

**Consultation:**

**Changes to residency criteria  
for access to financial support  
in Further and Higher  
Education**

## **Changes to residency criteria for access to financial support in Further and Higher Education**

This consultation seeks views on the proposal to change the residency criteria for access to financial support in Further and Higher Education

### **Responding to this Consultation**

We are inviting responses to this consultation by 31 March 2023.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space ([Scottish Government - Citizen Space \(consult.gov.scot\)](https://consult.gov.scot)). Access and respond to this consultation online at. <https://consult.gov.scot/higher-education-and-science/changes-to-residency-criteria-for-access>.

You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 31 March 2023.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

HE and FE Student Financial Support Team  
Scottish Government  
5 Atlantic Quay  
Atlantic Quay, 150 Broomielaw  
GLASGOW  
G2 8LU

### **Handling your response**

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

### **Next steps in the process**

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at [Scottish Government - Citizen Space \(consult.gov.scot\)](https://www.gov.scot/consultation). You will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

An Equality Impact Assessment and Children's Rights and Wellbeing Impact Assessment will then be prepared in connection with the reviewed course of action. It is intended that amending regulations will be laid before Parliament in order for the 2022 Regulations to be amended for the commencement of the 2023/24 academic year.

### **Comments and complaints**

If you have any comments about how this consultation exercise has been conducted, please send them to [David.Mackay2@gov.scot](mailto:David.Mackay2@gov.scot).

### **Scottish Government consultation process**

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: [Scottish Government - Citizen Space \(consult.gov.scot\)](https://consult.gov.scot). Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision-making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## **Executive Summary**

1. Following a judicial review hearing at the Court of Session, the Court issued a decision in the case of [Ola Jasim v Scottish Ministers \[2022\] CSOH 64](#) on 9 September 2022.
2. The Court declared paragraph 1(c)(ii) and (iii) of schedule 1 of the Students' Allowances (Scotland) Regulations 2007 ("the 2007 Regulations") (known as

'long residence rules') to be unlawful in light of Article 14 of, and Article 2 of the Protocol 1 to, the European Convention on Human Rights.

3. The 2007 Regulations were revoked upon the introduction of the Student Support (Scotland) Regulations 2022 ("the 2022 Regulations"), which came into force on 1 August 2022. However, the 2022 Regulations have mirrored the long residence rules at paragraph 1(c)(ii) and (iii) of schedule 1.
4. The Court found that the long residence rules failed to strike a fair balance between the impact they had on those excluded from eligibility for student support and the likely benefit to society of having clear rules restricting funding to those with a connection to Scotland.
5. The Scottish Ministers have given careful consideration to the decision of the Court in *Jasim* and have considered several options to address this. As a remedy for those students who were impacted by the 2007 Regulations, a Payment Scheme was launched in December 2022 to provide financial support.
6. Although the Court's decision was in relation to regulations which have now been revoked, Ministers have given an undertaking to review the residency criteria contained within paragraph 1 of schedule 1 of the 2022 Regulations and this consultation forms part of this work.
7. A core aspect of the current rules on eligibility for student support is reference to the "relevant date" for assessing a person's residence and immigration status (broadly the first day of the first academic year of the course). As part of this consultation, we are inviting views on the use of the relevant date as the reference point for eligibility assessments.
8. This consultation will run for a shorter period (10 weeks) rather than the standard 12 weeks. This is to enable the necessary analysis work to be undertaken along with the development of new legislation. The draft legislation needs to be laid in the Scottish Parliament in sufficient time to allow proper scrutiny and to ensure that the changes can take effect from the start of the 2023/24 academic year, being 1 August 2023. As the Parliament will be in recess over the summer months, this means legislation must be laid in May.

## **Background**

9. The long residence rules are part of the criteria for eligibility for access to financial support in Further Education<sup>1</sup> and Higher Education<sup>2</sup>. In Further Education, students who qualify for full support are able to access free tuition and bursary<sup>3</sup> support via their college. In Higher Education, eligible students are able to access free tuition (tuition fee grant), bursaries and/or student loans via the Student Awards Agency Scotland<sup>4</sup> (SAAS).
10. There are a number of different eligibility categories in student support legislation, which are largely based on residence and immigration status. A person must meet the conditions of at least one of these categories to be eligible to receive funding. The category which a student falls into can also influence the level of support they are eligible for, ranging from tuition fee support only up to full tuition fee and living cost support.
11. The long residence rules came into force on 1 August 2017, following the Supreme Court judgement in the case of *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 which declared it unlawful on ECHR grounds to refuse the petitioner student financial support purely on the basis that she was not settled in the United Kingdom. The effect of the judgement led to the Scottish Government considering whether its previous eligibility criteria for accessing student support were in contravention of ECHR rights.

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<sup>1</sup> Further education (FE) is a term to describe courses undertaken at a college under Higher National (HN) level i.e., SCQF level 6 and below, National Certificate courses, Access courses, National Qualifications (NQ) or Scottish Vocational Qualifications (SVQ).

<sup>2</sup> Higher Education is a term used to describe SCQF level 7 courses and above i.e., Higher National Certificate (HNC) and Higher National Diploma (HND) courses at college and degree level courses undertaken at university.

<sup>3</sup> Means-tested

<sup>4</sup> Level of living cost support (bursaries/ loan) that the student is entitled to is dependent on their household income (excl. Paramedic, Nursing and Midwifery students, Care Experienced and Estranged students). Free tuition is paid in the form of a tuition fee grant directly to the college/ university/ private provider of Higher Education. Scottish students studying elsewhere in the UK and those studying at Postgraduate level are entitled to a tuition fee loan. Students studying at a private provider of HE in Scotland are provided with a grant of £1,205 per year; however, the fees charged by these companies may be higher.

12. As a consequence, the long residence rules were introduced into paragraph 1(c)(ii) and (iii) of schedule 1 of the 2007 Regulations, in the following terms:

**“Schedule 1 – Persons eligible for allowances**

1. A person who –

(a) is ordinarily resident<sup>5</sup> in Scotland on the relevant date;

(b) has been ordinarily resident in the United Kingdom and Islands throughout the period of 3 years immediately preceding the relevant date; and

(c) is –

(i) settled in the United Kingdom within the meaning given by section 33(2A) of the Immigration Act 1971<sup>6</sup> on the relevant date; or

(ii) under the age of 18 and has lived in the United Kingdom throughout the seven year period preceding the first day of the first academic year of the course; or

(iii) aged 18 years old or above and, preceding the first day of the first academic year of the course, has lived in the United Kingdom either half of his or her life or a period of twenty years.”

13. Equivalent amendments were made to other pieces of student support legislation at the same time, to ensure that individuals who met the long residence rule would be entitled to the full range of student support<sup>7</sup>.

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<sup>5</sup> *Ordinary residence* is not defined in the legislation but has an establishment meaning in case law as a person living in a place lawfully, voluntarily and for a settled purpose as part of their day to day life, whether for a short or long time. A person moving to Scotland purely for educational purposes would not be deemed as being ordinarily resident in that country. Schedule 2 of the 2007 Regulations set out a number of rules which applied in determining whether a person was to be treated as being, or having been, ordinarily resident in a place at a particular point in time.

<sup>6</sup> This section of the Immigration Act states that references to a person being settled in the United Kingdom are references to that person being ordinarily resident in the United Kingdom without being subject to any time restriction for remaining in the UK.

<sup>7</sup> The Education (Fees) (Scotland) Regulations 2011  
The Education (Student Loans for Tuition Fees) (Scotland) Regulations 2006  
The Education (Student Loans) (Scotland) Regulations 2007  
The Nursing and Midwifery Student Allowances (Scotland) Regulations 2007  
The Education Authority Bursaries (Scotland) Regulations 2007  
The Education Maintenance Allowances (Scotland) Regulations 2007

14. Generally, prior to 1 August 2017, only students with settled status in the United Kingdom who had been resident in the UK / Islands for three years and were ordinarily resident in Scotland on the relevant date would be entitled to home fee status<sup>8</sup>, tuition fee and living cost support during their studies, with some exceptions (for example, frontier workers, refugees and those with temporary protection).
15. The overarching policy rationale for requiring students to have settled status to access student support was because it was considered to be a clear way for individuals to demonstrate a connection to Scotland, which in turn would suggest that they were more likely to remain here and make a longer-term contribution to the Scottish economy after graduation. Without the requirement for such a connection, there would be a risk of finite public resources for student support being provided to students who would be unable to complete their course because their time in the UK was limited or being unable to remain and contribute to society after completing their studies.
16. The long residence rules, however, provided a route for those who did not have settled status to access home fee status / student financial support providing they were ordinarily resident in Scotland on the relevant date and had resided within the United Kingdom for a specified period of time. These rules allowed people to establish a connection with Scotland even in the absence of settled immigration status.

### **Proposal to replace long residence rules**

17. As noted above, the 2022 Regulations mirrored the long residence rules as introduced to the 2007 Regulations in 2017, but with the addition of paragraph 1(c)(iv). The terms of schedule 1 in the 2022 Regulations are as follows:

#### **Schedule 1 – Persons eligible for Student Support**

##### **“1. Persons who are settled in the United Kingdom or have long residence**

A person who on the relevant date<sup>9</sup> –

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<sup>8</sup> Treated as a home student i.e., Scottish domiciled student. The fees for Scottish domiciled students undertaking an honours or ordinary degree course are capped at £1,820 by the Student Fees Specification (Scotland) Order 2011.

<sup>9</sup> *Relevant date* in relation to a course, means for a course starting in the period



- (a) is ordinarily resident in Scotland,
- (b) has been ordinarily resident in the United Kingdom and Islands throughout the immediately preceding 3 year period, and
- (c) is –
  - (i) settled in the United Kingdom within meaning given by section 33(2A) (interpretation) of the Immigration Act 1971
  - (ii) under the age of 18 and has lived in the United Kingdom and Islands throughout the seven-year period preceding the relevant date,
  - (iii) aged 18 or above, and preceding the relevant date, has lived in the United Kingdom and Islands throughout either half their life or a period of twenty years
  - (iv) aged 18 or above and received support by virtue of head (ii) for the academic year immediately preceding the relevant date, or
  - (v) the spouse, civil partner or child of a person described in head (i).”

18. Similar provisions are also found in definition of students having a relevant connection with Scotland in regulation 3 of the Education (Fees) (Scotland) Regulations 2022 (“the Fees Regulations”). As noted at paragraphs 14 and 15, the overarching policy rationale is that eligibility should be linked to having a relevant connection to Scotland as it would suggest that these students would more likely remain here post-graduation and make a longer-term contribution to the Scottish economy.
  
19. It is proposed that with effect from the 2023/24 academic year (i.e. from 1 August 2023), the long residence rules will be removed and the residency criteria under schedule 1 of the 2022 Regulations and the definition of relevant connection with Scotland under regulation 3 of the Fees Regulations will be expanded to include a wider group of students who would be eligible for home fee status and financial support. The intention is that eligibility will be expanded to include all those who have been living in the United Kingdom for 3 years and who are now ordinarily resident in Scotland, provided they have **any form of leave to enter or remain in the UK**. The type of leave to enter or remain will not be specified (subject to some exceptions below), but the leave must not have expired. It is proposed that eligibility would also be extended to the spouse, civil partner or child of a person with any form of leave to enter or

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1 August to 31 December, the relevant date is 1 August  
 1 January to 31 March, the relevant date is 1 January  
 1 April to 30 June, the relevant date is 1 April  
 1 July to 31 July, the relevant date is 1 July

remain in the UK. These family members would also have to meet the other eligibility requirements (3 years' residence in the UK and ordinarily resident in Scotland on the relevant date).

20. This proposal would see students without a form of settled status no longer being dependent on meeting a minimum number of years in the UK (beyond the standard requirement for 3 years' ordinary residence). We have selected 3 years as this is consistent with the minimum residence requirement that individuals with settled status in the UK must meet in order to qualify for student support. The reason for this requirement is to continue to ensure that individuals will only qualify for student support where they can establish a sufficient connection to Scotland at the time of their application i.e. that they may have set up a home here; they may have been in employment; or they have an intention to stay in Scotland post-graduation and contribute to the Scottish economy.
21. This proposal would capture students who have been granted forms of limited leave to remain<sup>10</sup>. Limited leave to remain can be granted for a number of reasons and for a variety of periods of time. Individuals on certain types of limited leave are eligible after a pre-requisite period of time (variable depending on the specific type of leave) to apply for indefinite leave to remain or British citizenship. Indefinite leave to remain gives the holder permission to stay in the UK on a permanent basis.
22. This expansion of the eligibility criteria would not include those who currently have outstanding asylum claims. This is due to conditions under UK immigration laws imposed on the applicant whilst awaiting their application being processed, which restricts their recourse to public funds. However according to the UK Government<sup>11</sup>, applicants will usually get a decision on their application within 6 months. A 2021 report by the Refugee Council stated that almost half of applicants waited more than a year with almost 5% of

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<sup>10</sup> Limited leave to remain refers to the status of UK visa holders who have been approved to enter the UK and remain here until their visa expires. Whilst holders of certain visa types will be expected to eventually return to their home country, some categories of limited leave may lead to settled status in the UK. Settled status (e.g., in the form of British nationality or indefinite leave to remain) gives the holder permission to stay in the UK on a permanent basis.

<sup>11</sup> [Claim asylum in the UK: Overview - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/topics/asylum)

applicants waiting for more than 3 years<sup>12</sup>. As the individual would be required to be ordinarily resident in the UK for a minimum of 3 years in order to be eligible for student financial support, it is believed that restricting access for asylum seekers should not pose a significant barrier for potential students as their time in the UK awaiting the outcome of their asylum application would still count towards the three year residency requirement. Asylum seekers who do choose to study in Further or Higher Education whilst awaiting the outcome of their application are already able to access hardship funds (Discretionary Funds) through their college/ university which are provided by Scottish Government.

23. Individuals who are in the UK on a student visa would remain ineligible for financial support as they have applied to enter the UK on the grounds of education. Current eligibility rules do not consider an individual to be eligible for support if they are resident in Scotland solely for the purposes of education<sup>13</sup>. Dependents of the student visa holder (spouse, civil partner or child) who are here on a dependent visa would be eligible for support providing they met the other set eligibility criteria such as ordinary residence, course eligibility etc.
24. Individuals who did not meet the eligibility criteria set out on the relevant date would be ineligible for home fee status / student financial support. This is known as a 'bright line' rule. This is the position currently taken where no flexibility can be afforded due to the complexities of administering such discretion. For example, if discretion was provided to those individuals who would meet the eligibility criteria within one month of the relevant date, this would still in effect be a 'bright line' as those individuals who did not meet the eligibility criteria within the discretionary time period would be ineligible.
25. In the *Jasim* case, the judge noted that the traditional justifications for having a bright line or blanket rule are practicality and legality. On practicality, he observed that, "a standard inclusionary bright line rule coupled with the possibility of inclusion by way of a more tailored approach to other cases, far fewer in number, falling outside the bright line rule but arguably within the ambit of the policy objective, while no doubt to a degree more cumbersome than the current system, is difficult to categorise as quite unworkable."

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<sup>12</sup> Living in Limbo: A decade of delays in the UK asylum system (2021) Refugee Council [Living-in-Limbo-A-decade-of-delays-in-the-UK-Asylum-system-July-2021.pdf](https://www.refugeecouncil.org.uk/wp-content/uploads/2021/07/Living-in-Limbo-A-decade-of-delays-in-the-UK-Asylum-system-July-2021.pdf) ([refugeecouncil.org.uk](https://www.refugeecouncil.org.uk))

<sup>13</sup> Periods of residence in the UK or Scotland for education purposes are disregarded in calculating periods of ordinary residence, by virtue of schedule 3 of the 2022 Regulations.

26. The Scottish Ministers have considered these observations and whether there is scope for discretion in the student support eligibility rules. This option is not being recommended for the following reasons:
- a. it would not be possible to introduce an element of discretion for the new rule alone; this would have to be extended to all of the eligibility criteria for student support. This could create a significant administrative burden for SAAS and Further Education providers when assessing eligibility, which could lead to significant increase in turnaround times when processing funding applications. Even with discretion, there would need to be a practical ‘cut off’ point where someone would be ineligible, due to restrictions on student numbers as a consequence of education provider capacity, and to allow budget certainty for SAAS and Further Education providers.
  - b. it is not necessary for there to be any discretion to meet the policy aim of targeting support to those with a sufficient connection to Scotland. The requirement of 3 years’ residence in the UK is a reasonable and proportionate way of assessing that connection.
  - c. it is also considered preferable for the Scottish student support system to operate on the basis of certainty, with individuals able to determine from reading the legislation whether or not they would be eligible for support. This also helps to ensure consistency in decision-making and improves fairness and transparency in the decision-making process.

### **Proposal in relation to relevant date**

27. In assessing eligibility for home fee status and student support, the 2022 Regulations provide that the assessment is to be undertaken on the “relevant date”. This has sometimes been referred to by SAAS as being “the first day of the first academic year of the course”. The Regulations<sup>14</sup> allow for 4 different relevant dates depending on the point in the year the course commences.
28. The relevant date in relation to a course is, for a course starting in the period:
- |                         |              |
|-------------------------|--------------|
| 1 August to 31 December | - 1 August,  |
| 1 January to 31 March   | - 1 January, |

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<sup>14</sup> “Relevant date” is defined in regulation 2(1) of the Education (Fees) (Scotland) Regulations 2022.

1 April to 30 June - 1 April, and  
1 July to 31 July - 1 July,

in each case the 'relevant date' being at the start of the first year of the course of education.

29. This means that a student's eligibility for home fee status and student support is undertaken at the start of the course. If they are eligible at that point then, in most cases, they will remain eligible throughout the duration of their course of education.
30. However, this also means that if an applicant is not eligible for either home fee status or student support on the relevant date but subsequently becomes eligible part-way through their course, SAAS do not reassess the student during their course of education.
31. There is an exception to this rule in relation to refugees: the 2022 Regulations allow for an eligibility assessment to be undertaken at the date an application for student support is made (which could be part-way through the course), so long as the student was a refugee at the date that their application for student support was submitted<sup>15</sup>.
32. The policy rationale for the current position is to prevent a significant administrative burden for SAAS of having to reassess eligibility on residence grounds on an annual basis.
33. The vast majority of courses in Scotland commence in the autumn, resulting in the most common relevant date of 1 August being applied to determine residency eligibility.
34. Unlike assessment of household income (which is used to determine the level and type of living cost support which students receive), eligibility on the grounds of residence as the trigger for accessing home fee status / living cost support is not reassessed every year of the course. If a student is deemed eligible / ineligible on the grounds of residence on the relevant date, then that status applies for the duration of that course. This approach enables consistency with tuition fee status awarded by colleges or universities. Each institution will determine a fee status for students and that will be the student's fee status for the duration of the course. Having a set of rules that could result in a change in status part-way through a course could impact on institutions' finances (for

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<sup>15</sup> Paragraph 8 of schedule 1 of the 2022 Regulations.

instance, if a student stopped paying international fees and became eligible to pay the home fee rate part-way through a course).

35. A reassessment process during the course could also impact "controlled subjects", which are (mainly medical) subjects that the Scottish Government has a policy interest in ensuring that student numbers correspond with projected staffing needs in the NHS (for example) in future years.
36. If, however, the assessment of eligibility for applicants could be streamlined in a manner such as that proposed in this consultation, it may be possible for SAAS to consider re-assessing **some** students part-way through their course if their circumstances change so as to render them eligible for home fee status or student support. If this only applied to a small number of students, then this should not have a significant impact on institutions' financial planning or the Scottish Government's policy on controlled subjects.
37. The Scottish Government is considering the possibility of setting out a number of 'events' that could trigger a re-assessment of eligibility in subsequent years of study. For example, if a student was ineligible for home fee status / student support in year one but during the course of that academic year they triggered an 'event' provision', this could lead to their funding entitlement being reassessed in year two.
38. Such events could include a person being granted a particular form of leave, for instance obtaining indefinite leave to remain. Another 'event' might be the student becoming a family member of a person with protected rights or of a person who is settled in the UK or a family member of a UK or EU national with resident status in Gibraltar or coming within the personal scope of the citizens' rights provisions. Each of the current eligibility categories would need to be examined to consider whether it might be appropriate, in certain circumstances, to extend eligibility part-way through the course. Another factor to consider is whether the minimum period of residence in the UK (or elsewhere, depending on the category) should be assessed from the point at which the individual's circumstances changed, or still from the relevant date.
39. In order to ensure that those benefiting from home fee status and / or student support could be assured that their support would continue throughout their course, any change to eligibility part-way through must only operate in favour of the student. This would mean that while an 'event' may have the effect of rendering an international student eligible for home fee status, a student enrolled as a home fee student could not lose that status during their course of study.

## **Consultation Questions**

40. The consultation questions are:

**Question One:** Do you agree with the overarching policy aim that students need to be able to demonstrate a connection to Scotland in order to obtain financial support from the Scottish Government for their studies?

Yes

No

Don't Know

**Question Two:** Please provide any relevant comments you may have in regard to your answer at question one.

**Question Three:** Do you agree that the length of a person's residence in the UK (together with a requirement to be ordinarily resident in Scotland on the relevant date) is an appropriate way of assessing whether a person has a sufficient connection with Scotland to qualify for the financial support package in Further / Higher Education?

Yes

No

Don't Know

**Question Four:** Do you agree that 3 years' residence in the UK is a suitable minimum residence requirement for setting eligibility for student support in Scotland?

Yes

No

Don't Know

**Question Five:** Do you agree that residence based on any form of leave to enter or remain from the Home Office in the UK should entitle a person to student support in Scotland, provided they otherwise meet the residence requirements?

Yes

No

Don't Know

**Question Six:** Do you agree that individuals who are here specifically for education purposes and are on a student visa, should remain ineligible for the financial support package from Scottish Government.

Yes

No

Don't Know

**Question Seven:** Do you think eligibility should be extended to the dependents (child, spouse or civil partner) of those with student visas?

Yes

No

Don't Know

**Question Eight:** Should financial support beyond support already given through discretionary funds be extended to students who are currently ordinarily resident in Scotland and have sought asylum from the UK Home Office, but whose application is still pending?

Yes

No

Don't Know

**Question Nine** Do you think eligibility for student financial support should be fixed according to an assessment at the start of their course (i.e., with reference to the relevant date)?

Yes

No

Don't Know

**Question Ten:** Do you have any comments on the sort of 'events or changes in circumstances that should trigger reassessment of a student's eligibility after the first academic year of their course?

**Question Eleven:** Do you have any other comments on the current policy of carrying out an assessment of eligibility on the relevant date, or the proposals to change it?





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