. We proposed to adopt the relevant content of the FHEQ and the UKSCQA degree classification descriptors into the regulatory framework so there is a single reference point for sector-recognised standards. The FHEQ itself can continue to be maintained by the QAA, but any changes to that document would not affect the content of the OfS's document, unless we undertook further consultation. We also anticipate that any future development of the degree classification descriptors would be undertaken by sector representative bodies on behalf of UKSCQA. The OfS would need to make a decision about whether any changes agreed by the sector in the future should be incorporated into the regulatory framework. Because HERA sets out the requirements for sector-recognised standards we do not consider that it is necessary to repeat those requirements in the definition of sector-recognised standards contained in B5.3.d.
235. As set out in paragraph 107 of the analysis of the phase one consultation and paragraphs 65-67 of the phase two consultation, our view, at the time of consulting, was that both the threshold standards and the degree classification descriptors met the definition of sector-recognised standards in HERA and that further consultation was not required. This remains our view having considered responses to this consultation, noting that only three respondents raised this point, and in light of the large number of respondents supporting our proposals.
236. In response to requests for further information about how we will assess whether a provider's standards are 'consistent' with the sector-recognised standards, as set out in paragraph 230 of this document, the threshold standards and degree classification descriptors provide a broad description of standards and a provider has some flexibility in implementing them appropriately for its courses. Higher education providers are familiar with this long-established approach to the interpretation of sector-wide standards. However, comments in response to the consultation have made us reflect on the use of the word 'consistent' and we have amended this so that B5.2 now requires the provider to ensure that [...] (wording changes shown in italics):
- a. any standards set *appropriately reflect* any applicable sector-recognised standards;  
and
  - b. awards are only granted to students whose knowledge and skills *appropriately reflect* any applicable sector-recognised standards.
237. We have also made equivalent amendments to the wording of B8.2.
238. We consider that the use of the words 'appropriately reflect' more clearly describes the flexibility that exists within the sector-recognised standards, although our expectation is that the vast majority of courses would meet the typical requirements set out in the sector-recognised standards and where they differ there should be credible evidenced reasons for this.
239. We have considered comments that the requirements imposed by condition B5 could impede the development of microcredentials and short courses but we do not consider that

this will be the case. We recognise that the limited size of such courses, for example in terms of their credit value, mean that students would be expected to demonstrate achievement of a more limited range of outcomes and attributes. This means that standards for these types of courses will match elements of the relevant sector-recognised standards rather than necessarily all of them. Paragraph 12 of Annex D to the consultation (Annex D sets out the sector-recognised standards) explains that not all qualification types at each level will meet all of the expectations of the qualification descriptor. Where a qualification type has a smaller volume of learning than the main qualification type, the qualification descriptor for the degree is used as a reference point and the sub-degree qualification is expected to meet the descriptor in part. This is also the approach taken for individual modules, where credit is awarded for completion of a smaller volume of learning than the main qualification type.

240. In relation to the views that moving away from a 'co-regulatory' approach means that the proposals would harm the UK's reputation overseas: we do not consider that there would be a basis for loss of reputation because, as set out in paragraph 233, the sector-recognised standards must command the confidence of providers and would not be changed without consultation. The sector-recognised standards that we proposed are also in use across the UK – the threshold standards have been used as regulatory requirements across the UK for many years; and the degree classification descriptors are currently used as reference points across the UK.

241. In response to comments that assessment of sector-recognised standards should take account of the expectations of other jurisdictions, if a registered provider is offering its own awards outside of the UK, or in another part of the UK, our view is that the standards must appropriately reflect sector-recognised standards regardless of expectations of other jurisdictions. Similarly, if a registered provider is delivering a course on behalf of an overseas provider or a provider located in another part of the UK, our view is that the standards of that course must still appropriately reflect the sector-recognised standards in England, again regardless of the expectations of other jurisdictions. The rationale behind this policy position is the need to ensure that students studying with a registered provider are entitled to the same minimum standard for their qualification. If an overseas qualification sets a standard that is lower than the sector-recognised standards, this would not be likely to be compliant with ongoing condition B5.

242. We set out how sector-recognised standards relate to the approval of HTQs in paragraphs 190-193 of the analysis of the phase one consultation. This explanation is also relevant to qualifications awarded within an apprenticeship and courses which have PSRB requirements.

### **Degree classification descriptors**

243. Because the descriptors have been in use for some time (they have been available in draft or final form since November 2018) and, as some respondents pointed out, are already well-established reference points, we do not consider that there should be considerable burden to providers in ensuring their awards appropriately reflect these standards. Where a provider does face burden, we consider this underlines the need to introduce the descriptors as regulatory requirements as it suggests that an alternative approach of relying on them as optional reference points has not been adequate to ensure that providers are applying minimum standards that students should expect and to safeguard public confidence.

244. As set out in paragraph 70 of our phase two consultation, we recognise that seeking to regulate degree classification standards in the way proposed may represent an intrusion on institutional autonomy. However, we consider that the need to protect standards outweighs considerations of institutional autonomy. We further note that we received some comments that the degree classification descriptors are too generic, which we consider supports our view that they are unlikely to be too prescriptive. Further, our interventions would be focused on cases where there is evidence that standards do not appropriately reflect sector-recognised standards and so would be a proportionate response to a legitimate regulatory concern.
245. Despite the generic nature of the descriptors, we consider that their adoption as sector-recognised standards is an important regulatory tool to secure minimum standards and that their use will bring more consistency in the awarding of degrees across the sector, giving assurance to students, employers and other stakeholders.
246. In response to comments that decisions about degree classifications should be based on academic judgement, the proposed sector-recognised standards were created by the sector so reflect expert academic opinions about standards. Although more rules-based than other aspects of the OfS's regulation, judgements about the standards achieved by individual students will draw on expert academic judgement, because we expect the DQB to appoint academic experts to undertake such an assessment. We have explained the process for our consideration of advice from the DQB in paragraph 305. To the extent that sector-recognised standards do impinge on the absolute discretion of assessors to assess entirely as they see fit, in balancing our general duties we consider that an approach where there is no regulation of standards would not provide sufficient assurance in the student and public interest that there is a minimum standard that students must achieve and would make it difficult to compare standards across the sector.
247. In relation to the point that imposing condition B5 on each provider in a partnership arrangement might disincentivise validation arrangements and encourage more providers instead to take up the delivery of Pearson qualifications – we do not consider there would be any incentive for providers to do this. A provider delivering Pearson qualifications, or qualifications from other awarding organisations regulated by Ofqual, will be required to satisfy condition B5 for any higher education course it offers, and so switching from validated provision to Pearson courses would not remove the regulatory requirement imposed by condition B5.
248. For the avoidance of doubt, a provider is able to develop classification descriptors appropriate to its context provided that these appropriately reflect the relevant sector-recognised standards.

### **Alternative suggestions**

249. We do not consider that, in and of themselves, the existing mechanisms, including external examiners, are sufficient to maintain confidence in comparability of academic standards in higher education, although they may form part of the systems by which providers assure themselves that their courses appropriately reflect sector-recognised standards. In order to avoid being unnecessarily prescriptive or introducing disproportionate regulatory burden, we focus our regulation on the outcomes providers deliver (i.e. the standards achieved) rather than the processes they use to achieve those outcomes.

250. Because our policy aim is to ensure standards are maintained by all providers we do not consider it would be appropriate to impose condition B5 only for providers that are seeking New degree awarding powers or that are operating in a probationary period.

## **Evidence gathering and enforcement**

251. In response to requests for information about how the OfS would assess condition B5 in the context of partnership arrangements (in particular, in respect of a provider in a collaborative partnership because it does not have DAPs), we consider that no registered provider involved in a partnership arrangement can abrogate its responsibilities for quality and standards to other organisations within the partnership. This includes wherever a registered provider is delivering a qualification which is awarded by another organisation (either a provider with its own DAPs or another awarding organisation). Condition B5 will apply to all registered providers, including those in partnership arrangements because they do not have their own DAPs. Assessment of the condition for these providers would be the same as for a provider with its own awarding powers, although any investigation of potential non-compliance would have regard to the provider's role in the partnership.

252. There are no specific triggers for investigations – we intend to use data and analysis to consider trends in a provider's performance and any decision to open an investigation will be made in light of our regulatory framework and other legal requirements.

253. In relation to points made about the use of students' assessed work – we consider that this evidence is likely to be necessary to make judgements about whether awards are only granted to students whose knowledge and skills appropriately reflect sector-recognised standards. For this reason, and in light of the reasons set out at paragraph 230-231, we do not agree with the concerns raised about interference with academic judgement and institutional autonomy, or that these expectations would duplicate existing mechanisms. In terms of guidance about the retention period for assessed work we have clarified our expectation that assessed work is retained for five years from the end date of the course, in paragraph 77 of the B5 guidance.

254. The associated guidance for condition B5 refers to assessed work and does not limit this to written work and it therefore applies to assessment of both written and non-written work. We consider that the digital storage of assessed work (including storage of practical assessments which can be recorded or photographed) should limit any logistical challenges. We have amended the guidance to reflect this. Our response to comments on GDPR is set out at paragraphs 198-203.

## **Conclusion**

255. We have therefore determined to adopt condition B5 as set out in proposal two of the consultation subject to the amendments set out in this response and as set out in the document Quality and standards conditions.

## **Proposal 3: impose two initial conditions of registration, one relating to the quality of, and one relating to the standards applied to, a provider's courses.**

256. The phase two consultation proposed to impose new initial conditions B7 and B8 that relate to quality and standards for all providers seeking registration with the OfS. The proposed initial conditions were expressed differently from the ongoing requirements for quality and standards, to ensure that our regulatory approach appropriately reflects the context for a provider that may not yet have delivered higher education. Applications that we now receive are more likely to be from providers without a track record of delivering higher education, or providers that are new to the regulated sector. Our experience is that such providers have found it difficult to identify evidence of compliance with the current B conditions and it has sometimes been challenging for DQB review teams to formulate forward-looking 'in prospect' judgements.
257. The proposed initial conditions B7 and B8 would therefore focus on the extent to which a provider (whether or not it has previously delivered higher education) will be able to comply with the ongoing conditions once it is registered and are designed to test in an appropriate way the credibility of its plans to do so.
258. Proposed initial condition B7 relates to quality. This condition would require a provider to have a credible plan that, if implemented, would allow it to satisfy ongoing conditions B1, B2 and B4 from the date of its registration. The provider would also need to demonstrate that its plan would be properly resourced.
259. Proposed initial condition B8 relates to standards. This condition would require a provider to demonstrate, in a credible manner, that the courses it plans to provide once it is registered are consistent with the sector-recognised standards set out in Annex D of the consultation document.<sup>32</sup> In practice, this means that the provider would need to be in a position to satisfy ongoing condition B5 from the date of its registration.

### **Comments about proposed conditions B7 (Quality) and B8 (Standards)**

260. The overwhelming majority of respondents agreed with the proposed introduction of initial conditions B7 and B8 and associated changes to the OfS's regulatory framework.
261. Respondents commented that it was reasonable to provide an alternative route for new providers seeking registration, and for initial conditions to be expressed differently to ongoing conditions provided they were proportionate and struck the right level of equivalence with the ongoing conditions.
262. Respondents also commented that they welcomed the fact that the proposals did not adopt a more rules-based approach to the requirements for new entrants that might stifle innovation.

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<sup>32</sup> See [www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/](http://www.officeforstudents.org.uk/publications/consultation-on-quality-and-standards-conditions/).

263. A small number of respondents considered that the OfS's normal risk-based approach to regulation might not be sufficiently robust for new providers, which they believed should be monitored more closely in their first years of registration, or that new providers should be required to enter into a partnership arrangement with a registered provider for a specified period of time to support their development. These repeated points made in response to the phase one consultation.
264. A small proportion of respondents considered that a credible plan was not a suitable substitute for a positive track record of delivery, and that it should not be relied upon when assessing compliance with proposed condition B7. A very small number of respondents stated that taking a different approach to the registration of new providers risked harming the reputation of all providers and weakened the OfS's registration requirements. Many respondents also commented that it was essential that new providers admitted to the Register were ready to deliver high quality higher education courses that meet sector-recognised standards in order to protect the interests of students and the reputation of the UK higher education sector.
265. A number of respondents raised points relating to the meaning of 'credible plans' in paragraph B7.3.b and 'in a credible manner' in paragraph B8.3.a, and how credibility in these contexts would be assessed. For example, a large proportion of respondents suggested that the definitions of 'credible' in paragraph B7.3.b and paragraph B8.3.a should be supported by more examples of evidence that providers could present, to support different types of providers and in particular providers that do not have a track record to draw upon as evidence to apply for registration. It was suggested that whether the provider seeking registration has a validation arrangement in place, and its mechanisms to engage with professional support from external bodies or PSRBs, could be examples of its credibility. It was also suggested that there should be guidance under condition B7 about how to produce a credible plan that maps against the requirements needed to satisfy conditions B1, B2, B4 and B5.
266. For condition B7, it was suggested that, in the absence of a provider's track record, the experience of senior managers should be taken into account in assessing a plan's credibility. Similarly, it was suggested that whether a provider proposed to offer awards validated by another provider or whether a provider proposed to draw on professional support from external bodies or PSRBs could be relevant to whether its proposals were credible. It was also suggested that it was not realistic for a provider seeking registration to have capacity and resources in place at the time of application and that demonstrating a commitment to recruit suitable senior staff was sufficient.
267. For condition B8 it was noted that the definition of 'credible' (which is relevant to the requirement in draft B8.2 that a provider demonstrate, in a 'credible manner', that the standards it intends to set and apply are consistent with sector-recognised standards) referred only to past performance, which new applicants were unlikely to have. In relation to paragraph 21 of the proposed B8 guidance, which stated that 'a history of non-compliance with ongoing condition B5 is likely to result in a judgement that initial condition B8 is not satisfied', it was suggested that a history of non-compliance with conditions should be considered by the OfS, but that the final decision about compliance with an initial condition should be based on the credibility of the application in light of any previous non-compliance.

268. It also was suggested that, in assessing credibility in relation to B7 and B8, the OfS should not only rely on the information submitted by a provider but should also collect independent evidence about providers seeking registration.
269. A very small number of respondents suggested that, in relation to condition B7, more clarity was needed on how the credibility of plans, or a provider's capacity and resources, would be assessed for courses delivered overseas, or in partnership arrangements.
270. Other points made about condition B7 included:
- That the definition of 'capacity and resources' in paragraph B7.3.a should be expanded to include physical and digital learning resources. Although no reasoning was given, we have understood this to be because of the importance of physical and digital learning resources to delivering a high quality academic experience and that its inclusion in condition B7 would be consistent with the requirements related to this in ongoing condition B2.
  - That it should be clear whether staff qualifications are included in the definition of 'capacity and resources' in paragraph B7.3.a.ii (which states that 'capacity and resources' includes 'the number, expertise and experience of the staff employed, and to be employed, by the provider).
271. Other points made about condition B8 related more generally to the requirements set out in condition B5 and are covered in that section. A small number of respondents suggested that the meaning of 'standards to be set and/or applied' in paragraph B8.2 needed to be clearer.

## Our response

272. As explained in paragraph 236236237 above, we have replaced the words 'are consistent with' in B8.2 with 'appropriately reflect'.
273. On the robustness of our proposals, we consider that the introduction of the proposed initial conditions B7 and B8, which are expressed differently to our ongoing conditions, would strengthen the rigour of our assessment through the clarity it provides about the requirements for registration, particularly where a provider may not have a track record of delivering higher education.
274. We have considered the suggestions that newly registered providers should automatically be subject to additional monitoring or be required to be in a partnership arrangement for a period of time or that only providers with a positive track record of delivery should be registered. The regulatory framework sets out our intention to 'remove unnecessary barriers to entry for high quality new providers, increasing diversity and competition in the sector for the benefit of students'. As explained in paragraph 244 of the analysis of responses to the phase one consultation, we consider that to require a provider to deliver validated or subcontractual provision before being eligible to apply for registration, or in its first years of registration, would risk stifling the market if new providers were unable to find a partner.
275. The credibility of a provider's application will be robustly assessed, including with reference to the conditions of registration that will apply to the provider once it is registered. Within our risk-based system of regulation, a provider that is judged to be at increased risk of breach of a condition may already be subject to more frequent and intensive monitoring. As paragraph 97

of the proposed condition B7 guidance and paragraph 111 of the proposed condition B8 guidance set out, where the OfS considers an initial condition to be satisfied, but that there is an increased risk of a breach of one or more of the general ongoing conditions for quality or standards, it may impose one or more specific ongoing conditions of registration and will also consider whether additional monitoring requirements are appropriate.

276. As described in paragraph 64.a of Regulatory advice 15, enhanced monitoring requirements might take the form of an internal 'reminder' to OfS staff undertaking monitoring activity that we need to review a particular issue for a provider on a more frequent or more detailed basis. This does not require any action by the provider – the requirement is visible only within the OfS, to inform our monitoring activities – and does not generate a regulatory burden for the provider. We would ensure that we look closely at data for new providers as it becomes available and apply the internal enhanced monitoring flag where appropriate to ensure there is a greater level of scrutiny of data and regulatory intelligence relating to new providers.
277. In light of the above, we consider that there are already sufficient regulatory mechanisms available to us to protect the interests of students in relation to newly-registered providers with or without a track record.
278. On the inclusion of more examples of evidence that could be presented to demonstrate 'credibility' with reference to paragraphs B7.3.b and B8.3.a, we recognise the interest of providers in more detailed information on this matter. It is difficult to provide comprehensive guidance that could encompass the full range of proposals that providers might make because the evidence of credibility is likely to be provider- and proposal-specific. In general terms, for a provider without a previous track record, evidence of compliance with condition B7 might include: the policies, processes and systems a provider proposes to have in place; how these will allow it to meet the requirements of each ongoing condition; and evidence of how it will assess for itself that it will continue to satisfy requirements of the ongoing conditions if registered. For a provider without a track record, compliance with condition B8 might include course documentation that shows that standards set in courses a provider is proposing to provide appropriately reflect relevant sector-recognised standards. Information to this effect has been added to paragraph 90 of the condition B7 guidance and paragraph 104 of the condition B8 guidance respectively. We will consider the extent to which further guidance is necessary about these issues for providers seeking registration.
279. Our test of the credibility of a provider's plans and our interest in its capacity and resources to deliver those plans work in combination. A provider's senior managers and other staffing arrangements, and any plans to work with other providers or other organisations such as PSRBs or awarding bodies, will inform its plans and as such would be relevant to our assessment of the credibility of those plans and the provider's capacity and resources to deliver the plan, as set out in paragraph B7.2.b. A provider's partnership arrangements and plans to engage with professional bodies might also provide relevant evidence regarding the standards of the courses it is planning to deliver, for the purposes of condition B8.
280. On the question of how a history of non-compliance with ongoing conditions should inform our decision-making on the initial conditions (a point that was raised in relation to B8), some respondents to the phase one consultation suggested that a provider re-entering higher education under a different trading name or title should be assessed in the same way as a

provider with a track record of higher education. We agreed that it is important that a provider cannot seek to avoid an assessment of poor performance through rebranding, or changes to corporate or legal form. The guidance in relation to the relevance of a provider's previous compliance history (paragraph 96 of the B7 guidance and paragraph 110 of the B8 guidance) is, in part, a response to this. It sets out that where a provider that the OfS considers to be operating substantially the same higher education business, has previously been registered, a history of non-compliance with relevant ongoing conditions is likely to result in a judgement that initial conditions B7 or B8 are not satisfied. As with all our regulatory decisions, we would ensure that our decisions about compliance with B7 and B8 are proportionate to the regulatory risks at issue. This means that, in assessing a provider against the initial conditions, we would consider the nature of the provider's historic non-compliance and the specific regulatory risks it poses.

281. On the testing of credibility of plans within initial condition B7, we will interrogate a provider's plan and test this against the evidence it provides. We will draw on other expertise, where we consider that appropriate, to test the evidence submitted. Where appropriate and necessary we may also collect evidence from other sources in order to verify information provided by a provider seeking registration.
282. On the definition of 'capacity and resources' in paragraph B7.3.a.iii, we have amended the definition to clarify that this includes 'the physical and digital learning resources deployed, and to be deployed, by the provider'. This recognises the importance of learning resources in meeting our ongoing quality requirements, without setting an expectation that higher education courses should necessarily have either physical or digital learning resources.
283. On the assessment of the credibility of a provider's plans in relation to initial condition B7 and capacity and resources in the context of courses delivered overseas and courses delivered through a partnership arrangement, a provider's plans would need to cover the full range of courses that it intends to provide at the point of registration and its capacity and resources need to be appropriate to deliver those plans. This should include plans and capacity and resources in relation to any TNE or partnership courses.
284. On the definition of 'capacity and resources' in condition B7.3.a, and whether 'expertise' includes qualifications, this would be the case but we have not made amendments to refer to qualifications because many respondents pointed out that – depending on the course – relevant expertise may not require particular qualifications.
285. In relation to comments that the definition of 'credible' in B7.3.b and B8.3.a (which is relevant to the requirement that a provider demonstrate, in a 'credible manner', that the standards it intends to set/apply appropriately reflect sector-recognised standards) referred only to past performance, which new applicants were unlikely to have, the proposed condition was drafted to be clear that a provider's past performance could be used as evidence within its plans but the definition of credible is not limited to past performance.
286. On requests for clarity about the meaning of paragraph B8.2 'standards to be set and/or applied', this refers to both standards that are set for a provider's courses, whether or not it is the awarding body for those courses, and to the way in which those standards will be applied to student achievement in practice. This has been clarified in paragraph 102 of the condition B8 guidance.

## **Conclusion**

287. We have therefore determined to adopt proposal 3, subject to the amendments set out in this response and as set out in the document Quality and standards conditions.

# **Proposal 4a: commission the designated quality body to provide evidence about compliance with the initial conditions for a provider seeking registration**

## **Introduction**

288. Proposal 4a related to the assessment of compliance with initial conditions of registration B7 and B8. It proposed that we would commission a standards review to provide evidence to inform our judgement about whether initial condition B8 is satisfied. We are required by HERA to seek advice from the DQB before making a judgement about a condition relating to standards. Where we determine it appropriate, we would also commission a quality review to provide evidence to inform our judgement about whether initial condition B7 is satisfied. We said that we would normally expect to commission a quality review but might decide not to do so, for example where a registered provider was seeking registration in a different category. Where a provider was also applying for New degree awarding powers (New DAPs) we would commission the DQB to collect information about compliance with condition B8 separately but at the same time as the DAPs assessment. Commissioning the DQB in this way would mean that we would have access to expert academic judgement as part of our decision-making process where we considered that appropriate.

289. Whether or not we commission the DQB to provide evidence in relation to a provider to inform our decisions about compliance with initial condition B7, in our proposed approach we reserved the right to gather evidence ourselves or to ask another appropriate body or individual to do so. This would give us the flexibility to draw on a range of evidence for our decisions and would also allow us to make decisions more quickly.

290. A clear majority of all responses to proposal 4a agreed with the proposal, with a very small proportion of the other respondents disagreeing. Few respondents provided substantial responses giving reasons for their response or any alternative suggestions.

## **Using the DQB to gather evidence on quality and standards for providers seeking registration**

291. There were several respondents who expressed broad support for the use of the DQB in gathering evidence for quality and standards reviews in general, and in particular for the proposed initial conditions B7 and B8, but either did not provide further comments beyond this support or felt there was insufficient detail in the consultation for them to make further comments.

292. The majority view was that it was appropriate for the DQB to provide evidence relating to the ability of a new provider to meet proposed conditions B7 and B8 and that this would help maintain confidence in the OfS in respect of any decisions relating to these conditions.

293. There was broad support for streamlining the quality and standards assessment processes, particularly relating to DAPs and change of registration category cases, which respondents considered to be low risk, to ensure burden on providers is reduced. The intention to

streamline the process for securing registration and DAPs was welcomed by respondents who noted the likely benefits in relation to resource and time savings. Respondents were also hopeful that the changes might facilitate a clearer and quicker route to New degree awarding powers.

294. There was broad support for the proposal that a quality review may not be necessary in certain circumstances, with respondents recognising it might not always be proportionate to require a review where there was already evidence of compliance.
295. Several respondents mentioned that drawing on expert academic judgement in relation to quality and standards would be beneficial and would ensure that curriculum and pedagogical considerations have been given due consideration by new providers.
296. Further information was requested by some respondents about the status of judgements made by the DQB under the proposals and whether the OfS could overrule, or disregard, those judgements. Respondents suggested that if this was the case there should be a clear rationale for doing so.
297. Further information was also requested about what a more 'flexible approach which does not involve commissioning the DQB' meant (page 30 of the consultation document). Respondents asked what other bodies the OfS might commission to make assessments of initial condition B7 and what weight the OfS would place on the judgements from such bodies. Some respondents stated that the OfS should always request quality reviews from the DQB in order to ensure that all providers receive equitable treatment and that decisions are consistent and reliable, or alternatively that assessments also involving New DAPs should only be undertaken by the DQB or that the DQB should always be consulted before any decision not to commission a review is taken.
298. Some respondents considered that bodies other than the DQB should gather evidence only in exceptional circumstances, and that an individual should never be commissioned to gather such evidence. It was also suggested that the reasons for using bodies other than the DQB should be published. There was a further point that a provider may be required to provide evidence to the OfS rather than the DQB and this would increase burden for that provider and undermine the DQB's role.
299. More information was also requested about the data or information on which the OfS would base a regulatory judgement, in cases where the evidence of a provider's compliance history was considered sufficient without the need for further assessment.
300. Some respondents stated that the DQB would have a range of expertise – which ensured fair assessment of all providers and reflected the diversity of the sector – and should therefore be asked to undertake assessments. Drawing on the expertise of the DQB would also help the sector engage with the decision-making process and ensure due diligence particularly in relation to DAPs.
301. It was suggested that quality and standards reviews conducted by the DQB were necessary to ensure alignment with European quality requirements and to maintain international credibility.

## Other comments regarding proposal 4a

302. Some respondents suggested that a visit to a provider should always be undertaken to assess the physical environment.
303. Some respondents suggested that the views of PSRBs should also be sought where appropriate for a provider seeking registration, as PSRBs set requirements for some courses and are better placed to assess quality and standards than the DQB.
304. A very small proportion of respondents stated that the regulatory burden of conditions B7 and B8 on providers needed to be considered. In particular, it needed to be clear how initial condition B7 would be assessed for apprenticeship training providers seeking registration because they are also subject to Ofsted inspection; there would therefore be duplication in also requiring an assessment of quality by the DQB, as well as additional burden.

## Our response

305. On the status of judgements made by the DQB, section 5(1) of HERA is clear that it is for the OfS to determine and publish the conditions of registration. Section 23(1) is clear that it is for the OfS to assess, or make arrangements for the assessment of, the quality of, and the standards applied to, higher education and section 27(3) that any DQB must conduct the assessment the standards. The purpose of assessments is to provide us with the evidence we need to make decisions about compliance with initial and ongoing conditions of registration, in a context where only the OfS has the powers to determine compliance. In making our regulatory decisions we must have regard for all relevant evidence available to us, including any assessment made by the DQB. However, it is for the OfS to determine how all relevant evidence should inform our regulatory decisions, and to make those decisions.
306. As we set out in the consultation document, HERA states that only the DQB is able to make any assessments relating to standards. To use the DQB to make assessments of quality in all circumstances would in our view introduce unnecessary delay and/or regulatory burden where we consider alternative approaches would provide the evidence we need. This may particularly be the case where a registered provider wants to change registration category or where a new entity is formed through merger or acquisition.<sup>33</sup> There may be other circumstances in which we consider an alternative approach to be appropriate.
307. On the question of which bodies or individuals other than the DQB we might commission and when, we set out in paragraphs 88 to 90 of the consultation that we would do this where the risk of non-compliance was low. We proposed this in order to retain the flexibility to draw on a range of evidence for our decisions and because it would also allow us to make decisions more quickly for a provider that is not likely to represent increased risk. However, responses to the consultation have pointed out other circumstances (beyond change of registration category or merger) that would mean it would be appropriate for the OfS to assess quality itself, drawing on expertise from bodies such as Ofsted or PSRBs where we consider that appropriate. Further, our experience of regulating to date is that there needs to be increased flexibility in the system and we can see that there may be other circumstances not mentioned in

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<sup>33</sup> See our Phase two consultation, paragraphs 85 and 89.

consultation responses where it would be appropriate for another body, or the OfS itself, to make an assessment of initial condition B7.

308. As we set out in the previous paragraph, we determine the evidence we need for our decisions, and the nature of this evidence would inform our decision about which bodies or individuals should conduct assessments. It is set out in our general duties that we will have regard to the principle that our regulatory activities should be transparent, accountable, proportionate and consistent (HERA section 2(1)(g)(i)) and it is our responsibility for all decisions about compliance with conditions of registration that provides the basis for consistent treatment of providers, regardless of whether the evidence is gathered by the DQB, another body or an individual.
309. On the suggestion that the OfS should publish the reasons for using bodies other than the DQB, we take the view that it is neither necessary nor appropriate as it would require us to explain an individual provider's circumstances in a way that revealed matters that would otherwise be likely to remain confidential. We will ensure that a provider is aware of which body or individual has been commissioned and, where relevant to the circumstances, the reasons for this.
310. We noted comments that supported the involvement of the DQB in assessments because this supported sector engagement with quality and standards matters and decision-making. The purpose of assessments is to provide reliable independent evidence for the OfS to make regulatory decisions – not to support provider engagement.
311. We note the comment suggesting that quality and standards reviews by the DQB are necessary to ensure alignment with European quality requirements and to maintain international credibility. We take the view that the approach we have decided to adopt through this consultation, when combined with the OfS's wider approach to quality set out in the regulatory framework, is consistent with parts 1 and 2 of the European Standards and Guidelines (ESG). We do recognise that it is important that international stakeholders understand the arrangements in place in England under HERA, and we discuss below at paragraph 427 the steps we are taking to reach out to them about our work.
312. On the suggestion that there should always be a visit to a provider to assess the physical environment, the guidance to condition B7 sets out that we would normally expect there to be a visit to a provider and interviews with relevant staff and students (condition B7, paragraph 83). We will apply our risk-based approach to any cases where we consider that there should not be a visit, or that a visit should take a particular form, for example where a provider has no physical learning resources. The underpinning consideration for any decision not to conduct a visit would be that, with reference to the circumstances of the individual case, the evidence needed to make the relevant regulatory decisions can be obtained without the need for a visit.
313. On seeking the views of PSRBs as part of our information gathering, as we set out in our phase one consultation analysis, not all providers have relationships with PSRBs and the requirements of individual PSRBs differ considerably. Nonetheless, understanding how a provider intends to meet the requirements of any professional, statutory or (other) regulatory bodies for the courses it intends to provide may be relevant to our assessment of compliance.

314. On the regulatory burden placed on a provider by conditions B7 and B8, we have set out in the proposals that we would reduce the scale and scope of our assessment – and so the burden on a provider – where this can be done without detriment to the rigour of the assessment, for example where a registered provider seeks registration in a different category. More generally, we recognise that the process of preparing for and undergoing assessment creates a burden for a provider seeking registration; however, the changes we have made to separate the initial conditions from the ongoing conditions are designed to reduce burden because they allow a provider to focus on its particular plans. Assessments of initial conditions B7 and B8 must, however, lead to robust decisions about whether a provider can be registered with the OfS. We plan to ensure that the information and engagement required from a provider is optimised as far as possible, for example so that the information required is tailored to that needed to complete the assessment, and there are no unnecessary ‘blanket’ requirements to provide irrelevant information.
315. In the case of higher and degree apprenticeships, we recognise that a provider that delivers only apprenticeship training will already be subject to Ofsted inspection and an assessment against initial conditions B7 and B8 may therefore mean that a provider has two reviews that cover the quality of its apprenticeship training. Section 23 of HERA sets out that the OfS must assess, or make arrangements for the assessment of, the quality and standards of a provider applying for registration for the purpose of determining whether the provider satisfies the initial conditions that relate to quality and standards. In relation to standards, HERA also sets out that where there is a DQB, only that body can make an assessment of standards.
316. A full Ofsted inspection will provide an overall effectiveness judgement as well as a judgement about the quality of a provider’s education. The considerations that Ofsted inspectors will give to apprenticeship provision are set out in paragraph 228 of its further education and skills inspection handbook.<sup>34</sup> These include a consideration of how well leaders and managers ensure that the apprenticeship curriculum meets the principles and requirements of an apprenticeship, as well as plans for assessment, support for apprentices, staffing and apprentices’ development of knowledge and skills. It is likely that the outcomes from a full Ofsted inspection would therefore provide some evidence about a provider’s likely future compliance with aspects of conditions B1, B2 and B4 which could be used by a provider as evidence in relation to its application for registration. We intend to consider how we might reflect this in revised guidance on applying for registration. Ofsted does not provide any judgement on the standards of a qualification and therefore there is no duplication in relation to assessment of initial condition B8.
317. The comments raised about the registration of apprenticeship training providers highlight one circumstance in which it might not be appropriate to require a DQB review because other expert judgement is available.
318. Once registered with the OfS, we have set out that our approach is to avoid duplication, as far as possible, by relying on Ofsted inspections and intervention by the Education and Skills Funding Agency (ESFA) as the funder of apprenticeship courses as the mechanism for

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<sup>34</sup> The Further education and skills handbook is available at <https://www.gov.uk/government/publications/further-education-and-skills-inspection-handbook-eif/further-education-and-skills-handbook-for-september-2021>.

maintaining high quality in apprenticeship training. However, training providers seeking registration with the OfS will normally be doing so because they wish to be eligible to apply for DAPs and it is therefore appropriate and proportionate to require that a provider meets the OfS's minimum requirement for quality and standards in relation to its apprenticeships. We have committed to work alongside the other organisations that have a role in the apprenticeships system in England, including the ESFA, IfATE and Ofsted, to ensure that the system operates as effectively as possible.

## **Conclusion**

319. We have therefore decided to adopt proposal 4a, subject to the amendments set out in this response and as set out in the document Quality and standards conditions.

# Proposal 4b: operate a flexible risk-based approach to evidence gathering and investigation for registered providers (question 8)

## Introduction

320. This section contains an analysis of responses to our phase one and phase two consultations relating to information gathering and investigation for registered providers.<sup>35</sup> We have already published an initial response to comments received in response to our phase one consultation on the proposed role of the DQB in paragraphs 253-271 of our analysis of that consultation. The part of this section on the role of the DQB therefore focuses only on responses to the phase two consultation.

321. In the phase one consultation, we set out our existing approach to gathering further information about concerns about quality and standards. We explained that, as set out in the regulatory framework, we aim to regulate in a way that would focus regulatory attention, and therefore burden, on cases where we consider a breach of one or more of the B conditions to be most likely or where there is significantly increased risk of a future breach. Intervention in this way is designed to send a clear signal about the importance of compliance and to incentivise providers to improve their performance where this is necessary.

322. We proposed to gather further evidence where we consider this appropriate in cases that raise concerns that there may be a breach of one or more of the B conditions, including by commissioning further assessment by the DQB, or another appropriate body, where we consider that helpful. We stated that we would use our enforcement powers as set out in the regulatory framework and set out an expectation that we would use the most significant of those powers, including for a serious or persistent breach of one or more of the B conditions.

323. In our phase two consultation we proposed a flexible, targeted approach to investigation. We set out that our approach to engagement, evidence gathering and investigation would be likely to include, one or more of the following:

- Engagement with a provider to ensure it was aware of the issues.
- Gathering further evidence from the provider or elsewhere to clarify whether a breach of one or more condition is likely.
- Using our investigatory powers where engagement increases our concerns or where evidence suggests that a breach of one or more condition is likely.

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<sup>35</sup> This section includes analysis of responses to proposals 3 and 4 of the phase one consultation relevant to the phase two proposals that were not included in our previous analysis of phase one consultation ([www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education-analysis-of-responses/](http://www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education-analysis-of-responses/)). We intend to publish in due course further analysis of responses on proposal three not covered by this publication alongside guidance on our approach to monitoring.

324. We set out our approach to information gathering in proposed guidance for conditions B1, B2, B4 and B5 in Annexes A and B of the consultation. These proposals included that we would expect to commission the DQB to gather evidence for an investigation for any case where we have opened an investigation because of compliance concerns about condition B5 in relation to standards. In relation to quality, we said that we would expect to commission the DQB where we have opened an investigation because of compliance concerns about one or more of conditions B1, B2 or B4, and we took the view that the expertise of the DQB was likely to be necessary for us to reach a view about compliance. For instances where we did not commission the DQB, we proposed that we would either undertake an investigation ourselves, or commission another appropriate body or individual to gather further evidence.<sup>36</sup>
325. In responses to the phase two consultation, there was recognition that the OfS had addressed feedback from the phase one consultation and there was support for the proposal that the approach to evidence gathering and investigation for registered providers should be flexible and risk-based.
326. In the phase two consultation, a clear majority of all respondents agreed with proposal 4b, with a minority of the other respondents disagreeing with the proposal.

## **Engagement, evidence gathering and investigations**

327. Many respondents to the phase one consultation commented that the broad approach set out would reduce burden for most providers, because the OfS would focus attention on areas of greatest risk. A number of respondents were of the view that providers needed regular engagement with the OfS in order to understand its view about their compliance with quality and standards conditions, and that a collaborative relationship between the OfS and providers would best support quality in the sector. Other key points raised in responses to the phase one consultation covered themes to which respondents returned in their comments on the more detailed phase two consultation which are discussed further below: the use of indicators for monitoring purposes, more information about the thresholds for OfS engagement, timelines for engagement and investigation, support for a role for the DQB, and points in relation to the proposed role for other bodies in undertaking assessments of individual providers.
328. In response to the phase two consultation there was broad support for the proposals on engagement, evidence gathering and investigations. A number of respondents welcomed the OfS's intention to continue with the approach to engagement we adopted during the pandemic.
329. Some respondents requested further information about the triggers that the OfS would use to engage with or investigate a provider. This included asking what numerical indicators the OfS would use and whether there was a particular proportion of a provider's courses that would need to be of concern or whether engagement or investigation could occur at a module, course or faculty level.
330. Some respondents asked for more information about the circumstances in which the OfS would use its formal powers to investigate, including when it would decide to move directly to

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<sup>36</sup> See phase two consultation, paragraph 97 and Annex A, paragraphs 15, 38 and 56.

those powers rather than engaging informally with a provider. Others asked for information about the timelines for completing an investigation.

331. Some respondents supported the commitment to engage with a provider where potential compliance issues have been identified and to allow representations before regulatory decisions were finalised. Some suggested that the OfS should always engage informally with a provider in the first instance so that concerns could, where possible, be resolved without the use of formal investigatory powers. Some respondents also suggested that the OfS should share the evidence for its concerns with a provider at the earliest point of engagement.
332. The cost of an assessment by the DQB was noted by one respondent as a reason to support a proportionate approach to engagement as this would avoid unnecessary costs for a provider. Some respondents identified potential regulatory burden were a provider to find itself subject to multiple, even if small, engagements with the OfS, in particular if these engagements were not coordinated by the OfS.
333. Some respondents suggested that there should be an opportunity for a provider to present evidence that it has identified and addressed an issue of concern, or put in place other mitigations, before the OfS escalates its interest through evidence gathering or investigation. More information was requested about how the OfS will take account of the context and diversity of the sector when making regulatory judgements. More information was also sought about the distinction between information gathered through engagement with a provider and the evidence collected during an investigation of the provider, and on the status of quality reviews conducted in other nations of the UK for providers operating there as well as in England. A number of more general points were made by respondents, including a request for more information about the role of PSRBs, and awarding bodies that are not themselves regulated by the OfS, in the OfS's approach to monitoring, investigations and evidence gathering. Respondents asked when the OfS might seek the views of a PSRB on concerns about a provider, what would happen if the requirements of different regulatory bodies were in conflict with each other, and how the OfS and other bodies or regulators would share information about concerns.
334. A very small number of respondents suggested that the difference between third-party notifications to the OfS and the Office of the Independent Adjudicator (OIA)'s complaints scheme needed to be clear to students, and to other stakeholders. They suggested it was not clear what would happen if the OfS launched an investigation, but the OIA concluded that a complaint was not upheld in relation to the same concern.
335. Some comments were made about the outcomes of investigations. Respondents suggested that the OfS should publish reports of investigations, that enforcement action for breaches should be proportionate to the size and resources of a provider, and the OfS should consider the impact of enforcement action on students. Further information was also sought about the time that a provider would be given to take remedial action before any sanctions were imposed.

## Role of the DQB and use of expert academic judgement

336. There was broad support for the role of the DQB in gathering evidence on the OfS's behalf where the expertise of the DQB is likely to be necessary for the OfS to reach a view about compliance.
337. The points made by respondents were similar to those made in relation to the proposals to use the DQB to gather evidence in relation to quality and standards for providers seeking registration. These included the view that the DQB should, as a matter of course, be given the responsibility for conducting investigations on all quality matters, for reasons that included the expertise of the DQB, its access to expert academic judgement, and consistency of approach and decision-making. Some respondents asked for further information about the circumstances in which the OfS might choose not to employ the DQB in an investigation and the basis on which the OfS would choose a body that is not the DQB to undertake quality assessments.
338. Additional points made with reference to proposal 4b relating to the role of the DQB were:
- One respondent considered that some previous quality and standards reviews undertaken by the DQB for registered providers had lacked focus and clarity. Particularly because a provider paid a fee for such reviews, it was important that lessons were learnt to ensure that future DQB assessments were not disproportionately costly and burdensome for providers.
  - One respondent sought clarification on how the OfS would commission the DQB to assess a provider's TNE courses and how this would fit with the commercial QE-TNE review work that the QAA carries out for its paying members.
339. Similar points were made about the use of expert academic judgement to those made in relation to the proposals for providers seeking registration. Respondents requested further information about when expert academic judgement would be sought and asked how appropriate expert academics would be recruited with an appropriately diverse range of experience and subject expertise. Some respondents suggested that expert academic judgement should be used in all matters of concern relating to compliance with the quality conditions. It was suggested by some respondents that the OfS could place reliance on existing mechanisms such as a provider's external examiners to reduce burden and duplication, and that the OfS should work with the DQB to do this.
340. Points made about the use of expert academic judgement also included the suggestion that there needed to be a shared understanding of, and confidence in, what constituted expert academic judgement and that PSRBs should be involved in the recruitment of experts for PSRB-regulated courses, in particular where a PSRB has statutory powers relating to those courses.

## Our response

341. On the points raised about the value of engagement between the OfS and a provider about which we may have concerns, we intend to continue with the general approach to provider engagement we adopted during the pandemic, in contexts where we consider that the use of

our formal powers is not likely to be appropriate or proportionate.<sup>37</sup> An approach to engagement whereby we routinely discuss with each provider its performance in relation to our requirements more generally would increase the burden on all providers and also the burden on the OfS, with consequent implications for the cost of regulation to the sector, without material benefit to students. As we have set out elsewhere in this document, we plan to publish cases studies to show how we have approached decisions about compliance with our quality and standards conditions. We intend that these will help all providers to understand our requirements and the way we approach these in practice.

342. On our use of data and other sources of information to identify providers for which engagement may be appropriate, we intend to adopt the general monitoring approach set out in the regulatory framework for conditions B1, B2, B4 and B5 by bringing together in a systematic way a range of information that we already hold for each provider – data that shows performance and context, reportable events and patterns of notifications. This regulatory intelligence would allow us to see any signals suggesting that further engagement, information gathering, or investigation might be appropriate for an individual provider.

343. On the scale of concerns that could lead to engagement with, or investigation of, a provider, it is the responsibility of each provider to ensure that it is compliant with conditions B1, B2, B4 and B5. We do not intend to adopt policies that would restrict our ability to intervene because we had a pre-determined view about the scale of concern that would or would not warrant regulatory attention. This means that it is possible that we could identify regulatory risk, or a breach of a condition, in relation to a single module or course. The scale and severity of a potential concern would be a relevant factor in our decisions about whether to initiate engagement with a provider, or to use our investigatory powers and this would be a risk-based judgement based on the information available to us. This is consistent with the approach set out in the intervention factors in paragraph 167 of the regulatory framework. In making decisions about intervention, we would also consider the strategic prioritisation of our available resources. We would have regard for our general duties, including the duty relating to the principle that regulatory activities should be proportionate, and, where appropriate, consider the intervention factors set out in paragraph 167 of the regulatory framework.

344. We have made some drafting changes to the guidance which accompanies each condition to be clear that the approach we take may involve engaging with a provider, gathering information on a voluntary basis or using our investigatory powers in any combination and order based on intelligence or evidence that there might be compliance concerns.

345. On the points made in responses about the need for our approach to be proportionate, as we set out in the phase two consultation document, it is our intention to continue with the risk-based approach to monitoring set out in the regulatory framework.<sup>38</sup> It is also the case that we are required to have regard to proportionality considerations in our regulation, and a risk-based approach is one of the ways we achieve this in practice.

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<sup>37</sup> See the phase 2 consultation, paragraph 94.

<sup>38</sup> See the phase two consultation, paragraph 94. See the regulatory framework, paragraphs 132-46.

346. On the point about the burden that may be created by multiple, separate, simultaneous engagements with the same provider, we would only engage with a provider where we had determined there was reason to do so and it is possible that several areas of concern may emerge at the same time. In those circumstances we would seek, as far as possible and practical, to coordinate our interactions with a provider.
347. On the consideration of contextual or other evidence, a provider will have opportunity to provide any information that it considers relevant as part of an engagement or investigation. We will give proper consideration to all relevant information, whether that has been obtained from the provider or from other sources, such as third-party notifications or information shared with us by other organisations. A provider will have an opportunity to demonstrate how, in its context, it has met or exceeded the requirements set out in conditions B1, B2, B4 and B5.
348. On the timelines for investigations, our view is that the timelines for an investigation may be legitimately shaped by a number of factors, including the potential severity and urgency of the concern, and the scale and complexity of the investigation required. For that reason we do not intend to set out overall timelines because these could not cover all reasonably likely circumstances.
349. We address points relating to the alignment of our proposed principles-based quality and standards requirements with the requirements of PSRBs in paragraphs 478 to 481. As we set out in paragraph 303 of our analysis of responses to the phase one consultation, because of the different functions of different PSRBs or other bodies with an interest in the same providers and courses, close alignment of our activities operationally with those of PSRBs is not straightforward. However, our proposed approach to engagement, information gathering and investigations set out in the phase two proposals would enable us to receive and consider information from PSRBs and, under the powers set out in section 63 of HERA, in appropriate contexts share information with a PSRB. As we set out in paragraph 303 of our analysis of phase one consultation responses, the inherent flexibility in our principles-based approach gives a provider scope to minimise the overheads incurred in meeting our requirements and maximise the opportunity for it to meet our requirements in an efficient way that aligns with the arrangements needed to meet the expectations of other bodies. We do not, therefore, see any reason why there should be conflicts between our requirements and the requirements of other bodies. For the avoidance of doubt, however, if we were to encounter a circumstance where a provider was able to demonstrate that it could not be compliant with our requirements because of the requirements of a PSRB, that would be a relevant factor when determining any enforcement action we might take in relation to non-compliance with our conditions of registration.
350. On the relationship between third-party notifications to the OfS and the OIA complaints scheme, during 2021 we revised the relevant guidance on our website. This sets out clear guidance on the difference between a complaint to the OIA and a notification to the OfS<sup>39</sup> and we therefore consider the risks of students or other stakeholders being confused about the two schemes is minimal. We do not consider that a conflict between our functions and those of the

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<sup>39</sup> See [www.officeforstudents.org.uk/for-students/ofs-and-students/notifications/](http://www.officeforstudents.org.uk/for-students/ofs-and-students/notifications/).

OIA can arise because of the different purposes that our notifications and the OIA's complaints serve. Provided the content falls within the scope of the OIA's scheme, a student may seek recommendations for personal redress for anything a provider has done or failed to do. We use notifications from students as a source of regulatory intelligence to help us to determine whether we should engage with or investigate a provider in relation to compliance with its conditions of registration. Our organisations may therefore legitimately take different views about the same matter, in line with our different functions.

351. On comments received relevant to the outcomes of investigations, we consulted separately on matters relating to the publication of information about individual providers<sup>40</sup> and will publish outcomes following that consultation in due course. This will include matters relating to publication of information about investigations and their outcomes.
352. On making any decision to use our enforcement powers in relation to a provider, we must have regard for our general duties, including our general duty to consider the principle that our regulatory activities should be proportionate (HERA section 2(1)(g)(i) and also consider the intervention factors set out in the regulatory framework, which include consideration of the impact on students (regulatory framework, paragraph 167 (c)). On the time that a provider would be given to take remedial action, we would also consider our general duties and intervention factors when determining any timeframes for any remedial action by a provider.

## **Role of the DQB and use of expert academic judgement**

353. On the points made relating to the DQB, please see our responses to similar points made in connection with proposal 4a, set out in paragraphs 305-311.
354. On the burden associated previously with quality and standards review visits, we consider that our proposed approach is proportionate. We commission an assessment from the DQB only where that is necessary for standards or we consider it appropriate for quality and we do so in a way that targets the assessment to the particular issues about which we have concerns. We will continue to work with the DQB to ensure that it delivers this approach in practice.
355. We consider that the use of bodies other than the DQB, or of individuals, to gather evidence, is consistent with Schedule 4 of HERA. Although only a DQB may assess standards, there is no similar restriction in place in relation to assessing quality.
356. On the QAA's QE-TNE review, we clarified our view of the status of this in paragraph 168 of our analysis of phase one consultation responses. We set out there that the QAA offers its paying members the opportunity to take part in a review process that covers their TNE activity. Participation in the QAA's TNE review process is entirely voluntary and the outcomes of that process, whether positive or negative for a provider, have no bearing on our judgement about whether that provider complies with our regulatory requirements. Any information gathering that we would commission from the QAA relating to a provider's TNE activity would be in its capacity as the DQB and entirely separate from any commercial activities it may offer to its members.

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<sup>40</sup> See [www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/](http://www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/).

357. On the points set out in paragraph 339 about expert academic judgement, please see our responses to similar points relating to the proposed conditions in paragraphs 32 and 33 above.
358. On the shared understanding of what constitutes expert academic judgement, we consider that the principle of expert opinion is well-established and understood both in matters relating to the quality and standards of higher education as well as in other contexts. The precise expertise needed will vary from case to case as set out above in paragraph 32. On the role of PSRBs in identifying expert academic judgement, we recognise that it may be appropriate to draw on the assistance of PSRBs to identify sources of expert academic judgement, for example in cases of some types of concern that may arise relating to relevant skills and regulated professions. We would seek expert academic judgement, in whatever form we determined to be appropriate, when in our judgement it is needed to inform our regulatory decisions.

## **Conclusion**

359. We have therefore decided to adopt proposal 4b, subject to the amendments set out in this response and as set out in the document Quality and standards conditions.

# Proposal 4c: Take account of a provider's compliance history in relation to the quality and standards conditions for the purpose of determining eligibility for other benefits of OfS registration

## Overview

360. The phase two consultation proposed that where we decide that there is, or has been, a breach of B1, B2, B4 or B5, or there is an increased risk of a future breach, we would take this compliance history into account in considering a provider's eligibility for other benefits of OfS registration. The relevant benefits of registration we identified were: TEF awards (including a provider's eligibility to apply for a new award); OfS public grant funding; and a provider's eligibility to be authorised for new or extended DAPs or for university or university college title. As set out in the phase two consultation, these proposals would not affect our ability to take enforcement action on the basis set out in HERA, for example, to revoke a provider's existing authorisation to award degrees or to revoke an existing authorisation for university title. We stated in the consultation that we were not consulting on the approach to the use of our enforcement powers and that we would take the approach set out in the regulatory framework for any enforcement action.
361. Almost half the respondents agreed with the proposal, with a small proportion of the other respondents disagreeing.
362. Some respondents sought further information about how far back a provider's compliance history would be considered, how positive and negative information about a provider's compliance history would be weighted in the decision-making process, and how a provider's current performance would be considered alongside past performance. How compliance history would be considered in the case of a provider's merger or acquisition was also queried, as well as how ineligibility for certain benefits would work for a provider in a partnership arrangement. For example, it was suggested that a quality and standards concern relating to international partnerships of an English provider, where it could be challenging for the English provider to resolve or mitigate concerns, should not disproportionately affect the provider's future eligibility or access to other benefits of registration.
363. Respondents asked whether eligibility for benefits would only be affected as a result of provider-wide concerns or if eligibility could be affected because of issues relating to a specific course. It was suggested, for example, that it might be disproportionate for issues with a single course to affect eligibility for a provider-wide benefit like a TEF award.
364. Respondents suggested that taking an increased risk of a future breach of a B condition into account when determining eligibility for benefits could be regarded as the OfS pre-judging a provider's future non-compliance and therefore should not be used to determine eligibility. Respondents also asked if a provider would be informed that an increased risk of breaching a condition was being considered when the OfS is determining eligibility for the benefits of

registration, as they noted that the OfS does not routinely share its risk assessments of a provider.

365. Some respondents asked about the length of time for which a provider might be ineligible for registration benefits and the timescales for renewed eligibility for those benefits.

366. Some respondents asked, if the conditions were revised, how a provider's compliance with the previous quality and standards conditions would be taken into account in judgements about eligibility for benefits, and how any DQB reviews undertaken prior to the amendment of the B conditions would be taken into account.

## Our response

367. Many responses focused on a provider's eligibility for TEF and OfS grant funding. The phase two consultation set out an intention for further consultation in relation to the relationship between a provider's compliance with the B conditions and eligibility for the TEF. We also set out that in future we may decide to take account of a provider's current and previous compliance with the B conditions in determining allocations of some types of OfS public grant funding, but that the details and effect of these proposals would be set out in any future funding consultation. Because both of these matters are subject to further consultation, we have not responded to points made or questions asking for further information in relation to the details and effects of these proposals. We note that there is currently an opportunity to submit comments on proposals relating to TEF,<sup>41</sup> and that there will be an opportunity to respond to the proposal about funding eligibility in the event of any future consultation on these matters.

368. This section therefore relates only to our response to the aspects of proposal 4c that relate to eligibility for DAPs and university (or university college) title. The phase two consultation proposed that, where a provider breaches one or more of the ongoing B conditions (namely, B1, B2, B4 and B5), or another relevant condition, we would be likely to suspend the provider's eligibility to be authorised for new or extended DAPs, and for university (or university college) title. Where the conduct relating to the breach is ongoing, we would be likely to decide that the provider is not suitable to be authorised for new or extended DAPs, and for university (or university college) title. Where the conduct is not ongoing, we would be likely to decide to investigate further. Where we have determined that there is an increased risk of a breach, we would also be likely to decide to investigate further.

369. We have simplified the guidance that accompanies each condition in relation to the regulation of DAPs and university (or university college) title to be clear that where we have identified a breach of one or more of conditions B1, B2, B4 and B5 we would be likely to suspend a provider's eligibility to be authorised for new or extended DAPs, and that we may also decide that a provider is not suitable to be authorised for new or extended DAPs where there is a breach or where we have imposed a specific condition in relation to conditions B1, B2, B4 or B5.

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<sup>41</sup> Available at [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/).

370. We note that many responses referred to the 'withdrawal of benefits'; however, the consultation did not make proposals regarding the removal of existing DAPs or university (or university college) title held by a provider. The OfS has existing mechanisms under HERA and the regulatory framework for the variation or revocation of existing DAPs and the revocation of university title and, as we made clear in the consultation, these were not being consulted on.
371. In reviewing the policy set out in the consultation document on how we would treat a provider's compliance history where there is a merger or acquisition, we noted some inconsistency in the wording in the consultation document. At paragraphs 112 and 120 of the consultation document, we said that 'Where the provider seeking registration is either the same entity, or is a new entity operating the same higher education business as the previous entity, we will take into account the compliance history of the previously-registered provider.' This has been amended to read 'substantially the same' [higher education business], to ensure consistency with how we treat a provider's compliance history when it is applying for registration (as set out in the guidance for conditions B7 and B8). Further, we note that paragraphs 114 and 122 of the consultation document omitted a reference to acquisitions, which should have been included so that the paragraphs deal with both mergers and acquisitions consistently. These updates will be reflected in consequential changes to the regulatory framework.
372. In relation to mergers or acquisitions, where a provider applies for registration following a merger, acquisition or other corporate change, we will take account of the compliance history of any relevant previously-registered provider – that is, where the new provider is operating the same or substantially the same higher education business as the previously-registered provider – when making decisions about eligibility for new or extended DAPs or for university or university college title. Further, where a merger, acquisition or other corporate change involving one or more providers with degree awarding powers occurs, we will take account of each previously-registered provider's compliance history in determining whether the new provider should be authorised for DAPs or for university or university college title.<sup>42</sup>
373. Where a provider is working in a partnership arrangement, as with any other regulatory action, we would be required to have regard to the proportionality of any decisions made, which means that we would take into account the context of any relevant partnership arrangement before deciding whether to investigate a provider, find a breach of a condition, or take enforcement action. As we set out in paragraph 37 of the phase two consultation document, we take the view that it is not appropriate for a lead provider to seek to generate income, or gain other benefits, through partnership arrangements while abrogating responsibility for the quality of those courses and the standard of awards.
374. On the proportionality of determining a provider ineligible for new or extended DAPs or for university or university college title as a result of a breach which relates only to a subset of

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<sup>42</sup> A merger or acquisition is a reportable event, and we would make a judgement about whether such an event resulted in any increased risk for any condition of registration for any of the providers involved. A merger or acquisition of two registered providers also requires a decision to deregister the dissolving entity – a decision to deregister a provider in these circumstances also means we consider whether any regulatory benefits or regulatory protection for students in relation to the deregistering provider transfer to the lead provider. Therefore, the relevance of any compliance history will be considered and, if appropriate, a new risk assessment will be completed as part of this process.

courses (as opposed to the wider portion of its provision), we consider that there could be circumstances in which we could make such a determination where the breach of a condition related only to a subset of a provider's courses. On the example raised relating to TEF, as we set out in the phase two consultation document, we are consulting further on the way in which a provider's current and previous compliance with the B conditions would be taken into account in TEF decisions.<sup>43</sup> We have updated the relevant guidance for each condition with some minor wording changes to be consistent with the proposals in the TEF consultation.

375. On questions about whether we would consider a provider's history of compliance under the previous quality and standards conditions, any decisions affecting eligibility for new or extended DAPs and university or university college title would only be made on the basis of a provider's compliance with the new quality and standards conditions. Where we have identified a risk of future breach in relation to the previous quality and standards conditions, we would be likely to investigate whether there was still an increased risk of a breach, or an actual breach, of the new conditions before making a decision about a provider's eligibility to apply for new or extended DAPs or university or university college title. In those circumstances our assessment of compliance would be made by reference only to the conditions in force at the time of the assessment, not the requirements of any previous quality and standards conditions.

## Conclusion

376. Having had regard for comments received in responses, we have determined to adopt the proposal that we should take account of a provider's compliance history in relation to the quality and standards conditions for the purpose of determining eligibility for new or extended DAPs or university or university college title, noting that the arrangements relating to eligibility for TEF and OfS public grant funding are subject to further consultation.

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<sup>43</sup> See paragraphs 83 to 88 of our consultation on the Teaching Excellence Framework (TEF) ([www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/)).

## Proposal 5: External quality assurance of integrated higher and degree apprenticeships

377. The phase two consultation proposed that, where a registered provider delivers one or more integrated higher or degree apprenticeships, the OfS would commission the DQB to assess the end-point assessments undertaken by a provider according to the Institute for Apprenticeships and Technical Education's (IfATE) framework for external quality assurance (EQA) and use this assessment to provide evidence about the provider's compliance with proposed condition B4 in relation to integrated higher and degree apprenticeships. We also proposed that the assessment would provide evidence about the provider's assessment practices for its integrated higher and degree apprenticeships in relation to the aspects of the IfATE's framework for EQA that relate to the quality of higher education that are not covered by proposed condition B4.
378. The majority of respondents supported these proposals. Comments made by respondents supporting the proposals included recognition that apprenticeships are within the scope of OfS regulation and comments welcoming of an approach seeking to reduce duplication and avoid parallel processes.
379. A small number of respondents expressed reservations about the proposal because they thought that commissioning the DQB to undertake EQA would create a disproportionate level of scrutiny because the OfS does not routinely propose to commission the DQB in respect of other types of courses.
380. Some respondents were of the view that the regulation of apprenticeships, including requirements for quality and standards, remains highly complex and places a high regulatory burden on providers, which makes operating apprenticeship training unattractive. Respondents suggested that there remained a risk of duplication of regulation where the roles of different organisations such as Ofsted and the OfS overlap and there may be conflicting requirements for providers. Respondents suggested it was important to ensure that the remit of each body which reviews or inspects an element of apprenticeship training is clearly defined to avoid unnecessary overlap, contradictory outcomes and excessive burden for providers.
381. A few respondents suggested a contextual approach was required for the assessment of the requirement within proposed condition B4 for providers to require technical proficiency in the use of English language when assessing students. They suggested that the OfS should permit a lower standard for some higher and degree apprentices, as compared to students on other types of courses.
382. A few respondents suggested alternative approaches. These were premised on the perceived complexity of the regulatory system and related to suggestions for rationalisation. One put forward the suggestion for a strategic review of EQA and others a reduction in the number of regulatory bodies and government agencies involved in the oversight of apprenticeships.

## Our response

383. We recognise that there are several different organisations with different responsibilities involved in the oversight of apprenticeships. We provided clarification about the roles of different organisations in the analysis to our phase one consultation.<sup>44</sup> We have shared the main responses from the phase two consultation in relation to EQA, and apprenticeships more generally, with ESFA and IfATE and will continue to work with them along with Ofsted and the DQB, to ensure there is clarity about roles and that duplication is removed wherever possible. We would also envisage working with ESFA, IfATE and the DQB to review how EQA is operating to ensure that regulation is effective. Any decision about a strategic review of EQA arrangements would be a matter for IfATE.

384. In response to comments that review by the DQB in relation to EQA would result in a disproportionate level of scrutiny when compared to other types of courses, the OfS is responsible for delivering EQA under a framework set by the IfATE, which IfATE has consulted on. The assessment that the DQB will undertake on behalf of the OfS for EQA is designed to discharge these responsibilities and has been designed to minimise burden on providers. We will continue to work with IfATE on the operation of EQA to ensure it remains proportionate.

385. Our approach to the consideration of English language proficiency is set out in paragraphs 184185-195.

## Conclusion

386. Having had regard for comments received in responses, we have determined to adopt the proposal that we should use assessments made in relation to EQA to provide evidence about the provider's compliance with proposed condition B4 in relation to integrated higher and degree apprenticeships.

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<sup>44</sup> See [www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education-analysis-of-responses/](http://www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education-analysis-of-responses/).

## Unintended consequences and other comments (Questions 12 and 14)

387. The consultation asked whether respondents had comments about any unintended consequences of the proposals, for example for particular types of provider or for any particular types of student. The consultation also asked whether respondents had any other comments about the proposals.
388. A large number of responses were received to these questions from all types of respondents. They have been organised into themes, with each theme covering both unintended consequences and other comments related to the proposals. Responses that referred to potential unintended consequences linked to one of the individual conditions have been considered in the relevant sections of this document which cover our responses to those conditions. Responses on the unintended consequences of the proposals relating to protected characteristics have been covered in paragraphs 497-504.

### Regulatory burden

389. A significant number of respondents made points that were also made in response to the phase one consultation. These included views about the regulatory burden arising from the proposed scope of conditions to include TNE courses, courses delivered through partnership arrangements and courses not eligible for funding by the OfS. Some respondents suggested that the burden of what they saw as an increased scope of OfS regulation may lead to providers reducing the number or type of courses they provide, for example by reducing provision of TNE courses or short professional courses, in order to avoid perceived increased burden in the regulation of those courses. They took the view that this would reduce student choice, in particular for mature learners, in direct contradiction to the Government's 'Skills for Life' agenda.<sup>45</sup>
390. Views were also expressed about the potential for regulatory duplication, including in the regulation of further education colleges (where the ESFA is the principal regulator) or for providers operating in partnership arrangements across the UK nations. Other areas where potential regulatory duplication was identified were courses also regulated or accredited by PSRBs, inspected by Ofsted, or approved by IfATE, including apprenticeships. With particular reference to courses also regulated by PSRBs, one respondent noted that it was important that the overall regulatory approach met the principles of the Regulators' Code by demonstrating an understanding of the implications for providers and ensuring proportionality and streamlining both for regulators and providers. One respondent suggested that the OfS should take an active role in ensuring 'coherence across regulators to protect the wider perception of value and equivalence of higher education provision'.
391. Several respondents repeated the view, also expressed in response to the phase one consultation, that the proposals would place a disproportionate regulatory burden on small providers and there were requests for the OfS to assess the impact of this.

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<sup>45</sup> For more information, see <https://www.gov.uk/government/topical-events/skills-for-life>.

392. Although some respondents welcomed the principles-based and risk-based approach underpinning the proposals, some suggested that providers would want to ensure they were exceeding minimum requirements because of the potential consequences of breaching the conditions. This would likely lead to internal audits or significant internal system development by providers, in order to ensure they are exceeding minimum requirements and to provide assurance of this to their governing bodies. Further, some respondents suggested that it was not clear how the proposals were compatible with OfS's strategic outcome EF3 that 'regulatory burden for providers is minimised' and more broadly the Secretary of State's guidance on reducing regulatory burden.
393. A small number of respondents suggested that any increase in regulatory burden might have the unintended consequence of stifling innovation because the more regulatory requirements there are, the less likely providers would be to innovate for fear of breaching the requirements.
394. A number of comments were made on the drafting of the conditions themselves. Some of these comments related to the readability of the requirements and the complexity involved in navigating through these. It was suggested that the process of seeking to understand these requirements would place additional regulatory burden on providers. Some respondents also commented that the status of the illustrative examples in the guidance needed to be clearer or this could lead to unnecessary burden being placed on providers in thinking that they need to comply with matters that are not in fact regulatory requirements.

## Our response

395. In relation to comments that burden would increase as a result of the inclusion of TNE courses, partnership arrangements and courses that are not eligible for OfS funding within the scope of the conditions, we have clarified that there is a potential regulatory burden placed on each registered provider if engagement with the OfS is necessary as a result of concerns about compliance with a condition. This is the case for all types of course covered by the conditions. We take the view that this burden already existed but acknowledge that some providers may not have understood that the existing B conditions relate to all of a provider's higher education courses and one of our reasons for revising the conditions is to make this scope clear.
396. We consider that it is in the interests of students that we ensure a minimum level of quality and standards for students whatever, wherever and however they study and regardless of the partnership or funding arrangements that may be in place for a course. We have set out our reasons for the approach we proposed to the regulation of partnership arrangements in paragraphs 440-449. We have set out in paragraphs 341-352 of our analysis of responses to proposal 4b how our risk-based approach to monitoring is proportionate. We are also of the view that providers should take advantage of the significant opportunity that our regulatory approach creates to dismantle complex internal processes that may have accreted over many years as a consequence of seeking to comply with the UK Quality Code. We therefore consider the regulatory burden associated with our regulation of all types of higher education courses covered by our conditions to be proportionate in enabling us to deliver a consistent approach to the minimum requirements for quality and standards in the interests of all students.

397. On the potential for regulatory duplication with the requirements of other organisations, we set out views on the interaction with PSRB requirements in paragraphs 302-304 of our analysis of responses to our phase one consultation, including our view that the proposed approach to the regulation of minimum requirements for quality and standards is proportionate and risk-based, and that this will align well with the differing approaches of other regulators or other bodies that also have an interest in the same providers or courses. We have further explained the interaction of our requirements with PSRBs in paragraphs 478-481 of this document and plan to have regular engagement with PSRBs to establish a co-ordinated approach in relation to quality and standards.
398. We also highlighted, in paragraphs 173-195 of our analysis of responses to the phase one consultation, the work we are undertaking with other organisations to develop a coordinated approach to the oversight of higher and degree apprenticeships. We were clear that to avoid the potential for duplication, we will take a risk-based approach and, as set out in the intervention factors in the regulatory framework, will take account of any action taken by another regulator to remedy an increased risk or breach of a condition before deciding whether to intervene in a particular case. Where we can take assurance from the ESFA that it can take appropriate action through its own intervention policy, we are unlikely to investigate a provider, find a breach of a condition, or take enforcement action in relation to the quality of a provider's apprenticeships ourselves. Because Ofsted undertakes regular inspections of the quality of apprenticeship training, we would not normally include apprenticeship training within the scope of our investigations, but there may be circumstances where it is appropriate for us to do so (for example if a matter of potentially significant concern was identified in between scheduled Ofsted inspections). We would be likely to take the same approach for any other higher education that is funded by the ESFA and subject to Ofsted inspection. We intend to use Ofsted reports as a source of regulatory intelligence to inform our judgements about whether there might be quality concerns about courses not subject to Ofsted inspection at a provider.
399. We also plan to continue to work with the ESFA to consider whether there are ways in which we can reduce duplication with ESFA requirements for further education colleges.
400. On the possibility of additional regulatory burden for partnership arrangements that operate across the UK nations, in paragraph 457 below we have set out our plans for ongoing engagement with other UK nations about matters of common interest, which would include the operation of relevant partnership arrangements. It is our view that our principles- and risk-based approach to regulation would align well with the differing approaches of other funder regulators in the UK where they have an interest in the same courses.
401. Before reaching final decisions on policy proposals, we are required to have regard to the principles in the Regulators' Code, including principles that regulators should have 'an understanding of those they regulate that enables them to choose proportionate and effective approaches' and that regulators should choose proportionate approaches to those they regulate, based on relevant factors (including, for example, business size and capacity).<sup>46</sup> In deciding on our approach, both in terms of how it would operate on its own and also how it would operate alongside the activities of other regulators, we have had regard to the principles set out in the Regulators' Code. We recognise that, where a provider offers courses that are

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<sup>46</sup> Regulators' Code, paragraph 1.1 and 1.3 (<https://www.gov.uk/government/publications/regulators-code>).

subject to regulation or oversight by more than one body, it has the potential to increase the level of regulatory burden for that provider. We consider, however, that our proposals are proportionate and risk-based, for the reasons set out at paragraphs 294-299 of the phase one analysis, and that this reduces the potential burden for providers that offer such courses, as opposed to more intrusive systems of regulation such as a process of universal cyclical reviews.

402. As set out in paragraph 300 of our analysis of the phase one consultation, we recognise that regulatory burden can in some ways be greater on small providers due to their smaller staff numbers. We do consider, however, that the flexibility within our approach can provide small providers with opportunities to adopt solutions for the delivery of courses that are right for their size and complexity. Because we do not mandate that a particular approach should be adopted, each provider is able to take an approach that will meet our requirements that best fits its size and context.
403. While one alternative approach would be to establish a different set of conditions for providers based on their size, we do not consider it to be in the interests of students to set different requirements for quality and standards for different types of provider. The conditions are outcomes-based and we think it is reasonable that all providers, regardless of size, should deliver those outcomes – it would be wrong to say that students studying at a small provider should not expect, for example, their course to be up-to-date, or effectively delivered. We consider that all students, regardless of their background and where and how they study, are entitled to the same minimum level of quality and standards. Throughout both consultations, there has been support for this principle.
404. We recognise that all regulation necessarily imposes some regulatory burden on regulated organisations and that any changes to regulation may result in some initial increase in burden as providers seek to understand and comply with new or changed requirements. We monitor the overall regulatory burden on providers and aim to minimise that burden. We took a number of steps in autumn 2020 to reduce the burden on providers, including actions relating to data collection through the Data Futures programme, random sampling, and the National Student Survey. As part of our activity towards our strategic outcome EF3 that ‘regulatory burden for providers is minimised’ we have subsequently introduced an experimental key performance measure (KPM 26) to monitor various aspects of regulatory burden, including in relation to data submissions and the number, word count and readability of OfS regulatory documents. We will continue to consider closely the regulatory burden we impose on all types of provider. We separately consider the potential for increased ‘substantive burdens’ (costs incurred by providers delivering core activities to meet OfS conditions of registration) when we consider the introduction of policy changes, such as those set out in our phase two consultation.
405. In response to points that the proposals would require a proliferation of internal quality arrangements for a provider to ensure that it is compliant with our conditions of registration, in the phase two consultation we proposed an ‘outcomes-focused’ approach (which sets out what is expected of providers relating to quality and standards, while expecting a provider to determine for itself how it wishes to satisfy those requirements). This means that we do not mandate any particular systems or processes that a provider must follow and a provider has very significant latitude to develop internal quality arrangements that meet its needs efficiently and effectively. We would expect high quality providers to take advantage of our approach and to dismantle complex internal processes that may have accreted over many years. Further, we

consider that our proposals provide increased clarity about our minimum requirements for quality and standards, including via the inclusion of detailed but non-binding guidance designed to assist providers in interpreting our requirements. This is designed to reduce the regulatory burden on providers.

406. The Secretary of State has asked us to minimise bureaucracy, while also driving up quality and standards in higher education.<sup>47</sup> As any form of regulation will always impose some burden, our quality and standards proposals inevitably place some burden on providers and reducing that burden too much would mean too little protection for students. Our risk-based approach to regulation, set out in the OfS's regulatory framework, is designed to ensure that there is higher burden on providers that pose the greatest risk to students. Further, as explained at paragraph 404 above, we consider the overall regulatory burden on providers and aim to minimise that burden in a variety of ways.

407. In relation to points that the proposed regulatory requirements could stifle innovation, our proposed conditions are designed to be predominantly principles based – we consider that this gives providers more scope to innovate than if we adopted a more prescriptive, rules-based approach or one that required particular processes to be followed. The responses to both phases of our consultation have highlighted that some providers may not yet feel confident in interpreting the principles, so we intend to publish case studies and regulatory insight reports over time to help providers understand how we have approached decisions about compliance in practice. Our consultation on our strategic plan<sup>48</sup> for the period 2022 to 2025 also proposes that we will consider small scale regulatory 'sandbox' activity for providers wishing to experiment in course design and delivery. This work would be dependent on resources and prioritisation of other work but in the longer term we are keen to support innovation in the sector in this way.

408. We have considered points about the potential burden arising from the complexity involved in navigating the way the conditions are drafted. We recognise that the legal drafting and alphabetical ordering of definitions (which follow standard legal conventions) may make the conditions more difficult to engage with, particularly for certain audiences such as students. This may also have an impact on the time it takes providers to engage with and understand the requirements in the conditions. As set out in paragraph 39, we therefore intend to produce an accessible guide to the conditions to support providers, students and other stakeholders in understanding our regulatory requirements.

409. In relation to points about the status of the illustrative examples in the guidance – we recognise the point made by respondents and it is clear from responses to the consultation that many respondents had interpreted these as rules that must be followed. We were clear in the consultation document, and in the draft guidance, that this is not the case. We reiterate that point here and have further emphasised the status of these illustrative examples within the guidance.

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<sup>47</sup> See the Secretary of State's letter dated 8 February 2021: <https://www.officeforstudents.org.uk/media/48277145-4cf3-497f-b9b7-b13fdf16f46b/ofs-strategic-guidance-20210208.pdf> [PDF].

<sup>48</sup> See [www.officeforstudents.org.uk/publications/consultation-on-ofs-strategy-for-2022-25/](http://www.officeforstudents.org.uk/publications/consultation-on-ofs-strategy-for-2022-25/).

## Other matters relating to courses and online delivery

410. A number of respondents made comments about the types of courses in scope of the proposed quality and standards conditions. A broad comment was made that the inclusion of all higher education courses, including modules that did not form part of a longer course, would lead to regulatory overreach and encroachment into institutional autonomy. A few respondents sought further information about whether short courses, such as those relating to continuing professional development, or non-credit bearing modules, were included in the scope of the conditions. One respondent further suggested that, given the proposals for short courses to be eligible for Lifelong Loan Entitlement, they should be subject to a separate condition of registration so that they could be coherently integrated into the regulatory framework.
411. A few respondents questioned whether the OfS had access to the data needed to be able to monitor short courses or module-level provision effectively and whether there would be a need for further data collections or other information from providers, which could create an additional burden for providers.
412. A small number of respondents discussed online learning and teaching. Some suggested that the OfS needed to develop a deeper understanding of the educational benefits of digital learning and teaching to ensure regulatory requirements were not a barrier to innovation and enhancement. Conversely, it was suggested that, while supporting the development of more flexible models of delivery, there needed to be further exploration of how minimum requirements for quality were maintained for online provision, in particular because online provision cannot fully replicate some elements of face-to-face delivery, such as in-studio provision for practical courses.

## Our response

413. As we set out in paragraph 30 of the phase two consultation document and have already discussed in this analysis of responses at paragraphs 38 and 40, the new conditions will apply to any higher education course (whether that course is eligible to be funded by the OfS or not), at any level, and with any volume of learning. This includes short courses, such as continuing professional development courses and non-credit bearing modules, that are at higher education level if a registered provider is involved in providing the course. Our reason for this is to ensure that all students can benefit from the protection of our quality and standards conditions. We developed the requirements set out in the proposed conditions with the intention that they would be equally applicable to a short course comprised of a single module or element, as to a course comprised of more than one module or element. Our new conditions, coupled with risk-based monitoring using the approach to indicators and other sorts of intelligence set out in the regulatory framework and below in paragraph 415, together form a proportionate approach to the regulation of such courses. In reaching our final decisions about this we have considered how we should balance our duty to have regard for institutional autonomy with our duties to have regard to the need to promote quality and equality of opportunity.
414. We see no reason at this time to set out a separate condition to regulate the quality of short courses, because we are satisfied that the wording of our new conditions and guidance will enable us to regulate short courses effectively (including the forms of delivery set out in the

Government's Lifelong Loan Entitlement). Additionally, imposing a separate condition for the regulation of short courses would simply duplicate the content of the other conditions which would unnecessarily increase the burden on providers.

415. On the data available to us to regulate short or modular courses offered in the UK, the data available to us varies. The data available from the HESA student record on student outcomes for short or modular courses that do not form part of a degree, diploma or other qualification is not as complete as the data currently collected for courses that do. Also, for providers that submit a HESA student record, we do not receive data on non-credit-bearing courses that do not form part of a degree, diploma or other qualification. The data we have on short or modular courses that do not form part of a degree, diploma or other qualification from the individual learner record (ILR) is comparable to that for courses that do. Students who are not studying for a degree, diploma or other qualification are not currently included in the NSS survey population. Where we have less data on short or modular courses, intelligence received from reportable events and third party notifications, in combination with student data where that is available, does however provide sufficient regulatory intelligence for monitoring purposes for these types of courses. Our ability to monitor short or modular courses offered in the UK would be enhanced by improved intelligence on partnership arrangements, which is discussed further below in paragraph 443 and improvement in our monitoring of short or modular courses would be a consideration in defining the scope of a data collection relating to partnership arrangements. The situation with regard to data on short or modular TNE courses is discussed further below in paragraph 431.

416. We have had regard for responses received to this consultation on matters relating to online learning and teaching. As we set out in the phase two consultation document, our intention is to ensure that the same minimum requirements for quality and standards apply to all forms of delivery, including wholly online and blended forms of delivery. Some providers have decided to continue with blended learning following the easing of government restrictions – we expect providers to ensure students receive the kind of face-to-face teaching and experience they would have expected before the pandemic rather than deploying online teaching as a cost reduction measure, and where elements of teaching and learning remain online they must deliver a high quality academic experience for students. On the question of stifling innovation in online delivery, as we have set out elsewhere, our principles-based approach enables providers to meet minimum requirements in innovative ways and imposes no requirements above the minimum for any form of delivery. With reference to the difficulty of reproducing some types of teaching and learning activity in online delivery, we agree and online delivery should not replace face-to-face learning where this cannot deliver a high quality academic experience. The principles-based requirements set out in new conditions B1, B2 and B4, taken in combination, ensure that, whether a provider intends to adopt a traditional or an innovative approach to the delivery of a course, the approach adopted must enable that course to meet or exceed each of those minimum requirements. An innovative solution for course delivery that was not effectively delivered would not meet our minimum requirements.

## **Transnational higher education courses**

417. A number of comments on our proposals related to TNE courses. Some comments focused on matters that we addressed in our analysis of responses to the phase one consultation, including comments that TNE courses are already covered by QAA TNE reviews, that it was not clear what the relationship was between the QAA's reviews and the OfS's proposals, and

that the inclusion of TNE courses within the scope of the proposed conditions disregards institutional autonomy. Our consideration of these points is set out in paragraphs 163-9 of the analysis of responses to the phase one consultation.<sup>49</sup> New matters that were raised in responses to the phase two consultation included:

- A public interest argument could not be made for the proposal to regulate TNE courses because they do not attract student loans or other public funding provided by taxpayers. Some respondents also argued that regulation of TNE courses would not be in line with the Regulators' Code, on the basis that it would not be proportionate. As an alternative it was suggested that the OfS should commit to minimal regulation and basic reporting on TNE courses for providers with a large interest in TNE provision.
- Another alternative suggested was that the OfS could adopt an approach that required upfront accreditation for a provider to operate in a particular country and then require the provider to seek approval to offer individual courses.
- The OfS should recognise other nations' regulatory requirements and contexts in applying the proposed conditions to TNE courses. This should include taking account of what may be relevant to a host nation's students in terms of skills, resources and other relevant matters.
- The proposals would disincentivise existing and new TNE courses because of the complexity involved in applying the OfS's regulatory requirements. Some respondents were of the view that this could stifle innovation and could harm the UK's higher education reputation. Other respondents suggested this would also undermine the UK Government's International Education Strategy and low quality providers in other countries could seek to exploit this in place of English providers if high quality English providers were disincentivised from TNE activity.
- A number of respondents made points about overseas regulators. These included questions about how regulatory action or sanctions might be interpreted by overseas stakeholders and whether this could lead to unintended consequences, such as a disproportionate response by an overseas jurisdiction due to a misunderstanding of the action being taken by OfS, possibly leading to a market exit scenario for English providers. Respondents were therefore of the view that the OfS should consult with international stakeholders in overseas jurisdictions before taking any regulatory action against a provider, to avoid these unintended consequences. Similarly, it was suggested that the proposals could confuse regulators and stakeholders in overseas jurisdictions. For example, one respondent commented that the QAA's role as the DQB in investigating quality matters for the OfS may be confused with the role it also performs as a commercial membership organisation in relation to its quality evaluation and enhancement of UK transnational education (QE-TNE) review. It was suggested that the OfS should not implement regulatory changes until it has relationships in place with international stakeholders.

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<sup>49</sup> See [www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education-analysis-of-responses/](http://www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education-analysis-of-responses/).

418. One respondent took the view that the OfS did not have the expertise necessary to regulate TNE courses given the complexity of this area.
419. Other comments sought further information about how the OfS would collect evidence and information on TNE courses and how judgements would be made about the quality of TNE courses. One respondent sought further information about how the OfS would make decisions about which providers to investigate and penalise in relation to TNE partnership arrangements. Another respondent sought more information about the data that would be collected, as they considered that the data available for TNE courses may not be comparable with data collected for courses delivered in the UK.
420. Some respondents asked the OfS to conduct an impact assessment of the proposals in relation to TNE courses to better understand any impact on providers' appetite and ability to enter into partnerships and the sector's international reputation.

## Our response

421. On the policy reasons for our regulatory interest in TNE courses, and the proportionality of our proposal to regulate TNE in the way described, higher education TNE courses are a substantial English and UK-wide export activity; we consider that it is important that students and other stakeholders, whether in England or elsewhere, can have the same confidence in the minimum requirements for quality and standards of those courses as they can have in courses delivered within the UK. There is a significant risk of reputational damage to English higher education, and the UK's reputation more generally, if TNE courses fall below the equivalent requirements for UK-based courses. We receive third-party notifications relating to matters of potential concern relating to TNE courses offered by English providers. The approach to TNE courses proposed in the phase two consultation, and which we discuss further in this section, will ensure that our regulation of TNE courses is proportionate, set within the particular context of the provision, and minimises regulatory burden for providers that do not represent significant regulatory risk, but equally will ensure that we can investigate and, where we judge appropriate, take action where there are concerns about quality or standards.
422. In accordance with our risk-based approach, we consider that it is in the interests of students and other stakeholders that we can base any regulatory decisions on the nature of regulatory risks which arise, rather than on the scale of a provider's TNE activity. For this reason, we do not consider it appropriate to limit our regulatory interest to large-scale TNE providers, as was suggested by one respondent. In proposing our approach to regulating TNE courses, we have had regard for the principles in the Regulators' Code, including the principle that regulators should base regulatory activities on risk.<sup>50</sup>
423. On the model of provider accreditation and course approval that was suggested by respondents, we note that this kind of approach would run counter to the risk-based approach to regulation that is set out in our regulatory framework, and provisions in HERA which require the OfS to take a risk-based approach to regulation. Further, our view is that the approach we

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<sup>50</sup> See Regulators' Code, section 3, available at <https://www.gov.uk/government/publications/regulators-code>.

have set out in our phase two proposals would provide effective regulatory oversight of TNE courses that fall within the scope of our regulation, without the extensive and ongoing regulatory burden that would fall on providers were this alternative proposal to be adopted.

424. On the suggestion that we should recognise other nations' regulatory requirements and local contexts, as we discussed in our responses to proposal one paragraph 28, the minimum requirements for quality and standards set out in the new conditions are principles-based. We consider that setting out our requirements in a principles-based way provides significant latitude for providers to devise courses that meet the particular needs of different markets, whether within the UK or overseas. We would also recognise the different local contexts in which TNE courses are delivered by taking account of any relevant contextual factors, such as those relating to skills and resources, in making any regulatory decisions in relation to these courses.

425. We do not accept that the implementation of our proposals would disincentivise existing or new TNE activity or stifle innovation. We have not seen evidence of any reduction in the numbers of students on TNE courses since we were established as a regulator, and have set out in paragraphs 341 to 352 above how our risk-based approach to monitoring and intervention, is a proportionate approach.<sup>51</sup> We recognise that if our proposals were to disincentivise providers from offering courses in partnership that met our minimum requirements, this could have a negative impact on student choice. We intend to continue to monitor the data and work with UK stakeholders, including government and sector bodies, to ensure that our approach to the implementation of our regulatory approach is understood. As part of this, as we set out in paragraph 166 of our phase one analysis, we consider that it would be a reassurance to stakeholders that the minimum requirements for English providers are high quality, that those minimum requirements are the same regardless of whether courses are delivered within the UK or as TNE courses, and that those requirements are monitored by the independent statutory regulator for higher education in England. For this reason, we do not consider that the new conditions will undermine the Government's International Education Strategy.

426. On our relationships with stakeholders in overseas jurisdictions, as we noted in our paragraph 167 of our phase one analysis the regulatory framework states that we will take into account any action taken by another regulator to remedy an increased risk or breach of our conditions of registration in determining whether and how we might intervene with a provider. We would be more likely to intervene where an increased risk or a breach is not being remedied by another regulator's actions.<sup>52</sup> This ensures that, in deciding whether to investigate a provider, find a breach of a condition, or take enforcement action in respect of a provider's TNE courses, we would consider the involvement of other organisations with regulatory oversight of that activity. During 2022 we plan to develop and expand our relationships with overseas governments and regulatory bodies to support this approach.

427. We recognise that it will be important to ensure that UK and overseas stakeholders understand our regulatory requirements and approach, and how these relate to TNE courses.

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<sup>51</sup> See HESA data on transnational education (<https://www.hesa.ac.uk/data-and-analysis/students/where-from/transnational>).

<sup>52</sup> See the regulatory framework, paragraph 167 (m).

To this end, we are taking steps to develop relationships with key stakeholders in TNE inside and outside the UK. We are already engaging with UK-based stakeholders, particularly funder regulators in the other UK nations and key UK contacts who are active in TNE. In spring 2022, we intend to begin engaging directly with overseas contacts as well as updating the OfS website to include a section on our approach to the regulation of TNE courses.

428. On the point about confusion over the QAA's role as the DQB in relation to the assessment of TNE courses on behalf of the OfS, and the voluntary commercial membership service it offers through its QE-TNE activity: as we set out in paragraph 168 of the phase one consultation analysis, the QAA's TNE review process is entirely separate from the OfS's regulation, and the outcomes of the QAA's TNE review process have no bearing on our judgement about whether a provider complies with our regulatory requirements. However, we agree with points made by respondents that there is potential for confusion and will continue to ensure the QAA clearly communicates the purpose and status of its voluntary QE-TNE reviews to stakeholders in England and beyond.
429. On points about the OfS's expertise in regulating TNE courses: our approach to the use of gathering information ourselves or asking another appropriate body or individual to do so, (as set out in our proposals and discussed further in our responses to overall comments about the proposed conditions in paragraph 32, would provide us with access to any additional expertise we consider appropriate to inform our regulation of TNE courses.
430. We would use the regulatory intelligence we gather about TNE courses through reportable events, third-party notifications and data from the aggregate offshore record to identify any providers where courses may not be meeting our minimum quality and standards requirements. Although we may engage with a provider at any time when this intelligence signals that there may be cause for concern, we do not intend to make TNE courses a focus of our regulatory activities before May 2023. We do, however, plan to analyse information about TNE courses to explore trends at sector level further. As part of this exercise, we expect to consider whether we can make improvements to the types of regulatory intelligence available about TNE courses.
431. Although sufficient for our immediate needs, the aggregate offshore record is currently not an individualised record and does not include any information about students on courses that do not lead to an award. We set out in paragraph 308 of our consultation on regulating student outcomes that we expect those proposals would at some point require an extension of the data submitted by individual providers.<sup>53</sup> When we consider our data requirements relating to student outcomes for TNE courses further, we will also consider our data needs for monitoring purposes in relation to conditions B1, B2, B4 and B5.
432. In relation to how we will collect information and make judgements in relation to TNE courses, this will be the same as for any other type of course. If we identify a concern that relates to a provider's TNE courses we would gather appropriate information and make an assessment in relation to the requirements set out in the relevant condition(s). Our approach

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<sup>53</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/).

would be consistent with the general approach set out in our response to comments on proposal 4b, set out in paragraphs 341-352.

433. On the suggestion that we should carry out an impact assessment of the proposals as they relate to TNE courses, we have considered all responses to our phase one and phase two proposals which raised points about impacts on TNE activity and set out our responses to the key points in this section and the corresponding section of our phase one analysis.<sup>54</sup> We remain of the view that our proposals will not disincentivise high quality TNE courses. Further, our plans to engage with UK stakeholders and stakeholders in overseas jurisdictions (as set out in paragraphs 426 and 427), and our proportionate approach to information gathering and monitoring (set out in paragraph 430), address concerns raised by respondents about the impact on TNE activity. We have therefore already extensively considered matters relating to our regulation of TNE courses and set out an appropriate approach. We conclude that no further assessment is necessary at this stage.

## Partnership arrangements

434. A number of respondents commented on the fact that the proposed conditions would mean that more than one registered provider could be responsible for compliance in relation to the same course, as set out in the draft guidance. Respondents took the view that this could disincentivise partnership arrangements as they thought that degree awarding bodies would be less likely to maintain partnership arrangements or enter into new ones if they were to be held accountable for compliance with the quality and standards conditions. Respondents were of the view that this would have the unintended consequence of limiting access to higher education, social mobility, innovation, small and specialist provision, and providers without DAPs. Another respondent acknowledged that there were some areas of poor practice and performance in current partnership arrangements which providers need to recognise and address but suggested that the OfS should have prioritised the work it had planned on reviewing the validation system before introducing changes that might disincentivise partnership arrangements.

435. One respondent argued that the proposal to apply the conditions to all partnership arrangements is unnecessary because providers already have their own systems for ensuring comparable quality and standards for courses delivered through partnerships.

436. Some respondents sought more information about the proposals. Similar to the comments made on TNE courses, further information was sought about how the OfS would decide which partner it would investigate, find a breach of a condition against, or take enforcement action against, where a partnership included two or more registered providers. One respondent went further and asked whether it was proportionate and an efficient use of the OfS's resources to investigate and take action against more than one provider in a partnership arrangement.

437. Further information was also sought about whether the OfS's proposals extended to, and what the expectations would be for, specific types of partnership arrangements. These

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<sup>54</sup> See Consultation on regulating quality and standards in higher education: Analysis of responses, paragraphs 159 to 169, at [www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education-analysis-of-responses/](http://www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education-analysis-of-responses/).

included providers that operate postgraduate research split site partnerships and courses leading to awards from bodies regulated by Ofqual (e.g. Awards for Training and Higher Education, OTHM) that are delivered by an unregistered provider but that enable progression to courses validated by a registered provider.

438. One respondent, when commenting on partnerships, proposed that the teaching provider should have responsibility for ensuring that teaching staff hold the requisite teaching qualifications.

439. Similar to comments made in relation to TNE courses, one respondent suggested that the OfS should assess the impact of the proposals on partnership arrangements in relation to providers' appetite to enter into such arrangements.

## Our response

440. On the possibility that our proposals would disincentivise providers from entering into partnership arrangements, we set out our response to similar points in paragraph 156 of our phase one consultation analysis and consider that this same reasoning responds to comments from the phase two consultation.<sup>55</sup>

441. We recognise that measures established by providers themselves are already in place to safeguard quality and standards in courses delivered through partnership arrangements. However, we consider that our risk-based approach to regulation, including the approaches to monitoring, information gathering and investigation we set out in our proposals, provides a proportionate method by which other stakeholders can have direct and independent assurance that minimum requirements for quality and standards are being met for courses offered through partnership arrangements. It also provides a mechanism through which concerns about compliance with those requirements can be effectively assessed and, where appropriate, through which decisions can be made to find a breach of a condition or take enforcement action. We consider this to be an appropriate and proportionate approach, because we routinely receive regulatory intelligence suggesting that there may be concerns about quality or standards in courses delivered through partnership arrangements. We take the view that we should regulate in a way that provides us with the tools we need to ensure that students on such courses are protected from low quality provision.

442. On the approach we would adopt to regulatory action in respect of courses delivered through a partnership arrangement, we are required to have regard to proportionality considerations in any regulatory intervention we make, which means that we would take into account the context of any relevant partnership arrangement before deciding whether to

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<sup>55</sup> 'In so far as our conditions set out baseline requirements for the quality and standards of higher education courses, this would create minimal restriction of competition and choice for students, as providers would still be able to offer higher education courses with quality and standards that are above the baseline required of them. We do not consider that proposals to ensure that courses meet baselines for quality and standards would disincentivise any provider to engage in partnership activity that meets the baseline and we are not aware of this happening in practice. We will continue to monitor student choice, including through the OfS's key performance measure (KPM) 9 (diversity of subject choice by region of domicile). If we were to identify a problem in practice in the future, we would work with the sector to understand what was driving providers' behaviour. We would then look for any steps we could take to support choice for students through partnership activity without compromising baseline quality and standards.'

investigate a provider, find a breach of a condition, or take enforcement action. We would determine how best to gather information from any or all of the registered providers involved in a partnership arrangement. While we do not directly regulate unregistered providers, we do have powers to gather information from them and would be able to use these as appropriate. In making decisions, we will have regard to the need to use the OfS's resources in an efficient, effective and economic way and the principle that regulatory action should be proportionate and targeted (as required by HERA). To take an alternative approach – whereby our regulatory actions were focused only on providers that held a particular role in a particular type of partnership arrangements (for example, as an awarding body, or a delivery provider) and did not consider the roles played by other providers in that partnership – would not allow us the latitude we need regulate in the interests of students.

443. To monitor performance for courses delivered through partnership arrangements more effectively, as we set out in paragraph 224 of our analysis of responses in relation to regulating student outcomes and setting numerical thresholds, we propose to consult on an approach to the collection of core information about partnership arrangements in order to assist us in performing our statutory functions.<sup>56</sup> We expect that this would also assist in our monitoring activities in relation to partnership arrangements.

444. On the scope of our regulation of courses delivered through partnership arrangements, the draft conditions and guidance are clear that the proposed conditions would apply to all of a provider's higher education courses, including courses delivered through partnership arrangements. This includes, for example, where a provider is responsible only for granting awards for students registered with another provider. This means that the conditions would extend to all kinds of partnership arrangements where courses are higher education courses, including partnerships between registered providers and unregistered providers and partnerships involving research students or students spending time away from their main provider studying at other providers, as happens in split site partnerships. We have made some small drafting changes paragraph 2 of the guidance for B1 (and the corresponding paragraphs which are replicated in the guidance for conditions B2, B4 and B5) to be clear that the conditions apply to all types of partnership arrangement. It now reads (changes in italics): *This condition applies to any higher education provided "by, or on behalf of, a provider"*. This includes higher education provided to all of the students who are registered with a registered provider, taught by a registered provider or studying for an award of a registered provider (*or where these services are provided on a registered provider's behalf*). We have also made consequential changes to the guidance for example at paragraph 4 of the condition B1 guidance (and the corresponding guidance for conditions B2, B4 and B5) to be clear that all types of partnership are covered.

445. With reference to requests for information about the application of our proposals to courses leading to qualifications regulated by Ofqual, the conditions apply to 'higher education provided' or 'to be provided', in the case of the initial conditions in any manner or form by, or on behalf of, a provider'. The draft guidance under conditions B1, B2, B4 and B5 sets out that 'Where a provider is not the awarding body for a course, this condition applies to a course the

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<sup>56</sup> See our analysis of responses in relation to regulating student outcomes and setting numerical baselines, paragraph 224, available at [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/student-outcomes/).

provider itself delivers, regardless of the identity of the awarding body, whether or not that awarding body is registered with the OfS, or the nature of any partnership agreement'. Similar wording is included in relation to conditions B7 and B8. This means that the conditions would apply where a registered provider is in partnership with any awarding organisation (including Ofqual) for a course (or an integrated part of a course; see the definition of 'higher education course'), that falls within the scope of the conditions. As we have already set out in paragraph 37 of this analysis, we consider that the OfS has clear legal jurisdiction to regulate any activities of providers that are directly or indirectly connected with higher education and, in any event, consider that our proposals to regulate higher education courses (including integrated parts of courses) which lead to awards regulated by organisations such as Ofqual remains appropriate.

446. On the qualifications of teaching staff, the requirements set out in condition B2, in particular relating to the expertise and experience of staff, would apply to any higher education course, including to a course offered through a partnership arrangement. As set out in paragraph 441, the requirements apply to each provider in a partnership because we consider this offers the most appropriate level of regulatory protection for students. As we set out in paragraph 37 of the phase two consultation document, as with any intervention we would take into account the context of a particular partnership arrangement in our regulatory decisions.

447. On the validation system, we have previously signalled that we would consider further the operation of the validation system in England, including the extent to which we should use the commissioning power given to the OfS by section 50 of HERA. We will revisit the possibility of using our commissioning power but any further activity is subject to decisions about the prioritisation of our resources.

448. On the proposal for an assessment of the impact of our proposals on partnership arrangements, we have considered all responses received which raised points about such impacts in our phase one and phase two proposals. We do not consider that proposals to ensure that courses meet minimum requirements for quality and standards would disincentivise providers from engaging in partnership activity that meets those requirements. We are not aware of this happening in practice, and we have not received any evidence of this in responses to the consultation or through our monitoring activity to date. However, we recognise that if our proposals were to disincentivise providers from offering courses in partnership that met our minimum requirements, this could have a negative impact on students, including underrepresented students and students with protected characteristics. Consequently, as we set out in paragraph 156 of our analysis of responses to the phase one consultation, we will continue to monitor the choices students make about what and where to study, including through the OfS's key performance measure (KPM) 9 (diversity of subject choice by region of domicile).<sup>57</sup> We also note comments made about the regulatory burden of these proposals for providers operating through partnership arrangements. We have set out at some length in this document the reasons why we consider that the requirements proposed are necessary to protect students. We take the view that it is appropriate to focus the attention of all providers in a partnership on any courses that do not meet our minimum requirements and consider that the burden created in doing so is proportionate, for the policy reasons given.

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<sup>57</sup> See [www.officeforstudents.org.uk/about/measures-of-our-success/experience-performance-measures/diversity-of-subject-choice-by-region-of-domicile/](http://www.officeforstudents.org.uk/about/measures-of-our-success/experience-performance-measures/diversity-of-subject-choice-by-region-of-domicile/).

However, we recognise that providers may need to make some adjustments to existing partnership arrangements in order to ensure compliance with our requirements. To afford providers some time for this, the new conditions will not come into force until 1 May 2022 and we do not plan to make the obligations of awarding bodies in partnership arrangements an active focus of our regulatory activities before May 2023. We may, however, still decide to take regulatory action in specific cases, where our intelligence signals that there may be particular cause for concern.

449. Given the above and the further steps we propose to take, we consider that further assessment of the potential impact of the proposals on partnership arrangements is not necessary at this time.

## **Alignment of proposals with approaches across the UK**

450. A number of respondents were of the view that the proposals represented further divergence from the idea of a UK-wide system of assessment of quality and standards. They were of the view that such divergence risked damaging the reputation of the UK higher education system internationally and that the OfS's approach could cause confusion for overseas bodies because its approach differed from the approaches of the other UK nations. A couple of respondents commented that the proposals should be consistent with the work of the UK Standing Committee on Quality Assessment in ensuring that there is coherence across the UK and upholding important perceptions of the UK sector as a whole. One respondent commented on the impact that divergence from the rest of the UK could have on students. They argued that there is significant cross-border flow of students between England and the rest of the UK and suggested that these students may not easily understand the arrangements that underpin their education. They similarly commented that international students may not recognise a distinction between English and other nations' higher education; and that it was important not to damage the reputation of UK higher education.
451. It was also suggested that regulatory action by a funder regulator for one nation of the UK could have implications for providers based in the other UK nations, and the OfS should consult with the other UK funder regulators prior to taking any regulatory action in relation to an individual provider.
452. A number of respondents commented that there was no reference to enhancement of quality within the conditions. They were of the view that this was in contrast to arrangements in the other UK nations which place an emphasis on enhancement in promoting continuous improvement of quality.
453. It was separately suggested that the OfS should consider working with the QAA and the other UK nations so that English providers have access to good practice, as in other UK nations, and to ensure that courses in England are not more heavily regulated compared with courses in other UK nations.
454. Other respondents suggested that the OfS should carry out an impact assessment to ensure that any potential unintended consequences that these proposals may have for the devolved nations are explored.

## Our response

455. Responsibility for higher education in the UK is a devolved matter. Each nation has a different approach to the regulation of higher education that responds to the different statutory and policy contexts of that nation. As the independent regulator in England, the OfS needs to make its own decisions about its approach to the regulation of higher education that are consistent with HERA and then test proposals through consultation.

456. In our analysis of phase one consultation responses we also said that we recognised the continued place of English higher education as one part of a UK-wide sector, and we set out our intention to initiate work to support stakeholders' understanding of the UK-wide model for quality and standards.<sup>58</sup> We have had very positive initial discussions with the other UK funder regulators and are confident that this work will successfully result in a shared account of how quality and standards are regulated in each nation. We agree that the particular arrangements for regulation in place in each of the UK nations need to be clear to students. As we have set out in paragraph 29 of this document, we intend to continue to publish and update information for students about our regulatory approach.

457. We recognise the importance of continuing to work closely with the other UK funder regulators on matters of common interest. With particular reference to the suggestion that we should consult other UK funder regulators on regulatory action we are contemplating in relation to an individual provider, we take the view that we must make all such decisions independently. We would, however, seek information about a provider from other UK funder regulators where we consider that appropriate to inform our regulatory decisions. Our intervention factors mean that we would take account of any action taken by another regulator to remedy an increased risk or breach of our conditions of registration in determining whether and how we might intervene with a provider.

458. In the phase two consultation, we covered proposals relating only to our minimum quality and standards requirements. We are currently consulting on proposals for the TEF and have set out in that consultation its purpose to incentivise improvement and excellence in the student experience and student outcomes.<sup>59</sup> We take the view, therefore, that the regulatory system as a whole for providers in England would result in protection of minimum requirements through the B conditions, and enhancement above those minimum requirements delivered through the TEF. It is therefore not the case that quality enhancement is absent from the OfS's regulatory system.

459. We see no basis for the suggestion that our risk-based regulatory approach, which does not have universal cyclical reviews and which directs regulatory burden where there is most regulatory concern, is likely to lead to heavier regulation compared with other possible

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<sup>58</sup> Phase one consultation analysis, paragraphs 216 and 218: 'we are therefore initiating a strand of work to support stakeholders inside and outside the UK to understand our approach to the regulation of quality and standards and how this fits within a UK-wide model. We will work with sector bodies, UK government, the funder regulators of the devolved administrations, and overseas stakeholders to ensure our approach is understood and that areas of common approach across the UK are clear to those stakeholders.'

<sup>59</sup> See [www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/](http://www.officeforstudents.org.uk/publications/student-outcomes-and-teaching-excellence-consultations/the-tef/).

approaches, including those adopted in other parts of the UK. To the extent there is regulatory burden associated with our approach, we are of the view that this is justified because, as we set out above in paragraph 396, it is in the interests of students that we ensure a minimum level of quality and standards for students whatever, wherever and however they study and regardless of the partnership or funding arrangements that may be in place for a course.

460. On the points about divergence from other UK nations' approaches and the proposal for an impact assessment of our proposals to identify any unintended consequences for other UK nations, we have conducted two phases of consultation in which we have explicitly invited responses about unintended consequences and we have had regard to those responses. We consider that appropriate activity is already underway to set out clearly the different approaches across the UK to ensure these can be described in a coherent way. As we set out in paragraphs 426-427 we are currently working with the funder regulators of the other UK nations to support stakeholder understanding of approaches across the UK and we plan to work with them on other matters of common interest. We therefore consider that further assessment of the potential impact of the proposals on arrangements in the other UK nations is not necessary.

## The UK Quality Code

461. A number of respondents commented on the decision not to include references to the UK Quality Code in the proposals for quality and standards conditions and guidance. Many of these comments repeated points made in response to the phase one consultation that removing the references to the UK Quality Code (which are contained in guidance underpinning the OfS's current quality and standards conditions) would risk undermining the coherence of UK higher education and create further burden for providers and awarding bodies working across the four UK nations, as different requirements would be in place in England compared with the other UK nations.

462. Respondents commenting on this also repeated the view expressed in response to the phase one consultation that it would make quality assessment arrangements in the UK more difficult for international stakeholders to understand, which may harm the UK higher education brand. They suggested that the UK Quality Code is internationally respected, enjoys the confidence of the sector through development with the QAA and covers elements of quality assessment such as externality, partnerships, and student engagement – which in their view were not adequately covered by the OfS's proposals in the phase two consultation. Respondents also suggested that the UK Quality Code demonstrates alignment with European and international expectations for quality assurance. Further, a very small number of respondents disagreed with the OfS's view that not including references to the UK Quality Code provided more clarity for providers.

463. Some respondents suggested that not including references to the UK Quality Code could make it more difficult for new providers to create high quality courses because they will no longer have a template or model to follow for arrangements that extend beyond the OfS's minimum requirements.

464. Some respondents sought further information about how the UK Quality Code and the conditions of registration would interact. They took the view that, without further explanation, providers may adopt their own interpretation which in turn would create unnecessary burden.

There was speculation that this may be most likely in relation to new providers because they are subject to assessment by the DQB during the application process for registration.

465. Some respondents suggested that, if there was to be a shift away from the use of the UK Quality Code, there needed to be a communications plan to UK and international audiences to ensure the OfS's approach was understood.

## **Our response**

466. We set out the full reasoning for our decision not to include references to the UK Quality Code in our phase two proposals in the analysis of responses to the phase one consultation (see paragraphs 203-227).

467. As noted in the phase one analysis, we consider that the removal of references to the UK Quality Code improves the clarity of our regulatory requirements, because we are able to be clear that neither the expectations nor the advice and guidance of the UK Quality Code form part of the OfS's regulatory requirements. Following the UK Quality Code is not necessary to meet the OfS's regulatory requirements and there is no interaction between any aspect of the UK Quality Code and the conditions of registration. We are firmly of the view that providers should take advantage of the significant opportunity this creates to dismantle complex internal processes that may have accreted over many years as a consequence of seeking to comply with the UK Quality Code. We would expect providers' efforts to be focused on delivering high quality courses to students, rather than on maintaining complex assurance and reporting processes that are not required by the OfS.

468. As set out in the analysis of the phase one consultation, providers may still choose to refer to the UK Quality Code if they find it helpful but should be aware that following the Code will not guarantee compliance with the OfS's requirements. In particular, providers should note that there are likely to be some parts of the Code which would lead to practice that we would consider non-compliant with our regulatory requirements.

469. We have considered points about the potential impact of not referring to the UK Quality Code in our regulatory framework and the need for a communications strategy. We have explained in paragraph 427 the work we have started in this area.

## **Use of external review and reference points**

470. Several respondents were of the view that external reviews and reference points, such as external examiners, subject benchmark statements and the ESG, are important for ensuring high quality courses and contribute to the success of UK higher education. There were further comments that externality and peer review are important in protecting institutional autonomy and providing confidence to students and stakeholders about the design, delivery, and enhancement of courses; all of which benefits students. Some respondents were of the view that these were absent from the OfS's proposals and should be included in our conditions and guidance.

471. Several respondents commented that the role of external examiners, which they viewed as an important part of the quality system in England by providing an independent external review, was absent from the proposals. One respondent argued that not referring to the use of

external examiners reduced their role to a voluntary one and would reduce the use of external examiners across the sector. One respondent commented that it was of concern that, under the proposals, external scrutiny or peer review were not set out as requirements for the assessment of research degrees. Some respondents suggested that the OfS should provide more information about the role of external examiners within its proposals.

## Our response

472. On the relationship of our proposals with external reviews and reference points, in line with the OfS's principles-based approach to regulation set out in our regulatory framework, it is for a provider to determine how (if at all) it should make use of external reviews and reference points in order to meet our conditions of registration. For example, a provider may choose to draw on descriptions of quality and standards, such as subject benchmark statements, or systems for assurance, such as external examiners or external assessment of research degrees. In our view, inclusion of specific requirements for these matters would run counter to our principles-based and outcomes-focused approach and could undermine institutional autonomy and stifle innovation. By not referring to external examiners or other reference points in our requirements, we are providing a significant opportunity for high quality providers to dismantle complex internal processes that may have accreted over many years and may have resulted in gold plating of their approaches.

473. We do not accept that our use of expert academic judgement in assessing a provider's compliance with conditions of registration would undermine the use of externality by a provider as part of its processes for quality assurance, as these serve different purposes. Expert academic judgement commissioned by the OfS provides us with evidence we need to make regulatory decisions, whereas a provider's own use of external expertise would be focused on input to its own assurance arrangements.

## Working with PSRBs

474. A number of general points relating to PSRBs made by respondents are discussed in this section.

475. One respondent commented on the importance of cooperation between the OfS and PSRBs in circumstances where the OfS engages with a provider, in particular in contexts where client safety is a concern. Respondents asked how the OfS would draw on PSRBs' subject expertise and how information would be shared between the OfS and PSRBs.

476. Some respondents asked what would happen if a provider was considered compliant by either the OfS or a PSRB but not by the other, in particular where this might relate to professional standards and where a PSRB has statutory responsibilities.

477. There was a request for further discussion and ongoing engagement between the OfS and PSRBs, and for there to be named contacts on each side.

## Our response

478. On the alignment of our regulatory activities with those of PSRBs, we recognise that this is an important area both for PSRBs and for providers. We have set out our views about the

alignment of our requirements with those of PSRBs in our responses to proposal 1 (paragraph 63); our approach to working with PSRBs where appropriate when we assess compliance with initial conditions of registration in proposal 4a (paragraph 307); or when we have compliance concerns about a registered provider in proposal 4b (paragraph 349). We have also responded to comments about the potential for increased regulatory burden where a provider is required to meet our requirements and those of a PSRB (in paragraph 397).

479. We understand why respondents have identified, in particular, points relevant to circumstances in which a PSRB has statutory powers and is responsible for ensuring that the welfare of the public is protected through the regulation of a profession. However, our proposals for regulating quality and standards do not in any way prevent a PSRB from setting requirements that are more specific or that set higher expectations than our minimum requirements.

480. Where our interests overlap with those of a PSRB, we recognise that coordination may be appropriate because both we and the PSRB need to properly and lawfully discharge our own functions. The approach we have set out provides a framework within which we could work cooperatively with a PSRB when appropriate in a way that will best safeguard the interests of students and minimise burden as far as possible for providers. Where appropriate we will engage with the relevant PSRB to share information about regulatory concerns. We would be more likely to intervene where an increased risk or a breach is not being fully remedied by a PSRB's actions. Where the need arises, a PSRB could still take its own action in relation to compliance with any its requirements regardless of whether the matter that concerns the PSRB raises concerns for us.

481. We have established a network with a number of PSRBs and invite others to make contact with us. We plan to work with the network to ensure a shared understand of the OfS's approach and to develop arrangements for coordination where that is appropriate.

## **Students and our proposed approach to quality and standards**

482. Some respondents sought more information about the involvement of students in the development of the OfS's proposals, and in the consultation, and implementation of proposals. One respondent asked whether the OfS student panel has been involved such that it is possible to identify students' input into the final version of the conditions.

483. Another respondent asked how the views of current and former students will inform judgements about a provider's compliance with the conditions as they considered this was absent from the proposals.

## **Our response**

484. On the involvement of students in our policy development and the consultation process, we have actively sought student feedback through both phases of consultation and have valued responses received from student representatives. During the development of our phase two

proposals, we engaged with the OfS Student Panel on issues relating to student involvement in our approach to information gathering.<sup>60</sup>

485. On the role of students in our proposals, we set out explicitly in our proposed guidance that, where we commissioned the DBQ to conduct a visit to a provider, we would normally expect that visit to include meetings with students, as well as staff.<sup>61</sup> In addition, the approach to information gathering and investigation that we set out in the phase two consultation enables students to raise matters of concern with us at any stage through our notifications process, and also enables us to gather information directly from students where that would support our investigation. Gathering information from students, including through our notifications process, informs our regulatory approach and should not be seen as a substitute to access to the complaints scheme operated by the OIA. This important distinction is discussed above in paragraph 350.

## Consultation approach

486. Some respondents made comments relating to the OfS's approach to the phase two consultation. A small number of respondents welcomed the attention paid by the OfS to responses to the phase one consultation and said this provided reassurance that the consultation process was meaningful. However, one respondent disagreed saying that the OfS's response to phase one and approach to phase two suggested that the OfS had not taken a proper assessment of the criticism of the proposals from what the responder described as 'a large proportion of respondents'.

487. Some respondents said that they could not give a view on the proposals in the phase two consultation until proposals on regulating student outcomes through condition B3 have been published, such that they can understand the approach the OfS proposes to take to assessing absolute or benchmarked performance. One respondent suggested that there should be a further opportunity to comment on the totality of the proposals once all consultations had been published.

488. Several respondents commented on the timing of the consultation. Respondents commented that this took place at a time of year when regular governance meetings do not normally take place and new student representatives are not yet in post, which meant responding to the consultation had been more difficult. One respondent commented that the consultation period coincided with providers planning covid-secure teaching and facilities for the new academic year and asked that the timeframes for future consultations should take account of external factors such as these.

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<sup>60</sup> See minutes 18 to 23 of the February 2021 meeting of the OfS Student Panel, available at [www.officeforstudents.org.uk/about/who-we-are/our-student-panel/](http://www.officeforstudents.org.uk/about/who-we-are/our-student-panel/).

<sup>61</sup> See phase two consultation document, paragraph 98, and associated guidance in Annex A (for example, condition B1 guidance, paragraph 15).

## Our response

489. In response to the comment that we have not made a proper assessment of the points made in relation to our phase one proposals from ‘a large proportion of respondents’, we have had proper regard for all responses received to both phases of consultation, and the main points arising from those responses have been summarised and addressed in the phase one analysis, phase two consultation document and in this document. We amended our proposals where we agree with points respondents have made. Where we do not agree with points made, we have explained why.

490. On the timing of our consultations, our phase one consultation was designed to set out background and preliminary policy thinking about the principles that should govern our broad approach to regulating quality and standards. We have ensured that matters relating to the impact of a provider’s compliance history on its eligibility for a TEF award are included in the current TEF consultation.<sup>62</sup> Beyond this, we do not agree that it is necessary for all of our proposals to be consulted on ‘in the round’. With the exception of matters relating to TEF eligibility, the proposals in the phase two consultation form a coherent set of proposals in their own right, and we do not expect that they would be altered by any decisions made subsequently about the approach to be adopted either to the regulation of student outcomes or to the TEF. On the question of overall regulatory burden, which might have some bearing across all three areas, respondents have been able to address this in their responses to each phase of consultation. Further, we also consider that there may be benefits to respondents in phasing these consultations, because this has spread out the work associated with consultation responses.

491. In determining the timing of our consultations, we are mindful of the difficulties for providers, in particular, in responding to consultations at certain times of year. We take this into account not only in deciding when we should open and close our consultations, but also in deciding the length of time for which our consultations remain open. We also give careful consideration to any requests for extensions to consultation deadlines. In determining the timing and arrangements for consultations we have to balance the demands that these place on providers with the interests of students in progressing the development of our regulatory approach where this will provide greater protection or other benefits to students. We consider that the phase two consultation timing afforded sufficient opportunity for consultees to consider and respond to the proposals.

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<sup>62</sup> Namely, proposals for the way in which a provider’s current and previous compliance with the B conditions would be taken into account in determining eligibility to apply for a TEF award, and proposals for the way in which a provider’s current and previous compliance with the B conditions would affect any existing TEF award.

## Equality considerations

492. Respondents were asked to comment on the potential impact of the proposals on individuals based on their protected characteristics. A large number of respondents commented or gave views on equality of opportunity and the potential impact on protected characteristics in their responses to other questions; some of the points arising from those comments are discussed further in this section.
493. There was broad agreement with the principle that all students, irrespective of their background, should be entitled to the same minimum quality and standards when undertaking higher education. Some respondents who commented were of the view that condition B2, and the requirement to support students to ensure success in and beyond higher education, might disincentivise recruitment of students with particular protected characteristics, for example disabled and mature students or students on maternity leave, given that they may have greater support needs. Many respondents who commented referred to 'underrepresented groups' rather than specifically referring to individuals with protected characteristics and commented that if particular groups of students are less likely to progress to successful employment this might disincentivise providers from recruiting them. Respondents suggested this might be particularly the case for students with certain declared ethnicities or disabled students.
494. One respondent said that the proposals were in tension with the OfS's requirements for access and participation plans and, in particular, that there was a tension between addressing grade inflation and addressing differential student outcomes. One respondent considered that some providers might roll-back on commitments in their access and participation plans because of the resources needed to support some students from disadvantaged backgrounds as a result of these proposals.
495. Several respondents also commented that the obligation to require technical proficiency in the use of English language when assessing students (B4.3.c.iii), and references in B1 and B4 guidance to English language proficiency, could result in unfair treatment of, or discrimination in relation to, students with a learning difficulty, for example dyslexia, or other disabled students.
496. A number of respondents suggested that the OfS should undertake an equality impact assessment of the proposals before they were implemented.

## Our response

497. In exercising its functions, the OfS must have due regard for the public sector equality duty (PSED) in the Equality Act 2010. This requires the OfS to have due regard to the need to eliminate unlawful discrimination and other conduct prohibited by the Equality Act 2010, foster good relations between different groups and advance equality of opportunity. We also have a general duty under section 2(1)(e) of HERA to have regard to the need to 'promote equality of opportunity in connection with access to and participation in higher education'.
498. In relation to responses requesting that we conduct an equality impact assessment before implementation of the proposals, we explained in response to the phase one consultation that we keep under review how we embed our equality duties into policy development and policy

implementation to ensure compliance with the PSED, as well as other relevant duties. We have engaged with equality considerations throughout our policy development and decision-making process and, in both phases of consultation, we have explicitly called for responses on the potential impact of these proposals on individuals on the basis of their protected characteristics. Throughout these processes, we have had proper regard to matters within the scope of the PSED and other relevant duties.<sup>63</sup> We have therefore already extensively considered matters relating to those duties.

499. Overall, we have concluded that our policy decisions will have a positive impact on individuals, including those from underrepresented groups and with protected characteristics, because our decisions are designed to ensure that those individuals will receive a higher education that at least meets the minimum requirements for quality and standards that we have proposed. As we set out in paragraph 3 of Annex F of the phase two consultation document, our view is that opportunities for study are not meaningful if students are able to choose, or continue on, low quality courses, because the regulatory system has endorsed such performance. Neither are they meaningful if the awards and qualifications granted are not credible and do not hold their value over time. Many English higher education providers offer high quality courses to students from underrepresented groups and we do not accept that it is necessary to compromise quality and standards to deliver to these groups.<sup>64</sup> This policy view has underpinned our approach to determining the requirements contained in new conditions of registration, including our decision to set requirements relating to the assessment of English language proficiency, which is discussed in greater detail in the section on condition B4 in paragraphs 183 -194. This is also a prominent consideration in our responses in paragraphs relating to condition B2 in paragraphs 117-121.

500. On the point made by some respondents that our proposals (and, in particular, the requirement in condition B2 to support students to ensure success in and beyond higher education) would disincentivise recruitment of students from underrepresented groups (including those with protected characteristics), as we have set out in preceding sections, we cannot see a valid reason why any of our proposals would disincentivise providers from recruiting students to courses that meet or exceed our minimum requirements. Further, as noted above, we take the view that no student from any group should study on a course that does not meet minimum requirements for quality and standards, as such courses would not amount to meaningful student choice, and that it is the role of the regulator to ensure that such courses are not available for students to choose.

501. We will, of course, continue to monitor student choice in the sector. We already publish a range of measures relating to student participation, student attainment and student choice including through our key performance measures (KPMs). Our existing performance measures for 'participation' include the gap in participation between most and least represented groups (KPM1), the gap in participation at higher-tariff providers between the most and least represented groups (KPM2) and the gap in continuation between most and least represented groups (KPM3). Our performance measures for 'experience' include diversity of provider

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<sup>63</sup> See also paragraphs 272-82 of the phase one analysis.

<sup>64</sup> See phase two consultation document, Annex F paragraph 3.

choice within subject (KPM8) and diversity of subject choice by region of domicile (KPM9).<sup>65</sup> These KPMs cover more than 97 per cent of students studying in the UK on courses provided by English providers included in data returns. We also plan to monitor patterns in the location and scale of TNE courses, and student outcomes in relation to TNE courses.

502. On the comments from respondents about the alignment of these proposals with our requirements for access and participation plans, the OfS's approach to regulation promotes equality of opportunity in connection with access to, and participation in, higher education. As we set out in paragraph 5 of Annex F of the phase two consultation document, this means that we are concerned with ensuring that students from underrepresented groups are able to access higher education, and also to succeed on and beyond their courses. Our conditions of registration are designed to ensure that students from all backgrounds are admitted to high quality courses on which they have sufficient resources and support to ensure their success and that the courses are designed, delivered and assessed effectively for those students.
503. Access and participation plans require providers to set clear, outcomes-based targets and the actions they are taking to reduce gaps between different student groups in respect of access to, success within and progression from higher education into employment. Where a provider has an approved access and participation plan, our quality and standards requirements would act in combination with the provisions in that plan to protect the interests of students from underrepresented groups through the access, success and progression phases of their student journey. We do not understand why meeting our proposed minimum requirements for quality and standards would lead to a provider wanting to reduce the commitments it has made in an access and participation plan, but we will not allow a provider to 'roll-back' on commitments it has made in an approved access and participation plan because it considers it difficult to deliver resources and support that are sufficient to ensure its students to succeed in and beyond higher education.
504. On the suggestion that there would be a tension between our proposals to address grade inflation and action taken by providers to address differential outcomes for students with different characteristics, our concern in relation to grade inflation is that classifications are awarded that do not reflect the same level of student achievement that would previously have been the case. As we set out in paragraph 182, we take the view that it is not appropriate for students with particular characteristics to have lower levels of attainment, but it is in the interest of all students that their qualification is credible. There is no tension between these positions.

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<sup>65</sup> See [www.officeforstudents.org.uk/about/measures-of-our-success/](http://www.officeforstudents.org.uk/about/measures-of-our-success/).

# Proposed implementation

## Overview

505. The phase two consultation set out our intention, subject to the consideration of consultation responses, to decide whether to impose new conditions of registration and revise the regulatory framework – with an intention that if new conditions were imposed they would come into force on the date of the publication of the outcomes from the consultation. We stated our intention that new ongoing conditions would come into effect for registered providers on the date of publication of that decision. The new initial conditions of registration would come into effect for any provider applying for registration on or after the date of publication of that decision.
506. The consultation asked for views about our proposed approach to implementation.
507. A very small number of respondents agreed that the timely implementation of the proposals was essential and that the need to safeguard the interests of students should outweigh any other considerations.
508. However, many respondents commented on the potential timeline for implementation of these proposals and suggested that the impact of the pandemic is still being felt by providers and that it may be unwise to implement changes in these circumstances. In addition, overwhelmingly, respondents asked for sufficient notice to be given before implementation, with many suggesting implementation of new conditions from the start of the 2022-23 academic year.

## Impact of the pandemic

509. Some respondents were of the view that a delay in implementation was desirable because of the continued uncertainty created by the pandemic both within the UK and globally. Respondents suggested that a delay would allow providers to manage and respond to the effects of the pandemic without distraction or additional burden.
510. One respondent expressed concern about investigations and enforcement of conditions that were not in place during the last two academic years, and which contain subject matter that is relevant to the impact of the pandemic. Another respondent commented that caution should be applied to considering data related to this period, such as changes to delivery models and changes in student satisfaction rates, as many decisions and factors have been outside of a provider's control and it has been necessary to follow public health advice.

## Timeline for implementation

511. A significant number of respondents suggested that the OfS's decisions following its consideration of responses to the phase two consultation should be published as soon as possible but any new requirements should not be implemented immediately. Respondents were of the view that it would be inappropriate to impose conditions which may lead to substantive changes for a provider part way through an academic year, particularly as they were of the view that this could lead to significant changes in how students were expecting to be taught and assessed, with subsequent implications for compliance with consumer

protection law. Respondents suggested that time was needed between any decision to impose new conditions and the point at which requirements would take effect to allow providers to make any changes needed to comply.

512. Many respondents suggested that implementation from the start of the 2022-23 academic year, at the earliest, would allow time for providers to understand any implications for their compliance and to make any necessary changes, particularly in response to the requirements in proposed condition B2. It would also allow time for a provider to engage with its students, to communicate with any partners in the UK or overseas, and to make any necessary changes to the reporting arrangements for governing bodies.
513. The need to protect the interests of students was welcomed by many respondents but they suggested an alternative approach which would be to engage with providers where significant quality and standards concerns exist, ahead of full implementation of new requirements. Respondents suggested that significant quality concerns are not likely to exist in large parts of the sector and therefore a slight delay in implementing these proposals would not make any difference to the majority of students.
514. Respondents suggested that a delay in implementation would also allow alignment with the consultations relating to the regulation of student outcomes and the TEF. They suggested this would provide an opportunity for providers to consider the consultations as a whole and it would also allow time for further information to be provided on the Skills and Post-16 Education Bill and the Lifelong Loan Entitlement.
515. Some respondents suggested it would be better to implement changes from all three consultations together as this would give providers time to plan and reduce regulatory burden, particularly for small providers, during very busy periods.

## Other comments

516. Some respondents considered further information was needed before implementation. Respondents requested information about when monitoring activity may begin and how the proposals, particularly in relation to the proposal to impose conditions B1, B2, B4 and B5, would be implemented in practice.
517. A small number of respondents commented that the OfS should take into account the size and resources of a provider during implementation, ensuring requests made of providers and associated activity are proportionate and appropriate for a provider's context. In particular, respondents noted that further education colleges and smaller specialist providers have fewer staff and resources compared to universities.

## Our response

518. We reduced our regulatory requirements at the start of the pandemic to avoid placing unnecessary burden on providers as they worked to minimise the impact of the pandemic on their students and staff. We recognise that there is still uncertainty about the ongoing impact of the pandemic and that new variants and increases in case numbers may lead to further restrictions with changes in teaching and assessment necessary to meet government guidance. However, providers have adapted through two national lockdowns and should now

have well established plans to manage any further changes that may be necessary. We will continue to take the context of the pandemic into account in our monitoring activity and as we investigate concerns about quality and standards, but we cannot operate with a reduced set of regulatory requirements indefinitely – to do so would fail to protect the interests of students. Students have faced significant disruption due to the pandemic, as a result of which changes to their courses were likely to have been necessary to meet government guidance. With students continuing to pay substantial fees for courses, providers must ensure they are delivering a high quality academic experience. It is more important now than it has ever been that we are able to act in the interests of students where quality does not meet minimum requirements.

519. We have considered comments in relation to implementation and concerns about introducing changes part way through an academic year. We consider that the conditions we have decided to impose cover the same broad subject areas as the previous conditions and responses to the consultation suggested that the requirements were reasonable and were also things that providers would already be delivering. We think it is in the interests of students to impose conditions that bring clarity and enable us to take action where that is appropriate as soon as possible. We acknowledge that the additional clarity in the definitions and scope of the conditions may mean that some providers need to make changes, because they had previously not understood the scope of the OfS's regulation for all types of courses, and so our approach to any investigations will take account of the impact of the timing of the implementation.

520. Our approach will be that new ongoing conditions of registration B1, B2, B4 and B5 will come into effect from 1 May 2022 and our general monitoring of compliance with these new conditions will start at this point. We intend, each year, to pick a number of themes for potential investigation and we would not actively investigate TNE courses or the obligations of awarding bodies for courses delivered under partnership arrangements until May 2023. We would not seek to actively investigate assessment of English language proficiency until October 2022. This will allow providers time to review their practices and take any necessary actions to ensure compliance. As the new conditions will be in place from 1 May 2022, we would be able to take enforcement action if there was evidence of a significant concern in any of these areas. However, as set out in the intervention factors in paragraph 167 of the regulatory framework, the extent to which a provider is aware of an issue and the actions it is taking to address it are factors that we would take into account in considering any enforcement action. New initial conditions B7 and B8 will apply to registration applications made on or after 1 May 2022. Transitional arrangements will apply to applications which are live at any time between 1 March 2022 and 30 April 2022, as set out in the Notice we have published alongside this document.<sup>66</sup>

521. Before May 2023, any findings following an investigation of a concern about quality or standards would be likely to take into account the opportunity a provider has had to identify and address any issues before the OfS's investigation of the matter. This would mean that we would be likely to consider the imposition of one or more specific conditions of registration to require any necessary improvement rather than taking more significant enforcement action.

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<sup>66</sup> 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/).

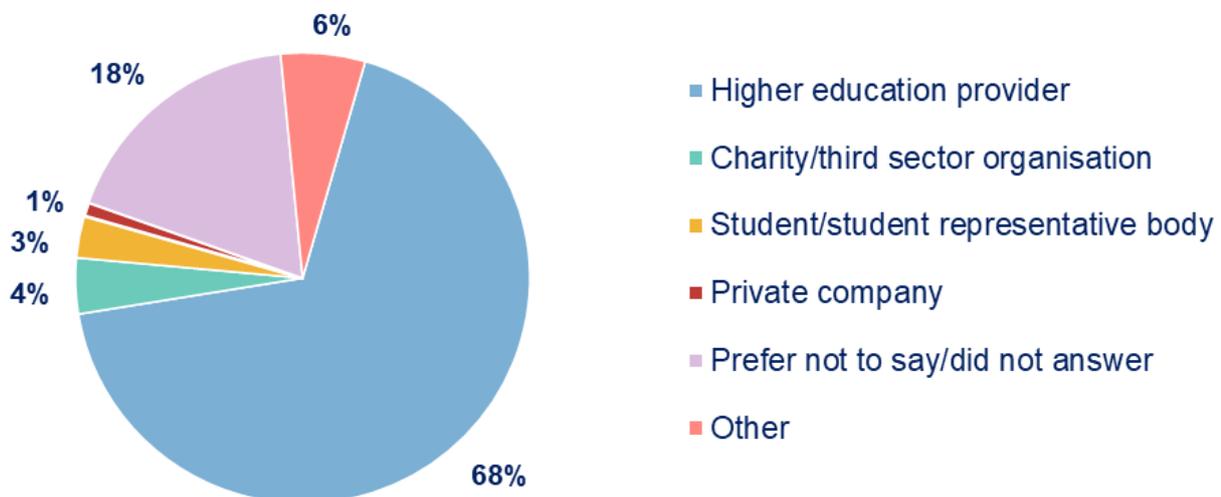
We will, however, consider the use of the full range of our enforcement powers where we identify significant concerns about quality or standards, including where a provider could have reasonably expected to be compliant because of the requirements contained in previous conditions (for example, if students are not provided with appropriate resources and support, this could amount to a breach of both the old and new version of condition B2). We consider that this is an appropriate and proportionate way to balance the need to regulate to protect students and the impact on providers of the timing of implementation, including any implications for compliance with consumer protection law (as explained in paragraph 65).

522. In relation to comments about alignment with the TEF, we consider that there is considerable benefit for providers in having certainty about the minimum requirements for quality and standards ahead of any decisions about future approaches to incentivising excellence above those minimum requirements. Providers will be able to respond to the TEF consultation knowing what the minimum requirements for quality and standards are. We consider that this is important for understanding the way our overall approach to quality and standards is intended to work, including the regulation of student outcomes through condition B3. We take the view that a delay to implementation would not provide any greater understanding of our full approach to quality and standards.
523. As set out in the phase two consultation, we drafted the conditions to apply to all courses including modules and short courses. Given uncertainty about the timing of the implementation of the Skills and Post-16 Education Bill and Lifelong Loan Entitlement, we do not consider, as an independent regulator, that we should delay implementation of the changes we have decided are necessary until further information about the legislative process is available.
524. Staggering publication of our consultations and their implementation was, in part, a response to considerable feedback from the phase one consultation about the burden on providers, particularly smaller providers, of considering multiple consultations at the same time and then ensuring compliance with any revised requirements. Therefore, while some respondents suggested a delay might reduce burden, our view is that, on balance, a staged approach is likely to be more manageable for providers.

## Annex A: Quantitative analysis of responses

1. This section contains quantitative analysis of some responses to the phase two consultation, for additional context. Note that where the charts in this section refer to numbers in percentages, these have been rounded to the nearest percentage.
2. Of the 157<sup>67</sup> responses received, 129 indicated their respondent type. 120 responses were collective, most of which were submitted on behalf of higher education providers, sector and student bodies, and charity or third sector organisations. Eleven responses were made by individuals, most of whom were employees in the higher education sector or students. Twenty-six respondents did not indicate whether they were responding on a collective or individual basis. The breakdown of responses by respondent type is shown in Figure 1.<sup>68</sup>

**Figure 1: Breakdown of responses by respondent type**



<sup>67</sup> Figures exclude any blank or duplicate responses.

<sup>68</sup> Based on the category chosen by the respondent using the options provided by the OfS. Where respondents gave their own free-text description, this has been recorded as 'other'. Where respondents did not specify – including because they submitted their response via email – this has been recorded as 'prefer not to say/did not answer'.

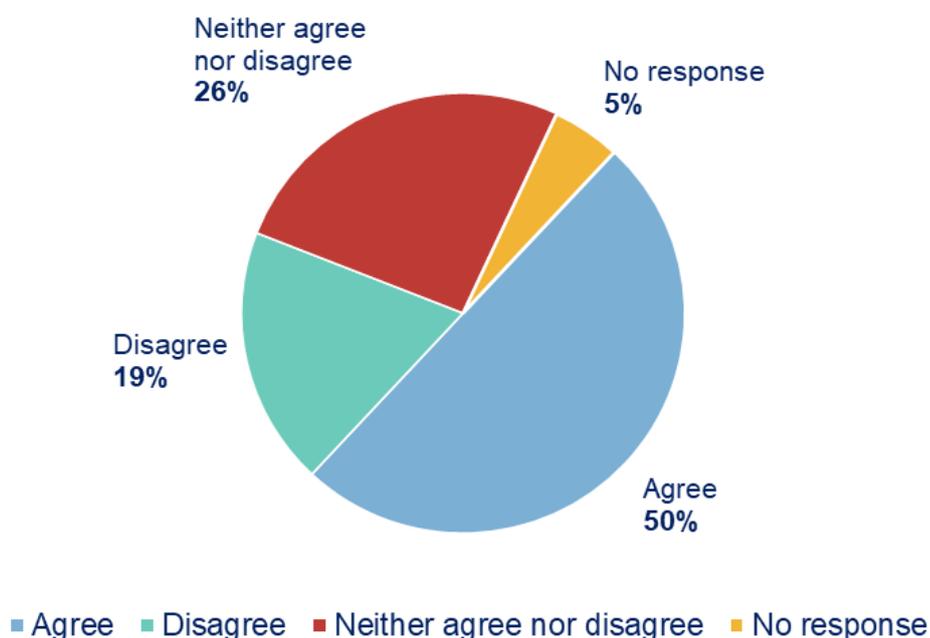
## Proposal 1

- For proposal 1, the consultation asked three questions that invited respondents to 'agree' or 'disagree' with the proposals.
- Question 1a asked:

**Do you agree or disagree with the proposed introduction of ongoing condition B1 and associated changes to the OfS's regulatory framework as set out in Annex A?**

Respondents either answered 'agree', 'disagree', 'neither agree nor disagree', or did not give an answer. Of the 149 respondents that answered, 79 agreed, 41 neither agreed nor disagreed and 29 disagreed with the proposal (see Figure 2).<sup>69</sup>

**Figure 2: Proportion of respondents who agreed or disagreed with question 1a**



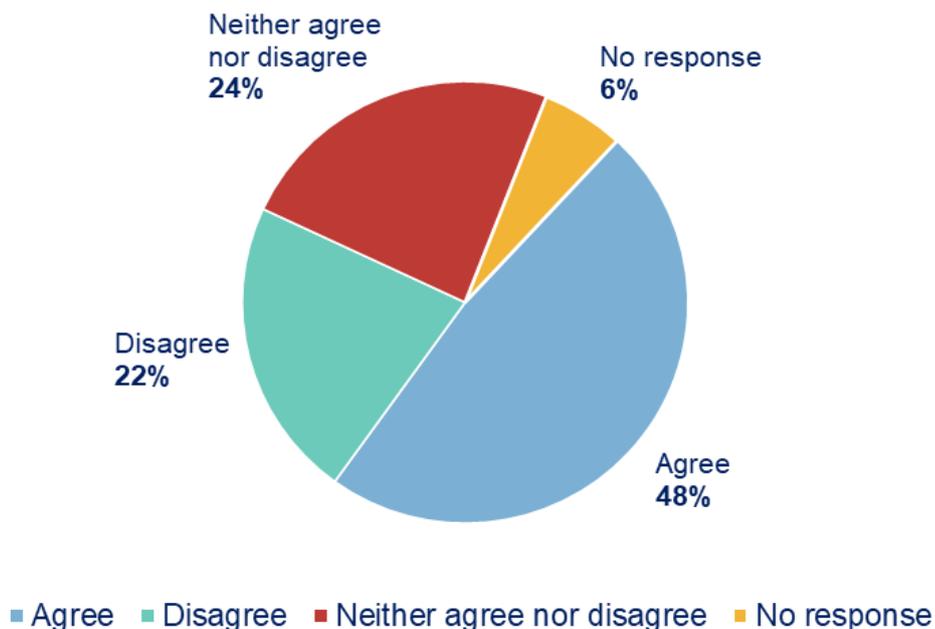
<sup>69</sup> These tables included responses received by email as well as through the online survey tool. Where a response was not supplied to a question by either route it is recorded as 'no response'.

5. Question 2a asked:

**Do you agree or disagree with the proposed introduction of ongoing condition B2 and associated changes to the OfS’s regulatory framework as set out in Annex A?**

Respondents either answered ‘agree’, ‘disagree’, ‘neither agree nor disagree’, or did not give an answer. Of the 148 respondents that answered, 75 agreed, 38 neither agreed nor disagreed and 35 disagreed with the proposal (see Figure 3).

**Figure 3: Proportion of respondents who agreed or disagreed with question 2a**

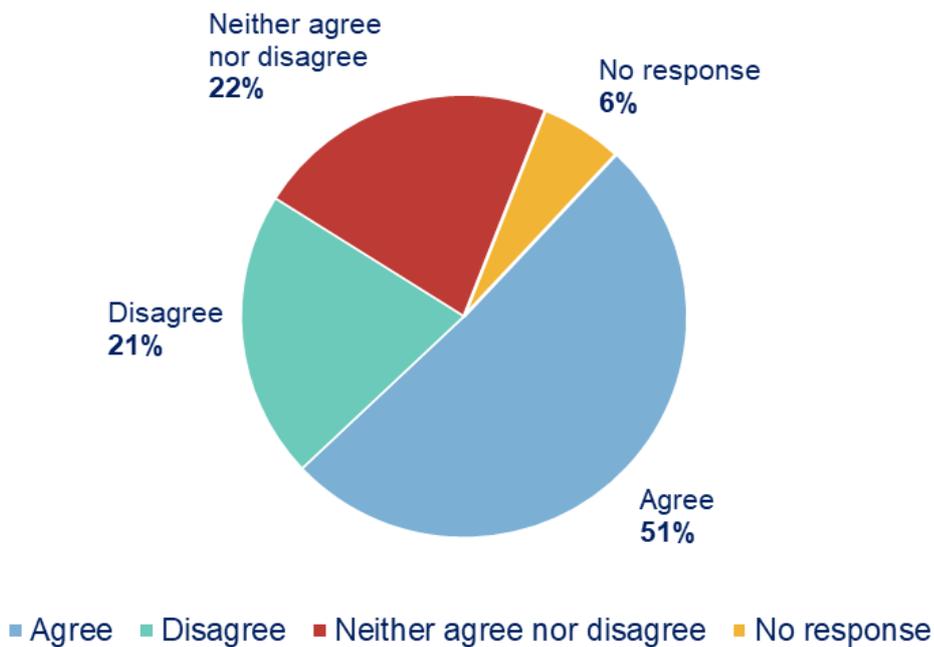


6. Question 3a asked:

**Do you agree or disagree with the proposed introduction of ongoing condition B4 and associated changes to the OfS’s regulatory framework as set out in Annex A?**

Respondents either answered ‘agree’, ‘disagree’, ‘neither agree nor disagree’, or did not give an answer. Of the 148 respondents that answered, 81 agreed, 34 neither agreed nor disagreed and 33 disagreed with the proposal (see Figure 4).

**Figure 4: Proportion of respondents who agreed or disagreed with question 3a**



## Proposal 2

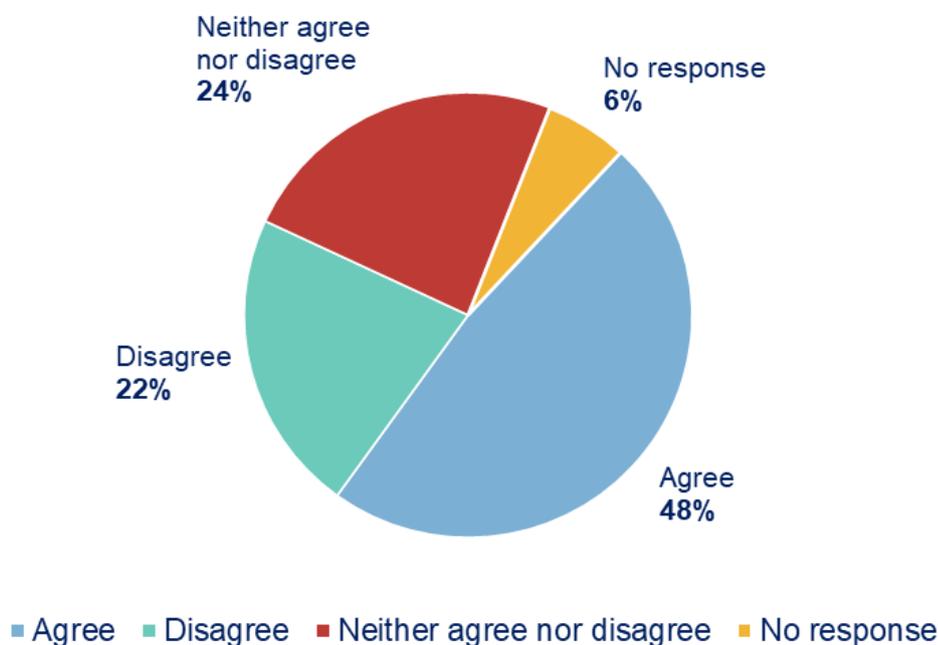
7. For proposal 2, the consultation asked one question that invited respondents to 'agree' or 'disagree' with the proposal.

8. Question 4a asked:

**Do you agree or disagree with the proposed introduction of ongoing condition B5 and associated changes to the OfS's regulatory framework as set out in Annex B?**

Respondents either answered 'agree'<sup>70</sup>, 'disagree', 'neither agree nor disagree', or did not give an answer. Of the 148 respondents that answered, 76 agreed, 37 neither agreed nor disagreed and 35 disagreed with the proposal (see Figure 5).

**Figure 5: Proportion of respondents who agreed or disagreed with question 4a**



<sup>70</sup> This figure includes one respondent that agreed in principle.

## Proposal 3

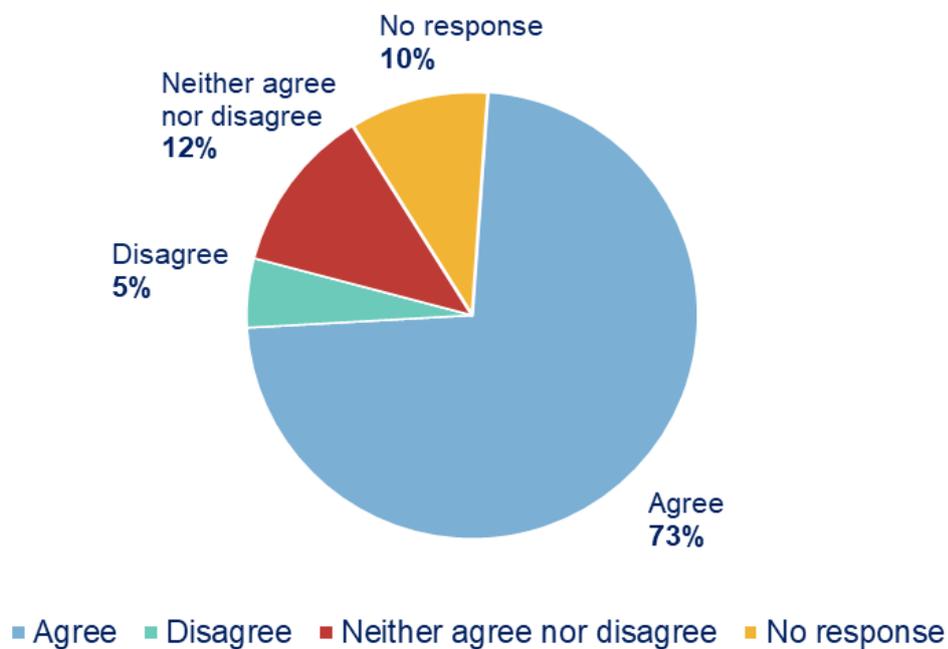
9. For proposal 3, the consultation asked two questions that invited respondents to 'agree' or 'disagree' with the proposals.

10. Question 5a asked:

**Do you agree or disagree with the proposed introduction of initial condition B7 and associated changes to the OfS's regulatory framework as set out in Annex C?**

Respondents either answered 'agree', 'disagree', 'neither agree nor disagree', or did not give an answer. Of the 141 respondents that answered, 115 agreed, 18 neither agreed nor disagreed and 8 disagreed with the proposal (see Figure 6).

**Figure 6: Proportion of respondents who agreed or disagreed with question 5a**

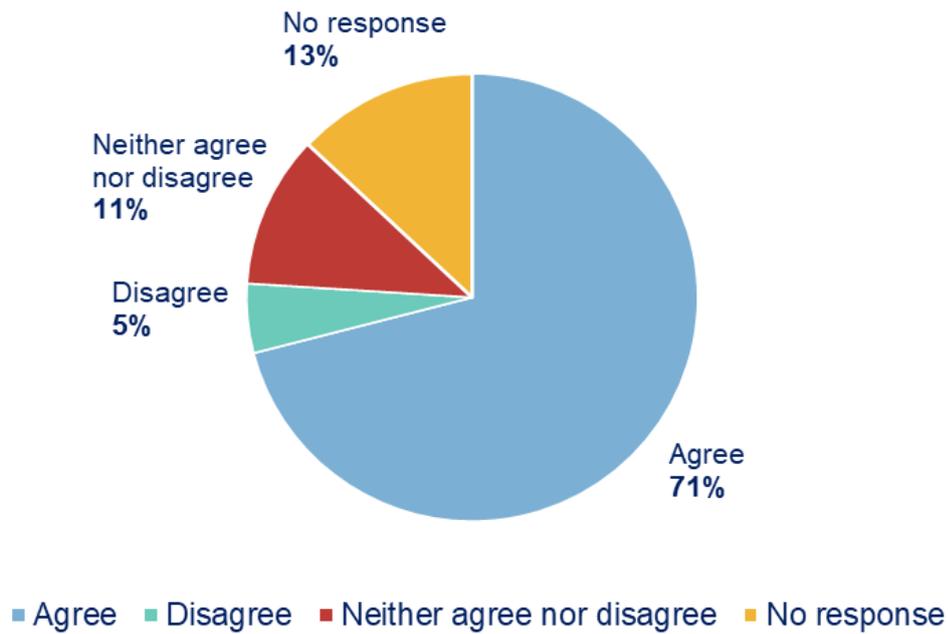


11. Question 6a asked:

**Do you agree or disagree with the proposed introduction of initial condition B8 and associated changes to the OfS’s regulatory framework as set out in Annex C?**

Respondents either answered ‘agree’, ‘disagree’, ‘neither agree nor disagree’, or did not give an answer. Of the 136 respondents that answered, 111 agreed, 17 neither agreed nor disagreed and 8 disagreed with the proposal (see Figure 7).

**Figure 7: Proportion of respondents who agreed or disagreed with question 6a**



## Proposals 4a, 4b and 4c

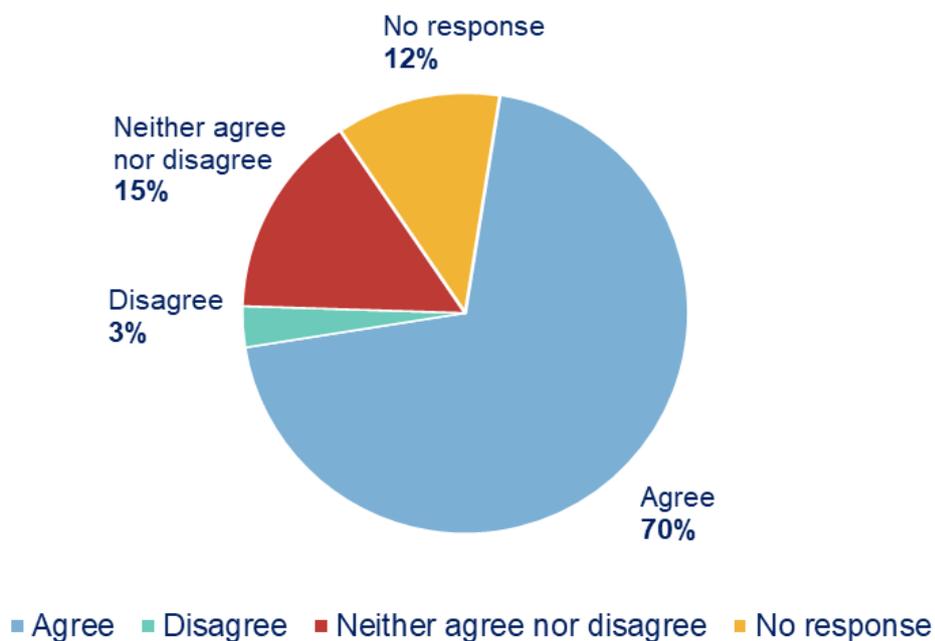
12. For proposals 4(a-c), the consultation asked three questions that invited respondents to 'agree' or 'disagree' with the proposals.

13. Question 7a (proposal 4a) asked:

**Do you agree or disagree with the approach to information gathering and assessment proposed in paragraphs 85-90 above [of the consultation document] and as set out in the proposed guidance for initial conditions B7 and B8 in Annex C?**

Respondents either answered 'agree', 'disagree', 'neither agree nor disagree', or did not give an answer. Of the 139 respondents that answered, 110 agreed, 24 neither agreed nor disagreed and 5 disagreed with the proposal (see Figure 8).

**Figure 8: Proportion of respondents who agreed or disagreed with question 7a**

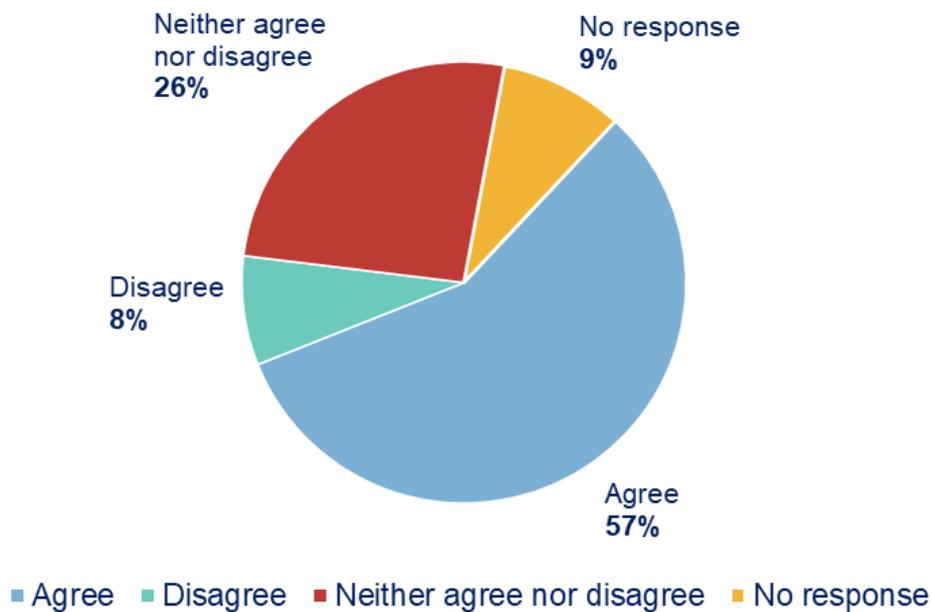


14. Question 8a (proposal 4b) asked:

**Do you agree or disagree with the approach to information gathering as part of an investigation proposed in paragraphs 91-98 above [of the consultation document] and as set out in the proposed guidance for conditions B1, B2, B4 and B5 in Annexes A and B?**

Respondents either answered 'agree', 'disagree', 'neither agree nor disagree'<sup>71</sup>, or did not give an answer. Of the 142 respondents that answered, 89 agreed, 41 neither agreed nor disagreed and 12 disagreed with the proposal (see Figure 9).

**Figure 9: Proportion of respondents who agreed or disagreed with question 8a**



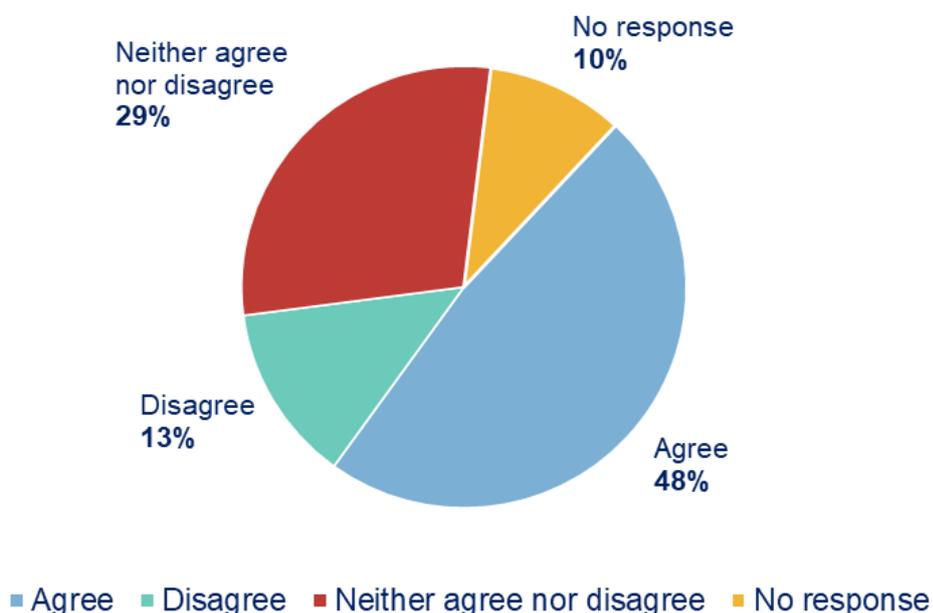
<sup>71</sup> This figure includes one respondent that agreed and disagreed with different aspects of the approach.

15. Question 9a (proposal 4c) asked:

**Do you agree or disagree with the approach to taking account of a provider’s compliance history for the purpose of determining eligibility for other benefits of OfS registration proposed in paragraphs 103-126 above [of the consultation document] and as set out in the proposed guidance for conditions B1, B2, B4 and B5 in Annexes A and B?**

Respondents either answered ‘agree’, ‘disagree’, ‘neither agree nor disagree’, or did not give an answer. Of the 141 respondents that answered, 76 agreed<sup>72</sup>, 45 neither agreed nor disagreed and 20 disagreed with the proposal (see Figure 10).

**Figure 10: Proportion of respondents who agreed or disagreed with question 9a**



<sup>72</sup> This figure includes one respondent that agreed in principle.

## Proposal 5

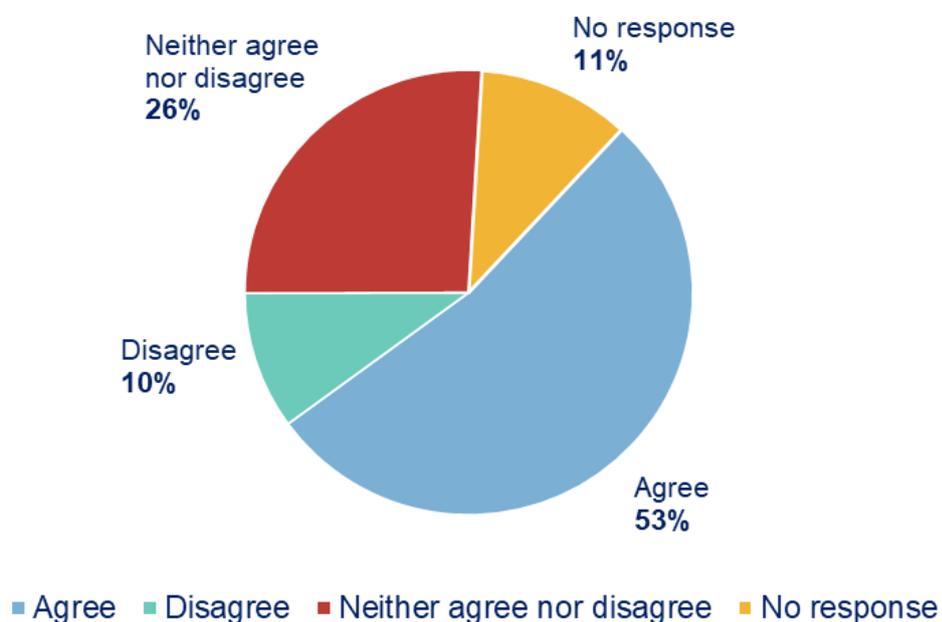
16. For proposal 5, the consultation asked one question that invited respondents to 'agree' or 'disagree' with the proposal.

17. Question 10a asked:

**Do you agree or disagree that the OfS should use its role as EQA [External Quality Assurance] provider to inform assessments of condition B4?**

Respondents either answered 'agree', 'disagree', 'neither agree nor disagree', or did not give an answer. Of the 140 respondents that answered, 84 agreed, 41 neither agreed nor disagreed and 15 disagreed with the proposal (see Figure 11).

**Figure 11: Proportion of respondents who agreed or disagreed with question 10a**



## Abbreviations used in this document

Abbreviation	Meaning
DAPs	degree awarding powers
DQB	designated quality body
EQA	external quality assurance
ESG	European Standards and Guidelines
ESFA	Education and Skills Funding Agency
FHEQ	Frameworks for Higher Education Qualifications
HERA	HERA Higher Education and Research Act 2017
HESA	Higher Education Statistics Agency
HTQs	higher technical qualifications
IfATE	Institute for Apprenticeships and Technical Education
KPM	key performance measure
NSS	National Student Survey
OIA	Office of the Independent Adjudicator
OfS	Office for Students
PSED	Public sector equality duty
PSRB	professional statutory and regulatory body
QAA	Quality Assurance Agency for Higher Education
QE-TNE	quality evaluation and enhancement of UK transnational education
TEF	Teaching Excellence Framework
TNE	transnational education
UKSCQA	UK Standing Committee for Quality Assessment



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