

CONSULTATION RESPONSE

OfS consultation on the integrity and stability of the English higher education system

Alan Palmer May 2020

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

Agree/**Disagree**/Neither

The condition as currently proposed is very widely drawn, with little by way of explanation of what constitutes misconduct and lacking some justification as to why this approach rather than specific individual conditions is the best way.

It appears similar to the reportable events condition that is part of the regulatory framework. That has led to confusion among providers, who noted the lack of clarity with that condition, and the level of interpretation it allowed the Office for Students. The concern with that condition is that this lack of clarity could lead to providers being penalised for something that appeared reasonable to them at the time but at some point in the future, the Office for Students interprets differently and decides to sanction a provider. The lack of specific explanation in the condition has caused problems and led to the OfS needing to issue clarification on that (October last year). It was also in the process of writing further detail on that condition pre-disruption.

It is not clear from the proposed condition what conduct is inappropriate, or how such conduct might have a negative effect. There has been a long-running debate on unconditional offers for many years, but that debate has not yet reached a conclusion. There are many assumptions about the possible negative effect of unconditional offers, with regular media and political outcries against them, but little by way of concrete evidence that they are always wrong or inappropriate.

For example, many offers made by universities are unconditional with good and valid reasons:

- If a student has already achieved the relevant qualifications, for example a mature student, then an unconditional offer recognises that.
- If a student is recruited via a performance or a portfolio, then an unconditional offer recognises that.
- If a student is recruited based on workplace or life experience, despite not having formal qualifications because a university considers an individual's potential, then an unconditional offer recognises that.

All universities make these types of offers, but some of them are particularly used by modern universities, especially where those offers recognise potential in people without formal education

qualifications. These approaches provide opportunities to people who otherwise would not receive them, thereby widening participation and increasing access and supporting social mobility.

In communication with MillionPlus, the Office for Students has confirmed that this behaviour is considered 'business as usual' and so providers could reasonably expect not be penalised. If this is the case, then it suggests that the condition needs to be more tightly drawn to be specific about what conduct the OfS deems to be unacceptable.

Condition B2 of the regulatory framework already makes reference to admissions with OfS expecting providers to have "a reliable, fair and inclusive admissions system." In assessing compliance to this condition, the OfS will also make reference to "[s]tudent continuation and qualification data [that] suggests that the provider has a reliable and fair admission system that results in students from all backgrounds being matched to appropriate courses...". The OfS proposal outlines why it believes the E Conditions need to be amended, but not why it does not consider Condition B2 relevant or sufficient.

Oddly, the condition makes no reference to the decision to allow providers to recruit up to 5% above 2020/21 enrolment forecasts. This is a key plank of the approach to ensure stability and integrity, so the lack of information for providers is troubling. Questions that remain include:

- Does it relate to September 2020 entry only or all applications/entries in 20/21?
- Does it include recruitment by validation, contract and franchise partners?
- If it does include contracted provision are partnerships signed after December 2019 included even though they were not in the forecasts, or can the 5% control be lifted and shifted if they had a different validating partner?
- Does it include apprenticeship provision?

The temporary condition is so widely drawn that without tightening and narrowing to create more clarity, it is inevitable that providers will misinterpret the condition (in the OfS's view) and potentially be penalised for something that is not inappropriate. The condition should be narrowed and restricted to matters relating to admissions in connection with the issues which the OfS is trying to address. It should also be limited to Home and EU students only. With the current challenges of international recruitment caused by Covid-19 disruption, it is sensible and appropriate to allow providers to continue to compete in this market without any additional restrictions.

The OfS needs to explain **WHAT** conduct it believes to have a negative material effect and **HOW** it believes that to be the case. Otherwise, the balance is tipped so firmly towards the OfS's own opinion that it will be impossible for providers to reasonably judge appropriate behaviour.

Question 2: Do you agree or disagree with the proposals for implementation of the proposed new general ongoing condition of registration?

The argument for applying it retrospectively is currently unconvincing. The moratorium announced by the government prevented all but a small amount of admissions work from 27 March so to

consider sanctioning providers for activity before that date seems to be an unfair penalty and risks catching legitimate behaviour that happened before it.

However, it is unclear that any conduct that took place during that period was inappropriate. Providers were acting in the best interests of their applicants to provide certainty and security in the context of an ever-shifting landscape. The decision to cancel examinations for key stage 5 students led to significant concern among applicants about their university applications. Providers converting offers to these students to unconditional prior to the moratorium was announced was behaviour designed to assure applicants that their higher education journeys were not endangered because of government decisions to cancel school examinations. Conduct by providers prior to the moratorium must be viewed in this context.

The OfS states in the consultation that it is in discussions with providers that carried out conduct deemed inappropriate between 11 March and 27 March, which seems to be a more sensible way to deal with this rather than, to use an educational metaphor, put the whole class in detention for the misbehaviour of a few students. Imposing a specific condition of registration on to those providers the OfS is already in discussions with would send a signal to other providers about behaviour OfS deems unacceptable. A more general, ongoing condition creates uncertainty and misinterpretation until such point that OfS feels it necessary to either a) sanction a provider or b) publish additional guidance (as with reportable events).

The suggestion that the providers may have to withdraw offers already made to applicants is potentially contrary to advice from the Competition and Markets Authority and is likely to prompt significant upset in applicants. It would be both unfair to applicants, and destabilising to providers to require this approach less than 3 months before the confirmation process begins.

Retrospective application is unlikely to be in the best interests of students who had made decisions based on conditions that were part of legitimate offers made in good faith by providers prior to the moratorium. Withdrawing these offers from students, at short notice and with little explanation, could be so destabilising as to persuade them to avoid higher education altogether. At the very least, it potentially damages confidence these students may have in the offer making process, and in the support available from universities.

Applying a condition retrospectively creates a situation whereby Governing Bodies and Accountable Officers act on advice in good faith and then find themselves having taken the wrong decision because OfS changes the rules and regulations. This sets a precedent that will create uncertainty in providers that at any point the OfS could retrospectively penalise appropriate behaviour.

The OfS refers to a "continuum of events" as a factor in any judgement it might make. However, with understanding what conduct is inappropriate, whether conduct is only inappropriate in some contexts, or if conduct only becomes an issue after a period of time (of currently indeterminate length) providers are unable to assure themselves that they are acting within regulations.

The OfS states that it will have the power to sanction a provider for conduct that it believes as a wider impact on the overall sector. This approach is excessive. A provider should be sanctioned if it

is in breach of regulations and those breaches have an impact on its applicants, students or graduates. However, to penalise a provider because of potential impact on other providers applicants, students or graduates appears unjustifiable. It is also unclear how the OfS expects a provider to know details of the conduct of other providers, given the legal restrictions on sharing this information between providers.

The moratorium was introduced by the Universities Minister, and subsequently extended by them. The new condition follows that moratorium and the desire by the government to prevent offers it (the government) does not like, and therefore intervene in the legally protected autonomy of higher education providers. There is the risk, therefore, that this new condition leads the OfS to act as a political organisation rather than a regulatory one.

The condition lasts a year, which means it will take into to its scope ALL application activity for 2021/22 entry, which seems to go far beyond the reasons why it is being introduced. Without clarification, it potentially prevents higher education providers making legitimate offers in the 2021 cycle that are based on performance, portfolio, audition, workplace experience or decades long prior attainment. It is unclear why the condition needs to apply to activity beyond the 2020 cycle. Since the first closing date for the 2021 cycle is 15 October 2020 that should be when the condition expires.

Including a sunset clause is helpful. However, the sunset clause as drafted is currently unsatisfactory. It says the condition ends a year after it is implemented, but that OfS can extend by saying it wants to do so, after a consultation, but there are no timescales. As it reads, OfS can announce it wants to extend a week before it's due to finish. It would be better if it was clearly indicated:

- by when OfS would need to announce its intention to extend
- on what evidence it would base that decision
- how long any consultation would last
- whether it would be an extension of the condition as introduced or if further changes would be made

An alternative approach would be that the duration of the condition can only be shortened by the Office for Students, thereby creating absolute clarity about when the condition will no longer apply to providers. The current proposals risks introducing uncertainty and instability into the 2021 application cycle.

Agree/Disagree/Neither

Question 3: Do you have any comments about any unintended consequences of these proposals, for example for particular types of provider or for any particular types of student?

Many of the offer types that could be called into question are those that are made by modern universities. These offers will often be made to students from disadvantaged backgrounds, or widening participation groups, some of whom apply without formal qualifications. These students

will potentially be the ones at most disadvantage from offers being withdrawn from them if a) the condition is applied retrospectively and b) the OfS applies a blunt approach to its view of apparent misconduct.

It is also the case that students from widening participation backgrounds are likely to also be those with lesser access to high quality, timely advice and guidance, whether from their own social networks or from their education settings. A change in the regulations surrounding university applications at this late stage in the 2020 cycle made at such short notice is likely to penalise these students and potentially risk them missing out on higher education opportunities.

Bursaries, scholarships and other types of support (including provision of technology or other equipment) must not be considered inappropriate incentives as part of offer making. These are often vital in providing assurance, stability and confidence to students for whom access to and experience of higher education is novel. These are important factors in widening participation and increasing access.

Question 4: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

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Question 5: Do you have any other comments?

