

The logo for Which?, featuring the word "Which?" in white text on a red square background.

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Response by: Which?

Consultation response

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Department for Education on the regulatory framework for the Office for Students - Securing student success: risk-based regulation for teaching excellence, social mobility and informed choice in higher education

About Which?

Which? is the largest consumer organisation in the UK with more than 1.7 million members and supporters. We operate as an independent, a-political, social enterprise working for all consumers and funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

Summary

1. Which? welcomes the reform of the regulation and oversight of the higher education sector through the establishment of the new regulator, the Office for Students (OfS). These reforms have the potential to help to address many of the key issues in the higher education sector. We are in broad agreement with the approach adopted in the Government's proposed regulatory framework.
2. It is right to focus the OfS's objectives on students, but we are concerned that these objectives may conflict with the body's statutory duties. The Government should make clear that in its interpretation of the OfS's general statutory duties that its primary role is to further the interests of students.

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3. Which? believes there are five key principles that should guide creation of the OfS and its regulatory framework:
 - Its primary aim should be to serve students;
 - As a market regulator, the OfS should have sufficient powers to meet its duty to students;
 - The OfS should be independent from government and higher education providers, setting its own priorities;
 - It should develop a meaningful set of measures to determine value for money; and
 - There should be meaningful engagement with students, with the OfS ensuring they are represented in the decision-making processes.
4. We share the Government's aim to encourage new higher education providers into the higher education sector. However, encouraging new entrants must be balanced against the need to safeguard students. As such, we have some concerns that the proposed lowest level of regulation – registered basic – will not sufficiently protect students.
5. We welcome proposals for student engagement such as a student representative on the OfS's board and a student panel. However, the regulator should ensure that the views and experiences across the student body are represented and that its decision-making processes and proposed interventions are tested and challenged. It should also work to ensure that students understand their rights. Therefore the OfS should proactively engage students using a broader range of methods.
6. Students should have access to clear and fair complaint handling processes within higher education providers, as well as routes to independent redress where complaints are not resolved satisfactorily. As such, we support proposals to require all registered providers to provide access to the Office for the Independent Adjudicator's (OIA) independent student complaints scheme; the OfS should also require all registered providers to adhere to the OIA's good practice framework for complaints handling.
7. Due to a power imbalance between students and providers, it must be acknowledged that barriers may still exist which prevent students from raising concerns or reporting when they have experienced a problem. Moreover, some issues will be widespread across the sector but not necessarily easy to identify for individuals. The Government should therefore grant the OfS the power to accept super-complaints from designated consumer bodies to complain on behalf of the student body.
8. The OfS should use its powers through the specific conditions to employ a broader range of sanctions, including formal routes to 'name and shame' providers that fail to comply with their regulatory duties. This will help combat minor offences and provide strong incentives to improve behaviour quickly.

9. The OfS should have concurrent powers with the CMA, and other market regulators, to take on targeted enforcement cases. Poor provider behaviour should not be allowed to become systemic problems before action is taken, and students should not be expected to take private actions in order to gain redress under consumer protection legislation. Due to its wider regulatory role, the OfS would likely be able to spot enforcement issues more quickly using its sector expertise and through regular monitoring than the current regime allows. This is also likely to be a more appropriate and proportionate route to resolving breaches of consumer law rather than suspending or deregistering providers.
10. Our 2015 investigations found that many higher education providers included unfair terms and conditions in their contracts with students. Therefore we support the proposal to develop model contracts to help providers comply with their obligations under consumer law, which the OfS should work with the CMA to develop.
11. We strongly support the proposals to improve student protections through student protection plans in the event of market exit, publishing plans for student transfer arrangements and improving conditions to enable greater switching. However, these requirements should be extended to all registered providers including registered basic providers.
12. Availability of better information will not necessarily lead to better outcomes for students in their choice of subjects and providers, but it can help some students to make better decisions, including on value for money. It can also help to ensure providers focus on the issues that matter most to students. Therefore, the OfS should use its powers to ensure that data is collected, standardised, freely available, and accessible; as well as developing a meaningful set of measures of value for money at a subject level.

Introduction

13. Higher education is not a traditional consumer market. For example, students play an important role in creating the value of a university education, including being responsible for self-study as part of their courses. However, the regulatory system must change to reflect how the market for higher education has evolved. The current regulatory system was designed for a more homogenous sector and one in which students shouldered less of the financial cost. The new regulatory system must be fit for purpose to effectively protect students.
14. Ensuring students get value for money is a crucially important part of these reforms. The financial cost of university means that making the right choice has taken on much greater importance than for previous generations of students. Without reform, it will be increasingly difficult to guard against students' feeling that they have had a poor value experience which risks undermining the reputation of the sector.



15. The higher education sector needs a strong, student-focused regulator. We broadly support the government's proposed regulatory framework. It is rightly focused on improving outcomes for students – past, present and future. By moving to a single register of higher education providers, with risk-based monitoring of individual providers, the new single regulator can help to protect students and tackle issues across the sector. Through its market shaping role, the OfS can also help to foster greater competition and innovation, and help prospective students to make more informed choices that lead to better outcomes.

Strengthening the OfS's general duties for students

16. The Government is right to focus the OfS's objectives on students, and we broadly support these four objectives. However, unlike some other market regulators the OfS's statutory duties are not solely focused on consumers. A 2007 House of Lords inquiry into UK economic regulators found that a clear remit for economic regulators – including fewer duties and the clear identification of primary duty(ies) – brings benefits. It also concluded that the rail sector suffers from a lack of focus in the statutory duties of The Office for Road and Rail (ORR): 'In taking its decisions, ORR has to reconcile a raft of statutory duties which do not have a hierarchy of priority and may pull in different directions.' The OfS risks running into the same problems as ORR because the OfS's duties are not solely focused on students.
17. Some other regulators have a clearer focus on consumers that can help to avoid some of these issues. For example, the FCA has an unambiguous remit to protect consumers. Ofcom has a clear consumer-focused duty, along with a requirement to take account of the opinions of consumers. The Government should make clear that in its interpretation of the OfS's general statutory duties its primary role is to further the interests of students, and that its duty to promote competition is to further the interests of students first and foremost.

Ensuring meaningful engagement with students

18. For the OfS to improve outcomes for students, the views and experiences of students must be represented. Its decision-making processes and the regulator's proposed interventions should be tested and challenged and it should also work to ensure that students understand their rights. When we asked members of the general public whether they had heard of a series of regulatory bodies only 17% and 24% said that they knew what the OIA and the Quality Assurance Agency respectively were. This contrasts with 74% for Ofsted and 86% for the Financial Service Ombudsman.¹

¹ Which? (2014), *A degree of value*

19. Some of this relates to the different level of detriment in these markets and the size of the population who might need to access these providers. Nevertheless it suggests that some parts of the higher education regulatory system suffer from low awareness rates. This means that students are less likely to know how to find out about and exercise their rights and so are less likely to obtain redress when things go wrong. We therefore welcome the proposals to include a student representative on the board of the OfS and for a student panel to input into the OfS's governance structure. These are important first steps to ensuring a proper student voice at the heart of the OfS. They should help the OfS to act in the student interest and that it raises awareness of how students can exercise their rights.
20. However, on their own these two measures are not sufficient to engage students and to understand the breadth of views and experiences of students across a diverse market. The OfS should set out a deep and wide-ranging programme of student engagement to directly understand their views and experiences, and to inform students about the role of the OfS and other related bodies such as the OIA. This programme should reflect the diversity of the student population and the range of providers in the sector.
21. We strongly agree that the OfS should be committed to serving past, present and future students, and so the OfS should directly engage with each of these groups, and encourage higher education providers to do the same with their student bodies. Furthermore, the OfS should set out a programme of research to understand the key areas of detriment for students and the best approaches to addressing them, including testing any proposed interventions with students.

Securing protections through requirements on registered providers

22. Competition should be a means to improve outcomes for students by driving improvements in what higher education providers, and the market, offer students. As such, we share the Government's aim to encourage new entrants into the higher education sector. However, encouraging new entrants must be balanced against the need to safeguard students. The Government's proposed system has three levels of registered providers with different registration requirements. The lowest level – registered basic – has very few requirements. There is a risk that this approach creates a two-tier system between 'registered basic' and 'approved' or 'approved (fee cap)' providers that does not guarantee students sufficient protections.
23. The two primary registration conditions for registered basic providers are to ensure that courses are at higher education level and that students have access to the OIA's student complaints scheme. This approach is presented as proportionate because registered basic providers will have no direct access to public funding or government-backed loans funding. However, neither the consultation document nor the accompanying impact assessment estimate the regulatory burden that any of the registration conditions would

place on providers. It is therefore unclear why registered basic providers should not be required to meet the key requirements proposed for providers in the approved or approved (fee cap) categories which provide important protections for students.

24. Students should be protected against a wide range of risks that could threaten the continuation of their course or provider. All providers should have procedures in place that would mitigate the potential impact on students in such scenarios. The Government is proposing that approved providers should have to agree student protection plans with the OfS and ensure they are complied with, but that these requirements should not apply to registered basic providers. We strongly disagree with this. Registered basic providers should be required to have an approved student protection plan and they should be required to publish details of their student transfer arrangements.

Improving provider-level complaints

25. Students will not always complain when they experience a problem. As the CMA notes, students are generally in a weaker position compared to providers. This is particularly the case with regard to complaints. Students may, for example, have a complaint against a member of staff who has a role in awarding their grades. Our 2014 research found that 17% of students reported that they had experienced a problem in one academic year and yet only half had complained to their university about it. Of those that did complain, six in ten (58%) were dissatisfied with the way the complaint was handled.²
26. Students should have access to clear and fair complaint-handling processes within higher education providers, as well as routes to independent redress where complaints are not resolved satisfactorily. We therefore support proposals for all registered providers to cooperate with the requirements of the OIA's independent student complaints scheme and to make students aware of their ability to use the scheme. This is in line with our calls for all higher education students to be able to access the OIA's student complaints scheme.³ To ensure that internal complaints are handled effectively, the OfS should also require all registered providers to adhere to the OIA's Good Practice Framework.
27. The OIA's Framework is a guide to handling complaints and academic appeals in higher education in England and Wales.⁴ It sets out overriding principles and operational guidance to support providers in areas including timeframes, progression between informal, formal and review stages, and record-keeping. If all providers followed these principles then this would help to overcome many of the barriers students may face to raising concerns in a higher education setting. Regrettably, at present it is not compulsory for providers to comply with the framework, and subsequently there is no formal monitoring of providers' compliance with the framework to assess complaints

² Which? (2014), *A degree of value*

³ Which? (2014), *A degree of value*



handling performance. We recommend that as well as requiring all registered providers to agree to follow the framework, the OfS should ensure that compliance with the framework is monitored effectively, either instructing the OIA to do this or doing it as part of its own monitoring.

Creating mechanisms for sector-wide complaints

28. Even if provider-level complaints-handling processes were improved, some issues will be systemic and not necessarily easy to identify for individuals or easily identified through individual complaints. The OfS should be granted the power to accept super-complaints from designated consumer bodies. This will help to raise systemic or market-wide issues to the regulator's attention and hold the regulator to account in investigating areas of consumer detriment in the market.

29. Which? and other designated consumer bodies have super-complaint powers in relation to a range of other regulators. For example, in 2015, Which? issued a super-complaint to the CMA on pricing practices in grocery retailing. This prompted the CMA to investigate issues around misleading supermarket special offers and unclear unit pricing, which it had previously failed to prioritise. This led to enforcement action and the revision of guidance on pricing practices.

Broadening the approach regulatory sanctions

30. The OfS should have sufficient powers to serve the interests of students and to tackle detriment wherever it may occur. The Government's proposals are likely to mean that the OfS's powers to sanction providers primarily relate to its role overseeing the register of providers. While it is necessary for the OfS to be able to suspend or deregister providers this is unlikely to be suitable for all but the most serious and persistent breaches of conduct. This leaves monetary fines as the primary sanction available to the OfS. The consultation proposals state that monetary fines should be used in cases of serious offences, where a provider 'has deliberately or negligently breached its ongoing conditions, has been dishonest and concealed information, or has had repeated breaches'. Other sanctions, such as the removal of degree-awarding powers and the title of university, only apply to approved providers and, as with suspensions and deregistration, are unlikely to be used frequently.

31. We are concerned that the proposed sanctions will not be sufficient. Instead, the OfS should consider using its powers through the specific conditions for deterrence and sanctions through non-direct means, such as using reputational sanctions and highlighting poor practice. This approach would be most appropriate to tackle minor offences and would provide strong incentives to improve provider behaviour and practice

⁴ OIA (2016), *The Good Practice Framework: Handling Complaints and Academic Appeals*



in an increasingly competitive market. The OfS should have a range of formal 'name and shame' sanctions available to use this approach. For example, universities that breach certain regulatory requirements could be required to publish details on their websites and promotional/marketing material, or it could be included as part of the Teaching Excellence Framework.

Strengthening consumer protections and enforcement

32. In recent years the higher education market has come under significant scrutiny due to concerns that higher education providers were not fulfilling their obligations under consumer protection regulations. In 2015, a Which? investigation found wide-scale use of potentially unfair terms that allowed institutions to vary courses, and a number of cases where providers' terms permitted them to prevent a student from graduating where they had outstanding non-tuition fee debt. Overall, we found that one in five providers (19%) used terms that we consider to be unlawful, and in contravention of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).
33. Our review of 50 university websites in 2015 found that nearly two-thirds (64%) of providers failed to provide updated information about tuition fees on their website; 38 providers (76%) were breaching the law by failing to provide at least one piece of material information; and no provider was uniformly adopting good practice in relation to information provision across all categories of information.
34. Across the CMA's three-year review which concluded in early 2017,⁵ higher education providers were found to be failing students through the use of unfair terms, and the information they provided to support student decision-making on institutions and courses. As a result, the CMA took enforcement action against a number of higher education providers by securing changes in student contracts and getting a fairer deal for students. However, the regulator noted that the sector still had a need to improve in some areas of compliance, and raised concerns about the length of time it took providers to implement changes for the benefit of students.⁶
35. Targeted enforcement cases are likely to be better routes to resolve breaches of consumer law than suspending or deregistering providers. In particular, such cases could lead to a court injunction that could prevent providers from continuing with practices that breach consumer law. However, unlike many other market regulators, the OfS will not have powers to enforce consumer law and so will be reliant on the Competition and Markets Authority (CMA) to take on a case. Concurrent with the CMA's powers, the OfS should have the powers to enforce consumer law so that it is fully equipped to address

⁵ Competition and Markets Authority, Consumer Protection Review of Higher Education, www.gov.uk/cma-cases/consumer-protection-review-of-higher-education

⁶ Competition and Markets Authority, July 2016, Consumer law compliance review: Higher Education undergraduate sector findings report, p4



sources of detriment for students. The government should designate the OfS as an enforcer of consumer law (under Part 8 of the Enterprise Act 2002). The OfS should also work with the CMA to build up its capacity over time to monitor compliance with consumer law and to lead enforcement cases.

36. We support the proposal for the development of model contracts that providers could use as a basis for their agreements with students. Model student contracts would help providers to ensure that terms and conditions comply with consumer law. The OfS should work with the CMA to develop model templates, but be mindful that these should not be too prescriptive so as to allow for differences between providers. They could particularly help to ensure that the core terms and conditions of contracts between providers and students comply with consumer law, including some standardisation of terms and conditions. It could also help to outline what core information should form part of contractual agreements, which typically involve a wide range of documents and other information – including universities’ websites, course prospectuses, and the provider’s various rules and regulations – since it is such a complex and multifaceted purchase.

Improving conditions for greater switching

37. Switching providers is inherently more challenging in higher education than in many other markets due to the economic and social costs involved. Nonetheless, students should have access to an efficient system of student transfer arrangements to enable them to switch mid-course as smoothly as possible and to allow them to gain credit for comparable academic achievements. The CMA’s guidance to HE providers on consumer law highlights that students are likely to be in relatively weak positions compared to providers as it is likely to be difficult to switch if a course or HE provider does not meet their expectations, and they are dissatisfied with their experience.⁷ The CMA recommends that providers should offer students the right to cancel and switch providers if they change something where some flexibility is required.⁸
38. However, levels of switching remain low. Around one in 40 full-time first undergraduates in England transfer providers by the end of their first year.⁹ As the consultation notes though, demand for switching providers is potentially higher. HESA’s longitudinal data has found that more than one in five UK domiciled leavers were likely or very likely to choose a different provider were they to have such an option again.¹⁰ The Office of Fair Trading’s (OFT) 2014 review of higher education cited issues with both the processes in place within institutions and the level of understanding of these processes among students. Our analysis of HESA data also shows that the share of students that transfer universities into the same subject without having to restart their course – which suggests

⁷ CMA (2015), *UK higher education providers - advice on consumer protection law*

⁸ CMA (2015), *UK higher education providers - advice on consumer protection law*

⁹ HESA (2015), *Table T3a - Non-continuation following year of entry: UK domiciled full-time first degree entrants 2014/15*

¹⁰ 2012/13 Longitudinal Destination of Leavers from Higher Education survey



that they gained credit for their first year – has fallen in recent years from 39% in 2008/09 to 26% in 2014/15.¹¹

39. The consultation's proposals primarily focus on improving students' understanding of transfers. Approved providers will have to publish details of their student transfer arrangements. We support this requirement but think that it should also be extended to registered basic providers. Simply improving student's awareness and understanding of the student transfer arrangements is unlikely to be sufficient given the costs and difficulties associated with switching. While the OfS will monitor and report on the availability and utilisation of student transfer arrangements, the OfS should go further and set out how it will improve the system of transfers so that the process of switching is smoother.

Improving quality of higher education data and information

40. The availability of better information will not necessarily lead to better outcomes for students in their choice of subjects and providers, but it can help some students to make better decisions, including based on value for money. It can also help to ensure providers focus and compete on the issues that matter most to students. Value for money in higher education is complex and while overall student satisfaction is high, many students also report concerns. Our research in 2014 found that three in ten students thought that their academic experience was poor value, and a quarter of students said that higher education had not helped them to develop the skills needed for work. This situation remains unchanged three years on, as the Higher Education Policy Institute's Student Academic Experience Survey in 2017 shows that a third of higher education students (34%) still think they are receiving poor value for money across the UK.
41. The OfS has the powers to recommend a designated data body (DDB) to the Secretary of State. The OfS will also have oversight of the performance of the DDB's duties to collect, make available and publish appropriate higher education information, including data. The OfS should use these powers to ensure that data is collected, standardised, freely available, and publicly accessible. It should aim to improve the quality of information published directly by universities, and the availability of data for third party organisations and research institutions to analyse to provide insight and services to students.
42. The Government has proposed that the OfS should lead a data strategy in 2018. In developing this strategy, the OfS should work closely with government, providers and students to define the set of measures that would best enable students to assess value for money. This should assess value for money at a subject level. Indeed, the ability to assess and compare institutions at a course or subject level is vitally important to informing student choice. Institution-level statistics in isolation only tell a fairly limited

¹¹ Which? analysis of HEFCE (2017), *Year one outcomes for first degree students*, Table 1



story, which wouldn't be able to take into account the variability of the institution across subject disciplines.

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