

EVIDENCE SUBMISSION

Office for Students consultation on 'new requirements for the oversight of subcontractual arrangements in English higher education'

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Introduction

The Office for Students is currently consulting on six proposals for how they may regulate 'subcontractual arrangements' (franchised provision) held by providers in England. As detailed below, these proposals could introduce new reporting and operational requirements on providers engaged in franchised provision, while also giving the OfS new regulatory powers to affect these franchise partnerships. Given the importance of franchised provision to many MillionPlus members, we therefore believe it is vital to gather the views of members and work to shape OfS' next steps in this area.

In this overview of our evidence submission, we provide a summary of each proposal and the responses we have drafted in response to OfS' consultation questions on each proposal. These responses have been developed through consultation with MillionPlus' Teaching & Learning network. We welcome feedback and commentary on these responses to allow us to ensure our submission to OfS reflects the needs and interests of a wide range of our members.

Proposal 1 - Introduce a new general ongoing condition of registration (Condition E8)

OVERVIEW OF PROPOSAL

Condition E8 is a new general, ongoing registration requirement for providers that act as a lead provider in subcontractual (franchised) arrangements. It applies to all registered providers—but only imposes obligations on those that meet specific criteria. These criteria include overseeing one or more subcontracted partnership and subcontracted provision involving 100 or more FTE students. It is important to note that some partnerships are exempt from E8, such as arrangements with public bodies such as the NHS. The requirements for E8 are set out over the course over Proposals 2-5.

RESPONSES TO OFS' QUESTIONS ABOUT THE PROPOSAL

1. Are there any aspects of the proposal you found unclear?

MillionPlus believes that the language used to set out condition E8 needs to be clearer and more specific on which public sector partnerships are out of scope for the condition, which types of provider would be exempt from the condition and what will be covered by "reasonable indicators of material risk" in relation to the E8 requirement for some providers. We also note the need for greater clarity on the use of the number of students enrolled on a subcontracted course as a threshold for E8 applicability – for example, would having

98 students on a course constitute a “reasonable indicator of material risk” that would make the course E8 eligible, despite this figure being lower than the 100 FTE student threshold?

2. Is the proposed definition of subcontractual arrangements clear and does it correctly capture the nature of these arrangements?

Generally, we are concerned that current overview of the proposals does not set out a clear definition of subcontractual arrangements, including the size, scope and activity that they include. We note that some examples of different types of subcontractual arrangements may support in providing some of this clarity.

More specifically, we are also concerned that the proposed definition of subcontractual arrangement is unclear insofar as it interchangeably uses terms such as “subcontracting”, “franchise” and “validation”, even though these represent different types of arrangement and are used in different ways between providers and partnerships. This is especially important as validation may present an area of higher risk for provider quality assurance and regulation as it involves a programme of study set by a partner to the lead provider.

3. Do you have any comments on the impact of these proposals for particular groups of students?

A large number of students, many from lower-participation backgrounds, access and benefit from franchised provision. As such, it is important to ensure that these students have a high quality educational experience.

Given this importance, we highlight two primary concerns about how the proposal may affect students from lower-participation backgrounds. Firstly we are concerned that the greater level of regulation of franchised provision will, in practice, lead to a greater level of regulation of students studying through franchised provision, with their choice to study being viewed as a particular risk to public money and their motivations for studying being more heavily scrutinised than their peers studying more traditionally and directly within a provider. We are concerned that this may contribute to a two tier regulation system which, given the high proportion of franchised provision students who are from lower-participation backgrounds, may further widen the gap in students’ experience of higher education.

Secondly and relatedly, we are also concerned that the E8 condition may prove to be especially onerous for many providers, proving very difficult and costly to put into practice. This is likely to be the case particularly for small providers and providers who currently hold extensive subcontractual partnerships. Given these material challenges, there is a risk of providers abandoning these partnerships, leading to a loss of parts of their course offer that are especially accessible to students from lower-participation backgrounds. The E8 condition could therefore have a particularly damaging impact on the widening participation agenda that is at the heart of many lead provider’s social mission.

Given these concerns, we believe it is vital for OfS to conduct a detailed, data-driven analysis of the potential equalities impact that the E8 proposal may have, with a particular focus on widening participation.

4. Do you have any alternative suggestions to the approach OfS have proposed?

Ensuring that subcontracted provision is of a high standard that supports students to succeed is vital. However, our review of OfS’ proposals with members has emphasised the current comprehensiveness and effectiveness of many providers’ current quality assurance processes. We therefore believe that current OfS mechanisms are sufficient to regulate subcontracted provision, including the use of B3 data in quality assessment. Regulation using these existing apparatus can prevent introducing damaging further complexity into the regulatory environment and is proportionate to the actual challenge that franchised provision presents to student outcomes and public funding.

Proposal 2 - A governance and control environment for subcontractual provision

OVERVIEW OF PROPOSAL

This proposal focuses on introducing key requirements for lead providers in subcontracted (franchised) teaching arrangements to ensure they maintain a robust governance and control environment. Lead providers must develop and maintain a single, comprehensive "source of information" that outlines their oversight and control mechanisms for subcontracting. The documentation must include policies and procedures to actively manage subcontracted arrangements as well as contingency plans detailing how the lead provider would intervene if a delivery partner underperforms or fails (e.g., academic misconduct or financial issues). Providers must also retain historical versions for five years, to facilitate retrospective regulatory review and demonstrate improvements over time.

RESPONSES TO OFS' QUESTIONS ABOUT THE PROPOSAL

5. What are your thoughts on the nature of the risks that OfS have included in their draft guidance that they are proposing providers mitigate?

We are concerned that the contingency measures set out by the OfS overlap with Student Protection Plans which are already in place at our member providers. As a result, introducing these new measures would force providers to needlessly reproduce something they already have in place, at considerable financial and operational cost.

6. Do you agree or disagree with the minimum content requirements OfS have proposed for the single document they propose a provider should maintain?

We have reservations that the current minimum content requirement includes elements that providers already have in place. For example, contingency plans will likely reproduce what providers already have covered in their Student Protection Plans. As expressed in our previous responses, this may lead to costly reproduction of activity and documents by providers. We also note that there may be a need for greater clarity around the purpose of the "source of information" as the purpose, and the accompanying minimum contents, varies over the course of OfS' current overview of Proposal 2.

7. Do you have any views on any challenges that you anticipate with the implementation of this proposal?

Our greatest implementation concern with this proposal is timelines. The current proposed start date for providers being held to regulatory account for the source of information is four weeks after E8 coming into effect, a window that MillionPlus believe is too short for institutions to appropriately prepare. Moreover, we believe it is vital that there is a structured process for providers to submit, receive feedback and iteratively improve their documentation in advance of them being subject to any regulatory oversight for the documentation. We also note that OfS should set out its standards for how financial contingency measures are presented in sources of information in a way that respects the fact that these measures maybe difficult to provide information on given the commercial sensitivity of disclosures.

Proposal 3 - A provider to operate in accordance with the comprehensive source of information

OVERVIEW OF PROPOSAL

Proposal 3 sets out that providers must implement the policies set out in their “comprehensive source of information” (described under Proposal 2). This will include on-site testing and validation – testing delivery partners’ practices through inspections, student interviews, sampling of assessments – and amending or renegotiating existing contracts to ensure they support any new approach scrutiny. Providers will be expected to put in place financing, resourcing and operational capacity to practice the policies and processes the source of information sets out.

RESPONSES TO OFS’ QUESTIONS ABOUT THE PROPOSAL

8. Are there any barriers to implementing the measures in this proposal, which require a provider to operate in accordance with its comprehensive source of information?

MillionPlus welcomes the use of any strategic documents to shape practice rather than to merely state ambitions for service improvement. Nevertheless, we have two primary concerns around implementing the comprehensive source of information. Firstly, many of our members are already engaged in extensive on-site testing of subcontracted provision, including scheduled and unscheduled visits to partners. They have also developed robust marking and moderation procedures to ensure assessment practices in partners meet a high standard. Although it provides effective quality assurance, all of this activity has been resource intensive to develop and is a considerable ongoing cost to lead providers. There is therefore a concern that any additional expectations around onsite testing may add to these already high costs and may duplicate well established and already effective processes for little added improvement in quality assurance practice.

Secondly, we note the need for there to be clarity around how context will be used to assess a lead provider’s implementation of its source of information. For example, the financing, resourcing and operational capacity varies between providers and consequently as does their ability to engage in activities such as contract revision and onsite testing. Greater clarity from the OfS is needed on how these key contextual considerations will be included in regulation.

Proposal 4 – Power of direction

OVERVIEW OF PROPOSAL

As part of this proposal, OfS would be able to issue a Subcontractual Arrangement Direction (SCD) when it has reasonable grounds to suspect that a lead provider’s existing or planned subcontractual arrangements pose significant risks to students or public funds. SCD powers could be triggered if there are “reasonable suspicions of significant risk”, including threats to student interests or misuse of taxpayer funding, with insights to prompt the powers derived from regulatory intelligence from various sources. An SCD can require the provider to take specified actions (e.g., strengthen controls) or refrain from certain actions (e.g., entering new subcontract arrangements) within a defined timeframe—even suspending payments or halting activities where public funding is deemed to be at risk. The SCD authority becomes active as soon as Condition E8 comes into effect.

RESPONSES TO OFS' QUESTIONS ABOUT THE PROPOSAL

9. Do you have any comments on the proportionality and effectiveness of OfS' proposed approach to using subcontractual arrangement directions?

MillionPlus has three areas of concern about this proposed approach. All these areas reflect the significant potential impact an SCD may have on a lead provider and their subcontracted provider and the consequent need for much greater clarity and consideration around their introduction.

Firstly, we note that greater clarity is needed around the conditions under which an SCD may be issued. The terms in current OfS guidance – “reasonable grounds”, “significant risk” – do not provide the specificity needed for providers to plan their partnership provision to be E8 compliant. It is also vital that the ways these “grounds” and “risks” are assessed and enforced in practice is data-driven and transparent to providers.

Secondly, we are concerned that the proposals as set out by OfS seem to assume that sub-contracted providers only hold a partnership with a single lead provider. In practice, sub-contracted providers may work in partnership with several lead providers. This raises questions in relation to Proposal 4 that will require clarifying – in particular, if a sub-contracted partner encounters financial challenges, would OfS impose an SCD on all the lead providers that partner works with? Equally, would OfS only issue an SCD to all those associated lead providers who are not believed to be managing this risk appropriately? If it is the case that all lead providers working with a partner in financial difficulty may be SCD-eligible then this may reduce the number of partners that lead providers work with, leading to a corresponding decrease in their course offer and their scope for maximising accessibility and participation.

Thirdly, we have a general concern that SCD powers may not be proportionate to the level of risk currently posed by franchised provision. As set out by OfS in its background to the proposals, the vast majority of franchised activity is delivered effectively and without issue or concern. Equally the new SCD powers, when exercised, could have a very damaging effect on partner providers' ability to remain financially solvent and their consequent ability to provide higher education pathways for students. As such, there appears to be a mismatch between the scope of the SCD powers and the problem they are aimed at solving. It is vital therefore that OfS consider the proportionality of these powers, especially given their potentially damaging impact on the accessibility of higher education to students from lower-participation backgrounds.

Proposal 5 –Requirements for providers to provide specified information relating to subcontractual provision

OVERVIEW OF PROPOSAL

Condition E8 will also require providers to provide information that will support transparency in the franchising system. This includes new disclosures in audited financial statements such as a published statement regarding the provider's rationale for using franchised provision, an explanation of how the provider ensures students' interests are prioritised and a detailed note on financial flows in subcontractual arrangement. The proposal also includes an expansion of reportable event obligations, with providers needing to notify OfS of key events such as the opening, suspending or terminating or subcontracting or validating arrangements, changes in contractual statuses or significant shifts in the size of cohorts engaged through franchised provision.

RESPONSES TO OFS' QUESTIONS ABOUT THE PROPOSAL

10. Are there aspects of the proposal to require additional disclosures in a relevant provider's audited financial statements that you found unclear?

We note from discussions with members that students interests often feature heavily in contracts and service level agreements. As such, including this information in financial statements may be needlessly duplicating current reporting and recording practices.

11. Are there any barriers to implementation of this proposal?

While we recognise the importance of transparency and information sharing with the OfS, we believe it also important to provide a detailed overview of what will be considered a reportable event in the expanded definition. We believe the threshold for what constitutes a reportable event should be carefully considered to ensure that the OfS does not receive a higher than manageable number of these reports. For example, small fluctuations in the number of FTE students on a course may be routine, but if all these occurrences are considered reportable events then the OfS may receive a large number of reports, slowing down engagement with reports that may be of greater practical concern about student experience in sub-contracted provision.

12. Do you have any comments on the proposals to publish this information, either in providers audited accounts or by the OfS?

As noted previously, while transparency and a healthy information flow with OfS are important, we maintain concerns about the duplication of reporting. Aside from duplication of current practices, there is also scope for duplication of reporting between the proposed single source of information and proposed inclusions into audited accounts. This level of duplications will introduce inefficiencies into current provider practices, often at considerable operational and financial cost during a time when many lead providers are experiencing financial challenges.

Proposal 6 –Monitoring compliance

OVERVIEW OF PROPOSAL

Proposal 6 sets out how OfS will monitor and enforce the new E8 condition. The new monitoring framework will use risk-based monitoring, but also may potentially include random sampling of providers to undergo reassessment of compliance. Monitoring will also use reportable events and data returns to serve as signals that may trigger regulatory scrutiny. In cases where providers appear to be non-compliant or there is evidence of risk, the OfS can deploy escalated monitoring activities, including regular follow-ups with named senior leaders or governing body chairs, requirements for enhanced reporting or submission of additional documentation or potential use of formal sanctions (e.g., monetary penalties, suspension, or deregistration).

RESPONSE TO OFS' QUESTIONS ABOUT THE PROPOSAL

13. Do you have any comments on the appropriateness and effectiveness of OfS' proposed approach to monitoring compliance with the proposed condition?

While MillionPlus recognises the necessity of OfS monitoring compliance with any of its regulations, we have three concerns about Proposal 6 based on consultation of our members.

Firstly, we believe it is important that any monitoring is accompanied by a robust process for how providers can iterate and improve on their current processes and practices. This may involve OfS providing feedback on submitted documents and creating opportunities and windows for providers to resolve any issues that are raised before more punitive regulatory powers are exercised.

Secondly, we raise the concern that the proposed monitoring activity may be reproducing oversight activity that is already included in the integrated quality framework. This duplication may introduce costly regulatory burden for providers who are already stretched operationally and financially. We also note that the random sampling approach to monitoring mentioned in Proposal 6 may be at odds with the risk-based approach taken as part of integrated quality assessment.

Thirdly, we note the need for greater clarity around what information from the monitoring process will enter the public domain. It will be important to reach agreement with providers about what information is shared given the potential impact this information may have on the financial sustainability of individual providers and the overall sector.