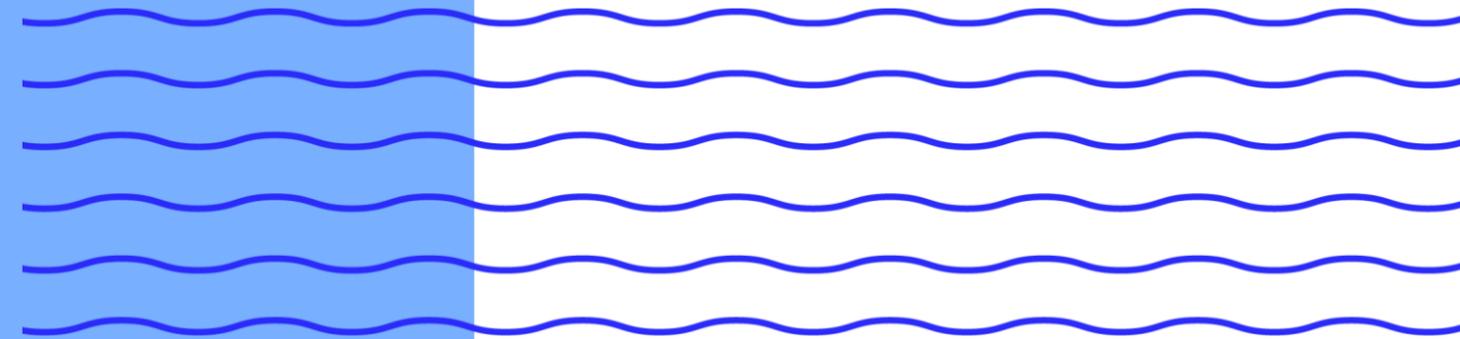


# This week

<b>Mond</b>	<b>Students as consumers and student protection</b>
<b>Tue</b>	<b>Access and participation</b>
<b>Wed</b>	<b>Improving institution-level student representation</b>
<b>Thu</b>	<b>Students on health courses</b>
<b>Fri</b>	<b>Students at work</b>



**WONKHE**  
SUs



# Students as consumers and protecting students



JIM DICKINSON | WONKHE SUS  
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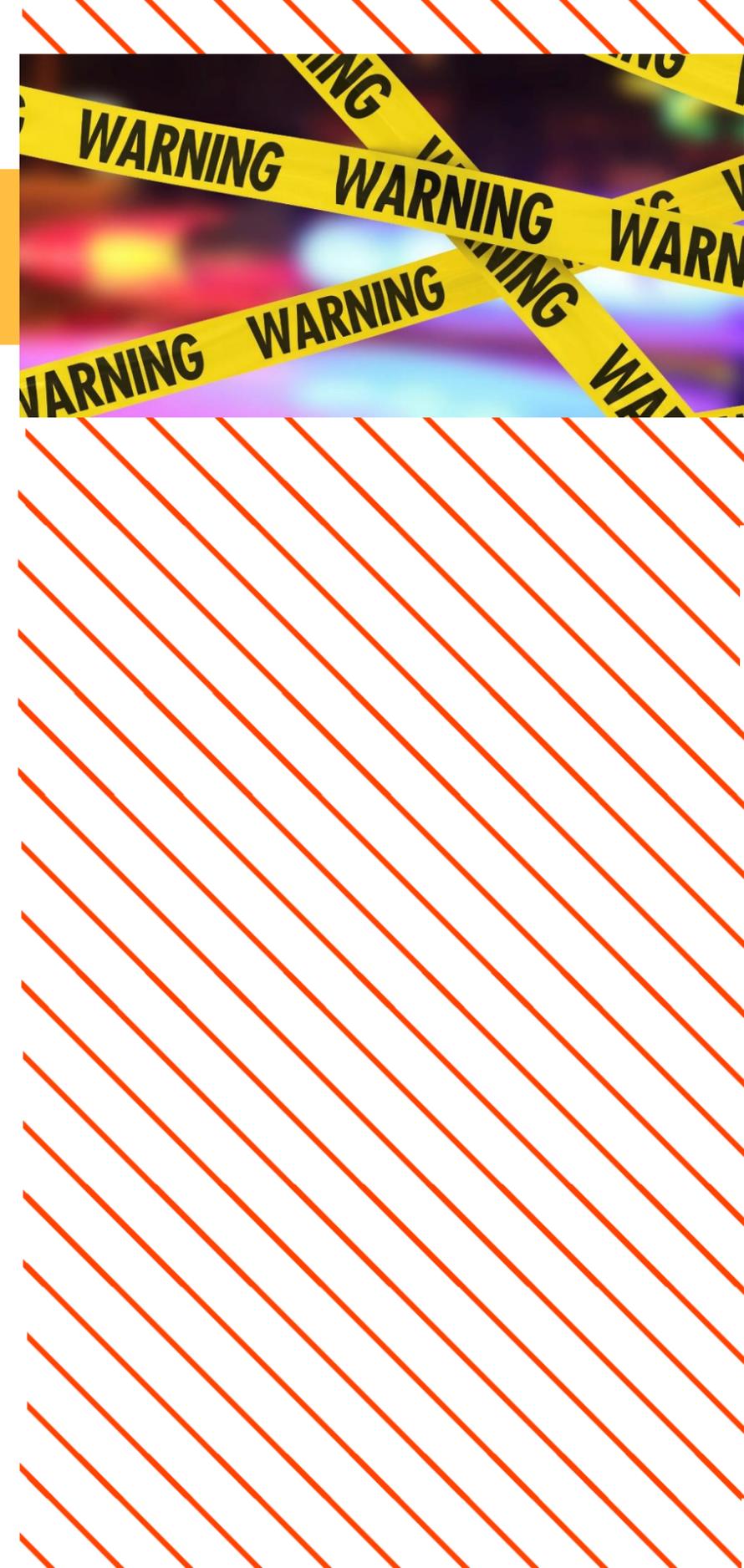
# Caveats

- We are not actual lawyers.
- We are triangulating legal advice to universities, advice from regulators/adjudicators and case law from other sectors
- Almost nothing related to the Consumer Rights Act (or other bits of consumer protection law) and the relationship to HE has been tested in the courts.
- If you want actual legal advice do contact an actual legal lawyer.
- Not a full overview of CPL, just relevant bits
- Lawyers themselves argue over interpretation.
  - Years of a course.



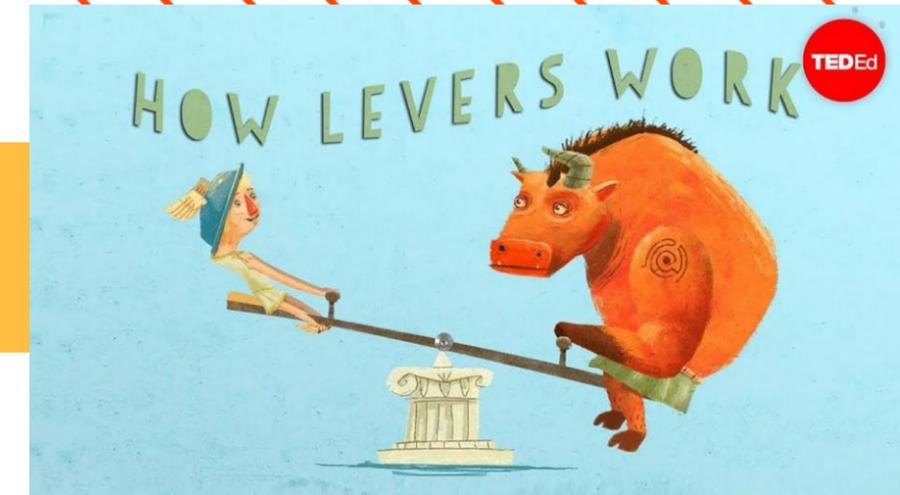
# Warning 2

- This information technically only applies to students who are “consumers” under consumer law.
- Purchase needs to be involved.
- Generally speaking, if you are acting for purposes outside your trade, business, or profession, you will be considered a “consumer”.
- Regulators tend to encourage universities to assume that all students are consumers **BUT...**



# Levers

- The Lobbying lever
  - We represent students informally and formally, and we advance their concerns using argument and evidence (maybe on rship to outcomes)
- The Campaigning lever
  - We involve students in the process of putting public pressure on our university in order to generate change
- The Regulatory lever
  - We point out the legal/regulatory requirements and seek to have them enforced either collectively or individually



# Consumer law & regulators

- Competition and Markets Authority
  - Guidance 2015.
- OfS regulates general compliance with advice on consumer protection law.
  - (SFC and HEFCW have similar but weaker powers)
- OIA judgments on complaints that reach them take into account consumer protection law.
- Trading standards/Citizens Advice has a role.
- And then there's the courts...

Press release

## **CMA advises universities and students on consumer law**

The CMA has today published advice for higher education providers to help them comply with consumer law when dealing with students.

Published 12 March 2015

From: [Competition and Markets Authority](#)



The Competition and Markets Authority's (CMA) [advice](#) informs providers about their consumer law obligations to undergraduate students, including advising them to:

# Developments...

- CMA advice from 2015 now out of date
- Internal team has “lost interest”
- OfS review following 3 years of ministerial pressure:

“It is not easy for students to identify instances where they have not received the service they were promised and to seek redress... We should, however, also consider whether a model that relies primarily on individual students challenging a provider for a breach of contract places a burden on students in an undesirable way.

- OfS planned to issue its own advice and cause providers to have to follow it – but was put on hold due to Covid-19
- OfS issued an interpretation in 2020, asked providers to review their compliance with CPL in Feb, and was been “monitoring”.

## Jo Johnson: student contracts could include 'legal remedies'

Minister also warns Labour plan to abolish fees would mean 'Reservoir Dogs ending' for universities

July 20, 2017

By Jack Grove

Twitter: @jgro\_the

Tough new consumer protection measures could soon be introduced to make it easier for students to sue universities in England that do not deliver promised levels of teaching.

Under proposals announced by universities and science minister Jo Johnson on 20 July, the country's new regulator, the Office for Students, is to consult on the idea of a student contract with universities, in which institutions would detail teaching levels that undergraduates could expect.



Source: Alamy

# The basics

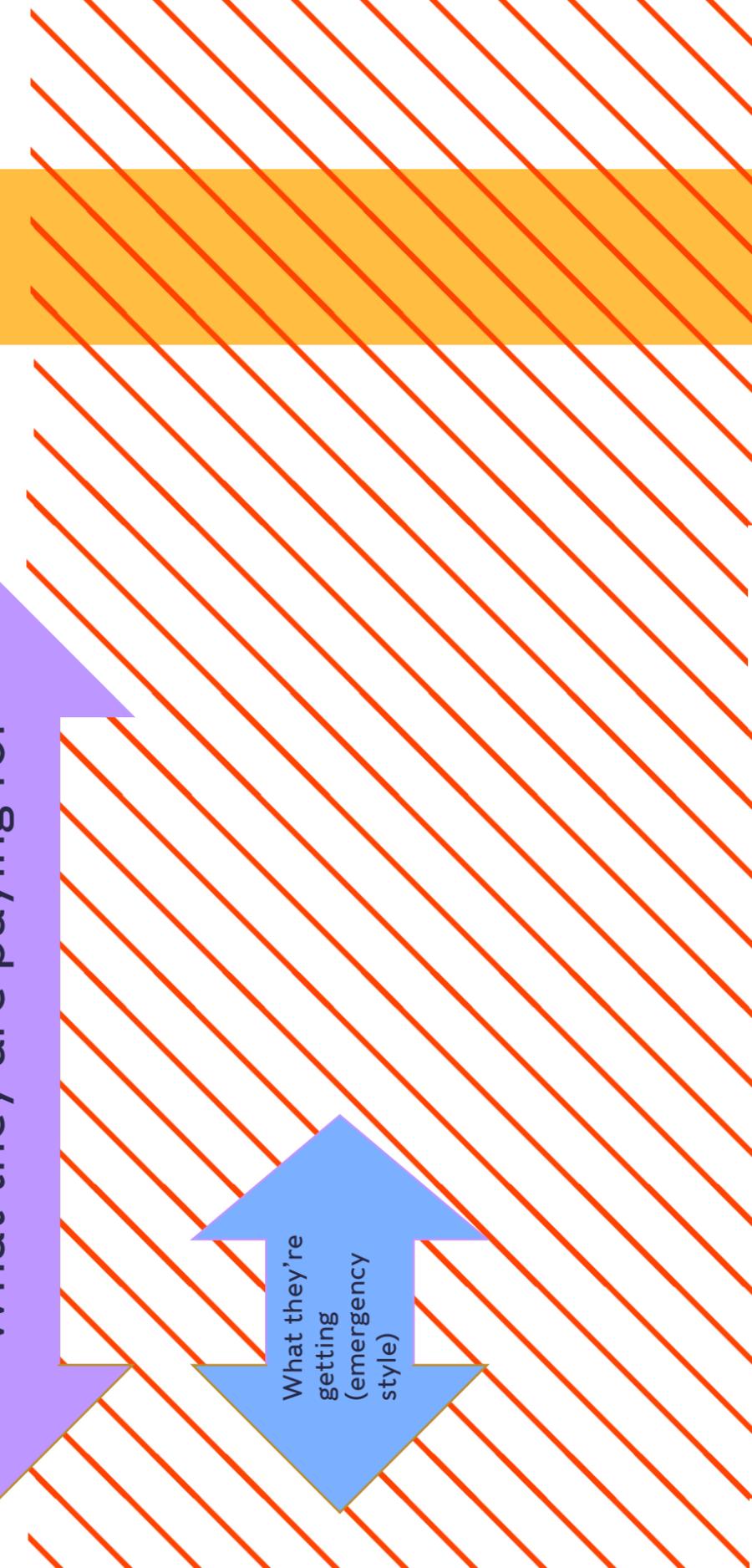
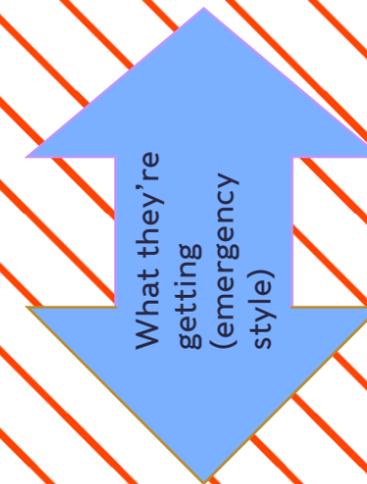
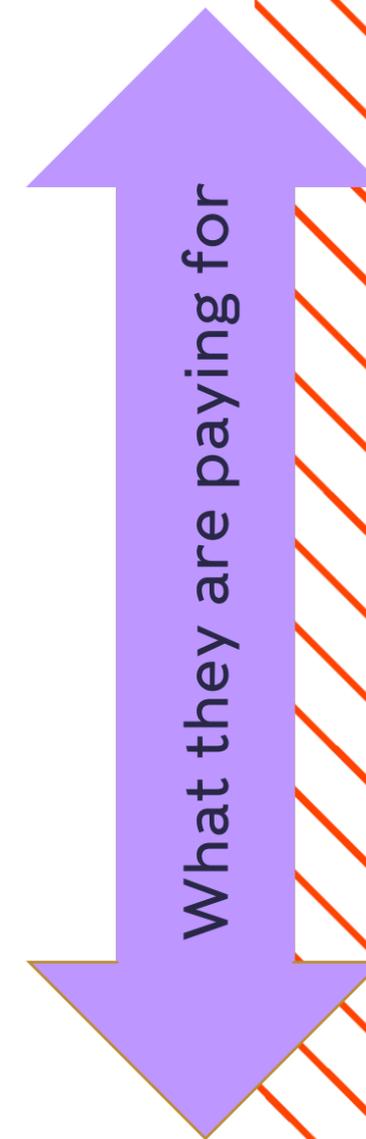
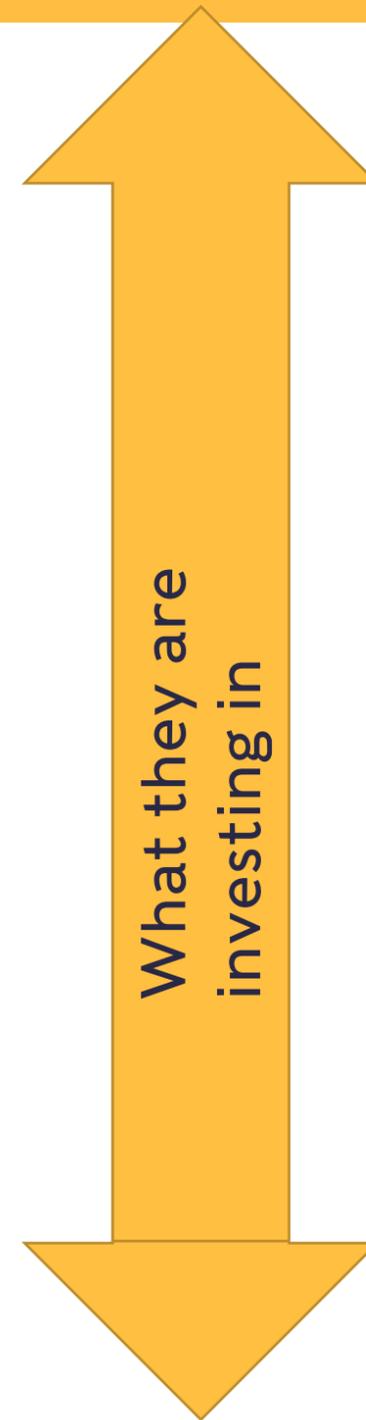
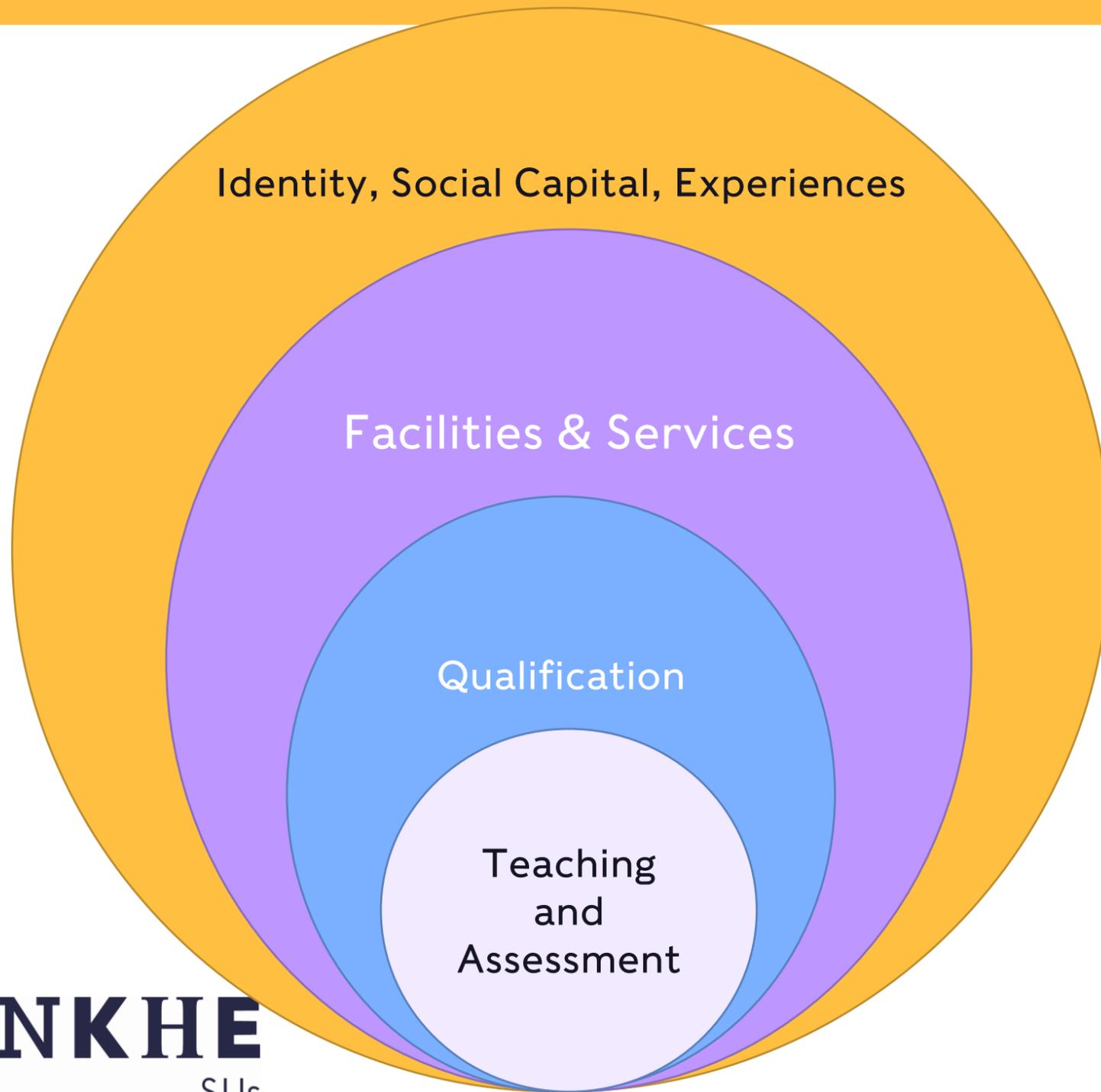
- Consumer Rights Act 2015
- Student-university relationship usually governed by a contract
- That sets out what a university promises to do and any circumstances under which it might not do it (etc) in exchange for the fee
- The wording in a contract is regulated by the law and if it's not compliant it doesn't apply
- All currently enrolled students were made promises about what was on offer
- Accommodation contracts/relationships should be separate (non academic debt & progression)
- Two contracts/agreements/phases – the application and the acceptance and beyond

BACK  
TO  
BASICS

# Material information

- Material information means information that the consumer needs to make an informed decision.
- Both formal and informal and what's in contract and wider advertising material.
- Lots of argument about what has actually been sold (morally, politically and legally)
- Consensus is things that the university provides that a student may have based a decision on.

# Student investment

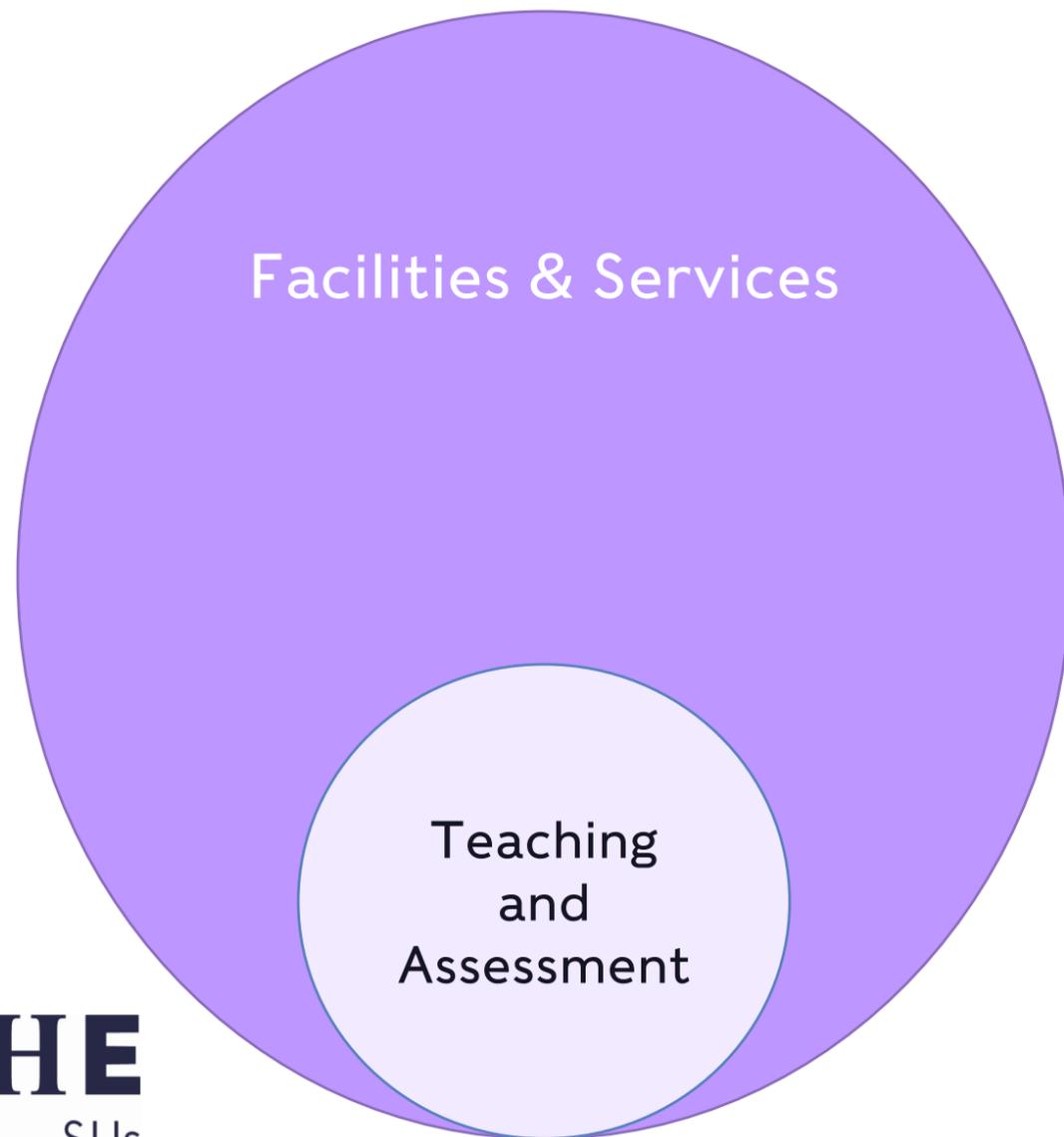


# It's not a fridge

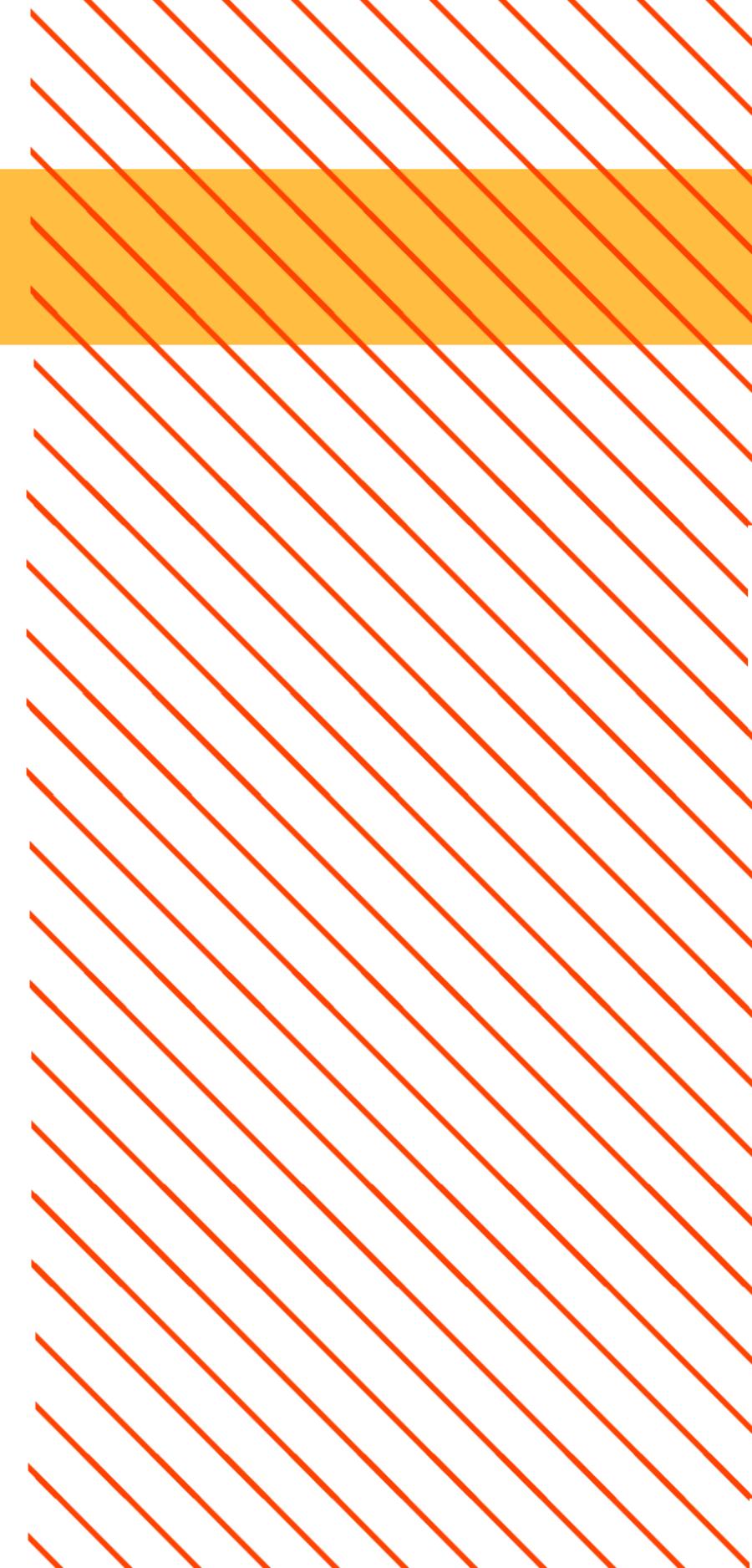
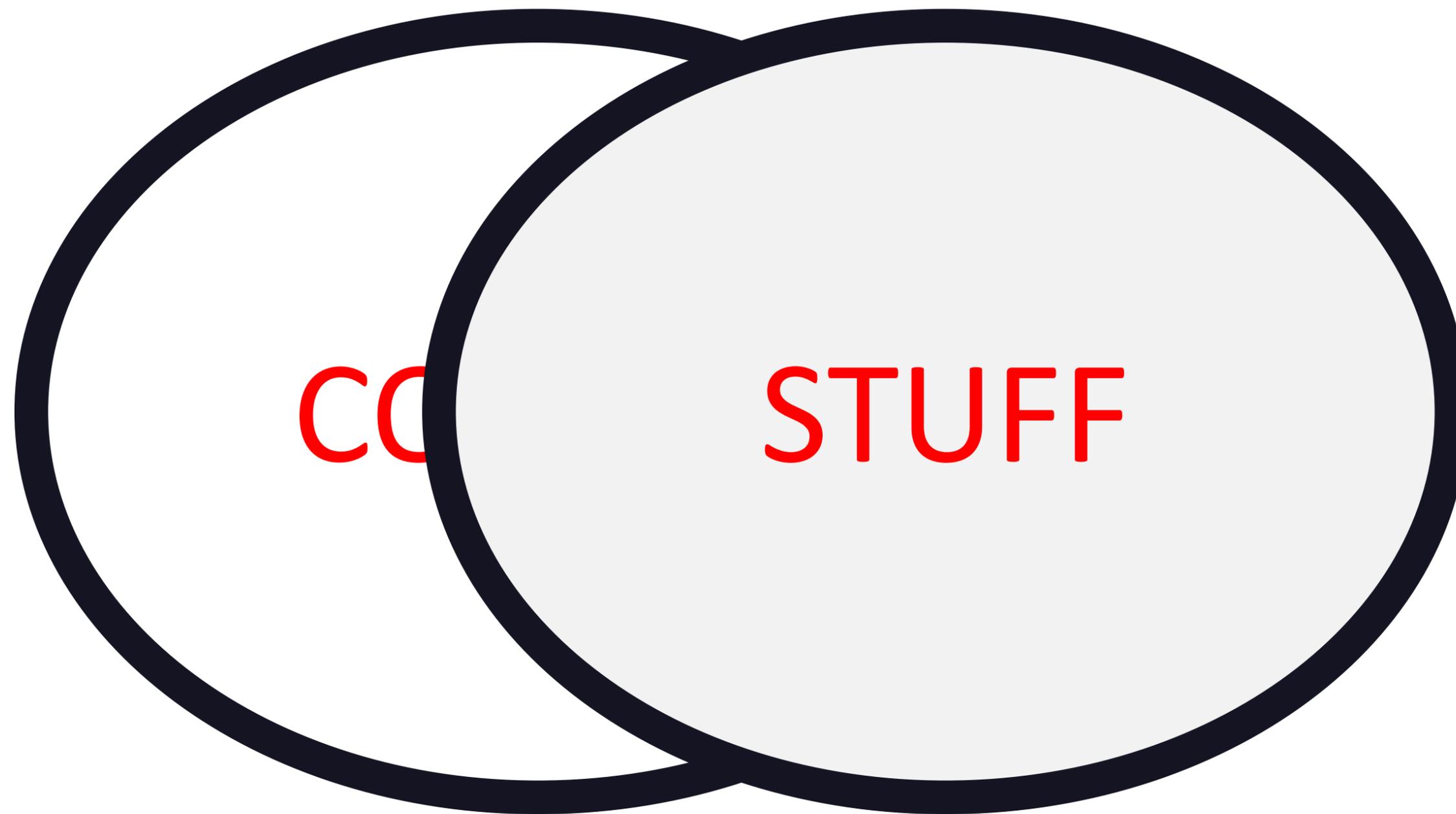
- Some say students are not consumers because students have to put some effort in
- You aren't "buying a degree"
- It has to be possible to pay full price for a degree and still fail
- So what are students paying for?



# Student investment



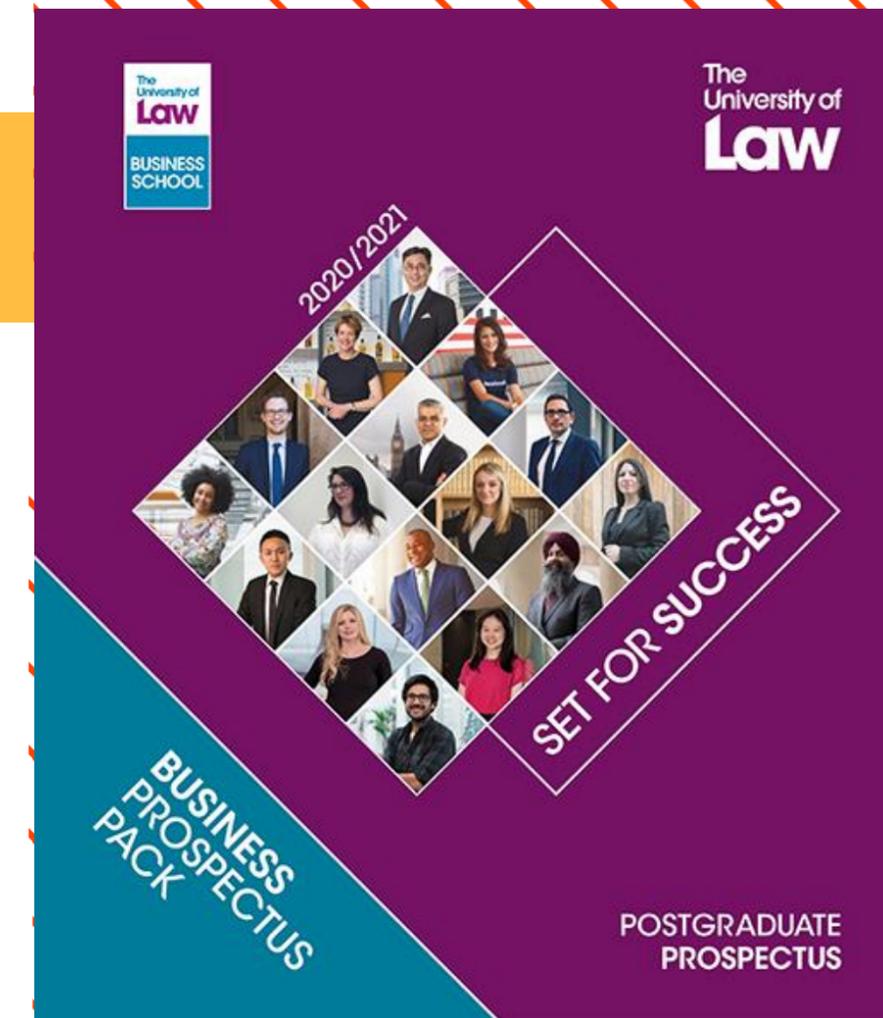
# What's been sold?



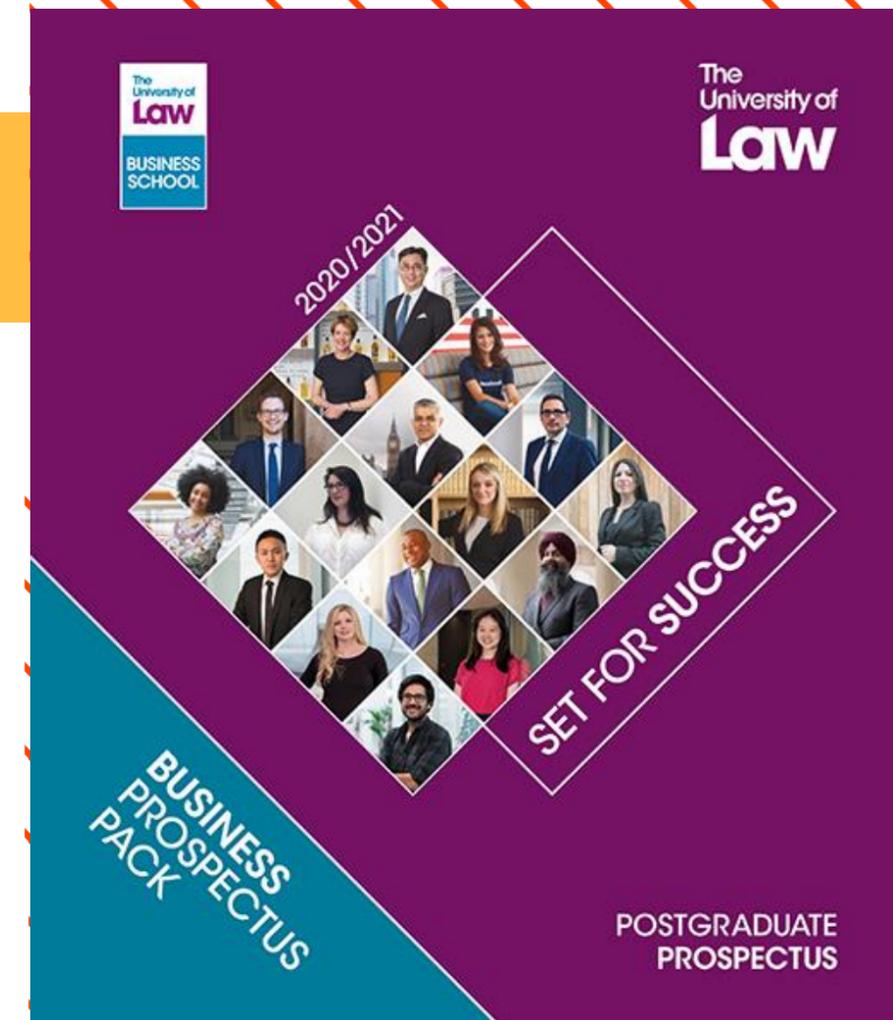
# Material

**Material information is information that the average consumer needs, according to the context, to take an informed transactional decision.**

- Core modules for the course and an indication of likely optional modules, including whether there are any optional modules that are generally provided each year;
- Information about the composition of the course and how it will be delivered, and the balance between the various elements, such as the number and type of contact hours that students can expect (for example, lectures, seminars, work placements, feedback on assignments), the expected workload of students (for example the expected self-study time), and details about the general level of experience or status of the staff involved in delivering the different elements of the course;
- This would include general information about the experience or status of the staff involved in delivering the course, for example professor, senior lecturer or postgraduate student.



**Material means you have an obligation to deliver it**

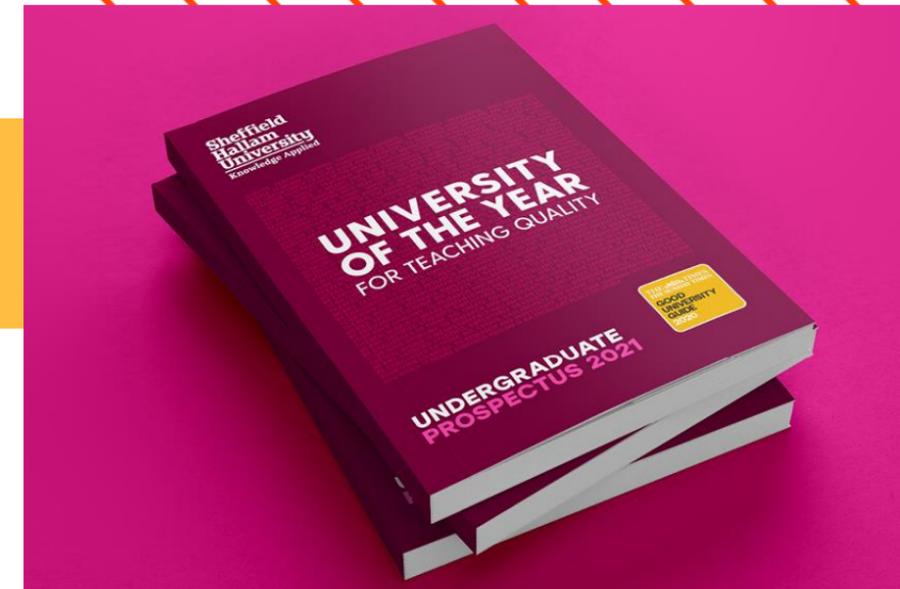


# Material

- The overall method(s) of assessment for the course, for example by exams, coursework or practical assessments, etc (or a combination of these);
- The award to be received on successful completion of the course and, if relevant, the awarding body or institution;
- Location of study or possible locations, which should also include the likely or possible location of any work placements to be undertaken (where known);
- Length of the course;
- Whether the course and provider are regulated and by whom, for example, where an institution is regulated by the Higher Education Funding Council for England or the Higher Education Funding Council for Wales or has a specific course designation;
- Whether the course is accredited, for example by a professional, statutory or regulatory body, and by whom; and

# Material

- Additionally, any particular terms, such as those in the HE provider's rules and regulations, that apply to the course that students may find particularly surprising (such as, for example, a term explaining that the body awarding the degree is different to the HE provider running the course) or are otherwise important (such as, for example, any rules or regulations whose contravention might prevent a student from completing their course).
- There is likely to be other, non-course-related information that students consider important and is likely to impact on their decision-making, such as in respect of accommodation options (for example, whether there is accommodation offered by or on behalf of the HE provider, on or off campus, or whether accommodation is provided exclusively or mostly by private landlords) and the availability of funding and support (for example, the type of funding help that may be available and who can apply for it). Consumer protection law will generally apply to these services, and providing misleading information, or omitting information, about such services may breach the CPRs, although they are not covered in detail in this advice.



# The frame game

## “Learning outcomes” frame

- The degree. Quality assurance processes say these have been met.

## Course frame

- The components of the course as advertised, including directly related experiences and facilities for the course.

## The university frame

- All of above plus facilities, services, spaces, etc

## The experience frame

- Friendship, social capital etc



# Force Majeure

- No magic concept in UK law
- Clauses will give a right to a provider to delay or not perform a (part of a) contract in the event of something
- Prevented, hindered, delayed
  - *“Excusing the affected party from performing the contract in whole or in part; excusing that party from delay in performance, entitling them to suspend or claim an extension of time for performance; or giving that party a right to terminate*

# Force majeure

**Q:** *I am an in-house lawyer for a university. In the current COVID-19 situation I am considering the implications of having to modify or cancel programmes and other services to students. Our contract does not have a force majeure clause. Does this mean that if we face claims for inability to deliver services as described in the course material, we have no defence to breach of contract? It seems that the doctrine of frustration may be too narrow to offer us any relief. Are there any other common law defences we may be able to rely upon to cover changes we may have to make unexpectedly to provision of courses to students?*



# Force majeure

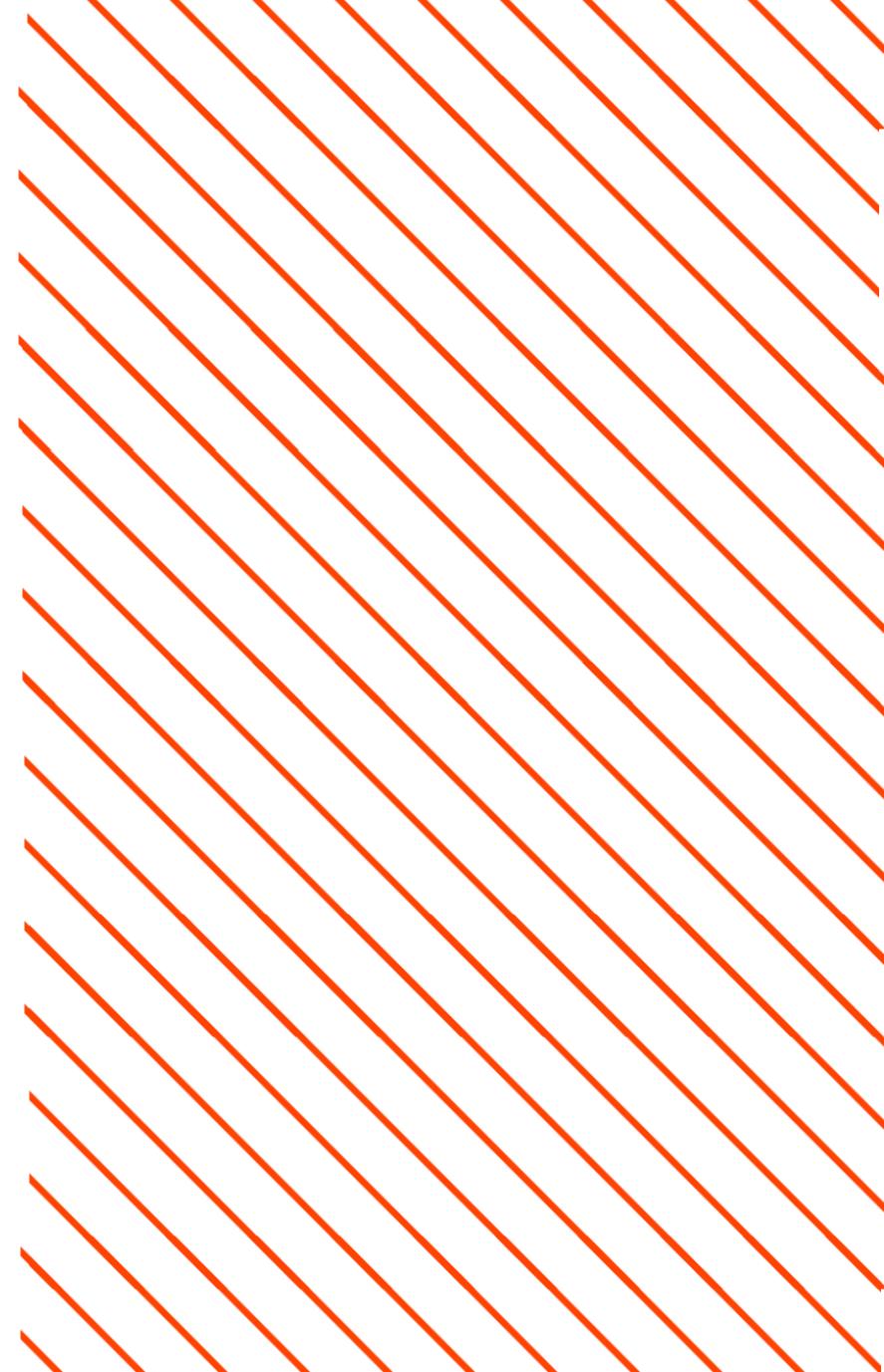
- Just because something is more difficult or more expensive (even if financially ruinous for a provider) that's not enough
- To rely on an FM clause it has to be drafted so as not to give a provider too much power, needs to be drawn to attn of students
- And provider needs to show it's done all it can to make up for the non/delay performance
- OIA looks at FM clauses when adjudicating

# Other CPL aspects

- “Force Majeure”
- Covid and variations from the MI both for current students and incoming, prospective students
- The ability to bring the agreement to an end and ability for students to switch provider
- Banned - False endorsements / authorisations - false claims of membership of trade associations, claiming a product has been approved by a public or private body when it has not
- Banned- Misleading information - the existence or nature of product/service, main characteristics, price, nature, attributes and rights of the trader, such as qualifications.
- Banned – aggressive/pressure selling

# Plus

- CMA also identifies non-course-related information that students consider important and is likely to impact on their decision-making – such as “accommodation options” (and presumably the detail of how that will be run) and “the availability of funding and support”.
- This is also about standout features you have promoted on your Open Day or in your prospectus. If you’ve “sold” them on the on-campus library, the careers hub, peer support schemes, wellbeing services, chaplaincies, clubs and societies, sports facilities or sports programmes, then you need to clarify if can’t deliver something you promised or if access to it might be severely restricted or now online.



# I can't keep my promises

I'm in breach of contract! Consumer has:

1. the right to require repeat performance (?)
2. the right to a price reduction (?)
3. other remedies...

- claiming damages;
- seeking to recover money paid where the consideration for payment of the money has failed;
- seeking specific performance;
- seeking an order for specific implement;
- relying on the breach against a claim by the trader under the contract
- exercising a right to treat the contract as at an end

# Price reduction

- CMA says you shouldn't pay for that which isn't being provided
- Difference between OfS, QAA and OIA equivalence and consumer right to a thing as described
- OIA thumb in air costs aspects as “academic delivery” (contact hours) as half
- **“Teaching”**, **“Support”**, **“Facilities”**, **“Mates”**



# Teaching issues

- Synchronous v asynchronous
- access issues (and costs)
- Access issues (and costs)
- Not enough to simply erase content expectation from assessment
- Are they put in a position to put things right
- Optional modules
- Field trips and years abroad
- Quality is a judgement owned by a university but has it followed own procedures (and are they any good at actually assuring quality?)

# Complaints

- OIA (in law) not allowed to consider complaints that concern “academic judgement”
  - (It is starting to take the view that aspects of academic judgement must be consistently applied across an HEI – the “case law” approach)
- Courts in other “professional indemnity” settings have started to question these magic wands/GOOJFCs
- Guidance tends to stress content

# Voluntarily

- You can try to voluntarily amend the MI
- Needs individual consent as the agreement is with the individual
- Likely that consent should be clear, obvious, willing, not framed as giving new consent to vary things (I'm offering X not seeking permission to do any old thing)
- Does the consent moment give students options (ie deferral, refunds etc)

# So...

- What have people been offered and what's different?
- If stuff is different was it equivalent and were students able to access it?
- Are students able to remove themselves from the commitment?
- Is the university able to unilaterally change it?
- Should there be a price reduction?
- Were there other costs if contract breached/frustrated?

# Wider issues

- Government says a matter for universities
- Universities says a matter for government
- Refunds/discounts and student loans
  - International, upfront, PG, Terms
- Complains as lever for changes (esp in small groups)
- Interaction with equality act and wider OfS/QAA expectations (and OIA expectations of fairness)
- Up, across or down...

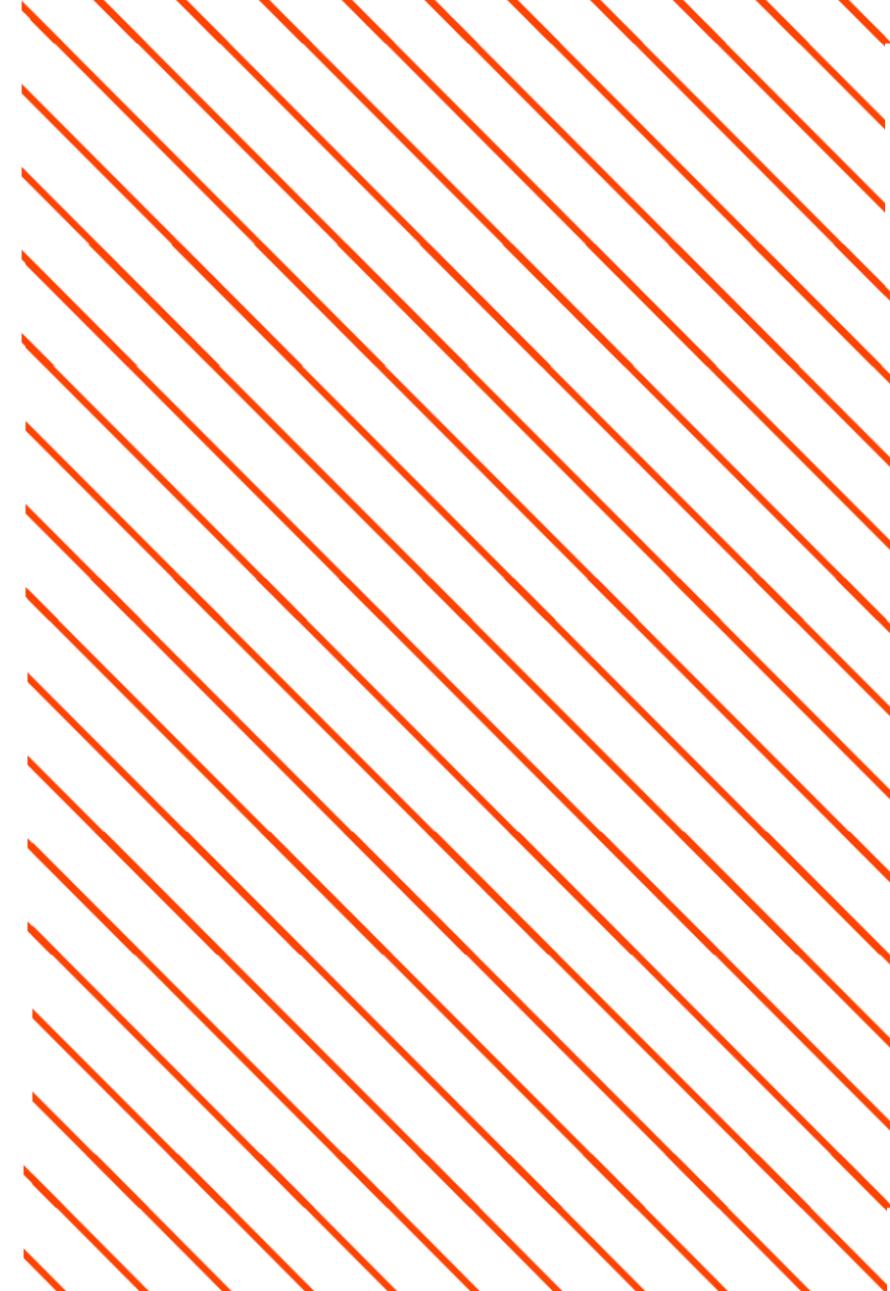
# Choppy waters?

- Over and under recruitment
- Changes to funding coming?
- So called low value courses?
- The “market” delivers quality
- APPs ensure courses are accessible
- Student protection plans protect students from the ravages of the market



# Why?

- Enrolling on a course of study is quite a risky business and involves a major investment from individuals.
- The idea (not one we necessarily agree with) is that the system of autonomous, competing providers that we have normally works well – but on the occasion that it doesn't, a regulator insists that an appropriate safety net has been developed so students can be confident they will be able to continue and complete their course.



# Student Protection Plans

- Regulatory requirement for all higher education providers that are on the Office for Students register in England.
- Introduced in Higher Education and Research Act.
- Set out the risks to continuation of study faced by students.
- Has to make clear the plan if any of those risks came to be “crystallised”.
- Equivalent coming in Wales.

# SPPs

- “Not good enough”
- Not clear enough about risks
- Not clear enough about mitigations
- Not considered all risks
- Student engagement issues
- Guidance is coming (but never came)
- Nevertheless many up for review...

# 1. Find it

OfS regulatory condition C3 says that a higher education provider must:

- Have in force and publish a student protection plan which has been approved by the OfS as appropriate for its assessment of the regulatory risk presented by the provider and for the risk to continuation of study of all of its students.
- Take all reasonable steps to implement the provisions of the plan if the events set out in the plan take place.
- Inform the OfS of events, except for the closure of an individual course, that require the implementation of the provisions of the plan.

UKPRN: 10006840

UNIVERSITY OF  
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## Student Protection Plan

A Student Protection Plan is a document that is approved by the Office for Students (OfS) that every University is required to have in place.

It explains what actions we would take in the event that a risk to the continuation of your studies arose, as well as how we would communicate with you about this. Examples of events that could trigger the Plan include:

- the discontinuation of a subject or discipline;
- department, location or campus closure;
- unanticipated or unforeseen changes which may affect our ability to provide the course (e.g. PhD, MSc, BA (Hons) etc.) to you.

You can find a fuller list of events included in section 1 of the Plan.

### Who does the Plan cover?

If you are receiving teaching or supervision from University of Birmingham employed staff and are expected to earn a recognised qualification, of the University, you are **likely** to be covered by this Plan.

You will **not** normally be covered if you are registered at partner provider and are taught by their staff. You will instead be covered by their Plan. For a full list of excluded courses see Annex 1.

### Contents of the Student Protection Plan

1. Introduction and Scope
  - What is the Student Protection Plan?
  - Who is covered by the Student Protection Plan?
  - What is covered by the Student Protection Plan?
  - How would the Student Protection Plan be triggered?
2. Student Protection Measures at the University of Birmingham
  - Protection measures
  - The risk of the University triggering the Student Protection Plan
  - Reviewing the Plan
  - The Plan: detailed actions that would be taken in the event of the Plan being triggered
  - Refunds and compensation
3. How will we communicate with our students?
  - Notification, advice and support
  - Our commitments to you as a student
4. Complaints
5. Annex 1: Courses not covered by the Student Protection Plan
6. Annex 2: Refund and Compensation Policy

# 1. When you've found it

- There's two sets of requirements for an SPP. First a university has to **assess risks**. Then it has to set out what it would do if any of the risks... happened.
- That means plans have to include:
- A provider's assessment of the **risks to the continuation of study** of the provider's students;
- The **likelihood** that those risks will **crystallise**; and
- The **severity** of the **impact** on students should the risks crystallise.
- So a good first step is to look at your plan and ask yourself – are the risks right? Is the threat or likelihood accurate? Is there anything missing?

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# Risk types

- the provider **as a whole** is no longer able to operate or no longer intends to operate
- the provider is no longer able to **award the qualifications** for which its students are registered because the OfS has varied or revoked the provider's degree awarding powers, or a validating partner has withdrawn validation
- one or more of the **locations** at which the provider delivers courses to students is no longer available
- the provider is no longer able to deliver **courses** to students in **one or more subject areas and/or departments**
- the provider is no longer able to deliver **one or more courses** to students, particularly if **course closures are likely in the next three years**
- the provider is no longer able to deliver **material components** of one or more courses (particularly if there are areas of vulnerability, such as single person dependencies for teaching)
- the provider is no longer able to deliver one or more **modes of study** to students, particularly if withdrawal of a mode of study is likely
- the provider is no longer able to recruit or teach a particular **type of student**.



# 3. Talking to students

- OfS says a provider is complying if (for example) it “works with its students when creating and implementing the student protection measures”.

It also says that non-compliance might include:

- A failure to publish a plan in a clear and accessible way
- A failure to regularly review a plan or a failure to update the plan to reflect changes in circumstances
- A plan that fails to take into account the diversity of students and their needs

# 4. Out of date

- OfS guidance says that the SPP should be a “live document that is routinely updated”.
- The guidance places the onus on universities (and therefore students that feed into decision making in universities) to make a judgement about how often to review and update the SPP based on circumstances that may change the assessment of risk, or the measures that a university needs to put in place to protect students.
- **So – if the range of risks, or the assessment of the severity or likelihood of these risks has changed, in theory a university should be reviewing and updating its plan.**

# 5. Circumstances...

- **Finances and savings.**
- Year abroad an obvious “material component” of some courses
- Placements are a big part of many courses, but the state of the economy might mean these are harder to arrange.
- PSRBs might need to re-approve courses.
- Obvious components.

# 5. Transparency

- Some universities worried that publishing them might “expose” areas of risk that they would not want to be exposed.
- OfS says **purpose** of the SPP is to protect the quality and continuation of study of students – and that universities need to be **transparent** for applicants and students about the **risks that are reasonably likely to occur** and the measures a university will put in place if any of these risks do crystallise.
- OfS considers what information an applicant might “reasonably expect to have” to make an “informed choice about study” and you should consider your approach to your SPP from the same perspective.



# 6. Process or Content

- Address risks from a general process point of view rather than identify specific courses?
  - “will be assessed as part of annual programme reviews”

OfS says that the SPP is intended to provide “meaningful information” to individual applicants and students about their study choices

# 7. Must haves

1. The range of risks to the continuation of study for students, how these risks may differ based on students' needs, characteristics and circumstances, and the likelihood that those risks will crystallise.
2. The measures in place to mitigate those risks that a university considers to be reasonably likely to crystallise.
3. Information about the policy in place to refund tuition fees and other costs to students in the event that a university is no longer able to preserve continuation of study.
4. Information about how a university will communicate with students about an SPP.

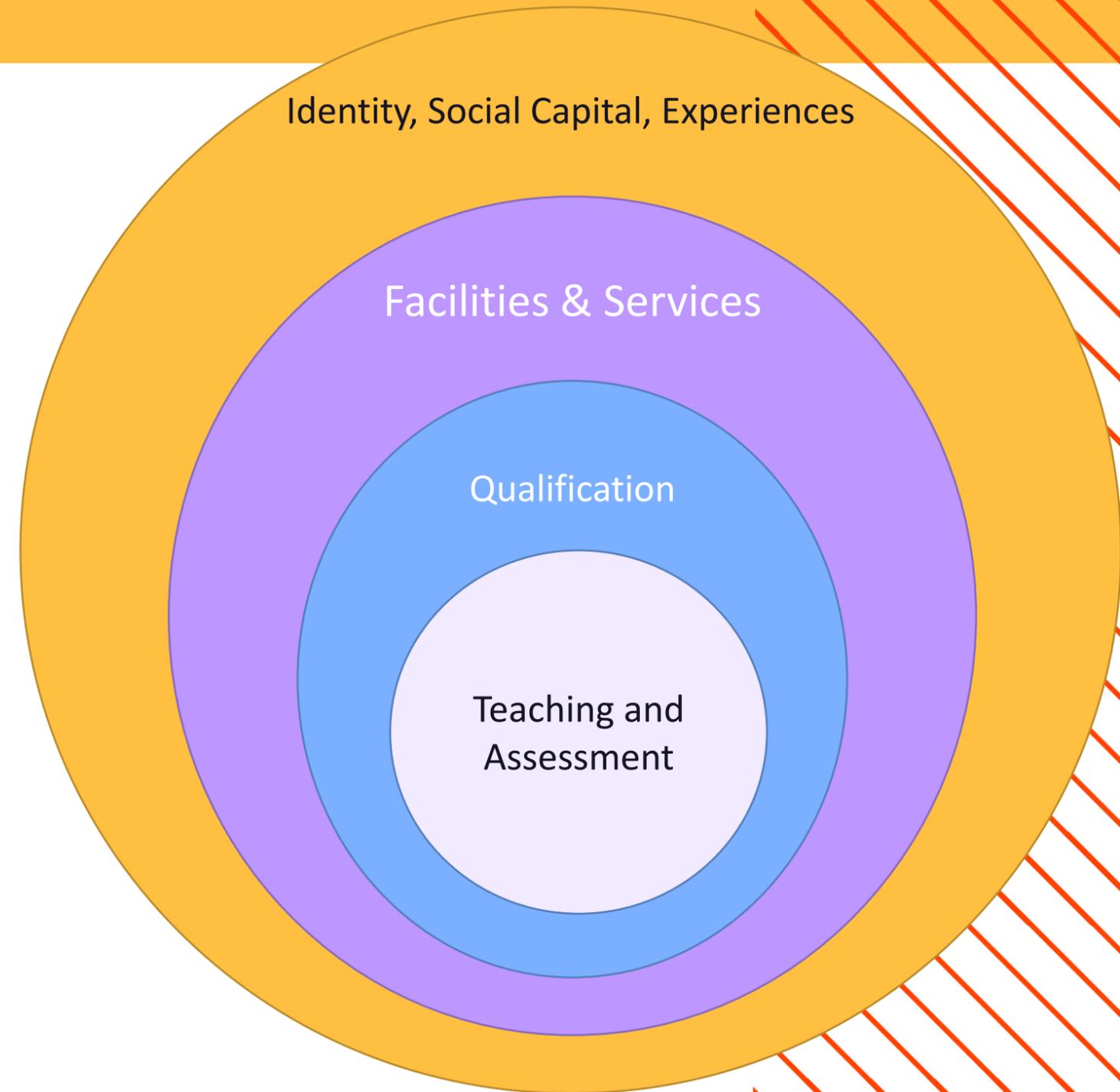
# 8. Crystals

- What does “risks that are likely to crystallise” actually mean?
- OfS says that these are risks that are “reasonably likely” to occur in the “short to medium term”.
- And no, we don’t know what “short to medium term” means!



# 9. Material

- Academic or wider?
- Material information – formal or informal?
- What have students been told?
- Software development example...



# 10. Short term?

- OfS says that SPPs are supposed to look at continuation of study for students and does not cover shorter-term disruption to study as a result of industrial action.
- That does raise the question about the pandemic and whether the duration of the impacts and effects (and/or long term social distancing rules) would count as shorter-term disruption or longer term.

# 11. Mitigations

- Should students get refunds and/or wider compensation?
- If a university says it would “teach out” a course (by not recruiting new students but carrying on delivering until all students had completed) how realistic is it that academics would hang around? And what would a university do if they didn’t?
- Often SPPs say that a mitigation would be to “transfer” students to another university – but would that be appropriate for all students?
- Are there universities nearby that teach the courses that might be at risk?
- The important thing here is to ask yourself- would students be happy with this mitigation?
- And would this mitigation actually work in the circumstances?

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