Dear Colleagues,

HIGHER EDUCATION AND RESEARCH BILL

Following the fourth day of Committee scrutiny of the Higher Education and Research Bill on 18 January, I am writing to offer clarification on a number of questions that were raised by Peers, on some of which Baroness Goldie and I committed to write. This letter provides further information on student protection under our reforms and, as an annex, I have attached an information note on student protection plans that was published in September 2016. The letter also includes further information on aspects of the register, including suspension and de-registration, as well as further clarification around the definition of an English higher education provider.

Student protection plans

Lord Lucas requested further detail on how Student Protection Plans (SPPs) will operate in practice. In a similar vein, Lord Stevenson asked for an illustration of the student journey in the event of a course or institution closure.

The role of SPPs should be twofold: to make sure that higher education providers have provisions and mitigations in place to reduce the risk of disruption and, secondly, to ensure that there are plans in place to support and protect students in the event of any such disruption. SPPs are likely to include a diverse range of measures to protect students, reflecting the diversity of the higher education sector. Reflecting this, we expect the Office for Students (OfS) to develop guidance on the detail of student protection measures, possible triggers, and the scenarios in which they could be deployed, as part of the wider regulatory framework. The OfS will take a risk-based approach to student
protection, and different measures may be appropriate to different providers.

We recognise that entering higher education and choosing the right provider involves a substantial financial commitment. Students should be able to see the SPPs of any registered institutions and will be able to take account of the available protections when they are making the decision whether to attend an institution.

I would like to reassure Peers that SPPs are intended to be a flexible tool, and should not be brought into play only after an institution gets into serious difficulties. The OfS will monitor the financial health of institutions where they or their students are eligible for funding and may require student protection plans to be implemented (in whole or in part) if a provider is at risk of being unable to deliver a course. Furthermore, the OfS will not be operating in isolation: it will be in dialogue with the institutions for which it is responsible, assess the level of risk for each institution, and will have a raft of information and data to draw upon. We envisage that early indications would alert the OfS if there are reasons for concern.

Student protection plans should be implemented in a timely manner, and specific measures should be brought into play as required. These might include financially compensating students or supporting students in transferring to alternative institutions. There are a variety of solutions, remedies and initiatives which could be deployed in SPPs. When requiring student protection plans from registered providers, the OfS must act in a proportionate manner. It must also have regard, so far as is relevant, to the principles of best regulatory practice. So the OfS should, when approving SPPs, ensure they make such protective measures as is practical, reasonable and manageable.

In most cases, we expect the student would be assisted to continue their studies, either through being taught out at their existing provider, or through transferring to another provider. If, for any reason, a student could not transfer to another provider, what happens will depend on the facts of the particular case or the circumstances. Students may have rights under the Consumer Rights Act 2015, but also potentially other consumer protection law such as the Consumer Contracts Regulations 2013 and the Consumer Protection Regulations 2008. These statutory rights would be in addition to any rights provided under the student protection plan.

**Student protection - different approaches for further and higher education**

Lord Stevenson asked why we are not using the same approach as in the Technical and Further Education Bill, where we have developed an approach to sector exit around the use of special administration regimes for further education institutions.

Although it is highly unlikely that either a further education college or higher education provider would become insolvent, in each case the starting point is the protection of learners. However, the two sectors have different characteristics, so it follows that they might need different approaches to meeting that objective.

Higher education providers should be subject to financial scrutiny from the OfS before they can gain Approved or Approved (fee cap) status. Ongoing risk-based monitoring will alert the OfS to the prospect of financial difficulty, while credible SPPs will minimise uncertainty and disruption for students.
The FE sector includes a higher proportion of young and locally-based learners than the higher education sector; including some adult learners, those training to get back into work, and 16-18 year olds. FE learners are also more likely to have originated as local residents and have a preference to remain in the general area. The HE sector caters primarily for students over the age of 18, and who tend to be more geographically mobile and therefore willing to transfer to another provider in the event of institution closure.

The purpose of a special administration regime would be to enable learners at an FE college to continue their studies with minimum disruption. SPPs fulfil a similar purpose, giving students considerably more protection than at present.

**The register, including suspension, de-registration and the First-tier Tribunal**

Lord Lisvane and Lord Judge asked about the OfS's evidential basis for taking decisions to suspend or de-register a provider or to impose a monetary fine, and also about the authority of the First-tier Tribunal.

As I have stated previously, the key principle is that the OfS, as a public body, must at all times act reasonably and proportionately in accordance with public law. Through clause 2(1)(f), the OfS must have regard to the principles of best regulatory practice and its regulatory activities must be transparent, accountable, proportionate and consistent. These obligations therefore apply where the OfS is exercising powers under clause 15, 16, 18 or 21. We consider that the current wording of these provisions sets an appropriate standard which must be satisfied before the OfS can act. This is explained more fully below.

As I stated in the House, the test of "it appears" is used in other legislation. I gave the example of section 151(1)(a) of the Apprenticeships, Skills, Children and Learning Act 2009: Ofqual may impose monetary penalties on a body that it has recognised for the purpose of awarding or authenticating certain qualifications where: "it appears to Ofqual ... that a ... body has failed ... to comply with any condition to which the recognition is subject". This provision has been in force since 1 May 2012.

The need for it to appear to the OfS that certain circumstances have arisen is the first stage in the process of imposing monetary penalties under clause 15, or deregistration under clause 18. The OfS may not take either of these actions against the provider until it has given the provider its reasons for doing so and the provider has had an opportunity to make representations. So, the suspension or deregistration does not take place on the initial assessment of the OFS; this can only proceed once the OfS has had regard to any representations made by the provider. If the OfS does proceed and impose a penalty or deregister the provider, that decision can be appealed to the First-tier Tribunal. There is also the possibility of further appeal.

There is no procedure put in place under the Bill for the steps that the OfS must take before it notifies a provider that it will not be approving a new access and participation plan in accordance with clause 21(2). However, the Secretary of State has powers under clause 21(3) and (4) to set up such a procedure in regulations. This procedure can
include any decision being a provisional decision in the first instance and provision for a review of that provisional decision, including to a person, or panel of persons, appointed by the Secretary of State in accordance with the regulations.

If the OfS were to exercise its powers under clause 16 to suspend a registered higher education provider in a way which was irrational or unreasonable, or if it failed to follow proper procedure in taking that action, the provider would be able to challenge the suspension through judicial review proceedings.

Lord Lisvane has drawn our attention to R v Central Criminal Court ex p Bright which concerned the release of self-incriminating material, access conditions in the Police and Criminal Evidence Act 1984 and the assessment of reasonableness. As explained above, we consider that the mechanisms provided in the Bill ensure that the OfS will not take a final decision under clause 15 or 18 without a provider being able to make representations on the reasons for such a decision, and the procedure in relation to a decision under clause 21 will be introduced in secondary legislation. A provider will be able to challenge a suspension under clause 16 if it considers that the OfS is acting beyond its powers. We therefore believe the language used in the relevant clauses is appropriate and proportionate.

The consequence of removing the ability of the First-tier Tribunal to remit a decision back to the OfS, in the case of de-registration or monetary penalty appeals, would reduce the options that the Tribunal has if it considers that the HE provider is justified in bringing the appeal. If the Tribunal considers that the best remedy is for the OfS to remake the decision with the benefit of the Tribunal’s judgment, it will not be able to order this. So removing the provision limits the action that the Tribunal can make. We consider that this is not in the interests of HE providers as there may be some circumstances where such an order would be the best outcome for the provider. I can confirm that a provider may appeal to the Tribunal against an OfS decision that has been remitted to the OfS by the Tribunal.

**Definition of an English higher education provider**

Baroness O’Neill asked for further information about the definition of an English HE provider.

The reference in Clause 77 of the Bill to “English higher education provider” meaning “a higher education provider whose activities are carried on, or principally carried on, in England” seeks to replicate section 62(6) of the Further and Higher Education Act 1992 - which has operated to date without issue.

The term “whose activities are carried on, or principally carried on” is not defined in the Bill, and neither is it defined in FHEA 1992. In neither case is there a requirement that providers must be legally incorporated in England.

It is the Government’s policy that a provider that has a physical presence in England, and that is delivering courses in England, can be an English higher education provider even if it is delivering other courses in another country, provided that its activities are principally carried on in England. There has never been an agreed measure for identifying where the majority of a provider’s activity might be. But there are a number of sensible measures (or combinations of sensible measures) that should make it reasonably clear, including
the number of students studying courses in each country, and/or where the provider has its administrative centre(s).

It is our policy that where a provider offers higher education through distance learning courses, which may include Massive Online Open Courses (MOOCs), we consider that the starting point in reaching a determination of where that activity takes place will be to examine from where the MOOC is delivered – i.e. the measurement of a provider’s activity for a MOOC will not necessarily be where students study the MOOC, but from where it is delivered. I hope you find this clarification helpful.

I look forward to further debate and scrutiny of the Bill as we pass through Committee. I am very happy to discuss the clarifications above, or the Bill itself, further with Peers who wish to do so. Officials from the Department for Education and the Department for Business, Energy and Industrial Strategy will also be available for factual briefings on the Bill during Committee stage of the Higher Education and Research Bill. I am placing a copy of this letter in the library of the House.

Yours ever,

Viscount Younger of Leckie
Higher Education and Research Bill: student protection plans

September 2016
Introduction

1. This note sets out further information on Student Protection Plans, which the Office for Students may require registered higher education institutions to provide under the Higher Education and Research Bill.

2. This is an information note; it does not represent full guidance, which the Office for Students will develop in consultation with stakeholders as part of the new higher education regulatory framework.

Context

3. Some providers already publish student protection plans. However, this requirement is voluntary and coverage is not consistent across the sector. Students can, in certain circumstances, claim protection under consumer law, but taking individual action can be costly and would not necessarily result in a continuation of studies.

4. Student protection plans are not a new concept, and we want to build on existing best practice to ensure more students can benefit from them; there are still too many students who would not know what would happen if their course, campus or institution were to close. We also need to ensure that students have a clear and long-lasting record to prove the value of their degrees, should their provider no longer exist after they have graduated.
Rationale for student protection plans

5. Higher education can be a life-changing experience. Students invest significant amounts of time, commitment and financial resources in their education, and expect to receive value for money in return. Our reforms will give students greater clarity about what they can expect from their provider, and greater consistency about what would happen if unexpected problems occur, including if their course, campus or institution were to close.

6. While institutional closures happen infrequently in the higher education sector, as part of a diverse and innovative sector providers may need to stop providing a course or close a campus. Managed course changes and orderly institutional exits are a feature of a healthy, competitive and well-functioning higher education market.

7. Providers are responsible for ensuring their own financial sustainability, and it will remain the provider's decision whether to exit and their responsibility to implement any exit plans. It should not fall to Government or the Office for Students (OfS) to bail out failing institutions or micro-manage the consequences; our objective is to ensure that providers put in place clear and robust plans that will protect students if a course cannot be fully delivered.

8. Students should know upfront what support would be offered to them in a course closure situation. We are committed to upholding the reputation of the sector as well as minimising any impact on Government finances.

9. Our policy on student protection plans aims to do this in a proportionate and risk based way, which does not undermine student choice and competition, whilst minimising additional burdens on providers and without creating a barrier to entry to the higher education sector.
Purpose of student protection plans

10. We want students to be reassured that they will not be left exposed if their chosen course or institution were to close.

11. The Higher Education and Research Bill gives the OfS the power to require institutions included in its register to put student protection plans in place (clause 13). The OfS will have the flexibility to impose a legally binding registration condition on institutions to put plans in place where it thinks it necessary; breach of this condition may allow sanctions to be imposed. This flexibility will support the risk-based approach taken by the OfS, enabling it to vary requirements between different types of provider. This will help to ensure adequate, appropriate and consistent protection for students across the registered sector.

12. The plans will be able to support continuity of study in the event of course, campus or institution closure, through adequate, appropriate and consistent protection for students across the registered sector. The plans will be able to set out how students' interests will be protected. In our view, key measures of whether a plan is effective will be whether it is fair, accessible, transparent and explicitly made known to students.
Institutions affected by the student protection plan requirement

13. As set out in the Government's White Paper, all approved and approved (fee cap) providers, regardless of size, will be expected to have a student protection plan in place. A protection plan will meet the requirements of the Bill only if it is approved by the OfS.

14. More widely, all providers will be expected to make contingency plans to guard against the risk that courses cannot be delivered as agreed. Providers on the basic register will be encouraged to develop student protection plans as a matter of good practice, and to meet this need.

15. We anticipate that student protection plans should, at a minimum, apply to students who are studying at Level 4 or above, and be easily accessible to all prospective and existing students.

16. These measures to protect students should not act as a barrier to new providers entering the market. In line with the risk-based approach taken by the OfS across our reforms, any registered provider may be required to have a student protection plan in place, but measures in these plans and the protections they offer will depend on the risk profile of the provider.
Regulatory framework for student protection plans

17. A student protection plan includes the requirement that the plan must be approved by the OfS.

18. To help enable providers to design plans that obtain this approval, the OfS will set out in guidance broad requirements and expectations about what student protection plans should cover. This guidance will be principles-based and illustrative rather than prescriptive. The OfS will consult on its guidance on student protection plans as part of developing the new regulatory framework for higher education.

19. The OfS guidance will include:

- examples of events which could trigger the implementation of student protection plans;
- examples of measures which could be included in these plans; and
- details of how the OfS will assess and monitor plans to ensure they are credible.
Events which could trigger student protection plans

20. Student protection plans would be triggered by material changes specified by the OfS (as set out in clause 13(3)), particularly those which could affect students' continued participation in their chosen course or at the institution at which they are studying.

21. These changes could include, for example:

- a strategic decision by a provider to close a course or campus, or exit the market altogether;
- loss of key staff;
- insufficient enrolment and course take-up resulting in course or department closure;
- de-designation for student support purposes; or
- removal of a provider's Tier 4 Sponsor Licence (the Home Office issued licence which allows a provider to teach international students).
Examples of measures to protect students

22. The OfS guidance will be able to set out examples of actions and measures which could be included in plans to protect students and minimise disruption to their studies.

23. These measures could include, for example:
   - provision to teach out a course for existing students;
   - offering students an alternative course at the same institution;
   - making arrangements for affected students to switch to a different provider without having to start their course from scratch;
   - measures to compensate affected students financially.

24. The existing sector owned "Higher Education Course Changes and Closures: Statement of Good Practice" provides an example of the sort of measures the OfS may expect student protection plans to contain.

25. The statement helps clarify expectations that are reasonable for both students and providers. A copy of this statement is attached to this note, and is also available online.

26. The statement highlights the following standards as examples of good practice when preparing Student Protection Plans:
   - Transparent, fair and accessible policies and practices governing course closure and changes. This mainly concerns ensuring terms and conditions are accessible in one place and set out in a way that is clearly understood by students; and made clear to potential students at all stages of the application and enrolment cycle.
   - Clarity of options, timely notification and clear arrangements for consulting with students when changes occur. This should include a clear process to ensure continuity of their studies and minimise any potential negative impacts on students affected by changes and/or institution closures.
   - Set out arrangements for continuity of provision for students in the event of the closure of a higher education course. If teaching out in the institution is not
possible, providers should seek to offer alternative courses either within the institution, help students to transfer to other providers including transfer of credits or where these options are not possible, refund all or part of the fees paid by the students.

- Consider how a provider can support the wider higher education sector and its students in the event of course, department or provider failure elsewhere.

27. The basic principles of any student protection plan could be applied across different faculties for the same institution in a relatively light touch way.
Assessment and monitoring

28. The OfS, as the body which can require plans to be in place and the body that approves such plans, will have responsibility for ensuring student protection plans are credible. It will take a risk-based and proportionate approach to assessing whether a requirement to have a plan should be imposed.

29. The OfS will, in guidance, be able to set out how the student protection plans will be assessed and monitored, including the frequency with which plans should be reviewed and updated.

30. Plans will be able to require providers to inform the OfS if they plan to close a course, department, campus or institution. This will enable the OfS to maintain visibility across the sector, help build an intelligence base, as well as act as an early warning mechanism to understand how and whether students are being adequately protected.

31. The OfS will be empowered to work together with any higher education provider who is changing/closing a course, campus or institution, to ensure students are supported appropriately and that any institutional closure is managed properly.
Market exit

32. Course closures and orderly exits are likely to continue to be a feature of the sector. This has happened before, for instance, through mergers or name changes.

33. Only a very small proportion of these exits may be due to financial insolvency. Insolvency has been historically extremely rare in the higher education sector, and we expect this to remain the case.

34. While it will remain the responsibility of providers to ensure their own financial sustainability, the OfS will monitor the financial health of registered institutions, and will require student protection plans to be implemented if a provider is at risk of being unable to deliver a course.

35. Instances of a provider suddenly and without warning exiting the market completely are likely to remain extremely rare. In such cases, the OfS will be able to work with students who want to transfer to alternative institutions, with the aim of their having banked credit for study already completed.

36. In addition, we plan for the OfS register to provide a list covering most current and past Degree Awarding Power holders, which will help to ensure students do not face difficulty in pointing to a clear and easily accessible record to prove the value of their degrees if their provider ceases to exist. This is to protect students who have graduated.

37. The ability of the OfS to require registered providers to create credible student protection plans will mean that students across the sector will have greater consistency in the protections they can expect, and greater clarity about what would happen if their provider were unable to deliver their course as agreed.