



Department  
for Education

# **Office for Students: monetary and financial penalties**

**Government consultation response**

**March 2018**

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## Introduction

1. The Higher Education and Research Act 2017 (HERA) makes provision for the OfS to impose sanctions on registered higher education providers ('providers') in circumstances stipulated in the Act. In particular, HERA enables the OfS to impose two types of penalty:
  - Section 15 of HERA confers a power on the OfS to impose a monetary penalty where it appears to the OfS that there is, or has been, a breach by a provider of one of its ongoing registration conditions. The OfS is required to impose any monetary penalty in accordance with regulations made by the Secretary of State which may include the maximum amount of a penalty and factors that the OfS must, or must not, have regard to when imposing a monetary penalty.
  - Sections 70 and 71 of HERA enable the Secretary of State to make regulations giving the OfS the power to impose a financial penalty on a provider for the late or non-payment of registration fees that it intends to charge from 2019/20 and for the late or non-payment of fees other than registration fees<sup>1</sup>. The legislation also allows the OfS, in accordance with regulations made by the Secretary of State, to charge interest on any outstanding fees.
2. On 28 February 2018 the OfS published its [regulatory framework](#) under HERA, together with its initial and general ongoing registration conditions. The regulatory framework includes a section on how the OfS will intervene and impose sanctions (including monetary penalties). The OfS's ongoing registration conditions include a condition requiring providers to pay registration fees and other fees. The Department for Education has also published a response to the '[Office for Students: registration fees \(stage 2\)](#)' consultation, setting out its decision on the registration fee model.
3. As part of the transition to the new regulatory system under HERA, it is planned that the provisions of HERA and regulations relating to monetary and financial penalties will come into force in time for the full launch of the new regulatory system from 1 August 2019.
4. The consultation '[Office for Students: monetary and financial penalties](#)', published on 14 December 2017, made a number of proposals, including:
  - that the Secretary of State should set a maximum limit on the monetary penalty amount that the OfS may impose for a breach of an ongoing registration condition

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<sup>1</sup> It is not intended that the OfS will be able to charge of 'other fees' under s71 of HERA in academic year 2019/20 but may be able do so in subsequent years following an evaluation of the cost of the OfS's regulatory activity and after further consultation

- that the maximum penalty should be the higher of a set percentage of the registered provider's "qualifying income" (being OfS grant funding, plus the income the provider receives through tuition fees) or £500,000; the government asked for views on whether that percentage of qualifying income should be either 2% or 5%
- the mandatory factors which the OfS must have regard to when imposing a monetary penalty
- that the OfS should charge a flat rate financial penalty for late payment of registration fees of £250 and should charge interest on any unpaid amount of fees accruing at 5% p.a. above the Bank of England's Official Bank Rate.

### **Treatment of income from penalties and interest**

5. Consistent with section 72 of HERA and Schedule 3, paragraph 5, the OfS cannot retain any income from financial penalties or monetary penalties or interest accrued on them. In practice, sums from penalties and interest would be remitted to HM Treasury's Consolidated Fund, from which general government expenditure is provided (including for the Office for Students). This approach guards against the regulator imposing penalties or charging interest for its own financial gain.

## Summary of decisions

Proposal	Summary of change or decision
<p><b>Q2.</b> Do you agree or disagree that 2% of qualifying income or £500,000 (whichever is the higher amount) is the most appropriate maximum monetary penalty amount?</p>	<p>The government has decided that to encourage compliance in the interest of students the maximum penalty amount should be 2% of qualifying income or £500,000 (whichever is the higher amount).</p> <p>Before the OfS can start imposing monetary penalties in August 2019, the OfS will publish guidance including further details on its processes and decision making.</p>
<p><b>Q3.</b> Do you agree or disagree that 5% of qualifying income or £500,000 (whichever is the higher amount) is the most appropriate maximum monetary penalty amount?</p>	<p>The government has decided to not use 5% of qualifying income or £500,000 as the maximum penalty amount due to concerns it could result in an overly punitive penalty.</p>
<p><b>Q4.</b> Do you agree or disagree with the proposed mandatory factors the OfS must take into account when considering whether to impose a monetary penalty, and how much that penalty should be?</p>	<p>The government has decided not to amend this proposal and can confirm that the mandatory factors are those proposed in Section 4 of the consultation.</p>
<p><b>Q5.</b> Do you agree or disagree with the proposals on the late payment penalty?</p>	<p>The government has decided not to amend this proposal and can confirm that the OfS will implement the late payment penalties policy proposed in Section 5 of the consultation.</p>

**Table 1: summary of changes and decisions**

## Summary of responses received

6. In total, the government received 54 responses to the consultation from a cross-section of the providers in the HE sector, including previously HEFCE funded institutions; Alternative Providers; Further Education Colleges delivering HE; mission and representative associations representing groups of providers; and two individuals. There were no responses from students. A list of respondents, excluding those who requested confidentiality, can be seen at annex A.

Type of respondent	Number	Percentage (rounded)
Publically funded higher education providers	28	52%
Alternative providers (with designated courses)	6	11%
Further Education Colleges	10	18%
Representative organisations, businesses and trade bodies	8	15%
Individuals (non-student)	2	4%

Table 2: breakdown of responses by type of respondent

## Question analysis

7. There was some duplication across responses to some of the questions, with respondents often repeating similar points in their answers. The following analysis therefore covers the points made under the most appropriate question heading, cross-referring to other questions where necessary.

## Main findings from the consultation

8. This document includes both the statistical analysis of responses to each question and a summary of the substantive themes raised in the responses. While all formal responses were considered and reflected in the quantitative analysis, the qualitative analysis seeks to capture the substantive themes arising from responses. The percentages reported relate to the number of responses to individual questions, rather than the number of responses to the consultation in total. The headline messages arising from the responses to the consultation questions are as follows:

- 50 respondents gave their views on the potential equality impacts of the proposals in the consultation. The main comments were that the imposition of a monetary penalty could impact on a provider's ability to deliver services to all students and particularly those with protected characteristics, and that a high maximum monetary penalty amount could deter providers from widening participation. However, 15 respondents noted that they did not think the proposals impacted on equality.
- 58% of respondents disagreed with using 2% of qualifying income or £500,000 (whichever is the higher amount) as the maximum penalty amount, whilst 23% agreed with the proposal. There were concerns that this proposal could result in financial sustainability issues for the provider if the maximum penalty amount was imposed, and that using monetary penalties in general takes away income that would be used for the benefit of students. Further Education Colleges and Alternative Providers were mainly concerned that the £500,000 ceiling would result in smaller providers receiving disproportionately high penalties. There were also general comments that further information was required about the circumstances for when the maximum penalty could be used, and the OfS's processes for imposing penalties. Respondents in favour of this proposal thought it would support compliance, and they were assured that the OfS would act proportionately when deciding on whether to impose a penalty and what the amount should be.
- 94% of respondents disagreed with using 5% of qualifying income or £500,000 (whichever is the higher amount) as the maximum penalty amount, whilst 2% agreed with the proposal. Respondents were concerned this proposal would result in an excessive penalty amount and that it could create financial sustainability issues for providers if it was used.
- 55% of respondents agreed with the proposed mandatory factors, whilst 17% disagreed. Respondents had a number of queries about whether the factors will be prioritised and how OfS's decision making will work. Many wanted the impact of a monetary penalty on students to be a priority factor.
- 63% of respondents agreed with the proposed financial penalty for late payment of registration fees whilst 30% disagreed. Respondents highlighted

that the OfS should demonstrate judgement when issuing financial penalties for late payment.

- There were 46 responses giving further views. The majority of these provided further views and comments in relation to matters covered by other questions within the consultation.



## Question 1

**What are your views on the potential equality impacts of the proposals that are set out in this consultation? Please provide any relevant evidence if you can as this will support future policy development**

9. 50 respondents raised various concerns around the equality impacts that the proposals might have, however, there was no evidence provided to substantiate these concerns. The most prevalent of these concerns were that:
- the imposition of a monetary penalty would impact on a provider's ability to deliver services to their students, which could specifically reduce the support given to students with protected characteristics. This was a particular concern for smaller providers, which is argued to tend to have a higher proportion of students with protected characteristics. However, 15 respondents noted that the proposals would not disadvantage students.
  - a high maximum monetary penalty could deter providers from widening participation as they could be at increased risk of breaching their ongoing registration conditions for quality as poorer student success and progression rates might be more likely.

Some respondents also queried why an equality impact assessment was not undertaken.

## Government response

10. The government has considered the equality impacts of these proposals (in particular, the matters to which due regard must be given under the Equality Act 2010) in light of the responses to the consultation. As part of the OfS's student focussed approach, its ongoing registration conditions are designed to ensure that English higher education delivers positive outcomes for students and that students from all backgrounds (particularly the most disadvantaged) can access, succeed in, and progress from higher education<sup>2</sup>. Compliance by providers with their ongoing registration conditions will therefore be in the interests of students (from all backgrounds and including those with protected characteristics). Compliance with certain conditions, such as those on access and participation plans and statements (OfS conditions A1 and 2) and the transparency condition (OfS condition F1), will in particular help to advance equality of opportunity between people who share a protected characteristics and those who do not. Other conditions such as those on good governance will help to eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by

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<sup>2</sup> The OfS's regulatory framework: [www.officeforstudents.org.uk/media/1047/ofs2018\\_01.pdf](http://www.officeforstudents.org.uk/media/1047/ofs2018_01.pdf)

the Equality Act, as well as to foster good relations between people who share a protected characteristic and those who do not.

11. This means that it is very important for students (as well as others who work for or with providers) including those with protected characteristics that the government ensures that the OfS has effective ways to secure provider compliance, which include the ability to impose monetary penalties that are meaningful and appropriate. The government believes the proposals discussed under question 2 and 4 below meet this objective.
12. As discussed under question 2, a maximum penalty amount is a maximum limit rather than an indicator of the likely level of a penalty. In practice, we expect providers to comply with their ongoing registration conditions. However, if a provider does breach an ongoing registration condition, the OfS has a variety of interventions and sanctions it can use, and will need to judge what the most appropriate action is, based on the particular circumstances of the situation. As discussed under question 2, the OfS's decision making will be subject to a number of constraints that mean, among other things, any monetary penalty imposed by the OfS can be expected to be reasonable and proportionate. In particular, when deciding whether to impose a monetary penalty and the penalty amount, the OfS will need to consider the mandatory factors (discussed under question 4 below). These are designed to support a reasonable and proportionate outcome and the factor relating to impact on students will ensure that any potential detrimental impact on students (including those with protected characteristics) is taken into account. The OfS will also need to comply with its obligations under the public sector equality duty in the Equality Act when making its policy decisions.
13. The impact on equality is an integral part of the policy making process, and does not only result in an equality impact assessment. In developing the proposals in this consultation, we have carefully considered the impacts.

## Question 2

**Do you agree or disagree that 2% of qualifying income or £500,000 (whichever is the higher amount) is the most appropriate maximum monetary penalty amount?**

	Total	Percent
Agree	12	23%
Disagree	31	58%
Not sure	10	19%

## Qualitative analysis

14. A majority of respondents did not support this proposal, and some had concerns about monetary penalties being used in the regulation of the higher education sector at all. A number of respondents stated that monetary penalties would take away provider income that is used for the benefit of students, and that this proposed maximum penalty could impact on a provider's financial sustainability if it is used. Of those who disagreed with the proposal, the most widely expressed concern was that the £500,000 ceiling could result in small providers, including further education colleges having an disproportionately high penalty imposed. Some publically funded providers were worried that a penalty could harm their charitable objectives. There were only a few respondents that suggested an alternative maximum penalty amount that included lowering it to 0.5% or 1% of qualifying income, removing the £500,000 ceiling, having an fixed maximum of £500,000 or using bands set by student full time equivalent numbers.
15. Respondents that were in favour of this proposal noted that they expected the maximum monetary penalty amount to only be imposed in exceptional cases, that they were satisfied that the OfS has a range of other interventions and sanctions that are likely to be used before imposing a monetary penalty, and that the maximum penalty amount should help encourage compliance. Both respondents who are not connected to, or representing providers, were either in favour of this proposal or thought the maximum should be higher.
16. There were some requests (from both those who disagreed with the proposal and those who agreed) for further information on the circumstances of when the maximum monetary penalty could be imposed, how the OfS will ensure that any monetary penalty is reasonable and proportionate, and how the OfS will reach a decision on the final amount of a monetary penalty. Respondents were also concerned that they could face a monetary penalty where they have inadvertently breached an ongoing registration condition, or where the context surrounding the breach has not been taken into account.
17. Nine respondents commented on qualifying income (tuition fees and OfS grant funding) being used as the penalty measure. Five were supportive, whilst the others thought it could disadvantage providers with income limited to teaching or where they are reliant on government funding, as they do not have alternate income streams to help absorb the cost of the penalty and would also mean a penalty would directly impact on the income used for teaching students. There were also some queries about the definition of qualifying income, including if it covers expenditure on access and participation, and the period it covers.

## Government response

18. The government has considered the views and comments submitted in response to this proposal and notes that a majority of respondents disagreed with it. However, the government remains of the view that, on balance, this proposal represents the best option. The government plans therefore to bring forward regulations<sup>3</sup> with a maximum penalty amount of 2% of qualifying income or £500,000 (whichever is the higher amount).

19. In considering its response the government has noted the following points in particular:

- There were no responses to this consultation from students, with 81% of responses coming from providers i.e. the group that would be affected by such penalties. There were only two responses from individuals (both of whom were not connected to higher education provision) and they both supported either this option or the 5% option.
- There was no consensus among respondents on what an alternative maximum penalty amount should be.
- Provider compliance is in the interest of students and is vital to the OfS's student focussed approach. To encourage that compliance, the maximum penalty amount needs to be set at a level that is high enough to ensure sufficient visibility and impact. Further, the maximum penalty amount needs to allow the OfS to be able to deal effectively with a diverse range of circumstances including varying provider and student risk levels, varying types and size of provider, and breaches of different registration conditions of varying levels of seriousness and impact.

20. We considered lowering the percentage, however when comparing this amount with other regulators, it is considerably lower than the 10% of turnover many others use, for example Ofqual and Ofgem<sup>4</sup>. We also did not think lowering it to 1% or 0.5% would meet the requirements relating to visibility, impact and flexibility as well as the 2% proposal, and it would not in any event adequately satisfy some respondents' concerns.

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<sup>3</sup> Subject to parliamentary approval.

<sup>4</sup> Ofqual's Taking Regulatory Action: [www.gov.uk/government/publications/taking-regulatory-action; in particular, see section 151B of the Apprenticeships, Skills, Children and Learning Act 2009](http://www.gov.uk/government/publications/taking-regulatory-action;in-particular,see-section-151B-of-the-Apprenticeships,Skills,ChildrenandLearningAct2009)

Ofgem's financial penalties:

[www.ofgem.gov.uk/sites/default/files/docs/2014/11/financial\\_penalties\\_and\\_consumer\\_redress\\_policy\\_statement\\_6\\_november\\_2014.pdf](http://www.ofgem.gov.uk/sites/default/files/docs/2014/11/financial_penalties_and_consumer_redress_policy_statement_6_november_2014.pdf); in particular, see section 30O of the Gas Act 1986 and section 27O of the Electricity Act 1989

21. The £500,000 ceiling is also desirable for a number of reasons:

- Firstly, there are some providers which will not have a qualifying income, as they do not charge tuition fees and they will not receive OfS grant funding (e.g. where they receive funding from UKRI, or where students have their tuition costs offset against their salary where they work alongside their studies). Therefore, an alternative to a percentage of qualifying income is needed to establish a suitable maximum penalty amount.
- Secondly, the £500,000 ceiling will give the OfS sufficient flexibility to impose an appropriate penalty amount in circumstances where a low qualifying income would not. For example, if a provider made a financial gain from breaching an ongoing registration condition greater than 2% of its qualifying income. This is more likely to occur where qualifying income is low.
- Thirdly, we considered lowering the £500,000 maximum or having banded amounts grouped by full time equivalent student numbers. However, it is difficult to determine lower amounts which work for the range of provider sizes and therefore keeping the £500,000 as a maximum would provide the best coverage.

22. The maximum penalty amount is also an upper limit and the government would expect the OfS to impose a monetary penalty at this level only in the most exceptional circumstances. In practice, the OfS's discretion to impose a monetary penalty will be constrained in a number of ways and the OfS can be expected to impose penalties that are appropriate, reasonable and proportionate, whilst having taken into account all the circumstances of a particular case. The OfS will need to consider the mandatory factors, and in considering the impact on students, the OfS will need to consider the impact of the penalty amount on a provider's financial sustainability. This addresses small providers concerns about the £500,000 ceiling resulting in disproportionately high penalty amounts, as the OfS will be expected to act reasonably and impose penalty amounts that are proportionate.

23. Before 1 August 2019 (from when the OfS will have the power to impose a monetary penalty) the OfS will produce more detailed guidance on how it will take decisions to impose monetary penalties and on the amount of penalty to be imposed, including processes for decision making and circumstances for imposing monetary penalties.

### **Proportionate and reasonable regulation**

24. In deciding whether to impose a penalty, and if so the amount of penalty, the OfS will be required under section 2(1) of HERA to have regard to relevant principles of best regulatory practice, including that regulatory activities should be proportionate and targeted only at cases in which action is needed. The Regulators' Code, which the OfS is committed to follow, notes that regulators should choose proportionate approaches to those they regulate, based on relevant factors including, for example,

business size and capacity<sup>5</sup>. In addition, the OfS will be required to act consistently with the principles of general administrative law. This means, among other things, that the OfS must act reasonably and any penalty should be proportionate.

25. HERA lays down detailed procedural safeguards in relation to the imposition of penalties. Before the OfS can impose a penalty on a provider the OfS must give the provider notice of the proposed penalty, with its reasons for proposing to impose a penalty. The provider will have a right to make representations, which must be taken into account by the OfS when making its final decision. HERA gives providers a statutory right of appeal to the First Tier Tribunal, against both a decision to impose a penalty and a decision on the penalty amount.
26. The OfS will also be required to have regard to the mandatory factors set out in question 4 and its own regulatory framework (which includes a number of intervention factors). These factors are designed to support a reasonable and proportionate outcome.

### OfS's ongoing dialogue with providers

27. In any event, before monetary penalties and other sanctions are imposed we expect the OfS to have had discussions with the provider to understand the circumstances of the situation, and to then use this information to form judgements on the most appropriate action to take, whether that is imposing a monetary penalty or using another sanction or intervention. The OfS's regulatory framework<sup>6</sup> sets out how this ongoing dialogue with providers will work:

*'All providers will be monitored using **lead indicators, reportable events and other intelligence** such as complaints. These will be used to identify early, and close to real-time warnings that a provider risks not meeting each of its ongoing conditions of registration. Regulatory decisions will not normally be taken solely on the basis of these indicators, but they will identify areas for the OfS to assess further. The OfS will respond swiftly with interventions (which may include sanctions) if deemed necessary'*

### Qualifying income

28. There were very few responses that gave views on using qualifying income<sup>7</sup> as the penalty measure, and we will not be making any changes to our proposal. As the OfS

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<sup>5</sup> The regulators' code, paragraph 1.1:

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300126/14-705-regulators-code.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf)

<sup>6</sup> Paragraph 19, of the OfS's regulatory framework:

[www.officeforstudents.org.uk/media/1047/ofs2018\\_01.pdf](http://www.officeforstudents.org.uk/media/1047/ofs2018_01.pdf)

<sup>7</sup> Qualifying income is intended to cover income that a registered provider receives through direct OfS grant funding, made under sections 39 or 40 of HERA (or, in 2018-2019, under the grant funding power previously exercised by HEFCE in the Further and Higher Education Act 1992), together with the income the provider receives through tuition fees for undergraduate, postgraduate, home, EU and international students (including fees paid directly through the Student Loans Company, and tuition fees paid directly to the provider by students themselves or via a sponsor).

only regulates a provider’s higher education provision, and as a provider can only receive a monetary penalty where it breaches one of the OfS’s ongoing registration conditions, the qualifying income for the penalty amount should only cover tuition fee income for their higher education courses, and grants from the OfS. Although this means that the income and funding for the benefit of students could be directly impacted, the OfS will need to consider the impact on students of imposing a monetary penalty (as part of its consideration of its mandatory factors) and if it judges that a penalty needs to be imposed, it should ensure the penalty amount is proportionate to the breach, and a provider’s individual circumstances. To further ensure there is not a detrimental impact on students the OfS can also set up payment plans with providers that have financial sustainability or viability issues.

29. The qualifying income will be calculated from a provider’s tuition fee and OfS grant funding income, and there will not be any deductions made for expenditure such as that spent on access and participation. Only grants made by OfS will be included in qualifying income. Grants made by other bodies, such as research funding by UKRI will not be included in qualifying income. Also, tuition fee income from non-credit-bearing courses, further education courses and research training support grants will not be included in qualifying income.
30. Qualifying income will be based on the data available for the 12 month financial year immediately before the breach. Where there is no preceding 12 month financial year, income for the months preceding the breach for which data is available should be used and, if necessary, scaled up to an amount that represents 12 months.

### Question 3

**Do you agree or disagree that 5% of qualifying income or £500,000 (whichever is the higher amount) is the most appropriate maximum monetary penalty amount?**

	Total	Percent
Agree	1	2%
Disagree	50	94%
Not sure	2	4%

### Qualitative analysis

31. Respondents were very unsupportive of this proposal. The same concerns for using 2% of qualifying income were raised, and respondents went further to say that 5% of qualifying income would be an excessive maximum penalty amount and would result in unnecessarily punitive penalties. Respondents noted that this proposal would also further impact on a provider’s financial sustainability if the maximum was used.



## Government response

32. The government has considered the views submitted in response to this proposal and has concluded that it will not pursue it due to the high number of respondents disagreeing with it. Although we want to ensure there is a high enough maximum penalty to encourage all providers to comply (including larger and wealthier ones). We agree that 5% could be deemed excessive, and have determined that a lower maximum of 2% of qualifying income or £500,000 (whichever is the higher amount) will provide the desired flexibility, visibility and impact.

## Question 4

**Do you agree or disagree with the proposed mandatory factors the OfS must take into account when considering whether to impose a monetary penalty, and how much that penalty should be?**

	Total	Percent
Agree	29	55%
Disagree	09	17%
Not sure	10	19%

## Qualitative analysis

33. Respondents were broadly supportive of the mandatory factors that the government proposed, with a number commenting that they were fair and reasonable and a sensible starting point for decision making. A common theme was the prioritisation and weighting of factors and the need for more detail about how they would be used to reach decisions. A number of respondents would like greater clarity on how the factors will be applied in practice and the framework and thresholds that will underpin OfS decision making.

34. There was some agreement that severe penalties should be reserved for breaches where regulations were deliberately or recklessly breached with the goal of making financial gains. One respondent felt the OfS should prioritise breaches that have a direct impact on students such as the conditions on consumer protection law and Student Protection Plans. For unintentional breaches, dialogue and engagement were felt preferable to a penalty by a number of respondents. Some would like an additional step in the process, after an issue has been identified but before sanctions become necessary, for the OfS to work with the provider to address the issue, to avoid formal regulatory intervention.

35. There was significant agreement among respondents that the factor on impact on students should be prioritised as this goes to the heart of the OfS' purpose. However,



for a number of respondents there was a tension here because they thought it unlikely that a penalty could be imposed without impacting on students.

36. One respondent stressed that unlike other sectors, rather than shareholders and profits being impacted by a monetary penalty, students bear the financial burden as it is the provider's operating expenses on education activities, funded by tuition fees, which is used. Some respondents suggested that students directly affected by the breach should receive compensation and that tuition fees should not be included in the qualifying income.
37. Other issues raised included the need to consider the potential reputational damage to the sector and the potential impact to the local communities or the surrounding region of a provider. There were also points raised about the Office of the Independent Adjudicator and the OfS needing to collaborate where a high numbers of students are adversely impacted.

## **Government response**

38. The government has considered the views submitted in response to this proposal and confirms that it will proceed with the mandatory factors as proposed. These are:

- 1) The seriousness, impact and nature of the breach
- 2) Any gain (financial or otherwise) made by the provider as a result of the breach and, if so, the amount of the gain (if it can be quantified)
- 3) The OfS's assessment of the risk of a provider failing in the future to comply with OfS regulation
- 4) The impact of the monetary penalty on students

39. The government remains of the view that these are the key matters that the OfS should consider when deciding whether to impose a monetary penalty and if so, how much it should be. The mandatory factor relating to the impact of the monetary penalty on students should be capable of covering not only the impact on a particular group of students, but also the impact on students generally whilst the factor on the seriousness, impact and nature of the breach will cover what impact the breach has had on students. In addition, as mentioned above, provider compliance with ongoing registration conditions will generally be expected to be in the interests of students overall.

40. The OfS will be required to consider these factors, but they will then have the discretion to consider other factors as they feel appropriate and relevant. It is also for the OfS to decide whether and how they want to prioritise these factors (including the mandatory factors). However, importantly, the OfS's discretion will be subject to the constraints to act proportionately and reasonably as discussed in paragraphs 24 to 26.

41. As already mentioned, the OfS will produce more detailed guidance on how it will take decisions to impose monetary penalties and on the amount of penalty to be imposed, including processes for decision making and circumstances for imposing monetary penalties. It is expected to provide more detail on how the OfS will take into account the mandatory and other factors.

## Question 5

**Do you agree or disagree with the proposals on the late payment penalty?**

	<b>Total</b>	<b>Percent</b>
Agree	29	63%
Disagree	14	30%
Not sure	3	7%

## Qualitative analysis

42. Respondents were broadly supportive of the proposals that the government made around penalties for late payment of fees. Such respondents generally felt that the proposals were fair and proportionate. Only three respondents opposed the principal of a late payment penalty and there was no great weight of concern on any single element of the proposal. Issues where a few concerns were raised with the proposal to impose both a fixed charge and interest and a concern that the OfS might not have the discretion to take account of genuine one off administrative errors. There was a clear expectation amongst respondents, both from those that agreed and disagreed, that the OfS should exercise judgement in issuing late payment penalties. A number of respondents also highlighted the need for the OfS to consider the cashflow of smaller providers when deciding when to issue the registration fee late payment penalty.

## Government response

43. The government has considered the views submitted in response to this proposal and considers the proposed approach to be fair, proportionate and in line with other late payment penalty schemes. The OfS will be able to exercise professional judgement based on the specific circumstances of a late payment rather than it being mandatory for them to impose these penalties. With regard to the question of charging interest, the Government considers that it is fair and proportionate that once a flat penalty is charged that the incentive remains for providers to pay it, this is the purpose of the interest charge where the OfS will also have discretion.

44. In line with the broad agreement of respondents, the OfS will adopt this late payment penalty proposal.

## Question 6

**Please provide any further views you have on the government's proposals on the maximum penalty amount, the factors and the late payment penalty**

### Qualitative analysis

45. A total of 46 respondents submitted further views on the proposals made in the consultation document. Where these further views relate to the other questions in this consultation we have addressed them within the analysis and response for the appropriate question. There are however some comments which do not fit within any other question. This included the view that putting monetary penalties on the OfS register would be a double penalty, and that clarity is needed on when the OfS may publish the details of a monetary penalty.

### Government response

46. The OfS's regulatory framework sets out that information will be published on its register about any sanctions applied to a provider. This information will be published after the provider has completed any appeal process and it remains available until the sanction is withdrawn. The OfS will include detail on the amount of the monetary penalty and the reason for imposing it on the register. It is right to have this information on the OfS register to provide transparency, and for users of the register to be clear on what potential risks there are for that provider. By including the detail on the reason for the penalty users of the register will be able to judge if there is a risk to their own interest in the provider. For example, students may not be too concerned about a provider receiving a penalty for not producing its regulatory or data returns on time.

## Next steps

47. Regulations will be prepared on the basis of the policy decisions set out in this document. Those regulations must pass through the relevant Parliamentary scrutiny processes<sup>8</sup>.
48. It is planned that the Regulations will come into force on 1 August 2019, when the new regulatory framework becomes fully operational, which includes the OfS's full suite of ongoing registration conditions and the OfS's power to impose monetary penalties coming into effect, and when registration fees begin to be charged. This will permit the OfS from 1 August 2019 to start imposing monetary penalties where it appears to the OfS that there is, or has been, a breach of an ongoing registration condition (from 1 August 2019), and financial penalties for the late or non-payment of registration fees. The OfS will publish detailed guidance on its monetary penalties policy and processes before this date.

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<sup>8</sup> See section 119 of HERA.

## **Annex A: List of organisations that responded to the consultation**

- Arts University Bournemouth
- Association of Colleges
- Association of Heads of University Administration
- Birmingham City University
- Bishop Grosseteste University
- Brunel University London
- Eastleigh College
- GuildHE
- Harlow College
- Harper Adams University
- Imperial College London
- Independent Higher Education
- Institute of Contemporary Music Performance
- London Metropolitan University
- Middlesex University
- MillionPlus
- Moorlands College
- NCG
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- Staffordshire University
- Sunderland College
- The Open University

- Tyne Coast College
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