

London Higher response to the Office for Students' consultation on a new approach to regulating harassment and sexual misconduct in English higher education

Question 1a: Do you agree or disagree with the proposal to introduce a new general ongoing condition of registration relating to harassment and sexual misconduct? Please give reasons for your answer.

London Higher members welcome steps to ensure that matters of harassment and sexual misconduct are taken seriously and tackled appropriately, in order to secure a safe higher education environment in which students can thrive. There is no clear consensus on whether a new condition of registration or a self-regulatory approach is the best course of action. Nevertheless, we do not oppose a new general ongoing condition of registration relating to harassment and sexual misconduct. We urge that this new condition is not positioned or perceived as a tick-box exercise for compliance, but rather a minimum baseline above which institutions are empowered by the OfS to create and change cultures in which they can tackle such important issues.

We note that the rationale to propose a new condition of registration stems from dissatisfaction with self-regulation, with the independent evaluation of the OfS' statement of expectations on harassment and sexual misconduct concluding 'that while some progress has been made, it has not been sufficient'. However, it is worth noting that the evaluation period started in March 2022, just eleven months after the voluntary standard of expectations had been published.

The evaluation also suggests that non-mandatory compliance leads to a variation in prioritisation of harassment and sexual misconduct at a leadership level, which a condition of registration would seek to address. In this respect, it is important that the OfS' relationship with providers, especially regarding such sensitive matters, is constructive, transparent and not perceived as punitive. Institutions that fail to take necessary steps on tackling harassment and misconduct should rightly be held accountable, but we call for the OfS to continue with a collaborative and supportive approach to providers who demonstrate clear commitment and steps to tackle harassment and sexual misconduct.

In addition, there are wider concerns from institutions that the OfS does not have sufficient resources to undertake its regulatory responsibilities as new duties are being added to its remit. Notably, the OfS has recently assumed the role of designated quality body following the Quality Assurance Agency's decision not to continue.

It is imperative, therefore, that if a new condition of registration relating to harassment and sexual misconduct is introduced, the OfS is properly resourced and able to fulfil its regulatory duty, particularly as this involves such a nuanced and critical area.

Question 1b: Do you have any alternative suggestions to the proposal to introduce a new general ongoing condition relating to harassment and sexual misconduct? If so, please explain and provide reasons for your view.

While discussions with our members reveal that providers are making good progress in this area through self-regulation and should be trusted to continue, should this become a matter for the OfS via the introduction of a new condition of registration, it is vital that there is absolute clarity on expectations, especially regarding:

- What constitutes 'credible and effective training' for staff and students;
- How 'understanding' of said training and the proposed single document is defined;
- How 'emotional intimacy' in a staff-student relationship is defined;
- What constitutes 'credible evidence and evaluation' of changed attitudes and behaviours.

In addition, phased implementation, or markers for what constitutes acceptable progress against the new condition within the implementation period would help drive forward the desired change, whilst also avoiding an overload of regulatory burden on providers in a condensed three-month period.

Question 2a: Do you agree or disagree that the definition of harassment in proposed condition E6 should have the meaning given in section 26 of the Equality Act 2010 and section 1 of the Protection from Harassment Act 1997? Please give reasons for your answer.

We agree that the definition of harassment in condition E6 should have the meaning given in section 26 of the Equality Act 2010 as this aligns the condition with established law and sector practice.

We note Universities UK's (UUK) concern that a decision to also use section 1 of the Protection from Harassment Act 1997, may lead to difficulty in practice owing to the existence of two definitions. We appreciate that the use of this provision is intended to broaden the definition beyond protected characteristics, but clear OfS guidance is required in order to ensure that institutions are appropriately equipped to respond to incidents.

In addition, there are instances in which provider definitions of harassment or misconduct go beyond what is set out by the proposed definition, or cases in which institutional policies are presented in more accessible language. Therefore, we strongly urge the OfS to clarify that the proposed definitions are a minimum baseline for tackling harassment, upon which providers can build.

Question 2b: Do you have any alternative suggestions to the proposal in question 2a that you think may be more appropriate? If so, please explain and give reasons for your view.

N/A

Question 3a: Do you agree or disagree that the definition of sexual misconduct in proposed condition E6 should mean any unwanted or attempted unwanted conduct of a sexual nature and include but not be limited to the definition of 'sexual harassment' contained in section 26(2) of the Equality Act 2010 and rape and assault as defined by the Sexual Offences Act 2003? Please give reasons for your answer.

We agree that the definition of sexual misconduct in proposed condition E6 should mean any unwanted or attempted unwanted conduct of a sexual nature and include but not be limited to the definition of 'sexual harassment' contained in section 26(2) of the Equality Act 2010 and rape and assault as defined by the Sexual Offences Act 2003, as this aligns the condition with the definition already set out in the voluntary statement of expectations.

We echo UUK's point concerning the risk of using legal language: students may be confused and may form inappropriate expectations as a result of this language. Universities cannot have legal authority over whether an offence such as rape has occurred, only judgement on the likelihood of if an instance of sexual misconduct has taken place. Alongside UUK, we ask that the OfS provides clarity on how universities may approach this and have complete transparency over their duties and authority in comparison to judicial systems.

Again, we agree with UUK's point regarding the OfS decision not to include domestic abuse in their definition. The rationale is understood, but like UUK, we are aware that some of our members include domestic abuse as part of definitions used in their policies. The OfS should clarify to universities that under new regulations this would be permissible but not mandatory.

Question 3b: Do you have any alternative suggestions to this proposal that you think may be more appropriate? If so, please explain and give reasons for your view.

N/A

Question 4a: Do you agree or disagree with the proposal that a provider should create a single document which comprehensively sets out policies and procedures on subject matter relating to incidents of harassment and sexual misconduct, and prominently publish that document in the manner we are proposing? Please give reasons for your answer.

While there are clear benefits to creating and prominently publishing a single document setting out the policies and procedures relating to incidents of harassment and sexual misconduct, the proposal also poses significant issues, some of which may be insurmountable and counterproductive to the aims of the new condition of registration. The positive results of implementing this proposal could be that complex policies will be easier to navigate and that an organisation's commitment to eradicating sexual harassment and misconduct may be more visible.

However, these potential gains are arguably outweighed by substantial challenges and issues. It is possible that requiring a single document would make it more difficult to navigate harassment and sexual misconduct policies and procedures, as the document would potentially be extremely long. Concerningly, this could discourage or hinder victims from reporting incidents of misconduct or harassment. This could be particularly detrimental to disabled students or staff, as it could be difficult to use assistive technology (e.g. screen readers) with such a large document. Additionally, the workload required to combine existing documents and revise existing policies to collate a single document would be significant and could divert or dilute existing work and staff resources in this area.

Question 4b: Do you have any alternative suggestions to the proposal in question 4a? If so, please explain and provide reasons for your view.

It could be more useful and feasible for institutions to provide a landing page to direct students and staff to the relevant policies and procedures. This may reduce the workload required to fulfil the requirements of this proposal and achieve its aims more successfully, namely the prominence, visibility and accessibility of policies and procedures.

Question 5a: Do you agree or disagree with the proposal that minimum content requirements should be specified for the single document we propose a provider should maintain? Please give reasons for your answer.

Minimum content requirements may be useful as a form of guidance and to ensure that sufficient information is provided on policies and procedures relating to harassment and sexual misconduct. However, providers may struggle to have the capacity or resources to meet these requirements as proposed. Furthermore, these content requirements may contribute to the risk of a single document being too large to be usable. Combined with the increasing amount of information that providers are asked to give prominence to, information may then risk being less visible or easy to access. This proposal therefore risks being counterproductive to the aims of the condition of registration as it may hinder reporting or the accessibility of information.

Question 5b: Do you have any alternative suggestions to the proposal in question 5a? If so, please explain and give reasons for your view.

It may be more effective to give these content requirements as guidance or apply them as guidance for general sexual misconduct and harassment policies and procedures, rather than as guidance for a single document format. It may be more useful to stipulate that these requirements are fulfilled in any format that ensures clarity and accessibility.

Question 6a: Do you agree or disagree with the minimum content requirements proposed for the single document we propose a provider should maintain? Please give reasons for your answer.

If these minimum content requirements were implemented, institutions would likely need assistance from the OfS to meet the condition of registration. In principle, we agree that requiring greater clarity around reporting, investigation and decisions would be a positive step for tackling harassment and sexual misconduct, both for the purposes of supporting current students and future ones. The inclusion of requiring clear guidance for victims who choose not to report is particularly welcomed. However, institutions' attempts to meet these requirements may be hindered by the single document format that has been proposed.

Some of the minimum content requirements are more difficult to fulfil than others. In particular, the requirements concerning training may be very difficult if not impossible to fulfil under current guidance, especially with the proposed timeline for implementation of three months.

If all providers were required to arrange and implement this training within three months, it is possible that demand would significantly outstrip supply in terms of training providers. While the minimum requirement for training for staff and students is suitable in principle, institutions would need support to be able to deliver this in terms of resources, guidance and time. As part of this, there would need to be greater guidance on what constitutes 'credible evidence and evaluation' of changed attitudes and behaviours, as there is no standard way of measuring this.

Fundamentally, the requirements are a good principle but cannot be met without sufficient guidance, resources, and more time. This applies to all provider types but would be particularly difficult or even impossible for smaller providers where staff and resources are very limited. It would therefore be salient to account for different types of provider in this proposal rather than using a 'one-size-fits-all' approach.

Question 6b: Do you have any alternative suggestions to the proposal in question 6a? If so, please explain and give reasons for your view.

The requirements are reasonable but cannot be implemented in their current form without additional guidance, support, and time. Institutional contexts (e.g. size of provider) must be respected regarding capacity to produce a single document compliant with requirements and provide training.

Question 7a: Do you agree or disagree with the proposal for content principles for the single document we propose a provider should maintain? Please give reasons for your answer.

We agree with the content principles but we do not agree with the single document format.

Question 7b: Do you have any alternative suggestions to the proposal in question 7a? If so, please explain and give reasons for your view.

These principles should be used for guidance overall, rather than for a single document. They could be adapted and more appropriately applied to a launch page or clearly demarcated cluster of documents.

Question 8a: Do you agree or disagree with the proposal that a provider should be required to have the capacity and resources necessary to facilitate compliance with this condition? Please give reasons for your answer.

We do not disagree that providers should have the capacity and resources necessary to comply with this condition to tackle harassment and sexual misconduct. However, having 'the necessary financial resources to continue to comply with all conditions of its registration' is already a condition of registration (D.4) with the OfS. Therefore, we would appreciate clarification as to why the OfS has specified the need for capacity and resource for this particular condition, which risks being prescriptive.

We agree with UUK that 'necessary capacity and resourcing' will appear very differently in different institutional contexts, owing to the diversity of higher education providers. There therefore needs to be a sufficient degree of clarity about what amounts to a 'necessary' amount of resourcing and how the full diversity of the higher education sector will be considered in this.

This is particularly relevant for London, where there is a higher number of small/specialist institutions than anywhere else in the country, which have overall lower staff capacity.

Question 8b: Do you have any alternative suggestions for the proposal in question 8a? If so, please explain and give reasons for your view.

N/A

Question 11a: Assuming that the OfS introduces a new condition of registration E6 (subject to the outcome of this consultation), which of the following options discussed in Proposal F do you think should be included in condition E6:

- A. Option A as proposed;
- B. Option B as proposed;
- C. An option similar to Option A but with some changes (in which case please set out the changes that you would suggest in the next question);
- D. An option similar to Option B but with some changes (in which case please set out the changes that you would suggest in the next question);
- E. Any of the alternative options considered in this proposal;
- F. None of the above.

For London Higher's diverse group of member institutions in the capital, both the creation of the register and the total ban on student-staff relationships have some clear benefits alongside some causes for concern. London is home to a very diverse group of higher education institutions who have expressed preferences for both the ban and the register, but all institutions in our membership agree that similar points need clarifying or defining in order to create meaningful policies. If our goal is to create high quality educational environments, both the ban and the register have the capacity to be tools that further that goal alongside rigorous training and enforcement of appropriate disciplinary procedures within institutions.

Accordingly, London Higher supports either option C or D, where the amendments we ask for are more detailed definitions of 'emotional intimacy' and which forms of relationship would be affected by the ban or the register. Please see question 11b for a fuller explanation.

Question 11b: Please give reasons for your answer in question 11a above.

With both options C and D, more clear and precise definitions of 'emotional intimacy' would be needed. London's student body has a large population of mature students, whose friendly and professional relationships with teaching staff may need to be carefully checked against more detailed standards for what constitutes an emotional relationship to determine where they stand in relation to the guidance. Where emotional intimacy could be interpreted as referring to appropriate and helpful instances of individualised support between teaching staff and students, HEIs would benefit from more detailed definitions of what non-sexual behaviours fall under the remit of Condition E6. HEIs also need urgent clarification on where familial relationships fit into guidelines around emotional intimacy and financial dependence. Though there are exceptions in the consultation document for pre-existing marriages and civil partnerships between staff and students, family relationships between, for example, parents and children, siblings, and other family relationships appear to be intimate relationships which will either be banned or require an entry on the register.

Because the proposed register will rely on relationships being reported to institutional management either by a participant in the relationship or by a third party, implementing the register will require careful consideration to make sure the most harmful and worrying relationships do not continue to be kept secret. The 2018 report from the 1752 Group highlighted the particular difficulties of tackling sexual misconduct when it is perpetrated by serial offenders within an institution. If a member of staff is targeting their students on an ongoing basis, committing sexual misconduct year on year that amounts to serial abuse, it is difficult to imagine that staff member voluntarily referring themselves to the register of relationships again and again.

In instances of serial abuse with multiple different victims over many years, the staff member may put pressure on the students to keep the relationship a secret. Where maintaining the register relies on third parties or bystanders to report relationships between staff and students that are being purposefully kept secret, many of these relationships may be left unreported. Where the only witnesses may be other students (for example, the flatmates of a victim of sexual misconduct) they may be frightened about coming forward or acting as whistle-blowers to report a relationship or possible abuse. If reporting relationships between students and staff becomes a requirement, and the parties in the relationship are less likely to report it themselves, rigorous planning will be needed to support bystanders, likely including coursemates and flatmates of the student. Creating a system that relies on student whistleblowers (whether it be students in relationships, students experiencing abuse themselves, or friends and bystanders) presents issues for student wellbeing and the amount of responsibility the sector puts on the shoulders of students to make the reports necessary to maintain the register in a way that serves its purpose. Support would need to cover not only supporting the students after the report to the register had been made, but also resources explaining what they might observe or hear about that would need reporting. The situation universities would most wish to avoid would likely be creating a register, participants in relationships failing to come forward to register themselves, and third parties not being aware of what required reporting, resulting in the administrative burden of a register that is not supporting victims of sexual misconduct.

Both a register of these relationships or an outright ban could potentially run the risk of driving relationships or the perpetrators of serial abuse further underground. Because being added to such a register would necessarily be stigmatising, parties in these relationships or serial abusers may go to significant lengths to hide their actions from institutional authorities or the friends and family of the student, to prevent the relationship being reported by others. Guidance may be required on whether anonymous reports referring staff-student relationships would be eligible for inclusion in the register. Whether the register or the ban come into effect as a result of these proposals, consideration would need to be given to giving higher education institutions enough time to put new practice into place informed by new definitions and clarifications in the response to this consultation. The intricacies of enforcing either a ban or the creation of a register would need to be done thoroughly in order to have a meaningful effect. Our member HEIs have indicated it would take significantly more than three months to put rigorous enforceable policies into action. Making changes to employment contracts for all teaching staff in line with the new regulations and current employment law would take significantly longer than three months.

Question 11c: Do you have any alternative suggestions to the options considered in Proposal F? Please give reasons for your answer.

We do not have any alternative suggestions to Proposal F.

Question 11d: We would welcome views on whether Option B or any of the other options considered should allow for other exemptions. Please give reasons for your view.

As discussed in our answer to question 11b, in implementing either a ban or a register, the regulator would need to consider whether family relationships between staff and students would fall under the remit of the legislation. If family relationships will be included as 'personal relationships', then higher education institutions might benefit from more relationships than only pre-existing marriages or civil partnerships being explicitly exempted. Relationships between parents and children, grandparents and grandchildren, siblings, cousins, or uncles/aunts and nephews/nieces may involve emotional and financial dependency and require clarification from the Office for Students on whether they would be a form of 'emotional intimacy' which will be banned or require entry on the register.

Question 12a: Do you agree or disagree with the proposals for the implementation of any new condition of registration? Please give reasons for your answer.

Many London Higher member already meet aspects of the requirements within the proposed new condition of registration, but proposals on training and creating a single document would require significant staff resource in order to implement effectively and to a high standard.

In addition, we note that the OfS – rightly – wishes to pursue a course of action to tackle harassment and sexual misconduct swiftly, however, institutions must be given appropriate time for implementation. There is likely to be high demand and competition for a limited pool of specialist training providers, and those institutions wishing to recruit specialist staff in-house may also not be able to do so within a three-month timeframe. Many institutions, such as small and specialist providers, may not have the adequate resourcing to develop and deliver training. This is especially relevant, given the elevated number of small/specialist providers that are present within the capital.

The time cost of delivering this training will also be substantial, particularly for London – with a small pool of training providers having to deliver interactive training to over 500,000 students in the capital.

Question 12b: Do you have any alternative suggestions for the implementation of any new condition of registration that you believe may be more appropriate? If so, please explain and give reasons for your view.

As mentioned in our response to question 1b, we would advocate for phased implementation, and markers for what constitutes acceptable progress against the new condition within the implementation period, as this aims to avoid an overload of regulatory burden on providers. As explained in more detail in our response to 12c, we believe that a longer timeframe for implementation is necessary, with a minimum of nine to 12 months.

Question 12c: Do you have any comments about the proposed timeframe for implementing any new condition outlined in this consultation? If so, please explain and provide reasons for your view.

The proposed 3-month timeframe for implementation is considered to be unfeasible for providers. There is significant concern over the proposed three-month timeframe owing to significant burden associated with:

1. **The revision of existing institutional policies, where these do not align with condition E6**, such as staff policies on professional conduct, disciplinary, reporting and grievance procedures.
2. **The creation and compilation of the proposed single document.**
3. **Contractual changes that would need to be enacted regarding student-staff relationships**, which would require consultation with trade unions.
4. **The development and delivery of training for staff and students.** Please see our response to 12a for more details.
5. **Communication to staff and students about requirements for training**, potentially over the summer vacation.

As briefly touched upon above, there is a concern that the condensed three-month implementation period will coincide with three months over summer, which provides substantial challenges due to:

- Unavailability of student representatives.
- University activities such as admissions.
- Staff on leave.

Our members have indicated that a nine to 12-month period would be more appropriate. Alternatively, HEIs could be allowed to indicate the plans for making changes that they are part way through implementing. A three-month period to indicate a roadmap to making changes could maintain pace on making progress while ensuring HEIs have the time to do the highest quality work.