

**Consultation**

**Office for  
Students**

The logo for the Office for Students, featuring a dark blue square with a yellow square in the top right corner containing the letters 'OfS' in white.

**OfS**

# **Consultation on a new approach to regulating harassment and sexual misconduct in English higher education**

This consultation runs from 23 February 2023 to 4 May 2023

**Reference** OfS 2023.06

**Enquiries to** [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk)

**Publication date** 23 February 2023

The Office for Students is the independent regulator for higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.

### **Our four regulatory objectives**

All students, from all backgrounds, and with the ability and desire to undertake higher education:

- are supported to access, succeed in, and progress from, higher education
- receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure
- are able to progress into employment or further study, and their qualifications hold their value over time
- receive value for money.

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## About this consultation

The Office for Students (OfS) is proposing a new approach to the regulation of harassment and sexual misconduct affecting students in registered higher education providers. This consultation sets out the background to our proposals, the reasons we are proposing to make changes and what we expect those changes to achieve.

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### Timing

Start: **23 February 2023**

End: **04 May 2023**

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### Who should respond?

We welcome responses from anyone with an interest in the regulation of English higher education.

The consultation is particularly relevant to anyone with an interest in preventing and addressing harassment and sexual misconduct affecting students in English higher education. We are particularly (but not only) interested in hearing from **students, staff, academics and leaders at higher education providers**. We welcome the views of all types and size of provider.

We also welcome the views of **organisations working on prevention and support, as well as other bodies with an interest in harassment and sexual misconduct**.

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### How to respond

Please respond by **04 May 2023**.

Please use the online response form available at <https://survey.officeforstudents.org.uk/s/HSM-consultation/>

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### How we will treat your response

We will summarise and/or publish the responses to this consultation on the OfS website (and in alternative formats on request). This may include a list of the providers and organisations that respond, but not personal data such as individuals' names, addresses or other contact details.

If you want the information that you provide to be treated as confidential, please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

The OfS will process any personal data received in accordance with all applicable data protection laws (see our privacy policy).<sup>1</sup>

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<sup>1</sup> Available at [www.officeforstudents.org.uk/ofs-privacy/](http://www.officeforstudents.org.uk/ofs-privacy/).

We may need to disclose or publish information that you provide in the performance of our functions or disclose it to other organisations for the purposes of their functions. Information (including personal data) may also need to be disclosed in accordance with UK legislation (such as the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

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## Next steps

We aim to publish a summary of responses to this consultation later in 2023. We will explain how and why we have arrived at our decisions, and how we have addressed any points made by respondents. If we decide to adopt the condition into the regulatory framework following consultation, we will also explain how we have considered feedback on our proposals relating to implementation.

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## Enquiries

Email [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk)

Alternatively, call our public enquiry line on 0117 931 7317.

We are holding two consultation webinars in **March 2023**, one for higher education providers on Tuesday 7 March and one for students and their representatives on Thursday 9 March. These events will provide an opportunity for you to ask any questions you may have.

We also intend to hold roundtable events for students, including online and in person in London, in April 2023.

Details of all events will be posted on our website.

If you require this document in an **alternative format**, or you need assistance with the online form, contact [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk). (**Please note:** this email address should **not** be used for submitting your consultation response.)

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For more information about our work to date on harassment and sexual misconduct, please visit the OfS website: [www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/prevent-and-address-harassment-and-sexual-misconduct/](http://www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/prevent-and-address-harassment-and-sexual-misconduct/).

## Executive summary

Harassment and sexual misconduct are serious issues in English higher education. In 2020, full-time students were more likely to have experienced sexual assault in the past year than any other occupational group.<sup>2</sup> The Equality and Human Rights Commission's 2019 inquiry into racial harassment found that 24 per cent of ethnic minority students had experienced racial harassment on campus,<sup>3</sup> and most recently the Community Security Trust found that there had been 95 antisemitic incidents reported in the higher education community in 2020-21, the highest number reported for any year.<sup>4</sup>

The Office for Students aims to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers. This should mean students can study without facing harassment or sexual misconduct.

We had hoped to see concerns about harassment and sexual misconduct addressed through effective self-regulation by universities and colleges. We have undertaken a range of activities to support the sector, including the development of sector-wide effective practice, guidance and resources through our Catalyst funding programme, through which we provided £4.7 million to 119 projects to tackle sexual misconduct, online harassment, and hate crime, including religion-based hate crime. In April 2021, we set clear and consistent voluntary standards in our statement of expectations to support providers to develop and implement effective systems, policies and processes, to prevent and respond to incidents of harassment and sexual misconduct.

The independent evaluation of our statement of expectations, published in November 2022, found that the statement has led to some improvements in the policies, systems and processes designed to address harassment and sexual misconduct and increased recognition of this as a serious issue. However, it also found clear variations in practice. Approaches in some universities and colleges did not always achieve their aims. In particular, disclosures of incidents were not always properly followed up with formal reports. Some universities and colleges have either been slow to take up the statement of expectations or have not sufficiently prioritised this issue. There has also been a lack of focus on forms of harassment that are not sexual harassment. Our evaluation ultimately concluded that while some progress has been made, it has not been sufficient.<sup>5</sup>

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<sup>2</sup> Office for National Statistics, 2021, 'Sexual offences prevalence and victim characteristics, England and Wales'. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/sexualoffencesprevalenceandvictimcharacteristicsenglandandwales>.

<sup>3</sup> Equality and Human Rights Commission, 2019, 'Racial harassment in higher education: our enquiry'. Available at: <https://www.equalityhumanrights.com/en/ymchwiliadau-ac-archwiliadau/racial-harassment-higher-education-our-inquiry>.

<sup>4</sup> 'Campus Antisemitism in Britain 2020-2022', 2023. Available at: <https://cst.org.uk/news/blog/2023/01/19/cst-report-shows-22-increase-in-campus-antisemitism>.

<sup>5</sup> More information about the statement of expectations, evaluation and Catalyst funding programme can be found here: [www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/prevent-and-address-harassment-and-sexual-misconduct/](http://www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/prevent-and-address-harassment-and-sexual-misconduct/). Further information on the evidence of harassment and sexual misconduct in higher education and the OfS's work to address these issues can be found in Annexes D and E.

This is why a different approach to regulation is needed to ensure that the number of incidents of harassment and sexual misconduct are reduced, and students can be confident that they will be supported by their provider if an incident does occur.

We are proposing to impose a new condition of registration on universities and colleges in relation to harassment and sexual misconduct. This would achieve the consistent level of protection for all students that self-regulation has not delivered. The proposed new condition would, among other things:

- Provide clear definitions of harassment and sexual misconduct to support consistency across the sector.
- Require each registered university and college to create and publish a single document explaining:
  - the steps it will take to protect students from harassment and sexual misconduct
  - its arrangements for handling incidents of harassment or sexual misconduct
  - the support it will provide to those involved in incidents
  - the training that it will provide to all students and all staff about what constitutes harassment and sexual misconduct and, in the case of staff, how to handle disclosures, formal reports, and investigations.
- Require each registered university and college to have the capacity and resources to deliver everything required by the proposed condition.
- Ensure freedom of speech and academic freedom are protected by requiring universities and colleges to continue to meet their legal and regulatory obligations in relation to both freedom of speech and harassment.
- Prohibit non-disclosure agreements that forbid students from talking about incidents of harassment or sexual misconduct that they may have experienced.
- Place regulatory requirements on universities and colleges in relation to personal relationships between students and relevant staff (for example, those involved in teaching students or marking their work). Two options are proposed here: requiring such relationships to be reported (our preferred option) and a register of relationships maintained, or a ban on relationships between students and relevant staff members.

We are therefore proposing to place substantive enforceable obligations on universities and colleges to ensure that students are protected from harassment and sexual misconduct to enable them to have an experience of higher education that enriches their lives and careers.

We are keen to hear the views of students, universities and colleges, and their representatives, and any other organisation or member of the public with an interest in tackling harassment and sexual misconduct in higher education.



## Introduction

1. In March 2022, we published our strategy<sup>6</sup> for 2022 to 2025 in which we described our two key areas of focus for this period that will inform our regulatory activity: quality and standards; and equality of opportunity. These are closely connected, mutually reinforcing and underpin our four primary regulatory objectives.
2. Our work to address harassment and sexual misconduct is relevant to quality because of the links between students' experiences of higher education and the outcomes they achieve. It is also relevant to equality of opportunity because certain groups of students have historically been more likely to experience harassment and/or sexual misconduct on the basis of their protected characteristics. This is why our strategy sets out our specific goal to ensure universities and colleges act to prevent harassment and sexual misconduct and respond effectively if incidents occur.
3. The proposals in this consultation explain how imposing requirements on a higher education provider through a new condition of registration would support the achievement of this goal. We consider that the increased regulatory focus we are proposing would help advance equality of opportunity, because providers would be required to take steps to prevent and address harassment and sexual misconduct for all students. Our proposals are also consistent with the goal in our strategy that providers should ensure free speech within the law for students, staff and visiting speakers.

## The OfS's current approach to addressing harassment and sexual misconduct

4. To date, the OfS has undertaken a range of activities to support and encourage self-regulation of harassment and sexual misconduct in the higher education sector. Full details are provided at Annex D. In summary our work has included:
  - a. Providing £4.7 million through the Catalyst safeguarding programme<sup>7</sup> between 2017 and 2020 to fund 119 projects across the sector designed to support the development of effective practice in addressing sexual violence, hate crime, online harassment and harassment based on religion or belief affecting students.
  - b. Commissioning an independent evaluation of the three rounds of funding delivered through the Catalyst safeguarding programme to support learning, exchange and dissemination of effective practice from the projects, and help establish 'what works' in safeguarding students.

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<sup>6</sup> Office for Students, 2022, 'Office for Students strategy 2022 to 2025'. Available at [www.officeforstudents.org.uk/publications/office-for-students-strategy-2022-to-2025/](http://www.officeforstudents.org.uk/publications/office-for-students-strategy-2022-to-2025/).

<sup>7</sup> Information on the evaluation of OfS Catalyst funded projects is available at: [www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/student-safeguarding-evaluation-and-resources/](http://www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/student-safeguarding-evaluation-and-resources/).

- c. Working in partnership with sector bodies and student groups to identify and promote effective practice, research and evidence.
- d. Developing and publishing in April 2021 our statement of expectations. This provided a set of clear voluntary standards to support higher education providers in England to develop and implement effective systems, policies and processes to prevent and respond to incidents of harassment and sexual misconduct.
- e. Commissioning an independent evaluation of the initial impact of the statement of expectations.

## **Statement of expectations**

5. We published our statement of expectations in April 2021.<sup>8</sup> This provided a set of clear voluntary standards to support higher education providers in England to develop and implement effective systems, policies and processes to prevent and respond to incidents of harassment and sexual misconduct.
6. In June 2021 we asked providers to review and update relevant systems, policies and procedures in line with the statement of expectations, and to do so before the start of the 2021-22 academic year. We said that we planned to review the impact of the statement of expectations and that we would consider options for linking it to conditions of registration if the evidence suggested that insufficient progress had been made.
7. An independent consultant, SUMS Consulting, evaluated the impact of the statement of expectations. The evaluation, published in November 2022, found that the statement has led to a positive shift in the sector, including improvements in providers' policies, systems and processes, and increased attention to addressing harassment and sexual misconduct, particularly from senior leadership teams and governing bodies. However, the evaluation also found that progress has been slow and inconsistent across the sector, and that there is substantial variation in the approaches of higher education providers. The evaluation concluded that the statement of expectations has resulted in progress, but further regulatory intervention would be needed to ensure universities and colleges address these issues appropriately. In particular, the evaluation pointed to the need for further intervention and increased regulation to address the variability across the sector.
8. The evaluation of the statement of expectations is set out in Annex D. This annex also describes in more detail the work we have previously funded and supported in this area. Other evidence that sets out issues of harassment and sexual misconduct in higher education can be found in Annex E.
9. The evaluation of the statement of expectations also identified that 'there is a significant lack of consistent quantitative data available about harassment and sexual misconduct affecting students' and recommended the development of a national prevalence survey of sexual misconduct in higher education. We are currently developing a pilot prevalence survey to be conducted in the 2022-23 academic year, and expect to follow that with a sector-wide survey to

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<sup>8</sup> Office for Students, 2021, 'Office for Students statement of expectations for preventing and addressing harassment and sexual misconduct affecting students in higher education'. Available at: [www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/prevent-and-address-harassment-and-sexual-misconduct/statement-of-expectations/](http://www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/prevent-and-address-harassment-and-sexual-misconduct/statement-of-expectations/).

provide data on sexual misconduct at a provider level. The development and potential future uses of this prevalence survey are not included in this consultation.

## **Proposed new approach to addressing harassment and sexual misconduct**

10. Our proposals, which are described in detail in the following sections, are as follows:

- a. Proposal A: Introduce new ongoing condition of registration E6 (harassment and sexual misconduct), which would place regulatory requirements on all registered providers. Proposals B-F below describe the proposed content of condition E6.
- b. Proposal B: Impose a requirement for a provider to develop and publish a single document explaining its approach to tackling harassment and sexual misconduct. We propose that this document should include information about:
  - i. Multiple steps a provider is taking that could make a significant and credible difference in protecting students from harassment and sexual misconduct.
  - ii. A provider's arrangements for handling disclosure and reporting of harassment and sexual misconduct incidents, including how information will be handled, investigations undertaken, and any decisions made in respect of how incidents are communicated to relevant individuals.
  - iii. A provider's arrangements for supporting students who have experienced incidents of harassment or sexual misconduct.
  - iv. A provider's arrangements for training students and staff in relation to harassment and sexual misconduct.
- c. Proposal C: Impose a requirement for a provider to have the capacity and resources necessary to facilitate compliance with this condition.
- d. Proposal D: Impose a requirement for a provider to comply with condition E6 in a manner consistent with the freedom of speech principles set out in the condition.
- e. Proposal E: Prohibit a provider from restricting the disclosure of information about an allegation of harassment or sexual misconduct that involves or affects one or more students. This section also proposes that a provider should not rely on or enforce pre-existing prohibitions, and should take all reasonable steps to prevent any other person from restricting the disclosure of information or relying on pre-existing prohibitions.
- f. Proposal F: Impose requirements on a provider relating to personal relationships between students and relevant staff. Relevant staff are defined as a member of staff who has direct or indirect academic responsibilities, or other direct professional responsibilities, in relation to a student. Two possible options are set out in this section:
  - i. Option A: Require a provider to take all reasonable steps to: require any relevant member of staff to disclose any personal relationship with a student; and to dismiss any relevant member of staff where they refuse to disclose a personal relationship with a student. This is our preferred option.

ii. Option B: Require a provider to take all reasonable steps to: prohibit any relevant member of staff from having a personal relationship with one or more students; and to take appropriate steps which would normally be dismissal of a relevant member of staff, where they refuse to end a personal relationship.

g. Proposal G: Subject to the responses to this consultation, any new condition of registration would come into force on a date not less than three months from the date the OfS publishes its final decisions.

11. We consider it important for this consultation to consider the range of options available to achieve our goal of ensuring universities and colleges act to prevent harassment and sexual misconduct and respond effectively if incidents occur. Throughout this consultation, we explain our proposals for tackling harassment and sexual misconduct, as well as the alternative options that we have considered and discounted. We are interested in receiving feedback from all respondents to this consultation, particularly students and their representatives and registered providers of different sizes and corporate forms.

12. When developing these proposals, we have carefully considered the matters to which we must have regard, including our general duties in section 2 of HERA. Our assessment of these matters, including the potential regulatory burden of our proposals, is set out in Annex C.

## **Proposal A: Introduce proposed ongoing condition E6 (harassment and sexual misconduct)**

13. Following our consideration of the evidence, including the outcomes of the evaluation of the impact of our statement of expectations, we consider it is appropriate to impose requirements on registered providers in relation to harassment and sexual misconduct. This is because the evaluation of the impact of the statement of expectations has clearly shown that our previous approach of providing funding, sharing effective practice and introducing the voluntary statement of expectations, has not achieved sufficient progress across the sector. Self-regulation has not worked in this area. There is slow progress overall. In particular progress is inconsistent and approaches to addressing harassment and sexual misconduct in higher education vary, which poses risk to the experience of students and their ability to succeed during, and after, their studies.
14. We consider that introducing a new condition of registration is likely to:
  - a. Ensure requirements are clear for all registered higher education providers in relation to harassment and sexual misconduct, including how it should be tackled with proper consideration for freedom of speech and academic freedom. A provider may satisfy conditions of registration in whatever way it considers to be appropriate (dependent on the framing of a particular condition), but the existence of an ongoing condition of registration establishes a minimum baseline of regulatory requirements that would apply to all registered providers.
  - b. Increase the pace at which registered providers in general develop their approach to preventing and responding to harassment and sexual misconduct experienced by students. We consider this is necessary because of the slow progress by many providers, and in relation to some particular issues, in response to our statement of expectations.
  - c. Give students confidence that wherever and however they study, their provider is subject to regulatory requirements to tackle harassment and sexual misconduct. We consider it important that all students experiencing harassment and sexual misconduct, or involved in allegations of harassment and misconduct, know where to go for help, and we can ensure an appropriate level of consistency through the imposition of binding requirements on all registered providers.
  - d. Provide clarity to students and providers about how the OfS may respond when a provider does not meet these requirements. The OfS has powers of intervention which it can use if a provider does not satisfy, or is at increased risk of not satisfying, regulatory requirements. For example, we could increase the scale and frequency of our monitoring activities, impose further conditions, or where there is a breach of a condition impose a monetary penalty or suspend or remove a provider's registration.
15. For these reasons we propose to introduce a new general ongoing condition of registration to tackle harassment and sexual misconduct. This means all registered providers would have to satisfy the requirements of the proposed condition on an ongoing basis.
16. We also have the power to impose initial conditions of registration, which a provider must satisfy in order to become registered. We are not proposing to introduce a new initial condition on harassment and sexual misconduct because we consider that our objectives can be

sufficiently achieved by imposing new requirements once a provider is successfully registered. We take the view that this approach appropriately limits the burden we place on a new provider seeking registration.

17. We have considered whether there are other approaches we could take instead of introducing a new ongoing condition of registration. In particular we have considered whether we could:
  - a. Take no further action, meaning that we would maintain the current position of having published our voluntary statement of expectations and the evaluation of its initial implementation.
  - b. Increase our communications and advocacy work in relation to the voluntary statement of expectations.
  - c. Provide more funding to support the development of further resources and effective practice.
18. Each of these approaches would see us continue with the self-regulation approach we have taken to date. However, we have relied on self-regulation for a number of years and this has been bolstered with extensive support and guidance from a range of sources, as set out in Annexes D and E. This approach has not resulted in consistent and sufficient progress across the sector. An assessment of the available evidence can be found in Annex E. The evaluation of the statement of expectations, details of which can be found in Annex D, found that it 'has not been a sufficient catalyst for change in its current form' and points strongly to the need to make the prevention of, and response to, harassment and sexual misconduct subject to binding regulatory requirements. For these reasons we have discounted the alternative options set out above.
19. We are therefore proposing to introduce a new general ongoing condition of registration for all registered providers to tackle harassment and sexual misconduct. The remainder of this consultation sets out the details of our proposals relating to that condition, which would be known as condition E6 (harassment and sexual misconduct).

**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.**

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

### **Proposed definitions for harassment and sexual misconduct**

20. An important part of a condition of registration to address harassment and sexual misconduct is the definitions used for those two terms because they would determine the nature of the requirements placed on a provider. This section sets out our proposed definitions of harassment and sexual misconduct.

21. We propose that our definitions of both harassment and sexual misconduct should include the meanings of those terms set out in section 26 of the Equality Act 2010. The full text of section 26 of the Equality Act 2010 can be found in Annex F, but in summary:

‘harassment, including sexual harassment, includes unwanted behaviour or conduct [of a sexual nature] which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment because of, or connected to, one or more of the following protected characteristics: age; disability; gender reassignment; race; religion or belief; sex; and sexual orientation.’

22. We have proposed using this definition because:

- a. There is clear evidence that there is a substantial volume of harassment, including sexual harassment, that is perpetrated on the basis of relevant protected characteristics in the Equality Act 2010. The relevant evidence is presented in Annex E.
- b. We used this definition in our statement of expectations and it is therefore likely that it will be used by providers in their existing policies, which may reduce the regulatory burden they will experience if we decide to impose the proposed condition. This is because they are already familiar with the definition.
- c. Harassment, including sexual harassment, that meets the test in section 26 of the Equality Act 2010 is unlawful. We take the view that it is reasonable to expect that our proposed regulatory requirements should cover unlawful harassment and sexual misconduct in relation to individuals’ protected characteristics. This means that we would be able to take regulatory action, as appropriate, in relation to conduct that is unlawful under that Act.
- d. In relation to harassment in the context of section 26 of the Equality Act 2010, in deciding whether conduct has the effect referred to, it is necessary to take into account: the perception of the person who is at the receiving end of the conduct; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. The last point is important because it introduces an element of objectivity into the test. The perception of the person who is at the receiving end of the conduct is not the only relevant consideration in determining whether the conduct amounts to unlawful harassment and we consider this a particularly important provision in a higher education context because of the particular importance of freedom of speech.

23. Taking the definitions set out in section 26 of the Equality Act 2010 as a starting point, we propose that ‘harassment’, in the context of the proposed condition, should mean the following:

‘harassment’ has the meaning given in section 26 of the Equality Act 2010 and section 1 of the Protection from Harassment Act 1997 (in its entirety, and as interpreted by section 7 of the Act).<sup>9</sup>

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<sup>9</sup> Terms that are defined as part of proposed ongoing condition E6 are not bolded in these yellow boxes in the consultation document to aid readability. However, the full condition text including all defined terms can be found in Annex A.

24. We are also proposing to use the meaning of harassment in section 1 of the Protection from Harassment Act 1997 (in its entirety, and as interpreted by section 7 of the Act), which is set out in Annex F. Section 1 prohibits harassment towards any person. Under that Act, harassment is:

‘a course of conduct conducted on at least two occasions that harasses one other person, or a course of conduct that harasses two or more persons at least once each. References to harassing a person include alarming the person or causing the person distress.’

25. This definition also includes an objective test whereby an offence is committed only if the person knows the conduct amounts to harassment of the other or a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other person. As set out above in relation to the Equality Act 2010, we consider this to be relevant in higher education because of the particular importance of freedom of speech.

26. We propose to include the definition from the Protection from Harassment Act 1997 because we consider that all students should expect to be protected from harassment and supported if they experience harassment, whether or not this conduct is in relation to a protected characteristic and therefore already captured by the Equality Act 2010. Including the reference to harassment as defined in the Protection from Harassment Act 1997 means the proposed condition would require a provider to protect students from harassment that is not related to a relevant protected characteristic in the Equality Act 2010. We take the view that while harassment on the basis of a protected characteristic (for example race or sex) is of significant concern, all students at all providers should be protected from unlawful harassment. Restricting the definition of harassment to the Equality Act 2010 would ensure that students who may be particularly vulnerable to harassment are protected, but it would be likely to exclude other students where an incident does not appear to occur in connection with a student’s protected characteristic(s).

27. We also consider that including the Protection from Harassment 1997 definition is likely to place few additional requirements on providers with the exception of the important addition that it covers harassment when this is not in connection with a protected characteristic. This is because our monitoring activity suggests that many providers have developed policies that already apply more broadly across student groups. Considering both the benefits and the burdens we consider extending our definition of harassment in this way is appropriate.

28. We welcome comments from respondents about our proposed definition of harassment, including whether it provides appropriate clarity about the scope of conduct that is intended to be covered.

**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.**

**Question 2b: Do you have 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.**



29. Taking the definitions set out in section 26 of the Equality Act 2010 as a starting point, we propose that 'sexual misconduct', in the context of the proposed condition, should mean the following:

'sexual misconduct' means any unwanted or attempted unwanted conduct of a sexual nature and includes but is not limited to:

- i. sexual harassment as defined by section 26(2) of the Equality Act 2010; and
- ii. assault as defined by the Sexual Offences Act 2003; and
- iii. rape as defined by the Sexual Offences Act 2003.

30. We have used the term 'sexual misconduct' in our proposed condition because it is a well-understood term in the higher education sector, for the media and student groups. It has previously been used to cover a wide range of serious issues relating to sexual offences, including sexual harassment, sexual assault, and sexual violence. In proposing to use this broad term, we do not intend to downplay or trivialise incidents of this type or the experiences of those who have experienced sexual misconduct, but to provide a term that enables providers to address the many facets of unacceptable conduct of a sexual nature. It is for this reason that we propose to include in our definition of sexual misconduct assault and rape as defined within the Sexual Offences Act 2003, to emphasise that sexual violence is included. Given the more limited scope of the definition in the Equality Act 2010 we consider that the use of these definitions within the Sexual Offences Act 2003 is important to ensure providers are aware of their regulatory obligations in relation to a wider range of sexual misconduct.

31. We consider that the combination of these definitions would cover the majority of sexual misconduct. In addition, we consider that our full proposed definition that sexual misconduct 'means any unwanted or attempted unwanted conduct of a sexual nature and includes **but is not limited to** [...]' ensures that where sexual misconduct does not fall within the descriptions set out in the Equality Act 2010 or in rape and assault as defined in the Sexual Offences Act 2003, it is still covered by our definition if it is unwanted or attempted unwanted conduct of a sexual nature.

32. We have considered expanding our proposed definition of sexual misconduct to include any offence defined in the Sexual Offences Act 2003. However, this Act includes a number of offences in relation to which we do not consider it appropriate to introduce binding regulatory requirements. For example, it refers specifically to children and under-18s and vulnerable adults. While we agree that it is important that such students are protected from sexual misconduct, providers must already comply with relevant safeguarding obligations which are reviewed regularly. Including these offences in our proposed definition would therefore be likely to duplicate regulation. For the avoidance of doubt, our proposed definition of sexual misconduct would apply to all students, including under-18s and vulnerable adults; it is simply that our proposal does not include the specific elements of the Act that refer only to these groups.

33. We also consider that there could be merit in including in our definition reference to legislation relating to distributing private and personal explicit images or video footage of an individual

without their consent, which is illegal under the Criminal Justice and Courts Act 2015, or ‘upskirting’, which is an offence under the Voyeurism (Offences) Act 2019. However, we do not consider it necessary to extend our definition of sexual misconduct in this way because our proposal would allow us to capture an appropriate range of conduct. These offences could fall under the full proposed definition of ‘unwanted or attempted unwanted conduct of a sexual nature’. It is likely that new offences relating to sexual misconduct will be brought into legislation over time. Setting out a more extensive list of relevant legislation in a new condition of registration would increase the likelihood that it could quickly become out-of-date if new legislation is introduced, and may create a misleading impression that the list is intended to be exhaustive. We would therefore expect a provider to make credible judgements about what constitutes ‘any unwanted or attempted unwanted conduct of a sexual nature’, as set out in the proposed definition.

34. We welcome comments from respondents about our proposed definition of sexual misconduct, including whether it provides appropriate clarity about the scope of activity that is intended to be covered.

**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.**

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

35. Another option we have considered is the inclusion of ‘domestic abuse’ in the definitions of the proposed condition, for example through the inclusion of section 1 of the Domestic Abuse Act 2021. We recognise that some elements of this definition of domestic abuse may be covered by the Equality Act 2010 or the Protection from Harassment Act 1997, for example sexual abuse, stalking, physical abuse and harassment. However, other elements of this definition of domestic abuse, such as coercion, financial control, and emotional abuse, could be more fully addressed through the inclusion of section 1 of the Domestic Abuse Act 2021 in our proposed definition.
36. Briefings from Universities UK<sup>10</sup> and ONS data, highlight the impact of domestic abuse on students. In the year ending March 2020, the ONS found that students were the occupational group in the UK with the highest likelihood of experiencing domestic abuse. Data for the year ending March 2022 has recently been published, but analysis for occupational groups has not been published and care is needed when using this data because of the reduced period of data collection and lower response rates. Nonetheless, adults aged 20 to 24 was the group with the highest likelihood of experiencing domestic abuse (10.2 per cent).<sup>11</sup> This evidence suggests

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<sup>10</sup> Universities UK, 2021, ‘Continuing the conversation: Responding to domestic violence and technology mediated abuse in higher education communities during the Covid-19 pandemic’. Available at: <https://www.universitiesuk.ac.uk/sites/default/files/field/downloads/2021-08/continuing-the-conversation.pdf>.

<sup>11</sup> See <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2022>.

that there could be potential benefits of including a definition of domestic abuse in the proposed condition.

37. However, we recognise that this is a complex area and one in which additional regulation could bring additional burden and complexity for higher education providers. We also consider that, if we were to introduce requirements in this area, providers would need to develop their approaches to preventing and addressing domestic abuse at pace; research by the HARM network suggests that only a small proportion of higher education providers have established relevant systems, policies and processes.<sup>12</sup> For these reasons we have concluded that we should not take this option forward at this time, but will keep the situation under review and may revisit this issue in due course.

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<sup>12</sup> HARM Network, 2021, 'Domestic abuse policy guidance for UK universities 2021'. Available at: <https://clouk.uclan.ac.uk/37526/>.

## **Proposal B: Proposal to require a provider to develop and publish a 'single document' with 'minimum content requirements'**

### **Proposal**

To require a provider to maintain and publish a single document which comprehensively sets out policies and procedures on subject matter relating to incidents of harassment and sexual misconduct. We propose minimum content requirements for this document that will require a provider to take meaningful action to prevent and reduce harassment and sexual misconduct where it occurs towards its students, while recognising that the types of action that would be appropriate will depend on the provider's context. We are also proposing 'prominence principles' relating to this document, which are as follows:

- i. The document is published in a prominent position in an area of the provider's website which is easily accessible by students and those considering applying to be students without the need for any form of password or security check.
- ii. A clear and easy to understand statement about the existence of the document, the nature of its content, and how to access it is:
  - communicated directly to all students and staff in writing at least once each calendar year
  - set out in the main documents designed to promote the higher education services available from the provider (for example, any document that is commonly known as a prospectus)
  - set out in any documents that are designed to provide a collection of useful information about rules, policies and procedures for students and staff (for example, any documents that are commonly known as student handbooks and staff handbooks).

### **Proposed requirement to create and publish a 'single document'**

38. Our proposals mean that a registered provider would be required to create a single document which comprehensively sets out its policies and procedures relating to incidents of harassment and sexual misconduct. If a provider did not have such policies and procedures when any new condition was imposed, it would need to develop these. A provider that already had such documents would need to review them to ensure that they meet the proposed requirements and present them in a single document.
39. We have considered potential alternatives to the proposed requirement to produce a single document, as we note that some providers maintain websites with multiple pages setting out their policies and procedures on harassment and sexual misconduct. We considered, for example, whether it would be sufficient for a provider to have a landing page to signpost to relevant policies, rather than requiring all relevant content to be in a single document. However, we consider that a single document would be preferable to ensure that current and potential future students are able to locate all of the necessary information easily. This would be helpful if they are involved in any incidents of harassment or sexual misconduct, and it would provide ease of comparison for current and potential future students looking at the approach taken by different providers to preventing and addressing harassment and sexual misconduct. We also consider that our proposed approach would improve transparency and accountability more generally. For example, members of the public and other stakeholders would more easily be

able to understand a provider's approach if it is set out in a single document. It would also assist the OfS's work if relevant information could be accessed in one place, particularly when we are considering concerns about a provider's compliance. We consider that a single document would be preferable to achieving these aims, but we are interested in feedback about alternative options, particularly from providers and students and their representatives.

40. Our proposal would also mean that a provider must operate in accordance with, and comply with, the single document required by the proposed condition. We consider this to be an important aspect of the proposed condition because it would not be sufficient for a provider to publish a document setting out its approach, if it is not also required to operate on the basis of that approach in practice. Students would not benefit in practice from the regulatory protection we intend if this were not the case.
41. We propose that the single document should be published in a prominent position on a provider's website that is publicly and easily accessible. For example, it should not be behind a password-protected section of the provider's website, or located several 'clicks' behind the main page. The document should be shared with registered students and staff at least once a year, and should be referenced in other key documents and policies such as in a prospectus, other information published for applicants and in documents about the provider's overall approach to student support. We are proposing this approach because we consider it important for this information to be prominent, readily available, and for there to be a high level of awareness of it among students. This would ensure that students know the approach their provider is taking to prevent harassment and misconduct, the training that will be provided to students and staff, and where they can go for support if they experience harassment or sexual misconduct and that they can understand the steps involved in reporting an incident.

**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.**

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

### **Proposed requirement to have 'minimum content requirements' for the single document**

42. We are proposing that there should be 'minimum content requirements' for the single document explained above, and for a provider's procedures and policies to comply with 'content principles'. The proposed 'minimum content requirements' and 'content principles' are as follows:

'minimum content requirements' means comprehensive and easy to understand provisions in respect of:

- a. In addition to any other steps required by virtue of the condition, multiple steps which could (individually or in combination) make a significant and credible difference in protecting students from behaviour that may amount to harassment and/or sexual misconduct, including, but not limited to, steps that may reduce the likelihood of harassment and/or sexual misconduct taking place.
- b. The ways in which students, staff and other persons are able to report behaviour that may amount to harassment and/or sexual misconduct to the provider.
- c. How information received or obtained in connection with incidents of harassment and/or sexual misconduct will be handled sensitively and used fairly.
- d. How the provider ensures that students are appropriately taught.
- e. The appropriate support that will be provided to students (including, but not limited to, actual or potential victims and actual or alleged perpetrators) in response to incidents of harassment and/or sexual misconduct.
- f. How the provider ensures that staff and other persons responsible for receiving information about, investigating, or taking decisions on, matters relating to incidents of harassment and/or sexual misconduct are appropriately trained.
- g. How the provider ensures that investigations undertaken and decisions made in respect of incidents of harassment and/or sexual misconduct are credible, fair and otherwise reflect established principles of natural justice.
- h. How the provider ensures that persons directly affected by any decisions made in respect of incidents of harassment and/or sexual misconduct (including, but not limited to, actual or potential victims and actual or alleged perpetrators) are directly informed about the decisions and the reasons for them.

43. We consider it important to specify minimum content requirements for a provider's single document to ensure that there is a minimum standard for the content of providers' policies and procedures. Our proposal would mean that a provider would need to include in its single document a range of content, for example in relation to training for students and staff, and support for students who are involved in incidents of harassment or sexual misconduct. We discuss each of the proposed minimum content requirements in turn below.

#### **Requirement to describe steps to make a significant and credible difference**

44. The first proposed minimum content requirement is that:

'in addition to any other steps required by the condition, a provider would be required to describe **multiple steps which could (individually or in combination) make a significant and credible difference in protecting students** from behaviour that may amount to harassment or sexual misconduct, including steps that may reduce the likelihood of harassment or sexual misconduct taking place.'

45. We take the view that any condition of registration imposed on a provider to tackle harassment and sexual misconduct must seek to reduce the likelihood of incidents occurring, in order to properly protect students. We also consider that a provider putting in place steps that could make a significant and credible difference should usually lead to a reduction in the prevalence of harassment and sexual misconduct, as well as protecting students from its impact.
46. What may constitute a 'significant and credible difference' will depend on the context for an individual provider, because the steps it needs to take will be informed by the nature and severity of the issues faced by its students. For example, we expect that there will be different levels of prevalence of harassment and sexual misconduct in different providers. Our proposal for minimum content requirements means that each provider would need to understand its student population and the extent to which its students may be likely to experience harassment or sexual misconduct in order to properly address these important issues. A provider with higher prevalence rates of harassment and/or sexual misconduct would be likely to need to take more, and more extensive, steps to make a significant and credible difference in protecting students in the way envisaged by the proposed condition.
47. We have set out in the guidance underpinning the proposed condition some illustrative examples of the type of issues that a provider would need to consider in identifying steps to make a significant and credible difference. These might, for example, include working with students and their representatives to allow them to provide feedback on the steps a provider proposes to take, or collecting, monitoring and publishing data where this is likely to inform effective action to protect students from behaviour that might amount to harassment and sexual misconduct. In all cases we would expect a provider to carefully consider and reach evidence-based views on the type of steps that it may need to take to make a significant and credible difference.
48. We considered not setting any minimum content requirements. If we had taken this approach the requirement for a single document would ensure transparency about a provider's policies and procedures but would not set out requirements about the substance of those policies and procedures. We consider transparency would be beneficial to students, and would create some incentive for providers to introduce effective policies. However, this would not create a sufficient and reliable degree of regulatory protection for all students and we consider that it would not go far enough in driving the improvement that is needed in providers.
49. We also considered proposing only one minimum content requirement, which would be the requirement proposed above; a provider would be required to describe multiple steps which could (individually or in combination) make a significant and credible difference in protecting students from behaviour that may amount to harassment or sexual misconduct, including steps that might reduce the likelihood of harassment or sexual misconduct taking place. However, we have explained above that we consider it important to have additional minimum content requirements because our objective is to ensure that providers' policies have an appropriate degree of consistency, which is achieved by requiring more detailed minimum content for all providers. This would also allow current and potential future students to compare the approach taken by different providers more easily, which could inform their decisions about where to study. The evaluation of our statement of expectations identified significant inconsistencies across the sector in terms of the approach taken by different providers and in relation to different issues. We therefore take the view that imposing requirements for minimum content is

a reasonable and appropriate way to address these issues, and to ensure that all students benefit from a minimum level of regulatory protection.

50. We have considered a further option which would entail introducing more detailed or extensive requirements. This could provide greater protection for students. For example, we considered the merits of requiring all providers to take specific steps, such as running night buses or having a minimum level of security on campus. There could also be merit in imposing particular arrangements in respect of investigations of incidents involving alleged harassment or sexual misconduct, for example requiring these to be conducted in a particular manner or requiring specific sanctions to be imposed on an alleged perpetrator who is found culpable. We consider this would create further certainty and consistency for students, as well as greater protections. However, on balance, we consider that introducing further more specific requirements that would apply to all providers would increase the likelihood that these would not be appropriate for the context of each provider, as well as representing a greater infringement of institutional autonomy.
51. We welcome views from respondents about the principle of imposing minimum content requirements and, as explained below, the particular proposed minimum content requirements.

**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**

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

### **Reporting, investigation and decisions about complaints**

52. The proposed minimum content requirements mean that a provider would need to explain, and then comply with, its arrangements for reports and complaints relating to harassment or sexual misconduct. This includes how students could report an incident, how information would be handled, how the provider would ensure any investigation is credible, fair and reflects principles of natural justice, and how individuals would be informed of the outcomes of an investigation. By 'principles of natural justice', we mean that a provider's policies and procedures should ensure that all of those involved in an investigation into harassment or sexual misconduct, including the alleged perpetrator, are treated fairly by the provider throughout any investigation.
53. These proposed requirements would mean that a provider's arrangements are clear and transparent for current and potential future students, and that a provider would comply with its arrangements in practice. The evaluation of our statement of expectations found that levels of reporting for incidents of harassment and sexual misconduct is likely to be far lower than the true prevalence, with a number of possible reasons provided. For example, students may lack confidence in a provider's likely response to a report, reporting systems may be inaccessible, or students may be aware of negative experiences of others who have made reports. Some students suggested that the outcome of a complaint is sometimes not clearly communicated to those who have made complaints. Our proposal would mean that a provider's single document would need to be sufficiently comprehensive to explain the processes involved while being easy to understand, and for those processes to be effective in practice. For the avoidance of doubt, our view is that all individuals involved in an incident of potential harassment or sexual



misconduct should be made aware of the outcome of any investigation and decision-making process.

54. Where appropriate, a provider's single document may need to describe possible interactions with other policies, for example, to staff complaint and disciplinary policies.

### **Support for students**

55. The proposed minimum content requirements would mean that a provider would need to set out the support it would make available to students in response to incidents of harassment or sexual misconduct, including where an incident does not proceed to a formal report, investigation, or finding. We are also proposing substantive requirements in relation to the support which should be provided to students:

- a. Support for students should cover personal support, including access to counselling where this is appropriate, for alleged victims, alleged perpetrators, and witnesses. We consider this to be appropriate given the potentially sensitive nature of harassment or sexual misconduct incidents. We have also explained in the draft guidance underpinning the proposed condition that appropriate support could involve a provider delivering its own support services, commissioning support from other organisations, or making appropriate and effective referrals to other service providers.
- b. Academic support should also be provided where appropriate – to alleged victims and alleged perpetrators – including in relation to decisions about a student's continuation, suspension or cessation of study, and attendance.
- c. Support should be made available to students who witness or experience incidents of harassment or sexual misconduct, regardless of whether they wish to make a formal complaint or report the incident. We consider that it is important that students are able to make their own decisions about reporting, without losing access to appropriate support.
- d. Students who are the alleged perpetrators of incidents of harassment or sexual misconduct should also be supported. The requirement for a provider to provide appropriate support to students does not mean that it cannot proceed with fair and transparent reporting, investigation and decision-making processes; rather, it means that appropriate support should be provided for all students during any such process.

### **Training about harassment and sexual misconduct**

56. We propose that the minimum content requirements cover training for students and staff. In relation to training for students, a provider would need to ensure that students understand the content of the single document explaining the provider's approach. It would also need to deliver credible and effective training to students studying on higher education courses. We have proposed that a provider should deliver mandatory training for all students, and that this should include training for potential witnesses to raise awareness of and prevent sexual misconduct; this is known as 'bystander training'. We have particularly emphasised that this training should be underpinned by credible evidence and evaluation which demonstrates measurable changes in attitudes and behaviours as a result of the training. Given the complexity of these issues, we would expect there to be an appropriate amount of time dedicated to mandatory training as well as an opportunity for attendees to ask questions. For example, a short online session at the

beginning of a student's higher education career that does not allow for questions and discussion, is unlikely to be sufficient to meet our proposed requirements.

57. In relation to training for staff, our view is that staff must receive appropriate and effective training to enable them to handle the issues that they may encounter. These issues are likely to vary in complexity because the proposed condition covers issues ranging from prevention of harassment and sexual misconduct, to training for staff and students, and reporting and investigatory processes. It is likely that specific training will be required to support staff to deliver steps that could make a significant and credible difference in protecting students. A provider's approach to training will vary depending on the steps that are appropriate in its particular context. We would expect that training would cover, in detail, our proposed definitions of harassment and sexual misconduct and the full range of requirements set out in the proposed condition, including but not limited to the freedom of speech principles. This is because staff would need to be trained to challenge harassment and sexual misconduct where they see it, and to engage in conversations about what may, or may not, constitute harassment in connection with freedom of speech.

58. The following aspects of our proposals are particularly relevant here:

- a. We have set out in the draft guidance underpinning the proposed condition that a provider should deliver training for staff with specific responsibilities relating to incidents of harassment or sexual misconduct (including those responsible for investigations into incidents of harassment and sexual misconduct). It should also deliver training for staff who have regular engagement with students or a role in which a student might reasonably expect a staff member to be familiar with a provider's reporting and support systems. Our intention is to ensure that all staff understand a provider's approach to harassment and sexual misconduct as part of induction arrangements for all new staff. Beyond induction, a provider would need to determine where best to direct resources for staff training to ensure it meets the requirements in the proposed condition.
- b. We have proposed that training for staff should be evaluated to ensure it remains robust and credible. Our view is that a short online course as part of a standard induction package is unlikely to be appropriate for most staff. It would not be appropriate for staff with specific responsibilities for preventing harassment and sexual misconduct, receiving disclosures and reports, and undertaking investigations into incidents, including reaching final decisions and recommending any disciplinary action. Further training is therefore likely to be appropriate for staff with responsibilities directly relevant to harassment and sexual misconduct.

**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.**

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

## Proposed requirement to have ‘content principles’ for the single document

59. In addition to the minimum content requirements proposed for this condition, we have also proposed ‘content principles’. The proposed content principles are as follows:

‘content principles’ means the following requirements:

- a. The provider may include other information and provisions in the same document which contains the minimum content requirements, but such other information and provisions must:
  - not contradict, undermine or conflict with the minimum content requirements; and
  - be subject to a provision which makes it expressly clear that the minimum content requirements take precedence over any other information and provisions.
- b. The provider must not include information and provisions on matters relating to harassment or sexual misconduct in any other documents which could reasonably be considered to contradict, undermine or conflict with the minimum content requirements.

60. The concept of ‘content principles’ in our proposals is designed to ensure and explain that a provider may include other information and provisions in its single document. However, any such additions must not contradict, undermine or conflict with the minimum content requirements, and must include a provision which makes it expressly clear that the minimum content requirements take precedence over any other information and provisions. Further, such additions must not include information and provisions on subject matter relating to harassment and/or sexual misconduct (and/or any subject matter of a similar nature to matters covered by those defined terms) which could reasonably be considered to contradict, undermine or conflict with the minimum content requirements. It should be noted that under E6.5 a provider will also need to comply with this requirement in a manner which is consistent with the freedom of speech principles. We have proposed including these content principles because we recognise that some providers may wish to expand the coverage of their single document to respond to their particular circumstances. For example, there may be particular safeguarding obligations for students in relation to fitness to practise requirements for some courses.

61. We have considered whether it is appropriate to propose these content principles and have concluded that it is. This is because our experience from monitoring activity is that there can sometimes be inconsistencies in the information provided to students and we consider that the proposed content requirements, as well as the proposal for a single document, would appropriately minimise the likelihood of confusion.

**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.**

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

## Proposal C: Requirements relating to capacity and resources

### Proposal

Require a provider to have the capacity and resources necessary to facilitate compliance with the condition

62. Our proposals would require a provider to have the capacity and resources necessary to facilitate compliance with proposed condition E6. The proposed condition defines 'capacity and resources' and the draft guidance underpinning the proposed condition sets out some examples of relevant matters.
63. This proposal is designed to ensure that a provider allocates appropriate resources to addressing harassment and sexual misconduct. While there is a requirement for a provider to have sufficient capacity and resources to ensure compliance with the condition in respect of all students, it may be appropriate for resources to be allocated in particular where certain student groups are more likely to face harassment and sexual misconduct, or may require additional support to continue their studies successfully. For example, it may be appropriate for a provider to allocate additional resources to meet the proposed requirements in relation to:
- the number of students registered with the provider
  - the demographic characteristics of a provider's student population, including students with particular protected characteristics
  - students with different modes of study or at different levels of study
  - the prevalence and types of incidents being reported and how these affect students differently.
64. The proposed condition does not restrict the ability of a provider to recruit any type of student, provided it then puts in place the resources and support consistent with the needs of those particular students.
65. We have set out in the draft guidance underpinning the proposed condition that a provider may determine the approach it takes to ensuring it has sufficient capacity and resources to meet the condition's requirements, including by sharing services with other organisations or providers. However, our view is that regardless of the approach a provider chooses to take, this condition may introduce new capacity and resource requirements. These could relate to its ability to protect students from harassment and sexual misconduct, provide appropriate support to students, ensure students and staff receive credible training, and have appropriate reporting and investigatory processes. Some providers will already have dedicated capacity and resource to these areas because they have implemented, or are working to implement, our statement of expectations, while others may not. Our policy objective is to ensure that a provider has sufficient capacity and resources to meet the requirements set out in the proposed condition on an ongoing basis.

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

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

## Proposal D: Requirements relating to freedom of speech

### Proposal

Require providers to comply with the requirements of the condition in a manner which is consistent with the freedom of speech principles. 'Freedom of speech principles' means the following requirements:

- a. Irrespective of the scope and extent of any other legal requirements that may apply to the provider, the need for the provider to have particular regard to, and place significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context or environment, including in premises and situations where educational services, events and debates take place.
- b. The need for the provider to apply a rebuttable presumption to the effect that students being exposed to any of the following is unlikely to amount to harassment:
  - the content of higher education course materials, including but not limited to books, videos, sound recordings, and pictures
  - statements made and views expressed by a person as part of teaching, research or discussions about any subject matter which is connected with the content of a higher education course.

66. Freedom of expression and academic freedom are essential underpinning principles of a high quality experience of higher education. They ensure an environment that is conducive to the advancement of new ideas, encourages productive debate, and challenges conventional wisdom. Students must be able to express lawful views, and to be taught by academics confident in their ability to teach, discuss and express a wide range of lawful views, including where these are controversial or unpopular.

67. It has been suggested by some commentators that an emphasis on freedom of speech is at odds with work to tackle unlawful harassment in higher education. We do not agree with this position. We recognise that these issues – ensuring lawful free speech and challenging unlawful harassment – are sometimes contentious and complex. We have recently published an insight brief which discusses the regulatory and legal landscape in relation to freedom of speech and academic freedom in the context of higher education, including their interaction with equality law.<sup>13</sup> That insight brief explains that freedom of speech and academic freedom that are 'within the law' are protected. Unlawful speech (such as discrimination or harassment under the Equality Act 2010) is not protected. However, there is no need to point to a specific legal basis for particular speech. Rather, the starting point is that speech is permitted unless it is restricted by law. It is important to remember that free speech and academic freedom are bound by this requirement of lawfulness.

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<sup>13</sup> Office for Students, 2022, 'Freedom to question, challenge and debate', Insight Brief, vol 16. Available at: [www.officeforstudents.org.uk/publications/freedom-to-question-challenge-and-debate/](http://www.officeforstudents.org.uk/publications/freedom-to-question-challenge-and-debate/).

68. The Equality and Human Rights Commission guidance for further and higher education providers explains that providers ‘are not restricted in the range of issues, ideas and materials [they] use in [their] syllabus and will have the academic freedom to expose students to a range of thoughts and ideas, however controversial. Even if the content of the curriculum causes offence to students with certain protected characteristics, this will not make it unlawful unless it is delivered in a way which results in harassment or subjects students to discrimination or other detriment.’<sup>14</sup>
69. Policies and processes that define ‘harassment’ too broadly, and so conflate what may be lawful speech with harassment, may act to curtail free speech for students, staff and others. Such restrictions could take the following forms:
- a. Where academic staff could be subject to disciplinary action if they contravene such a policy, that policy may interfere with the academic freedom of those staff (whether through the application of such disciplinary action or through staff self-censoring due to concern it will be applied).
  - b. Where students could be subject to disciplinary action if they contravene such a policy, that policy may interfere with the freedom of speech of those students (whether through the application of such disciplinary action or through students self-censoring due to concern it will be applied).
  - c. Where such a policy (directly or implicitly) informs the content of the curriculum it could narrow the range of perspectives to which students are exposed, and the academic freedom of those devising and teaching courses.
  - d. Where such a policy (directly or implicitly) informs decisions about topics that can be discussed and individuals that can be involved in speaking events, it could narrow the range of perspectives to which students are exposed.
70. We consider that there is significant harm in free speech and academic freedom being restricted in this way – it undermines the quality of higher education by deterring the open exploration of ideas and denies students the opportunity to be exposed to a wide range of views and positions.
71. Several of the proposals in this consultation are designed to encourage a more robust approach to preventing and tackling harassment. However, we consider that there is a possible risk that some providers may interpret these proposed requirements too broadly and take actions that restrict free speech, for example, by applying an overly broad definition of ‘harassment’. Our proposed definition has been deliberately framed by reference to statutory definitions of unlawful harassment in order to avoid inadvertently restricting lawful free speech.
72. In our view, the risk that a provider’s policies and processes define ‘harassment’ too broadly, and so conflate what may be lawful speech with harassment, is exacerbated in circumstances where a provider may face pressure from students or staff (or from other external parties such as through social media campaigns) to take a heavy-handed approach to tackling what is

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<sup>14</sup> Equality and Human Rights Commission, 2015, ‘Equality Act 2010: Technical guidance on further and higher education’, p. 146. Available at: <https://www.equalityhumanrights.com/en/publication-download/equality-act-2010-technical-guidance-further-and-higher-education>.

perceived to be harassment but which does not constitute unlawful harassment. This pressure that providers can face is evidenced in notifications we have received from third parties and also, for example, in a 2022 survey by the Higher Education Policy Institute:

- a. 61 per cent of students polled said that ‘when in doubt’ their university should ‘Ensure that all students are protected from discrimination rather than allow unlimited free speech’ (an increase of 24 percentage points from an equivalent poll in 2016).
- b. 76 per cent of student respondents agreed that ‘Students that feel threatened should always have their demands for safety respected’. This suggests support for an approach to harassment that relies on the perception of the person at the receiving end of the conduct. Such an approach does not take into account the objective tests set out in the Equality Act 2010 and Protection from Harassment Act 1997.
- c. More students agreed than disagreed that ‘If academics teach material that heavily offends some students, they should be fired’ (by 41 per cent to 31 per cent).<sup>15</sup>

73. We note that The European Court of Human Rights has held that ‘freedom of expression constitutes one of the essential foundations of [democratic] society’, and is applicable not only to ‘information’ or ‘ideas’ that are ‘favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb’. There has been significant public debate in recent years on whether speech or other expression, which some may perceive to be offensive, non-inclusive, discriminatory or harassment, can lawfully be curtailed in order to protect certain groups or those offended by it. This has included litigation on the lawfulness of particular views. This public debate and litigation has highlighted that even where expression may be controversial and may offend, if it is lawful it should be protected. Providers will need to bear this in mind when navigating complex free speech issues.

74. For these reasons we are proposing to introduce freedom of speech principles into proposed condition E6. This will ensure that when navigating these issues a provider places significant weight on the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context.

75. This is also why we have proposed that a provider should apply a rebuttable presumption to the effect that students being exposed to any of the following is unlikely to amount to harassment:

- the content of higher education course materials, including but not limited to books, videos, sound recordings, and pictures
- statements made and views expressed by a person as part of teaching, research or wider discussion about any subject matter that is connected with the content of a higher education course.

76. In effect, this rebuttable presumption would require a provider to assume that the exposure of students to course materials, and statements made and views expressed by a person as part

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<sup>15</sup> Hillman, N., 2022, “You can’t say that! What students really think of free speech on campus’, Higher Education Policy Institute. Available at: <https://www.hepi.ac.uk/2022/06/23/you-cant-say-that-what-students-really-think-of-free-speech-on-campus/>.



of teaching, research or discussions about any subject matter which is connected with the content of a higher education course, are unlikely to constitute “harassment”, unless otherwise demonstrated that these matters do in fact amount to harassment.

77. In formulating our proposals we have considered the potential implications of the Higher Education (Freedom of Speech) Bill. While we do not consider that there is any content in our proposed condition that conflicts with the Bill, or would be difficult to implement if the Bill were passed in its current form, we will consider any legislation in place when we make final decisions in respect of this proposal following our consultation.
78. We have also considered whether there are any alternative options to our proposed approach. In particular, we considered the option of simply requiring providers to have regard to the importance of freedom of speech and academic freedom, rather than the more extensive requirements set out in the proposed condition. However, we consider that this approach would not be as effective in achieving the policy aim of ensuring that lawful free speech and academic freedom are appropriately protected. Moreover, we consider that providers will appreciate the clear guidance we are providing about the weight we expect to be placed on the importance of freedom of speech within the law, academic freedom, and tolerance for controversial views in an educational context. We have therefore discounted not including such provisions in the proposed condition.

**Question 9a: Do you agree or disagree with the proposal that a provider should be required to comply with the proposed condition in a manner that is consistent with the proposed freedom of speech principles? Please give reasons for your answer**

**Question 9b: Do you have any alternative suggestions for the proposal in question 9a? If so, please explain and provide reasons for your view.**

## Proposal E: Requirements relating to restricting the disclosure of information

### Proposal

Prohibit any contractual provisions that prevent or restrict someone from disclosing information about an allegation of harassment or sexual misconduct which affects one or more students.

We propose that a provider must not restrict the disclosure of information in relation to harassment or sexual misconduct incidents, must not enforce any restrictions agreed prior to the date the condition takes effect, and must take all reasonable steps to ensure no other person places or enforces restrictions on the disclosure of information.

79. In the context of harassment and sexual misconduct allegations the use of non-disclosure agreements (NDAs) or confidentiality clauses in settlement agreements has long been a cause of controversy. They can prevent students who experience harassment or sexual misconduct from speaking about their experiences, including how their provider has dealt with any allegations they have made. They may also serve to protect the reputations of perpetrators and allow them to continue inappropriate behaviour at the same or at a different provider.
80. The higher education sector has made some progress in addressing this issue, but this has not been consistent across providers. In January 2022, the then Minister for Higher and Further Education encouraged providers to commit to not using NDAs in cases of sexual harassment and misconduct. At the time of writing, 80 providers in England have signed this pledge.<sup>16</sup> The Office of the Independent Adjudicator for Higher Education (OIA) has also recently published its updated good practice framework, which states that it is not good practice to ask a student to sign a confidentiality agreement or non-disclosure agreement as part of an offer to settle or resolve a complaint. This is because 'such agreements can leave the student feeling that their complaint has not been listened to or taken seriously, and can mean that learning from the complaint is lost'.<sup>17</sup>
81. We are proposing the following in relation to non-disclosure agreements:
- a. Prohibiting a provider from preventing or restricting, through contractual arrangements, any person from disclosing information about an allegation of harassment or sexual misconduct that in any way involves or affects one or more students, to any other person.
  - b. Prohibiting a provider from relying on or enforcing any pre-existing non-disclosure agreements that cover the issues described above (i.e. an allegation of harassment or sexual misconduct that affects one or more students). This provision would prevent a

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<sup>16</sup> For more information, see: <https://www.cantbuymysilence.com/uni-pledge>.

<sup>17</sup> Office of the Independent Adjudicator, 2022, 'Good Practice Framework – Handling complaints and academic appeals'. Available at: <https://www.oiahe.org.uk/resources-and-publications/good-practice-framework/handling-complaints-and-academic-appeals/>.

provider from relying on any such existing provisions from the date that the proposed condition comes into effect.

- c. Requiring a provider to take all reasonable steps to prevent any other person from entering into contracts that prevent or restrict any person from disclosing information about an allegation of harassment or sexual misconduct that in any way affects one or more students. We are proposing this to address the possibility that another organisation or third party could be involved in handling an incident of harassment or sexual misconduct, for example if a student is studying on a work placement.
- d. Requiring a provider to take all reasonable steps to prevent any other person from relying on or enforcing an agreement that is already be in place.

82. These provisions are intentionally expressed broadly, to set out our view that it is unacceptable for any student to be prevented from discussing their experiences of harassment or sexual misconduct. It covers NDAs preventing a student from discussing these issues. We consider that it would be unacceptable for any student to experience any negative consequences from their provider if they decide to disclose information about any experience of harassment or sexual misconduct, including to the police, the media, or the OfS. Our intention here is to protect victims of harassment or sexual misconduct who may wish to share information, including where a victim may wish to approach the media about their experience. We also consider that ‘informal’ arrangements, which, while non-contractual, aim to control how an individual discusses these issues, are also unacceptable and should be avoided.

83. We have considered a range of alternative options to our proposals on NDAs:

- a. Restricting the scope of the prohibition so that any NDAs should always allow disclosures to certain organisations or individuals: for example, the police, medical professionals, a student’s lawyer, and the OfS. This would have the effect of ensuring that investigations into incidents could proceed, students could receive independent advice and medical advice and treatment if needed. This would also have the effect of making clear to a victim the circumstances in which a provider could not impose restrictions. While we consider that this is a viable option, we take the view that it does not go far enough in meeting our policy objective of allowing victims of harassment or sexual misconduct to speak about their experiences, including their experience of the support they have received from their provider. For this reason we have discounted this option.
- b. Setting our regulatory obligations so they refer to compliance with legal requirements if these are introduced. The Higher Education (Freedom of Speech) Bill is currently before Parliament. If passed in its current form, the Bill<sup>18</sup> would prohibit the use of certain non-disclosure agreements by higher education providers. This option would allow us to align our regulatory requirements with statutory obligations, and take enforcement action for a breach of those regulatory requirements where appropriate. It would also avoid creating additional burden for providers as any action they take to comply with the statutory requirements would then also be likely to satisfy our regulatory requirements. We will take into account any relevant legislative provisions if the Bill has been passed when we

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<sup>18</sup> Freedom of Speech (Higher Education) Bill, version at 14 December 2022  
<https://publications.parliament.uk/pa/bills/cbill/58-03/0219/220219.pdf>.

make final decisions following this consultation. For this reason we have not currently discounted this option, and invite views in response.

- c. Making no provision for this type of prohibition, which would mean not imposing enforceable regulatory requirements in relation to this issue. While this approach would maintain the current arrangements where a provider is able to determine for itself whether to enter into a non-disclosure agreement, we take the view that this would not be appropriate because it does not address our concern that these agreements place students at a disadvantage and should not be used. We welcome the steps that some providers have already taken to address this issue, and the position adopted by the OIA, but we consider that further regulatory intervention is now appropriate to ensure NDAs are not used in relation to harassment and sexual misconduct for all providers.

**Question 10a: Do you agree or disagree with the proposal to prohibit a provider from using provisions which have the effect of preventing or restricting the disclosure of information about incidents relating to harassment or sexual misconduct? Please give reasons for your answer.**

**Question 10b: Do you support any of the alternative options we have outlined or do you have any other proposals? If so, please explain and provide reasons for your view.**

## Proposal F: Requirements relating to personal relationships between staff and students

### Option A (our preferred option)

E6.8 The provider must take all reasonable steps to:

- a. require any relevant staff member to disclose any personal relationship that the relevant staff member has with any student (including the nature of that personal relationship);
- b. maintain a register of any such personal relationships that exist between a relevant staff member and a student (including the nature of any such personal relationships); and
- c. in respect of such a personal relationship, manage and address any actual or potential conflict of interest and/or abuse of power.

E6.9 For the purposes of paragraph E6.8, 'all reasonable steps':

- a. is to be interpreted in a manner which disregards case law relating to the interpretation of contractual obligations; and
- b. includes, but is not limited to, the provider taking the following steps:
  - i. putting in place appropriate contractual arrangements and enforcing any breaches of those contractual arrangements;
  - ii. in circumstances where, after taking other steps to secure compliance with E6.8 a., any relevant staff member refuses to disclose any personal relationship that they have with any student, terminating that member of staff's contract of employment or service (as may be applicable).

For the purposes of this condition:

- a. 'abuse of power' means a situation where a relevant staff member exploits a position of power in relation to a student so as to apply pressure in a way which:
  - i. may result in the student doing something, or refraining from doing something, that they may not have otherwise done; and
  - ii. that action or inaction could reasonably result in something that falls within the scope of the personal relationship.
- b. 'personal relationship' means a relationship that involves one or more of the following elements:
  - i. physical intimacy including isolated or repeated sexual activity;
  - ii. romantic or emotional intimacy; and/or

iii. financial dependency.

e. 'relevant staff member' means a member of staff who has direct or indirect academic responsibilities, or other direct professional responsibilities in relation to that student.

## Option B

E6. 8 The provider must take all reasonable steps to:

- a. prohibit any relevant staff member from having a personal relationship with one or more students;
- b. take appropriate steps, which would normally be dismissal of the relevant staff member, in circumstances where they refuse to end a personal relationship.

E6.9 Paragraph E6.8 does not apply where a relevant staff member has a personal relationship with a student by virtue of a marriage or civil partnership that existed before the date this condition came into force and remains in existence.

E6.10 for the purposes of paragraph E6.8, 'all reasonable steps':

- a. is to be interpreted in a manner which disregards case law relating to the interpretation of contractual obligations;
- b. includes, but is not limited to, putting in place appropriate contractual arrangements and enforcing any breaches of those contractual arrangements.

The same proposed definitions of 'personal relationship' and 'relevant staff member' apply for Option B as for Option A.

84. We propose that condition E6 should contain requirements relating to personal relationships between students and relevant members of staff. We recognise that the proposals we explain below would limit a provider's autonomy and the personal autonomy of students and staff. However, we consider there is an increased likelihood of harassment and sexual misconduct occurring in personal relationships between students and relevant staff members because of the actual and potential abuse of power and conflicts of interest that can arise. We therefore consider it appropriate to propose to address this issue.

85. Our view is that there is a power imbalance between students and staff where a member of staff has a supervisory, management, support or teaching responsibility for a student. Staff could subject students to harassment or sexual misconduct by exploiting that power imbalance. For example, qualitative data gathered as part of a 2017 survey of 30,000 students in Australia across 39 universities suggested that the power disparity between students and teaching staff in universities could make students vulnerable to sexual harassment.<sup>19</sup>

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<sup>19</sup> Australian Human Rights Commission, 2017, 'Change the course: National report on sexual assault and harassment at Australian Universities'. Available at: <https://humanrights.gov.au/our-work/sex->

86. Our proposals, therefore, seek to address the following:

- a. Conflicts of interest or abuses of power that may occur within ostensibly consensual personal relationships between students and relevant staff members. For example, even where a relevant member of staff does not seek to abuse their power, students could potentially experience the negative effects of an inherent power imbalance. Students may feel pressured to take a personal relationship with a relevant member of staff further than they might otherwise wish, or may not feel able to end such a relationship, on the basis that to do so may result in detriment. Such detriment could include, for example, not receiving a positive review or reference, an adverse impact on assessments of academic performance or not receiving PhD funding.
- b. A relevant member of staff actively abusing their power to coerce a student into a personal relationship with either the promise of favourable treatment or threat of detrimental treatment that could affect the student's higher education experience, outcomes, or career prospects.
- c. A relevant member of staff using the power imbalance that exists between a member of staff and a student to pressure a student to engage in physical or sexual activity amounting to sexual misconduct. This could include implicitly or explicitly threatening a student with detriment, (for example, in relation to assessment of the student's academic performance where the relevant staff member is involved directly or indirectly in that assessment). This could occur in a personal relationship where the relationship is consensual, or started consensually.

87. The full range of proposals for condition E6 is intended to cover staff-to-student personal relationships. A provider's single document, if this proposal is adopted, would still need to cover arrangements for addressing sexual harassment towards any student from any person, including a staff member.

88. We are making additional targeted proposals in relation to personal relationships between students and relevant staff. We consider that doing so will deter relevant staff from entering into personal relationships with students, and will help address the risk of abuse of power and/or conflict of interests where such relationships exist.

89. Issues relating to personal relationships between staff and students have previously been explored in guidance published by Universities UK (UUK), with input from the National Union of Students (NUS), Rape Crisis and the 1752 Group<sup>20</sup> and guidance from the 1752 Group in partnership with McAllister Olivarius.<sup>21</sup> We have noted in particular the following evidence:

- a. In 2018, the NUS undertook a survey of 1,839 current and former students. There are some limitations to its findings, as it was drawn from a non-representative, self-selecting sample of current and former student responses. It is also the only study of its kind in the UK.

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[discrimination/publications/change-course-national-report-sexual-assault-and-sexual?\\_ga=2.58816548.803804975.1676563970-1404141791.1676563970](https://www.universitiesuk.ac.uk/what-we-do/policy-and-research/publications/sexual-discrimination/publications/change-course-national-report-sexual-assault-and-sexual?_ga=2.58816548.803804975.1676563970-1404141791.1676563970) <https://humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>.

<sup>20</sup> See <https://www.universitiesuk.ac.uk/what-we-do/policy-and-research/publications/sexual-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>.

<sup>21</sup> See <https://1752group.com/sector-guidance/>.

However, we consider that this is still useful because it illustrates the presence of sexual misconduct in higher education, the risks posed to students, and the serious consequences that can arise and have arisen. For example, the study suggested the following:<sup>22</sup>

- i. 0.8 per cent (n=15) current and former students had suffered sexual assault or rape by a staff member.
  - ii. 2.3 per cent (n=35) had experienced non-consensual sexual contact by a staff member.
  - iii. 12 per cent (n=220) had experienced being touched by a staff member in a way that made them uncomfortable. This differed by sex; 15.6 per cent of women and 7 per cent of men reported being touched by a staff member in a way that made them uncomfortable.
  - iv. 41 per cent (n=752) had experienced at least one instance of sexualised behaviour from staff, and an additional 5 per cent (n=94) were aware of someone they knew experiencing sexualised behaviour.
- b. Universities UK's evidence review on approaches to addressing staff-to-student sexual misconduct in higher education presents the outcomes of different studies. It suggests that there is widespread uncertainty about appropriate professional boundaries between staff and students, that there is under-reporting of staff-to-student sexual misconduct, and that the approach of several providers seemed to involve 'making it up as they go along'.<sup>23</sup> These findings are of significant concern to us because they suggest that protection for students is likely to be inconsistent and inadequate.
- c. The 1752 Group's report 'Silencing Students: Institutional responses to staff sexual misconduct in UK higher education', has explored academic, health and financial effects on those who have experienced boundary-blurring and grooming behaviours, sexualised communication, sexual assault, stalking and surveillance and bullying and revenge behaviours.<sup>24</sup> This report also found that there can be significant barriers to reporting staff perpetuating sexual misconduct, and that the power imbalance between staff and students in particular may discourage students from reporting behaviour that may constitute sexual misconduct. Other barriers to reporting included a lack of clarity about how to report and matters we consider relevant to the power imbalance that exists in relationships between students and staff. For example, students may consider that reporting concerns may damage their studies and future careers, affect their references, or risk disruption to their studies. These are all findings which underline our concerns about the potential impact of personal relationships between staff and students.

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<sup>22</sup> National Union of Students and the 1752 Group, 2018, 'Power in the academy: Staff sexual misconduct in UK higher education'. Available at: <https://1752group.com/power-in-the-academy-report/>.

<sup>23</sup> Universities UK, 2022, 'Evidence review on addressing staff-to-student sexual misconduct in higher education'. Available at: <https://www.universitiesuk.ac.uk/sites/default/files/field/downloads/2022-09/staff-to-student-sexual-misconduct-evidence-review.pdf>.

<sup>24</sup> Bull, A. and Rye, R., 2018, 'Silencing Students: Institutional responses to staff sexual misconduct in UK higher education'. University of Portsmouth/1752 Group. Available at: <https://1752group.com/sexual-misconduct-research-silencing-students/>.



- d. In both the Universities UK and the 1752 Group guidance documents, the definition of staff-to-student sexual misconduct is broader than the definition of sexual misconduct we have used in Proposal A. The UUK guidance recommends that providers should strongly discourage such relationships and that where relationships do happen, the staff member should declare the relationship and be removed from all responsibilities which could create a conflict of interest.
- e. We have also considered findings from the independent evaluation of our statement of expectations. This recommended that providers should consider whether to ban personal relationships between staff and students.

90. Our proposal to introduce requirements in relation to personal relationships between staff and students is therefore intended to reduce the impact on students of the power imbalance that exists in such relationships. We have carefully considered and had regard to proportionality when devising these proposals because we note the relevance in this context of Article 8 of the European Convention on Human Rights (ECHR), often referred to as the right to respect for private and family life.<sup>25</sup> Article 8(1) of the ECHR sets out that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. These rights include the right to have and maintain family relationships, such as intimate or sexual relationships. However, Article 8(2) explains that this is a qualified right that can be restricted, where that restriction accords with the law, is necessary in a democratic society, and in the interests of, among other things, the protection of health or morals, or for the protection of the rights and freedoms of others. Our proposed imposition of requirements in relation to personal relationships between students and relevant staff members seeks to protect the health and rights of students, and morals.

91. 'Personal relationship', as defined in E6.10 of the proposed condition, would mean a relationship that involves one or more of the following elements:

- a. physical intimacy including isolated or repeated sexual activity
- b. romantic or emotional intimacy; and/or
- c. financial dependency.

92. 'Relevant staff member', also defined in E6.10 of the proposed condition, would mean a member of staff (which would include an employee and/or contractor) who has direct or indirect academic responsibility, or other direct professional responsibility in relation to that student. 'Staff with direct or indirect academic responsibility' is intended to capture all staff directly or indirectly involved with the education and assessment of a student. This is likely to include any staff member with teaching responsibility for that student and anyone involved in determining a student's assessment outcomes, directly or indirectly (e.g. those involved in setting degree classification algorithms). 'Staff with other direct professional responsibility for a student' is intended to capture all other staff with a direct professional or pastoral responsibility for a

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<sup>25</sup> European Convention on Human Rights – Article 8. '1) Everyone has the right to respect for his family life, his home and his correspondence. 2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

student, for example, mental health advisers, staff operating student complaint processes, and security personnel. The proposed wording of this provision is intended to avoid capturing relationships between students and individuals in staff roles (who may also be students) where there is less likelihood of a material power imbalance or risk of abuse of power.

93. We do not anticipate that cleaning or catering staff would be captured by the definition of 'relevant staff member' unless they have a direct professional responsibility towards a student. Some individuals are students at a particular provider and also staff members (for example, a PhD student who is tutoring or lecturing undergraduate students, or acting in a supervisory capacity). These individuals would be considered a student and could also be captured by the definition of a 'relevant staff member' where they have direct or indirect academic responsibility, or other direct professional responsibility, towards a particular student or group of students. Conversely, we would not normally expect the definition to capture a relationship between two students where one student happens to also be employed in a supporting role, for example, in the provider's library, bar, or shop. We would expect a provider to make reasonable judgements about what constitutes direct or indirect academic or professional responsibilities. Where a provider is unclear about a member of staff's position in the context of considering potential personal relationships with a student, it should assume that individual is a relevant staff member.

94. We have set out below two potential options to address the issues raised above:

- a. Option A, which is our preferred option, would require a provider to take all reasonable steps to require a relevant staff member to disclose personal relationships with students; maintain a register recording these (including the nature of that personal relationship); and manage and address any actual or potential conflicts of interest or abuse of power arising from or connected with any such personal relationships.
- b. Option B proposes that a provider must take all reasonable steps to ban personal relationships between relevant staff members and students.

95. In both options, we propose that a provider (as part of the reasonable steps it is required to take) should take appropriate disciplinary action, including terminating a relevant staff member's contract of employment or service, or dismissal, where the relevant staff member refused to disclose a personal relationship or end a personal relationship with a student.

## **Option A**

96. For the purposes of Option A, an 'abuse of power' means a situation where a member of staff exploits or could exploit a position of power in relation to a student so as to apply pressure in a way which:

- a. may result in the student doing something, or refraining from doing something, that they may not have otherwise done; and
- b. that action or inaction could reasonably result in something that falls within the scope of the defined term 'personal relationship' (i.e. physical intimacy including isolated or repeated sexual activity; romantic or emotional intimacy; and/or financial dependency).

97. Option A is directed at reducing the impact of the issues described at paragraph 86 above. In particular, we consider that the requirements in Option A address the concern that a relevant

staff member in a personal relationship could abuse their power to pressure a student to engage in action or inaction that could reasonably result in physical intimacy (including isolated or repeated sexual activity), romantic or emotional intimacy, or financial dependency. A relevant staff member may do this by either implicitly or explicitly promising favourable treatment or threatening detrimental treatment which could affect a student's higher education experience, outcomes, or career prospects. We consider that Option A goes to addressing these concerns because a provider would be required to take all reasonable steps to ensure that relevant staff members disclose personal relationships with students, and proactively manage and address actual or potential conflicts of interests or abuses of power that can arise or be connected with those personal relationships.

98. We also consider that the existence of personal relationships increases the opportunity that a relevant staff member has to abuse their power. If relevant staff members are required to disclose personal relationships, that and the knowledge that steps might be taken by a provider in response to such disclosure (or a refusal to disclose), could deter such personal relationships. This could reduce the number of personal relationships between relevant staff members and students and there will be less opportunity for relevant staff members to abuse their power. We consider this to be a beneficial element of Option A rather than a consequence that we would seek to minimise. This option would not prohibit relationships but we consider that it would and should have the effect of providers expressly discouraging them. This is because we consider that the most effective way to protect students from the issues we have set out is for such personal relationships to be avoided altogether.
99. Under Option A, we would expect a provider to take all reasonable steps to require a relevant personal relationship to be reported either before it begins or within a short time of it beginning: we consider that three weeks would be an appropriate period, but invite views on this in consultation responses. We propose treating a personal relationship as beginning at the point one or more of the following occurs: physical intimacy, including isolated or repeated sexual activity; romantic or emotional intimacy; or financial dependency.
100. We would also expect a provider to take all reasonable steps to ensure that all staff understand that the existence of any of the following elements: (1) physical intimacy including isolated or repeated sexual activity, (2) romantic or emotional intimacy, and/or (3) financial dependency, (either in isolation or together) in any relationship between a relevant staff member and student would constitute a type of a personal relationship that needs to be disclosed. The nature of the personal relationship, i.e. which of these three elements (either in isolation or together) it involves should also be disclosed. We propose that it should not be necessary for a relevant staff member to make a disclosure each time the same element occurs. However, we propose that it should be necessary for a relevant staff member to make a disclosure when the nature of a personal relationship has changed from the time of disclosure, for example when a personal relationship extends to involve financial dependency. This is to assist a provider in effectively managing and addressing actual or potential conflicts of interests.
101. We expect that it will be likely in some cases that a provider will already have taken steps to address conflicts of interests related to personal relationships between staff and students , and to reduce the likelihood of abuses of power and sexual misconduct. For example, many providers will already have policies and processes in place that do not allow a staff member

in a personal relationship with a student to be involved in assessing the student's work, given the conflict of interest that exists in those circumstances.

102. In practice, we expect that to properly maintain a register, a provider would need to have systems in place to ensure it is updated promptly when an individual relationship is reported, as well as being periodically checked for ongoing accuracy.
103. We recognise that our proposed Option A may require a provider to introduce contractual changes to its contracts with staff in relation to the requirement to disclose a personal relationship and potential consequences for failing or refusing to do so. This would introduce additional burden for a provider, and we invite feedback on this point in consultation responses.
104. For the purposes of Option A, 'all reasonable steps' would include, but not be limited to, a provider terminating a relevant member of staff's contract of employment or service (as may be applicable). This would apply where, after taking other steps to require any relevant staff member to disclose any personal relationship they have with any student, they refuse to disclose a personal relationship. We consider that if a relevant staff member deliberately withholds information about a personal relationship with a student, this is likely to raise concerns about the staff member's intentions. The risk of harassment or sexual misconduct in such circumstances may be higher because the provider would be prevented from effectively identifying personal relationships, which it would need to do so that it could manage and address actual or potential conflicts of interest or abuse of power. Our intention here is to emphasise the seriousness of our concerns about personal relationships between relevant staff and students where there appears to be a deliberate attempt to conceal a personal relationship.
105. Option A would require less intrusive interference with an individual's right to respect for private and family life than Option B because it would not prohibit staff and students from participating in personal relationships. It would only require those relationships to be declared and recorded, and for the provider to manage and address actual or potential conflicts of interests, in the interests of the students in them. We consider that requiring this would be effective in achieving our policy aim of protecting students and reducing sexual misconduct in higher education to the extent that a provider is effectively managing conflicts for disclosed personal relationships (by ensuring that any staff member in a personal relationship with a student is not able to abuse their position in the way we have set out). This should reduce the impact of the power imbalance that will exist in many, if not most, personal relationships between relevant staff members and students, and reduce the likelihood of this being exploited to enable misconduct, including sexual misconduct.
106. However, proposed Option A, means that personal relationships between relevant staff members and students can still exist. As explained above, an inherent power imbalance exists in these personal relationships and this means that the risks discussed at paragraph 86 above are not eliminated by Option A, but are instead mitigated. It is possible that different providers would take different approaches to Option A. Depending on the arrangements that each provider puts in place to comply with it, there could be different levels of protection for students at different providers. A non-uniform approach across the sector could mean that some students were less effectively protected than others, and some students could have less confidence about the protections that were in place.

107. In addition, Option A would mean that:

- a. There may be some 'lag' from the time a personal relationship is declared and recorded, and when a provider takes action to manage and address actual or potential conflicts of interest or abuses of power.
- b. There is potential for uncertainty and blurred boundaries for students in understanding what is permitted. We consider that there is minimal risk of this because we consider that our policy intention has been made clear in this consultation, but we welcome feedback on this point.

108. For these reasons, we are also setting out Option B as a potential option for consultation. We consider that the impact of these potential limitations of Option A is low and that, in practice, Option A would enable robust mitigation of conflicts of interest and abuses of power. However, we welcome views on the effectiveness of both Option A and Option B.

## **Option B**

109. Proposed Option B would mean that a provider would be required to take all reasonable steps to impose a prohibition on personal relationships between a relevant staff member and a student, and take appropriate steps, which would normally be dismissal of the relevant member of staff, in circumstances where they refuse to end a personal relationship.

'Relevant staff member' would have the same proposed meaning as is proposed for Option A. We consider that the following are advantages of Option B:

- a. A more uniform approach and protection for students in different providers would be more likely under Option B. This is because all providers would be required to ban personal relationships between a relevant staff member and any student, rather than each individual provider determining its own particular approach. This is a clear requirement that we consider would be particularly effective in addressing our concerns because relevant staff members would not be permitted to have personal relationships with students. This would mean that if such a ban were implemented and adhered to, the risk of relevant staff members abusing the power imbalance in existing consensual personal relationships in order to subject a student to harassment or sexual misconduct would be mitigated because those consensual personal relationships should not exist. Similarly, the risk of relevant staff members coercing students into personal relationships should also be mitigated because those personal relationships would not be permitted.
- b. We recognise that the concerns discussed at paragraph 86 would not completely be eliminated by Option B, either because it would be possible that some relevant staff members may continue to engage in personal relationships with students despite a ban. This is why we consider the requirement under Option B that a provider should take appropriate steps – which would normally be dismissal of the relevant member of staff, in circumstances where the relevant staff member refuses to end a personal relationship – important to disincentivise such behaviour and to ensure the effectiveness of this option in targeting the risks. We also consider that a prohibition would send a clear message to relevant staff members that have a direct or indirect academic responsibility, or other direct professional responsibility towards students, that engaging in personal relationships is not permitted, and that relevant staff should

not be making sexual and romantic approaches to students. We consider that the preventative (rather than reactive) nature of this option would make it particularly effective.

110. We recognise that the prohibition on personal relationships that Option B would entail would interfere with the Article 8 right to respect for private and family life for staff members and students because it would prevent them from forming personal relationships where the staff member is a relevant staff member in respect of the student in question. In some instances, this may also potentially require an end to existing personal relationships. We have sought to mitigate this interference with Article 8 rights by proposing that if Option B were to be introduced, pre-existing marriages or civil partnerships should be exempt from the proposed prohibition. This is because these are legally established relationships. We note that this proposed exemption does not capture marriages or civil partnerships that are not legally recognised in the UK, and that this may include marriages or partnerships that have been entered into via customary or religious marriage ceremonies. Our reasons for making this distinction is that these unions are not legally recognised as valid marriages or civil partnerships in England, but we have set out a specific question about whether other relationships should be exempted under this option. We do not consider that it is necessary to propose exemptions for Option A because this option does not seek to prohibit any relationships. Rather it records them and manages actual or potential conflicts of interest or abuses of power.
111. One other disadvantage of Option B is that it would be likely to result in greater regulatory burden for providers than Option A. As explained above, we expect that many providers already have policies and processes in place to manage and address potential conflicts of interests and abuses of power. However, we anticipate that far fewer providers have policies in place that prohibit personal relationships between relevant staff members and students. We therefore consider that this Option B is likely to create greater regulatory burden for providers if taken forward.
112. However, because we recognise that there are advantages to Option B, specifically achieving a more uniform approach and taking a preventative rather than a reactive approach, we are putting this forward as an option for consultation, and we welcome views on both options in consultation responses.
113. We have also considered a number of alternative options, which are set out below.
  - a. We have considered not proposing any regulatory requirements in relation to personal relationships between staff and students:
    - i. The advantage of this approach is that we would not interfere with individuals' right to respect for private and family life and it would not increase regulatory burden.
    - ii. The most significant disadvantage of this approach is that we would not be taking any targeted action to address our concerns, which we consider are increased in personal relationships between staff and students, although our broader proposals would address the risks relating to harassment and sexual misconduct

in the higher education context more broadly. For this reason, we have discounted this option.

- b. We have considered proposing an option that would require a provider to develop and publish its own policy on staff-to-student sexual misconduct and impose any restrictions or prohibitions it considers appropriate:
- i. The advantage of this approach would be that it would allow a provider to exercise more autonomy in determining what may be appropriate for its circumstances.
  - ii. The disadvantages of this approach would be that it would be likely to lead to an inconsistent approach between providers and some students may not be as adequately protected as others. Our view is that this option would be likely to be less effective in achieving the policy objective of protecting students from staff-to-student sexual misconduct in the higher education sector for that reason. As explained in the Introduction and Annex D, we have previously sought to address harassment and sexual misconduct across the sector through our voluntary statement of expectations, and this has not achieved the progress we consider to be necessary. Under this option, different arrangements would be likely to apply at different providers. This would not address the aspects of the evaluation of our statement of expectations, which found that further regulatory intervention is needed to ensure consistency in how universities and colleges address this issue.

Therefore, we do not consider that this option would properly protect students from staff-to-student sexual misconduct, both within and outside of personal relationships. For this reason we are proposing to impose further regulatory requirements through Proposal F. However, we remain of the view that a provider's own internal policies are important. This means that if, following consultation, we were to adopt the condition with significant changes or with the removal of Proposal F, we would still expect a provider to include policies to tackle staff-to-student sexual misconduct under the proposed minimum content requirements.

- c. We have considered proposing a prohibition on all staff-to-student relationships (not just where a staff member has a direct or indirect academic responsibility or other direct professional responsibility towards a student), with an exception for existing marriages or civil partnerships:
- i. The advantage of this approach is that it would be particularly effective in achieving the policy objective of protecting students from staff-to-student sexual misconduct because all personal relationships between staff and students would be prohibited. Its greater simplicity would also reduce the regulatory burden of implementation relative to the more targeted prohibition of Option B.
  - ii. The significant disadvantage of this approach is that, of all the options considered, this would represent the most onerous and intrusive interference with individuals' right to respect for private and family life. This is because it does not

make any allowance for the fact that there may be personal relationships between staff and students that are unlikely to give rise to perceived or actual abuses of power because the staff member does not have direct or indirect academic responsibility or other direct professional responsibility in relation to that student. The most obvious examples of such relationships are, for example, students or recent graduates at a provider who are also staff because they are working for the provider in a café or shop, or are employed as student representatives, and are maintaining a personal relationship with another student.

114. We are inviting views on all of the options discussed above.

**Question 11a: [Multiple choice] 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.**

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

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

**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.**



## Proposal G: Proposed implementation

115. We have considered how we might implement the proposed new general ongoing condition of registration if we decide to do so following consultation. We take the view that it would be important to implement any new condition as soon as possible after a final decision is taken, because of the substantial body of evidence about the extent of harassment and sexual misconduct in higher education and the need to ensure consistent, effective approaches to preventing and tackling these issues so that students are appropriately supported wherever they study.
116. Subject to the responses received to this consultation, we propose that any new ongoing condition would be published with our final decisions, and come into force on a date not less than three months from the date we publish our final decisions. This means that existing providers, or those registered before the date of publication of the condition, would have not less than three months from the date of publication to ensure that they are compliant with the condition. We propose that new providers that are registered with the OfS after the date of publication will have not less than three months from the date of their registration to ensure that they are compliant with the condition. We have proposed this approach to allow sufficient time for all providers to properly consider, and make the changes they consider necessary to comply with, the new condition. We propose that the condition applies from the date of registration for a provider that has previously been subject to the condition (and therefore already benefitted from a grace period of not less than three months to ensure compliance with the condition). For example, this would apply where a provider changes its category of registration. Similarly, we propose that where a provider applies for registration following a merger, acquisition or other corporate change, and either that provider or the provider it has merged with or acquired, was previously subject to the condition, the provider applying for registration will be subject to the condition from the date of registration (if granted) where in the opinion of the OfS it is operating the same or substantially the same higher education business as the previously registered provider.
117. We have considered alternative approaches to implementing the proposed new condition. We have considered whether all provisions in the proposed new condition should take effect sooner: within one or two months of the date of publication of any final decisions. This would reflect our objective of protecting students, but we have provisionally reached the view that this may not provide sufficient time for providers to comply with any new requirements.
118. We have also considered whether we might adopt a phased approach to implementing any new ongoing condition of registration, with different requirements coming into effect on specified dates. We have identified that the requirements in Proposal C, relating to restricting the disclosure of information, could be introduced and function independently of the other requirements. Providers are likely to be able to comply with those requirements more quickly than the other proposals, which may involve devising new policies.
119. We have considered implementing Proposal C no less than one month from the date of any final decision, with all other aspects of the proposals coming into effect on a later date, no less than three months from the date of any final decision. This approach would recognise the additional work providers would be likely to need to complete in order to comply with any new regulatory requirements. It would quickly prevent restrictions being placed or enforced on those affected by harassment or sexual misconduct who may want to share their

experiences and could be implemented to a different timeline because there are no interdependencies with the other proposals in this consultation. We have, however, provisionally discounted implementing any ongoing condition in this way because the evaluation of our statement of expectations pointed to variation in policy and practice in the sector and we know that less than a third of registered providers have publicly committed to stop using NDAs in cases of harassment or sexual misconduct. This means that it is likely that a sizable number of providers will need time to properly consider and adapt their practices to ensure they comply with any new regulatory requirements.

120. We have also considered a staggered implementation over a more extended timeline. In this case, Proposal C would take effect no less than three months from the date of any decision and the remaining proposals coming into effect at a later date, for example after six months. We have provisionally discounted this approach because we consider that the evidence about the extent of harassment and sexual misconduct in higher education requires action to be taken as soon as possible to ensure that students are properly protected.
121. Subject to the responses we receive to this consultation, we plan to make decisions about whether and how to implement these proposals later in 2023.

**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.**

**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.**

**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.**

## **Other questions about the proposals**

**Question 13: Do you foresee any unintended consequences resulting from the proposals in this consultation? If so, please indicate what you think these are and the reasons for your view.**

**Question 14: Are there any aspects of these proposals you found unclear? If so, please specify which, and tell us why.**

**Question 15: In your view, are there ways in which the policy objectives discussed in this consultation could be delivered more efficiently or effectively than proposed here?**

**Question 16: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?**

# Annex A: Proposed new condition of registration and guidance

## General ongoing condition of registration

### Condition E6: Harassment and sexual misconduct

#### Scope

E6.1 This condition:

- a. covers subject matter relating to **incidents of harassment** and/or **sexual misconduct** which in any way involve or affect one or more **students**; and
- b. applies in relation to **students** on higher education courses provided in any manner or form by, or on behalf of, a provider (including, but not limited to, circumstances where a provider is responsible only for granting awards for students registered with another provider).

#### Requirements relating to policies and procedures

E6.2 The provider must maintain a single document which comprehensively sets out policies and procedures on subject matter relating to **incidents of harassment** and **sexual misconduct** and that document (and any revisions made to it from time to time) must:

- a. comply at all times with the **minimum content requirements** and the **content principles**;
- b. be published and accessible at all times in a manner which complies with the **prominence principles**.

E6.3 Subject to paragraph E6.5 (which takes precedence over any other requirements of this condition), the provider must operate in accordance with and comply with the document referred to in paragraph E6.2.

#### Requirements relating to capacity and resources

E6.4 The provider must have the **capacity and resources** necessary to facilitate compliance with this condition.

#### Requirements relating to freedom of speech

E6.5 The provider must comply with the requirements of this condition in a manner which is consistent with the **freedom of speech principles**.

#### Requirements relating to restricting the disclosure of information

E6.6 This paragraph applies to any provisions that have the object or effect of preventing or restricting any person from disclosing information about an allegation of **harassment** and/or

**sexual misconduct** which in any way involves or affects one or more **students** to any other person (**'restricting provisions'**).

E6.7 Where paragraph E6.6 applies, the provider must:

- a. not include any **restricting provisions** in any contract formed or varied on or after the date this condition takes effect;
- b. not rely on or enforce any **restricting provisions** in any way after the date this condition takes effect (including, but not limited to, by continuing with a form of reliance or enforcement that was initiated before the date this condition took effect);
- c. take all reasonable steps to prevent any other person from:
  - i. including **restricting provisions** in a contract that applies to **students** and is formed or varied on or after the date this condition takes effect;
  - ii. relying on or enforcing **restricting provisions** in any way in respect of **students** after the date this condition takes effect (including, but not limited to, by continuing with a form of reliance or enforcement that was initiated before the date this condition took effect).

#### **Requirements relating to personal relationships between staff and students**

E6.8 The provider must take all reasonable steps to:

- a. require any **relevant staff member** to disclose any **personal relationship** that the **relevant staff member** has with any **student** (including the nature of that **personal relationship**);
- b. maintain a register of any such **personal relationships** that exist between a **relevant staff member** and a **student** (including the nature of that **personal relationship**); and
- c. in respect of such a **personal relationship**, manage and address any actual or potential conflict of interest and/or abuse of power.

E6.9 For the purposes of paragraph E6.8, 'all reasonable steps':

- a. is to be interpreted in a manner which disregards case law relating to the interpretation of contractual obligations; and
- b. includes, but is not limited to, the provider taking the following steps:
  - i. putting in place appropriate contractual arrangements and enforcing any breaches of those contractual arrangements;
  - ii. in circumstances where, after taking other steps to secure compliance with E6.8 a., any **relevant staff member** refuses to disclose any personal relationship that they have with any **student**, terminating that member of staff's contract of employment or service (as may be applicable).

## Definitions (which include substantive requirements)

E6.10 For the purposes of this condition E6:

- a. **'abuse of power'** means a situation where a **relevant staff member** exploits a position of power in relation to a **student** so as to apply pressure in a way which:
  - i. may result in the **student** doing something, or refraining from doing something, that they may not have otherwise done; and
  - ii. that action or inaction could reasonably result in something that falls within the scope of a **personal relationship**.
- b. **'appropriate support'** means the effective deployment of assistance, including but not limited to:
  - i. support targeted at the needs of students involved in any way in an incident of harassment and/or sexual misconduct, including but not limited to during an investigatory and decision-making process;
  - ii. personal support, including in the form of counselling where appropriate;
  - iii. academic support, including in relation to decisions about attendance, continuation, suspension or cessation of study.
- c. **'appropriately taught'** includes, but is not limited to:
  - i. ensuring that **students** understand the content of the document required by paragraph E6.2 when they register at the start of each year of study; and
  - ii. induction sessions for new **students** contain training to ensure they understand behaviour that may constitute **harassment** and/or **sexual misconduct**.
- d. **'appropriately trained'** means staff have and maintain:
  - i. up-to-date understanding of the content of the document required by paragraph E6.2 and all the requirements of this condition;
  - ii. up-to-date understanding of behaviour that may constitute **harassment** and/or **sexual misconduct**;
  - iii. the required knowledge and skills to support **students** who:
    - wish to make allegations or complaints about **harassment** and/or **sexual misconduct**;
    - are the actual or potential victims of **incidents** of **harassment** and/or **sexual misconduct**; and

- are the actual or alleged perpetrators of **incidents of harassment** and/or **sexual misconduct**; and
- iv. the required knowledge and skills to undertake investigations or make decisions in relation to **incidents of harassment** and/or **sexual misconduct**.
- e. **'capacity and resources'** includes, but is not limited to:
- i. the financial resources of the provider;
  - ii. the number, expertise, and experience of the staff employed or contracted by the provider; and
  - iii. the resources deployed by the provider to undertake investigations or make decisions in relation to **incidents of harassment** and/or **sexual misconduct**.
- f. **'content principles'** means the following requirements:
- i. the provider may include other information and provisions in the same document that contains the **minimum content requirements**, but such other information and provisions must:
    - not contradict, undermine or conflict with the **minimum content requirements**; and
    - be subject to a provision which makes it expressly clear that the **minimum content requirements** take precedence over any other information and provisions;
  - ii. the provider must not include information and provisions on subject matter relating to **harassment** and/or **sexual misconduct** (and/or any subject matter of a similar nature to matters covered by those defined terms) in any other documents which could reasonably be considered to contradict, undermine or conflict with the **minimum content requirements**.
- g. **'freedom of speech principles'** means the following requirements:
- i. irrespective of the scope and extent of any other legal requirements that may apply to the provider, the need for the provider to have particular regard to, and place significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context or environment, including in premises and situations where educational services, events and debates take place;
  - ii. the need for the provider to apply a rebuttable presumption to the effect that **students** being exposed to any of the following is unlikely to amount to **harassment**:

- the content of higher education course materials, including but not limited to books, videos, sound recordings, and pictures;
  - statements made and views expressed by a person as part of teaching, research or discussions about any subject matter which is connected with the content of a higher education course.
- h. **'harassment'** has the meaning given in section 26 of the Equality Act 2010 and section 1 of the Protection from Harassment Act 1997 (in its entirety, and as interpreted by section 7 of the Act) .
- i. **'incidents'** includes, but is not limited to, circumstances where:
- i. allegations or complaints are made to the provider about **harassment** and/or **sexual misconduct**; and
  - ii. a provider could reasonably be considered to have grounds for suspecting that **harassment** and/or **sexual misconduct** has taken place or is taking place.
- j. **'minimum content requirements'** means comprehensive and easy to understand provisions in respect of:
- i. in addition to any other steps required by virtue of the condition, multiple steps which could (individually or in combination) make a significant and credible difference in protecting **students** from behaviour that may amount to **harassment** and/or **sexual misconduct**, including, but not limited to, steps that may reduce the likelihood of **harassment** and/or **sexual misconduct** taking place;
  - ii. the ways in which **students**, staff and other persons are able to report behaviour that may amount to **harassment** and/or **sexual misconduct** to the provider;
  - iii. how information received or obtained in connection with **incidents of harassment** and/or **sexual misconduct** will be handled sensitively and used fairly;
  - iv. how the provider ensures that **students** are **appropriately taught**;
  - v. the **appropriate support** that will be provided to **students** (including, but not limited to, actual or potential victims and actual or alleged perpetrators) in response to **incidents of harassment** and/or **sexual misconduct**;
  - vi. how the provider ensures that staff and other persons responsible for receiving information about, investigating, or taking decisions on, matters relating to **incidents of harassment** and/or **sexual misconduct** are **appropriately trained**;

- vii. how the provider ensures that investigations undertaken and decisions made in respect of **incidents of harassment** and/or **sexual misconduct** are credible, fair and otherwise reflect established principles of natural justice;
- viii. how the provider ensures that persons directly affected by any decisions made in respect of **incidents of harassment** and/or **sexual misconduct** (including, but not limited to, actual or potential victims and actual or alleged perpetrators) are directly informed about the decisions and the reasons for them.
- k. **'personal relationship'** means a relationship that involves one or more of the following elements:
  - i. physical intimacy including isolated or repeated sexual activity;
  - ii. romantic or emotional intimacy; or
  - iii. financial dependency.
- l. **'prominence principles'** means the following requirements in respect of the document required by paragraph E6.2:
  - i. the document is published in a prominent position in an area of the provider's website which is easily accessible by **students** and those considering applying to be **students** without the need for any form of password or security check;
  - ii. a clear and easy to understand statement about the existence of the document, the nature of its content, and how to access it is:
    - communicated directly to all **students** and staff in writing at least once each calendar year; and
    - set out in the main documents designed to promote the higher education services available from the provider (for example, any document that is commonly known as a prospectus);
    - set out in any documents that are designed to provide a collection of useful information about rules, policies and procedures for **students** and staff (for example, any documents that are commonly known as student handbooks and staff handbooks).
- m. **'relevant staff member'** means a member of staff who has direct or indirect academic responsibilities, or other direct professional responsibilities, in relation to that **student**.
- n. **'staff'** includes but is not limited to employees and contractors.
- o. **'sexual misconduct'** means any unwanted or attempted unwanted conduct of a sexual nature and includes but is not limited to:



- i. sexual harassment as defined by section 26(2) of the Equality Act 2010; and
  - ii. assault as defined by the Sexual Offences Act 2003; and
  - iii. rape as defined by the Sexual Offences Act 2003.
- p. ‘**students**’ includes, but is not limited to, persons who are registered on a higher education course and, at any point in time within the overall duration of that higher education course, are employed by, or otherwise providing services to, a higher education provider.

## Summary

**Applies to:** all registered providers

**Initial or general ongoing condition:** general ongoing condition

**Legal basis:** section 5 of HERA

## Guidance

### Condition E6.1

1. The reference to higher education courses provided ‘in any manner or form’ includes any higher education course (whether or not that course is recognised for OfS funding purposes, or any other purpose), at any level, and with any volume of learning. This means, for example, any research courses, the study of modules or courses leading to microcredentials, and apprenticeships are included within the scope of this condition. It also includes courses provided face-to-face, by distance learning, or a combination of delivery approaches.
2. This condition applies to any higher education course provided ‘by, or on behalf of, a provider’. This includes higher education provided to all of the students who are registered with a registered provider, taught by a registered provider or studying for an award of a registered provider (or where these services are provided on a registered provider’s behalf). This includes UK-based and non-UK-based students, and courses delivered through partnership arrangements both within the UK and internationally.
3. The reference to ‘including, but not limited to, circumstances where a provider is responsible only for granting awards for students registered with another provider’ means that a provider is required to comply with the provisions of this condition where it is the awarding body for a course, whether or not that provider has any other role in the design or delivery of that course.
4. Where a provider is not the awarding body for a course, this condition applies to a course the provider itself delivers, or which is delivered on its behalf, regardless of the identity of the awarding body, whether or not that awarding body is registered with the OfS, or the nature of any partnership agreement. For the avoidance of doubt, this means for example, that a

provider delivering, or allowing another provider to deliver, courses leading to a qualification awarded by Pearson is responsible for compliance with this condition in relation to those courses. Similarly, a provider delivering, or allowing another provider to deliver, courses leading to a qualification awarded by another higher education provider, whether that awarding provider is located in England or elsewhere, is responsible for compliance with this condition in relation to those courses.

5. In practice, these provisions may result in more than one registered provider being responsible for compliance with this condition in relation to the same students.
6. 'Harassment' has the meaning given in section 26 of the Equality Act 2010 and section 1 of the Protection from Harassment Act 1997. Section 1 of the Protection from Harassment Act 1997 is interpreted in accordance with section 7 of that Act.
7. These definitions of 'harassment' in section 26 of the Equality Act 2010 and section 1 of the Protection from Harassment Act 1997 include 'objectivity' and 'reasonableness' tests:
  - a. In the context of section 26 of the Equality Act 2010, in deciding whether conduct has the effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment towards that person, it is necessary to take into account: the perception of the person who is at the receiving end of the conduct; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. The last point is important because it introduces an element of objectivity into the test. The perception of the person who is at the receiving end of the conduct is not the only relevant consideration in determining whether the conduct amounts to unlawful harassment.
  - b. In the context of section 1 of the Protection from Harassment Act 1997, an offence is committed only if the person knows the conduct amounts to harassment of the other, or a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other person.
8. These objective tests are of particular importance in a higher education context where a provider may on occasion face pressure from students or staff, or pressure from external groups, to curtail speech that is lawful but which is perceived as offensive towards a particular person or group of persons.
9. 'Sexual misconduct' is defined as any unwanted or attempted unwanted conduct of a sexual nature, including but not limited to:
  - a. sexual harassment as defined by section 26(2) of the Equality Act 2010; and
  - b. assault as defined by the Sexual Offences Act 2003; and
  - c. rape as defined by the Sexual Offences Act 2003.
10. Where conduct does not fall squarely within the provisions of the Equality Act 2010 and the definitions of rape and assault within the Sexual Offences Act 2003, that conduct may still amount to sexual misconduct under this definition where it is unwanted or attempted unwanted conduct of a sexual nature. This may include other offences under the Sexual Offences Act

2003 or other legislation. The definition therefore includes the most serious offences of assault and rape but this is not intended to be an exhaustive list.

11. An 'incident' of harassment and/or sexual misconduct includes a wide range of circumstances. For example, it includes, but is not limited to, allegations, complaints, suspected behaviour, and formal findings of harassment and/or sexual misconduct. This means that it also includes instances where a formal complaint is not made, or where there is insufficient evidence to progress to disciplinary proceedings.

### **Condition E6.2 and E6.3**

12. Condition E6.2 requires a provider to maintain and publish a single document which comprehensively sets out its policies and procedures on subject matter relating to incidents of harassment and/or sexual misconduct, with which the provider must then comply. The single document must comply with minimum content requirements and content principles. It must be accessible and published in a way that is consistent with the prominence principles.
13. In relation to the minimum content requirements, the single document referred to in condition E6.2 must contain provisions in respect of 'multiple steps which could (individually or in combination) make a significant and credible difference in protecting students from behaviour that may amount to harassment and/or sexual misconduct, including, but not limited to, steps that may reduce the likelihood of harassment and/or sexual misconduct taking place'. Condition E6.3 requires a provider to operate in accordance with, and comply with, its single document and it is therefore required to take 'multiple steps' as described above in practice.
14. Taking steps that could make a such a significant and credible difference would normally lead to a reduction in the prevalence of harassment and/or sexual misconduct and would protect a provider's students from their impact, for example through support for victims. The steps that may be significant and credible will depend on the context for an individual provider because they will need to be informed by the nature and severity of the issues faced by a provider's students. The minimum content requirements mean that each provider will need to understand its student population and the extent to which its students may be likely to experience harassment or sexual misconduct in order to properly address these issues. A provider with higher prevalence rates of harassment and/or sexual misconduct would be likely to need to take more, and more extensive, steps to make a significant and credible difference in protecting students from behaviour that may amount to harassment and/or sexual misconduct. This would include, but not be limited to, steps that may reduce the likelihood of harassment and/or sexual misconduct taking place.
15. This requirement to take steps to make a significant and credible difference is in addition to other steps required by the condition and so a provider will not comply with this requirement if it delivers only each of the other minimum content requirements and provisions of the condition.
16. The following is an illustrative non-exhaustive list of examples of the range of steps the OfS may expect a provider to identify and take, which could together make a significant and credible difference in protecting students from behaviour that may amount to harassment and/or sexual misconduct, and/or reducing the likelihood of harassment and/or sexual misconduct taking place:

- a. Consider the potential needs of different groups of students, including those with needs affected by a student's protected characteristics. This may include, for example, working with students and their representatives when a provider develops its policies and procedures to ensure that they are appropriate for the provider's particular student population. This may include inviting students to provide feedback on the likely significance and credibility of the difference the steps a provider proposes to take will make in protecting students from behaviour that may amount to harassment and/or sexual misconduct.
  - b. Collect, monitor and publish data where this is likely to inform effective action to protect students from behaviour that may amount to harassment and/or sexual misconduct. This may include data relating to the prevalence of harassment and/or sexual misconduct affecting students. It may also include data about reporting, such as the number and type of incidents reported to the provider, how many of these lead to an investigation, and the outcomes from incidents and investigations. Where data on prevalence and reporting is available a provider should consider whether understanding the relationship between prevalence and reporting rates can improve its understanding of campus culture and the effectiveness of the steps it is taking.
  - c. Undertake credible and evidence-based evaluation of the effectiveness of the steps it is taking to make a significant and credible difference in protecting students from behaviour that may amount to harassment and/or sexual misconduct, and reviewing and adjusting its approach as appropriate.
17. The examples listed in paragraphs 16a-c are likely to be steps which could (individually or in combination) make a significant and credible difference in reducing the likelihood of harassment and/or sexual misconduct taking place, and protecting students from behaviour that may amount to harassment and/or sexual misconduct. This is because these steps place significant emphasis on the need for a provider to engage with its students and their particular experiences of harassment and sexual misconduct in order to determine the steps that may be needed. Similarly, collecting, monitoring and publishing data, and evaluations of the effectiveness of a provider's approach, is likely to provide insight about where a provider's existing steps may not be sufficient to make a significant and credible difference.
18. A provider with higher prevalence rates of harassment and/or sexual misconduct would be likely to need to take more extensive steps to make a significant and credible difference in protecting students from behaviour that may amount to harassment and/or sexual misconduct, including, but not limited to, steps that may reduce the likelihood of harassment and/or sexual misconduct taking place. The OfS would not expect a provider only to rely on data measuring reports of incidents (reporting rates) to determine the prevalence of harassment and sexual misconduct, but, in addition, to consider other relevant evidence about the prevalence of harassment and sexual misconduct. This is because a provider may have lower reporting rates because it has already taken significant and credible steps to effectively tackle and manage harassment and sexual misconduct, or it may have lower reporting rates because its reporting mechanisms are inadequate or ineffective. Condition E6 requires all providers to ensure they have effective reporting mechanisms in place (see paragraph 23 below).
19. Condition E6.2 and the minimum content requirements require a provider to set out in a single document how it will ensure that students are 'appropriately taught'. Condition E6.3 requires a provider to operate in accordance with, and comply with, its single document. A provider is

therefore required to ensure that students are appropriately taught in practice. The following is an illustrative non-exhaustive list of examples of how a provider may demonstrate that it has complied with these requirements:

- a. Mandatory training is delivered for all students.
- b. Training for potential witnesses of sexual misconduct (often referred to as 'bystander training'), and training on sexual consent, is delivered.
- c. Training is underpinned by credible evidence, and its effectiveness is evaluated.
- d. Training is designed and delivered by persons with credible and demonstrable expertise.

20. Condition E6.2 and the minimum content requirements require a provider to set out in a single document how it will ensure that staff are 'appropriately trained'. Condition E6.3 requires a provider to operate in accordance with, and comply with, its single document. A provider is therefore required to ensure that its staff are appropriately trained in practice. The following is an illustrative non-exhaustive list of examples of how a provider may demonstrate that it has complied with these requirements:

- a. Mandatory specialist training is delivered for staff likely to be involved in receiving disclosures about incidents of harassment and/or sexual misconduct, undertaking investigations, and making decisions about disciplinary cases. This training ensures that relevant staff have a clear understanding of a provider's relevant policies and procedures, which results in appropriate practical application.
- b. Mandatory training in relation to the freedom of speech principles set out in this condition is delivered to ensure that staff have a proper understanding of the content of the document required by paragraph E6.2 and all the requirements of this condition, including E6.5.
- c. Training is underpinned by credible evidence, and its effectiveness evaluated.
- d. Training is designed and delivered by persons with credible and demonstrable expertise.

21. Condition E6.2 and the minimum content requirements require a provider to set out in a single document how it will ensure that students are provided with 'appropriate support' when they wish to make allegations or complaints, are actual or potential victims, or are actual or alleged perpetrators. Condition E6.3 requires a provider to operate in accordance with, and comply with, its single document. A provider is therefore required to ensure that 'appropriate support' is provided in practice. A provider may determine the approach it takes to making such support available to students, for example, by delivering its own support services, commissioning support from other organisations, or making appropriate and effective referrals to other service providers. The following is an illustrative non-exhaustive list of examples of how a provider may demonstrate that it has complied with these requirements:

- a. Support is targeted at the needs of students who wish to make allegations or complaints about harassment and/or sexual misconduct, including, but not limited to during any investigatory and decision-making process.

- b. Support is targeted at the needs of students who are the actual or potential victims of incidents of harassment and/or sexual misconduct, including, but not limited to during any investigatory and decision-making process.
- c. Support is targeted at the needs of students who are the actual or alleged perpetrators of incidents of harassment and/or sexual misconduct, including, but not limited to during any investigatory and decision-making process.
- d. Potential or actual victims of sexual misconduct are signposted to sources of specialist personal support, such as counselling or to a Sexual Assault Referral Centre, where appropriate.
- e. Support is available to, and appropriate for, students with different needs, including those with needs affected by a student's protected characteristics.
- f. Support is provided at all relevant times as appropriate, for example, before any formal investigation, for the duration of an investigation, and following its outcome. This includes for actual or potential victims, actual or alleged perpetrators, and witnesses.
- g. Students that are potential or actual victims, witnesses, and/or alleged or actual perpetrators are signposted to a provider's relevant academic support, such as processes for extenuating circumstances or support with assessment.
- h. Support is provided to ensure the continued academic engagement of any student involved in an investigation, or a disciplinary or similar process. It may be appropriate to make changes to academic and/or assessment arrangements for an alleged perpetrator and/or alleged victim, or witness, during or following such a process.
- i. Support is available to potential or actual victims whether or not they decide to make a formal report about an incident.

22. Condition E6.2 and the minimum content requirements require a provider to set out in a single document how students, staff and other persons are able to report behaviour that may amount to harassment and/or sexual misconduct to the provider. Condition E6.3 requires a provider to operate in accordance with, and comply with, its single document. A provider is therefore required to ensure that it has appropriate reporting mechanisms in practice. The following is an illustrative non-exhaustive list of examples of how a provider may demonstrate that it has complied with these requirements:

- a. Clear information is published about where and how a report can be made.
- b. A range of different mechanisms is provided for making a report, including in person and online.
- c. Reports are accepted on behalf of potential or actual victims or witnesses, from third parties, for example third party reporting centres.
- d. Any mechanisms intended to support anonymous reporting of allegations of harassment are implemented and explained to students and staff in a way consistent with the freedom

of speech principles in condition E6 to ensure that they do not have the effect of limiting freedom of speech.

- e. Any actual or perceived barriers that may make potential or actual victims or witnesses less likely to make a report are removed.

23. Condition E6.2 and the minimum content requirements require a provider to set out in a single document how information received or obtained in connection with incidents of harassment and/or sexual misconduct will be handled sensitively and used fairly. Condition E6.3 requires a provider to operate in accordance with, and comply with, its single document. A provider is therefore required to ensure that information is handled sensitively and used fairly in practice. The following is an illustrative non-exhaustive list of examples of how a provider may demonstrate that it has complied with these requirements:

- a. Information is collected sensitively and treated with appropriate confidentiality, irrespective of the mechanism used to make a report or disclose information, for example, in person or online.
- b. Information is handled on the basis set out in data protection legislation.
- c. Students understand how information they disclose may be used, for example during a disciplinary process for a student or a member of staff.

24. Condition E6.2 and the minimum content requirements require a provider to set out in a single document how it will ensure that investigations undertaken and decisions made in respect of incidents of harassment and/or sexual misconduct are credible, fair and otherwise reflect established principles of natural justice. Condition E6.3 requires a provider to operate in accordance with, and comply with, its single document. A provider is therefore required to ensure that its investigation and decision-making processes are credible, fair and otherwise reflect established principles of natural justice in practice. The following is an illustrative non-exhaustive list of examples of how a provider may demonstrate that it has complied with these requirements:

- a. The policy which sets out the circumstances in which a provider would initiate an investigatory or decision-making process against a student or a member of staff, is clear and easy to understand. The policy also explains how any process would address allegations that may also constitute a criminal offence.
- b. Information about various matters, including but not limited to the following, is clear, accessible and explicit:
  - i. A provider's investigatory process.
  - ii. A provider's decision-making process.
  - iii. Timescales for investigation and decision-making, including factors which may affect timescales.
  - iv. The range of possible actions that may result from a provider's investigation and decision-making process.

- v. Any appeal mechanism in relation to a provider's decisions and how this can be triggered.

c. Investigatory and disciplinary processes are free from any reasonable perception of bias.

25. Condition E6.2 and the minimum content requirements require a provider to set out in a single document how it will ensure that persons directly affected by any decisions made in respect of incidents of harassment and/or sexual misconduct (including, but not limited to, actual or potential victims and actual or alleged perpetrators) are directly informed about the decisions and the reasons for them. Condition E6.3 requires a provider to operate in accordance with, and comply with, its single document. A provider is therefore required to ensure that relevant individuals are directly informed in practice. The following is an illustrative non-exhaustive list of how a provider may demonstrate that it has complied with these requirements:

a. Information about various matters, including but not limited to the following is clear, accessible and explicit:

- i. How all relevant parties affected by any decisions made by a provider will be identified.

- ii. The information that will be shared with each relevant party, and the timing of this.

b. Those directly affected by any decisions made – as potential or actual victims, witnesses, and/or alleged or actual perpetrators – are in practice provided with sufficient information to understand the provider's decisions and the reasons for them.

26. In relation to all of the content of its single document, a provider must ensure that its approach is set out in 'comprehensive and easy to understand provisions'. This means, for example, that each provision must be clear in its own right, and not require a detailed knowledge of the provider's other policies or processes.

27. The content principles explain that a provider may include other information and provisions in its single document. However, any such additions must not contradict, undermine or conflict with the minimum content requirements, and must include a provision which makes it expressly clear that the minimum content requirements take precedence over any other information and provisions. Further, such additions must not include information and provisions on subject matter relating to harassment and/or sexual misconduct (and/or any subject matter of a similar nature to matters covered by those defined terms) which could reasonably be considered to contradict, undermine or conflict with the minimum content requirements. It should be noted that under E6.5 a provider will also need to comply with this requirement in a manner which is consistent with the freedom of speech principles.

28. The prominence principles ensure that a provider's single document is prominent and accessible for current students and potential future students. They also require a provider to ensure that awareness of its single document is raised with students and staff through direct communication and by references in other documents, such as a prospectus or student or staff handbook.



## **Condition E6.4**

29. Condition E6.4 requires a provider to have the capacity and resources necessary to comply with condition E6.
30. A provider with higher prevalence rates of harassment and/or sexual misconduct would be expected to ensure that it has more capacity, and to deploy more resources, to comply with this condition than a provider with lower prevalence rates.
31. A provider may determine the approach it takes to ensuring it has the capacity and resources to comply with this condition, for example, by sharing services with other organisations and/or providers. Whatever approach a provider decides to take, it remains responsible for ensuring compliance with all of the provisions of this condition.

## **Condition E6.5**

32. The requirement of condition E6.5 and the freedom of speech principles are concerned with the importance of free speech, and ensuring that it is a fundamental consideration when a provider produces policies and processes for dealing with harassment and sexual misconduct and when it takes action to comply with this condition.
33. The 'freedom of speech principles' in the condition include a 'rebuttable presumption' that requires a provider to assume that the exposure of students to course materials, and statements made and views expressed by a person as part of teaching, research or discussions about any subject matter that is connected with the content of a higher education course, are unlikely to constitute 'harassment', unless otherwise demonstrated that these matters do in fact amount to harassment.

## **Condition E6.6 and E6.7**

34. Condition E6.6 prohibits a provider from restricting the ability of a person to disclose information about an allegation of harassment and/or sexual misconduct. Such restrictions are often written into contractual documents referred to as 'non-disclosure agreements' or 'NDAs'. This provision means that a provider cannot impose any provision that would prevent or restrict any person from disclosing information about an allegation of harassment and/or sexual misconduct which involves or affects one or more students.
35. A provider must not, therefore, include such a restriction in any contract that applies to students and is formed or varied from the date this condition comes into effect, and must not rely on any restriction that had previously been imposed before that date. Condition E6.7 also requires a provider to take all reasonable steps to prevent any other person that was a party to a non-disclosure agreement from similarly including such provisions in any contract that applies to students and is formed or varied from the date this condition comes into effect, or relying on or enforcing any such restriction that had previously been imposed before that date.

## **Condition E6.8**

36. In relation to this condition, a 'relevant staff member' is intended to capture any member of staff, employed or contracted by a provider, who has direct or indirect academic responsibilities, or other direct professional responsibilities, for a student. The reference to 'academic responsibilities' includes, but is not limited to, teaching, supervision, and assessment. The reference to 'other direct professional responsibilities' is intended to capture

staff with a direct professional or pastoral responsibility for a student, including but not limited to: mental health advisers, staff operating student complaint processes, and security personnel.

37. Cleaning or catering staff would not normally be captured by the definition of a 'relevant staff member' unless they have direct professional responsibilities for a student. Where an individual is a student at a particular provider and also a staff member at that same provider (for example, a research student who is tutoring or teaching undergraduate students, or acting in a supervisory capacity), that individual is considered to be a student and could also be captured by the definition of a 'relevant staff member' where they have direct or indirect academic responsibility, or other direct professional responsibility, for a student.
38. Condition E6.9 explains that 'all reasonable steps' is to be interpreted in a manner which disregards case law relating to the interpretation of contractual obligations, and includes, but is not limited to, the provider putting in place appropriate contractual arrangements and enforcing any breaches of those contractual arrangements.
39. Where a provider has taken other steps to require a relevant staff member to disclose a personal relationship with a student and that relevant staff member refuses to disclose any such personal relationship, the provider is expected to take the step of terminating that relevant staff member's contract of employment or service.
40. The following is an illustrative and non-exhaustive list of examples of the other steps the OfS may expect a provider to identify and take in order to require a relevant staff member to disclose any personal relationship with any student:
  - a. Ensuring all staff are aware of and understand the relevant contractual arrangements requiring them to disclose a personal relationship with a student where they may be a relevant member of staff in respect of that student. This includes ensuring clarity about the definitions of 'personal relationships' and 'relevant staff member'.
  - b. Ensuring that all staff are aware of and understand the requirement to disclose a personal relationship and the consequences (including potential disciplinary action and/or sanctions) of failing to properly disclose.
  - c. Ensuring that all staff understand that the existence of any of the following elements: (1) physical intimacy including isolated or repeated sexual activity, (2) romantic or emotional intimacy, and/or (3) financial dependency, (either in isolation or together) in any relationship between a relevant staff member and student would constitute a type of a personal relationship that needs to be disclosed. The nature of the personal relationship, i.e. which of these three elements (either in isolation or together) it involves should also be disclosed. It is not necessary for a relevant staff member to make a disclosure each time the same element occurs. It is, however, necessary for a relevant staff member to make a disclosure when the nature of a personal relationship has changed from the time of disclosure, for example when a personal relationship extends to involve financial dependency. This is to assist a provider in effectively managing and addressing actual or potential conflicts of interests.
41. The condition requires a provider to take all reasonable steps to maintain a register of personal relationships that exist between a relevant staff member and a student. The following is an

illustrative and non-exhaustive list of examples of the range of steps the OfS may expect a provider to identify and take in order to maintain such a register:

- a. Steps to ensure the register is up-to-date and can be used appropriately by those who need to do so.
  - b. Explaining the point at which a personal relationship is considered to have commenced, which is the point at which one or more of the following occurs: physical intimacy, including isolated or repeated sexual activity; romantic or emotional intimacy; or financial dependency.
  - c. Explaining the time period within which personal relationships between a relevant staff member and a student should be reported, with this being not more than three weeks.
42. The condition requires a provider to take all reasonable steps to manage potential or actual conflicts of interests or abuse of power that may arise from a personal relationship between a relevant staff member and a student.
43. Abuse of power is a defined term in the condition. For the purposes of that definition, something falls within the scope of a personal relationship, where it amounts to: (1) physical intimacy including isolated or repeated sexual activity; (2) romantic or emotional intimacy; and/or (3) financial dependency.
44. The following is an illustrative and non-exhaustive list of examples of the range of steps the OfS may expect a provider to identify and take in order to manage and address any actual or potential conflicts of interests or abuse of power:
- a. Managing the academic or professional interaction between a relevant staff member and a student with whom the relevant staff member has a personal relationship, in order to ensure the student's academic, employment and pastoral interests are not compromised. For example:
    - i. Ensuring a student is able to report any harassment or sexual misconduct through a mechanism that does not involve the relevant member of staff with whom they have a personal relationship.
    - ii. Ensuring a student is not at risk of adverse academic performance, or negative references, through a mechanism that ensures that the relevant staff member cannot influence these things, or appear to influence them, in a way that adds to the power imbalance in their personal relationship with the student.
  - b. Managing the academic or professional interaction between a relevant staff member and a student with whom the relevant staff member has a personal relationship, in order to ensure that there is confidence these are being approached fairly for all students. For example:
    - i. Ensuring there is no perceived or actual unfair advantage to a student, for example in assessment, references or academic opportunities, due to their personal relationship with a relevant staff member.

- c. Making decisions to share information contained in the register as needed to ensure any actual or potential conflict of interests or abuses of power are managed and addressed.

## **Information gathering, assessment of evidence and enforcement**

- 45. The OfS will use its general risk-based approach to monitoring as set out in the regulatory framework.
- 46. Where monitoring activity produces intelligence or evidence that suggests there may be compliance concerns for an individual provider, the OfS may adopt one or more of the following approaches in any order:
  - a. Engage with a provider to ensure it is aware of the issues.
  - b. Gather further information it considers relevant to the scope of the potential concerns, from a provider or from elsewhere on a voluntary basis, to facilitate an assessment of whether there is, or has been, a breach of one or more conditions.
  - c. Use its investigatory powers where that is considered appropriate for any reason.
- 47. Where the OfS considers it appropriate to use its investigatory powers it may conduct an investigation itself, or may ask another appropriate body or individual, to gather further information it considers relevant.
- 48. Having gathered further relevant information as necessary, the OfS will reach a view about a provider's previous and ongoing compliance with the condition. Where the OfS takes the view that there is or has been a breach of the condition it will write to the provider to set out the reasons for its provisional decision and set out the evidence it has used to reach this view. The provider is able to submit any further information it considers relevant in a representations process and the OfS will consider this before reaching a final decision.
- 49. Where the OfS has decided that there is, or has been, a breach of this condition, it will consider the use of the full range of its enforcement powers. This includes the imposition of a monetary penalty, suspension of elements of a provider's registration, for example its access to student support funding or OfS public grant funding, or deregistration. The OfS will follow any statutory consultation process as it takes enforcement action.
- 50. Where the OfS considers there to be an increased risk of a breach or a relevant wider regulatory concern, it may impose one or more specific ongoing conditions of registration. This may include, but not be limited to, requiring a provider to conduct a prevalence survey of its whole student population to the OfS's specification and publish the outcomes of that survey. The OfS will also consider whether additional monitoring requirements are appropriate, for example, a requirement to report additional matters as reportable events.

## Annex B: List of consultation questions

### Questions relating to specific proposals

In responding to the questions in this consultation, we would encourage you to consider the potential for any unintended consequences of the proposals on particular types of provider or students, or on individuals on the basis of their protected characteristics.

**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.

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

**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.

**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.

**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.

**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.

**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.

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

**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.

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

**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.

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

**Question 7:** 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.

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

**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.

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

**Question 9a:** Do you agree or disagree with the proposal that a provider should be required to comply with the proposed condition in a manner that is consistent with the proposed freedom of speech principles? Please give reasons for your answer.

**Question 9b:** Do you have any alternative suggestions to the proposal in question 9a? If so, please outline and give reasons for your view.

**Question 10a:** Do you agree or disagree with the proposal to prohibit a provider from using provisions which have the effect of preventing or restricting the disclosure of information about incidents relating to harassment or sexual misconduct? Please give reasons for your answer.

**Question 10b:** Do you support any of the alternative options we have outlined or do you have any other proposals? If so, please explain and provide reasons for your view.

**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.

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

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

**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.

**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.

**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.

**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.

**Question 13:** Do you foresee any unintended consequences resulting from the approaches set out in this consultation? If so, please indicate what you think these are and the reasons for your view.

**Question 14:** Are there aspects of the proposals you found unclear? If so, please specify which, and tell us why.

**Question 15:** In your view, are there ways in which the policy objectives discussed in this consultation could be delivered more efficiently or effectively than proposed here?

**Question 16:** Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

## **Annex C: Matters to which we have had regard in formulating our proposals**

1. In formulating these proposals, we have had regard to the matters set out below.

### **The OfS's general duties**

2. The OfS's general duties are set out in section 2 of the Higher Education and Research Act 2017 (HERA). We are required to have regard to:

- a. The need to protect the institutional autonomy of English higher education providers.
- b. The need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers.
- c. The need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers.
- d. The need to promote value for money in the provision of higher education by English higher education providers.
- e. The need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers.
- f. The need to use the OfS's resources in an efficient, effective and economic way, and
- g. so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be —
  - i. transparent, accountable, proportionate and consistent, and
  - ii. targeted only at cases in which action is needed.

3. We have carefully considered each of our general duties. We consider that the proposals set out in this consultation are particularly relevant to general duties (a), (b), (c), (e), and (g): institutional autonomy; quality, choice and opportunities for students; competition; equality of opportunity; and best regulatory practice.

4. When formulating our proposals, we have placed significant weight on our general duty relating to equality of opportunity in connection with access to, and participation in, higher education provided by English higher education providers. We consider that imposing requirements on all registered higher education providers to tackle harassment and sexual misconduct is particularly consistent with this duty. This is because all students should be protected from incidents of harassment and sexual misconduct and supported effectively when incidents do occur. Any experience of harassment or sexual misconduct is likely to have a negative effect on a student's ability to fully participate in higher education and to succeed on their course and



in their careers. This view is supported by evidence suggesting that experiences of harassment or sexual misconduct can negatively affect a student's outcomes.<sup>26</sup>

5. The evidence presented in Annex E also shows that harassment disproportionately affects students from groups that are underrepresented in English higher education, such as black students. We consider that our proposals to tackling harassment and sexual misconduct, may also encourage such underrepresented groups to access higher education by providing reassurance that they would be protected in case any such incidents do occur.
6. We consider that our proposals are relevant to general duty (b) (quality, choice and opportunity) insofar as equality of opportunity and quality and standards are closely connected and mutually reinforcing. A student's experience of harassment or sexual misconduct that negatively affects their outcomes and experience, will not lead to a high quality education.
7. We have also placed weight on the need to promote choice and opportunity for students. The proposals in this document would promote a greater degree of consistency across higher education providers in their approach to harassment and sexual misconduct, with all required to meet a shared standard. We consider that this will create more choice and opportunities for students who are particularly affected or concerned about these matters because it will give them greater confidence that they can attend any registered provider and these protections will be in place. At the same time, there will be some variation between providers' approaches. Our proposal that each provider creates a single published, prominent document setting out its approach to tackling harassment and sexual misconduct is designed to promote informed choice. It will ensure that students and applicants fully understand the approach that an individual provider is taking to address harassment and/or sexual misconduct on its campuses and as it might affect any of its students.
8. We have considered our general duty relating to competition where this is in the interests of students and employers, and the benefits to students and employers from collaboration between providers, in developing our proposals. We consider that having prominently published policies on these matters will allow students to compare providers' policies and encourage providers to compete to provide the best offer to students. In addition, we have placed weight on our general duty relating to competition when proposing that this should be an ongoing condition and not an initial condition of registration. This is because we are seeking to limit the burden on new providers applying to register with the OfS, while still protecting students from harassment and sexual misconduct.
9. We have carefully considered our general duty relating to institutional autonomy. It is because of the importance of autonomy that we have fully explored self-regulation on this important issue, including through our Catalyst funding and subsequently the statement of expectations, during which time each provider had the autonomy to address harassment and sexual misconduct in whatever manner it considered to be appropriate. Having considered the available evidence, we consider that our initial approach, which allowed for total provider autonomy, has not achieved our intended goals.

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<sup>26</sup> See Baird, H. et al, 2022, 'Evaluation of the Initial Impact of the Statement of Expectations – Final Report'. SUMS Consulting. Available at: [www.officeforstudents.org.uk/publications/evaluation-of-statement-of-expectations-final-report/](http://www.officeforstudents.org.uk/publications/evaluation-of-statement-of-expectations-final-report/) p. 17.

10. We recognise that the proposals set out in this consultation place limits on a provider's institutional autonomy. However, we consider that the importance of addressing harassment and sexual misconduct outweighs this impact. In developing our proposals, we have also considered where there should be room for a provider to apply its own judgement – an example of this is on how a provider's policies and procedures may exceed the minimum content requirements, or how it may develop its student and staff training.
11. We have sought to limit the impact on provider autonomy while still proposing requirements that would address our objective that providers will act to prevent harassment and sexual misconduct and respond effectively if incidents occur. In respect of the minimum content requirements, we have proposed clear requirements regarding student and staff training (for example) but are clear that a provider has the autonomy to determine what additional steps it may need to take to make a significant and credible difference in preventing harassment and sexual misconduct.
12. We have also considered alternatives to our proposals that would allow for greater autonomy – for example, by not prescribing minimum content requirements, or by having fewer minimum content requirements. However, as explained in more detail in each of the relevant sections, we consider that these alternative approaches do not go far enough in protecting students.
13. We have had regard to the need to use the OfS's resources in an efficient, effective and economic way. We have identified evidence that supports proposals for increased regulatory intervention in relation to harassment and sexual misconduct, including from surveys and the independent evaluation of the impact of our statement of expectations. Our proposal that a provider should create a single document with all relevant policies has benefits in terms of transparency for the OfS as well as students; it will enable the OfS to identify and test issues more efficiently than if a provider's policies and procedures were located in multiple different areas. We have also chosen not to propose that the OfS should approve the single document that each provider is required to publish. Having set out our proposed expectations clearly, we consider that it is better to give providers the autonomy to determine how they can meet our requirements in the best way, without implementing approval processes, which can be burdensome for both providers and the OfS.
14. We have also had regard to the principles of best regulatory practice – including the principles that regulatory activities should be – (i) transparent, accountable, proportionate and consistent, and (ii) targeted only at cases in which action is needed. The proposed condition is designed to be transparent about our requirements, ensuring greater consistency in the approaches taken by individual providers. Beyond this, we have clearly defined all of the key terms included in the condition and included associated guidance on the approach the OfS will take to making judgements about compliance. We also consider that harassment and sexual misconduct are important issues and that action is needed in this case due to the lack of consistent improvement achieved through self-regulation.
15. We have carefully considered and had regard to matters of proportionality as we have developed our proposals. Our evaluation of the impact of the statement of expectations indicates that some, but not all, providers have policies in place that are likely to go some way to meeting our expectations in addressing harassment and sexual misconduct. We have therefore proposed minimum requirements in this condition that include aspects that some provider's existing policies and processes are likely to already meet (for example, existing

training for staff and students). The additional burden imposed by this proposed condition is therefore likely to be greatest where there is the greatest regulatory risk because providers' existing policies and processes are inadequate.

## Regulatory burden

16. We have carefully considered the regulatory burden that would be imposed if condition E6 were adopted into the regulatory framework following consultation. We acknowledge that there may be significant work to do, especially for those providers that have not yet taken steps to address harassment and sexual misconduct effectively, or to formalise their approach in policies and procedures. It is likely that the greatest burden will be placed on providers that present the greatest regulatory risk, i.e. those furthest away from the position we set out in our statement of expectations and the requirements proposed in this consultation. We consider this to be appropriate in the context of the risk posed by harassment and sexual misconduct incidents to students and because we have expended time and OfS resources encouraging self-regulation of these issues.
17. We also recognise that there is likely to be some burden for all providers due to the proposed requirements in this consultation to address these issues in a particular manner, but as we have explained we consider this to be appropriate given the benefits to students of consistency and clarity. Our proposed approach to implementation of any new condition reflects our acknowledgement of this likely burden for all providers. In all instances, we consider that any increase in regulatory burden is appropriate in these circumstances in order to ensure that appropriate requirements are put in place, and we are effectively regulating this area, to protect students.
18. In our proposals we have sought to limit the regulatory burden placed on providers in a number of ways, including:
  - a. Our proposal that condition E6 should be an ongoing condition, and not an initial condition. This would place no additional regulatory burden on a new provider seeking registration, enabling entry to the regulated higher education sector for high quality providers. Once registered, we consider it appropriate that all providers would be subject to any new ongoing condition to ensure all students are protected.
  - b. Our proposed definitions of harassment and sexual misconduct.
    - i. Many elements of our proposed definitions match those used in our statement of expectations; these are section 26 of the Equality Act 2010, and rape and assault as defined in the Sexual Offences Act 2003. This means that providers that have adopted the statement of expectations should already be familiar with these definitions. Providers that are public bodies must comply with the Public Sector Equality Duty, and so will already be familiar with the requirements of the Equality Act 2010. This approach therefore limits the burden on providers that would be associated with understanding and applying new definitions.
    - ii. We have limited the use of new definitions to cases only where we consider this to be appropriate. For example, we have chosen not to include all offences defined in the Sexual Offences Act 2003, which we consider would add additional regulatory burden for those providers with students under 18. Similarly, we have not included 'voyeurism'

as defined in the Voyeurism (Offences) Act 2019. While it is likely that some incidents that match those described in the Sexual Offences Act 2003 or Voyeurism (Offences) Act 2019 will fall under our approach to ‘unwanted or attempted unwanted conduct of a sexual nature’, our proposals mean that a provider would not need to plan to address all offences in these Acts.

- iii. We have discounted including domestic abuse as defined in the Domestic Abuse Act 2020 in our proposals, at this time. We consider that doing so would be likely to create significant additional regulatory burden for some providers because research by the HARM network suggests that only a small proportion of higher education providers have established relevant systems, policies and processes.<sup>27</sup>
- c. Our approach to the proposed minimum content requirements and single document.
- i. We considered imposing more detailed requirements for all providers relating to the steps they should take to make a significant and credible difference in protecting students from harassment and sexual misconduct, and relating to training of students on harassment and sexual misconduct. We concluded that it would not be appropriate to impose more detailed requirements, including because we know from the evaluation of our statement of expectations that some providers have further to go than others in developing their policies and procedures. Imposing further detailed requirements on all providers, including those with more developed policies and processes that are better equipped to deal with harassment or sexual misconduct than others and therefore have lower prevalence rates, would represent regulatory burden where it may not be appropriate.
  - ii. We have sought to limit regulatory burden by explaining in the draft guidance underpinning the proposed condition that a provider would be required to meet the minimum content requirements but, subject to other provisions in the condition, it could decide for itself how best to do so. In other words, we are, where appropriate, providing space for institutional autonomy and for a provider to take less burdensome approaches to compliance.
  - iii. We have not proposed that a provider should submit its single document for approval by the OfS, as we currently do for student protection plans. This is because we have set out what we consider to be the key components in the proposed minimum content requirements to ensure that this minimum level of important detail is included in a provider’s document. This means that a provider will not need to seek approval or re-approval from the OfS as it reviews its single document, limiting the ongoing regulatory burden that would arise from the proposed condition.
- d. Our proposed freedom of speech principles. Several of the proposals in this consultation are designed to encourage a more robust approach to preventing and tackling harassment. However, we consider that there is a potential risk that some providers may interpret these proposed requirements too broadly and take actions that restrict lawful free speech, for example, by applying an overly broad definition of ‘harassment’. Our

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<sup>27</sup> HARM Network, 2021, ‘Domestic abuse policy guidance for UK universities 2021’. Available at: <https://clock.uclan.ac.uk/37526/>

proposed definition has been deliberately framed by reference to statutory definitions of unlawful harassment. We take the view that this serves to limit the burden on a provider by avoiding creating tension with the requirement that it does not restrict lawful free speech. We consider that tying our definition of harassment to existing legislation reduces regulatory burden and that the proposed freedom of speech principles provide clarity for all providers about the interaction of different obligations, thereby reducing burden created by uncertainty.

- e. Our preferred proposal relating to personal relationships between staff and students. We expect that many providers will already have policies in place to manage and address actual or potential conflicts of interests. A smaller number have policies in place that prohibit personal relationships between relevant staff members and students. We recognise that our proposals would therefore be likely to create some regulatory burden if implemented. We are proposing Option A as our preferred option in part because we consider that it would create less regulatory burden for providers than Option B.
- f. Our proposed approach to implementation. We had considered proposing a shorter implementation timeframe because of the importance of ensuring that all providers have appropriate arrangements in place to protect students. However, if we decide to impose a new condition, we have proposed that it would come into force not less than three months from the date our final decisions are published. This reflects our understanding that providers will need to make changes to come into compliance with the condition, for example, agreeing the single document, and allowing an appropriate period for this reduces regulatory burden.

## **Public Sector Equality Duty**

19. We have had regard to the public sector equality duty (PSED), as set out in section 149 of the Equality Act 2010. This duty states that the OfS 'must, in the exercise of its functions, have due regard to the need to:
- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'
20. Central to the proposals outlined in this consultation is the aim to have a positive impact on all students. We are also seeking to achieve a particularly positive impact for students who may be more likely to experience harassment and sexual misconduct because they share one or more of the protected characteristics. As set out in Annex E, there is significant evidence about the extent and scale of harassment and sexual misconduct affecting groups of higher education students, including students with protected characteristics who are at greater risk.
21. We have developed our proposals following reviews of the relevant evidence and literature, our independent evaluation (which also examined sources and strength of evidence about prevalence on different groups) engagement with stakeholder groups, including groups

representing students who have experienced harassment or sexual misconduct and third party reporting centres and national representative bodies. We did this to understand how students with different protected characteristics are affected by harassment or sexual misconduct and to inform the development of our proposed regulation. Regular stakeholder engagement on these issues before, during and after our consultation, should contribute strongly to our understanding of the impact our proposals would have on our PSED general duty aims.

22. Through this consultation we are seeking views on any unintended consequences of our proposals, for example on particular types of provider or student. We are also seeking views about the potential impact of our proposals on individuals on the basis of their protected characteristics. Responses to this consultation will inform our assessment of the impact of our proposals on different groups.

## **Guidance issued by the Secretary of State**

23. We have a duty to have regard to guidance issued by the Secretary of State under section 2(3) of HERA. Guidance issued in March 2022<sup>28</sup> set out the government's view that leaders of higher education providers should 'prioritise a zero-tolerance culture to all harassment and sexual assault and improve the systems for reporting incidents':

'We welcome the OfS's publication of the statement of expectations on sexual harassment and misconduct last spring and follow up work since then. We understand that the OfS will continue its work to evaluate the implementation of the statement of expectations but, in our view, the OfS should include this in a condition of registration as soon as possible.'

24. We agree that tackling harassment and sexual misconduct in higher education is important, and as set out in this consultation we consider that there is more that universities and colleges can and should do to address these issues. As our voluntary statement of expectations has not resulted in consistent action and improvements on this issue across the sector, we have taken the view that new regulatory requirements and intervention are necessary in order to achieve systematic improvements to preventing and effectively responding to incidents of harassment and/or sexual misconduct.
25. The same guidance also refers to freedom of speech and academic freedom as fundamental principles that underpin higher education and notes the Secretary of State's view that 'without action to counter attempts to discourage or even silence unpopular views, intellectual life on campus for both staff and students may be unfairly narrowed or diminished' and references the expanded role envisaged for the OfS in the Higher Education (Freedom of Speech) Bill in ensuring these values are upheld. We agree that freedom of expression and academic freedom are essential underpinning principles for a high quality experience and recognise that ensuring lawful free speech and challenging unlawful harassment can sometimes be complex. Our proposals are designed to ensure a more robust approach to preventing and tackling harassment while also ensuring freedom of speech within the law and academic freedom and tolerance for controversial views in higher education.

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<sup>28</sup> Available at: [www.officeforstudents.org.uk/media/be054f0b-696a-41fc-8f50-218eb0e3dcab/ofs-strategic-guidance-20220331\\_amend.pdf](http://www.officeforstudents.org.uk/media/be054f0b-696a-41fc-8f50-218eb0e3dcab/ofs-strategic-guidance-20220331_amend.pdf).

## The Regulators' Code

26. We have had regard to the Regulators' Code.<sup>29</sup> Section 1 of the code discusses the need for regulators to carry out their activities in a way that supports those they regulate to comply and grow. Elements of section 1 that are particularly relevant are that regulators should avoid imposing unnecessary regulatory burden and consider how they might support or enable economic growth for compliant businesses. We have had particular regard to matters relating to regulatory burden, as set out above. While we consider that the proposed condition would impose burden on all providers, and particularly where a provider has not engaged fully with our voluntary statement of expectations, we consider that any increase in regulatory burden is appropriate to ensure that we are putting requirements in place to protect students. We have also considered how the proposed condition may support or enable economic growth for compliant providers. Our proposals are intended to ensure that each provider allocates resources to address harassment and sexual misconduct in a way appropriate for its context. For example a provider that is compliant with our proposed requirement to take steps to make a significant and credible difference in protecting students, such that it has lower prevalence rates, would be expected to allocate less resource than a provider with higher prevalence rates..
27. Section 2 of the code suggests that regulators should provide simple and straightforward ways to engage with those they regulate and hear their views. It is important that all providers regulated by the OfS understand the proposals set out in this document. We have sought to explain both our proposals and our policy intention in making them throughout this document. We have also explained the alternatives we have considered and discounted, to enable respondents to tell us if they consider we should not have discounted a particular option. We are holding scheduled consultation events to discuss our proposals with those we regulate and others.
28. Section 3 describes how regulators should seek to base regulatory activities on risk. We have set out in this consultation document the serious risk that harassment and sexual misconduct poses to students, and that evaluation in this area shows that self-regulation has not gone far enough to mitigate this risk, and suggests further steps are needed to tackle it. In addition, we take a risk-based approach to regulation. This means we focus regulatory attention on those providers that are at greatest risk of breaching their conditions of registration. A providers that poses minimal regulatory risk should face minimal regulatory burden beyond the initial transitional costs of creating its single document and making any necessary changes to its policies and processes.
29. Section 5 of the code is also particularly relevant in its discussion of the need for regulators to ensure that clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply:
- a. Paragraph 5.1 provides for regulators to provide advice and guidance that is focused on assisting those they regulate to understand and meet their responsibilities.

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<sup>29</sup> Available at <https://www.gov.uk/government/publications/regulators-code>.

b. Paragraph 5.2 provides for regulators to publish guidance and information in a clear, accessible and concise format.

30. The proposals in this consultation respond on this point by including definitions of key terms in the proposed condition and draft guidance that sets out the approach the OfS is likely to take to judgements about compliance for an individual provider



## Annex D: Previous OfS activity to address harassment and sexual misconduct in higher education

1. To date, the OfS has undertaken significant activity to support providers in the higher education sector so that they can improve practice in addressing harassment and sexual misconduct. Our work has included:
  - a. Providing £4.7 million through the Catalyst safeguarding programme<sup>30</sup> between 2017-20 for 119 projects designed to support the development of effective practice in addressing sexual violence, hate crime, online harassment and harassment based on religion or belief affecting students.
  - b. Commissioning an independent evaluation of the three rounds of funding delivered through the Catalyst safeguarding programme to support learning, exchange and dissemination of effective practice from the projects, and help establish 'what works' in safeguarding students.
  - c. Working in partnership with sector bodies and student groups to identify and promote emerging effective practice, research and evidence.
  - d. Developing and publishing in April 2021 the statement of expectations, providing a set of clear voluntary standards to support higher education providers in England develop and implement effective systems, policies and processes to prevent and respond to incidents of harassment and sexual misconduct.
  - e. Commissioning an independent evaluation of the initial impact of our statement of expectations.
2. The 119 projects in the Safeguarding programme covered a wide range of activity, including training, raising awareness, digital innovation, and new approaches to prevention and reporting. Projects were match-funded by providers and their partners, delivering an investment value of almost £10 million.
3. Advance HE conducted an independent evaluation of the Catalyst programme to understand its impact and learning, exchange and dissemination of effective practice from the projects. While there is evidence of significant additional activity in the sector as a result of the Catalyst programme, the evaluation showed that there is still a significant level of variation in the responses of individual providers, including by leadership teams and in relation to a number of recommendations. The evaluation also recommended that the OfS should develop a framework of minimum safeguarding practice to 'help drive a further step change in addressing student safeguarding issues' which should be monitored. It also said that further strategic sector-level changes may be needed in future, potentially including firmer regulation.<sup>31</sup>

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<sup>30</sup> See [www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/student-safeguarding-evaluation-and-resources/](http://www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/student-safeguarding-evaluation-and-resources/).

<sup>31</sup> Baird, H. et al., 2018, 'Evaluation of Safeguarding Students Catalyst Fund Projects: Summative Report'. Advance HE. Available at: [www.officeforstudents.org.uk/publications/catalyst-fund-projects-evaluation/](http://www.officeforstudents.org.uk/publications/catalyst-fund-projects-evaluation/).

## Statement of expectations

4. The OfS published its statement of expectations for higher education providers in April 2021.<sup>32</sup> The statement of expectations provided a set of recommendations to support higher education providers in England so that they could develop and implement effective systems, policies and processes to prevent and respond to incidents of harassment and sexual misconduct. The seven principles that make up the framework provided a set of standards that all universities and colleges could follow to:
  - a. Minimise potential barriers to reporting and disclosing instances of harassment and sexual misconduct.
  - b. Ensure that investigatory procedures are fair and independent.
  - c. Ensure all students involved receive appropriate support.
  - d. Clearly set out behavioural expectations for all students.
5. In June 2021 we asked providers to review and update their relevant systems, policies and procedures in line with the statement of expectations before the start of the 2021-22 academic year. We said that we intended to review the impact of our statement of expectations and that we would consider options for linking it to conditions of registration if the evidence suggested that insufficient progress had been made since its publication.
6. We commissioned an independent evaluation by SUMS Consulting to understand the initial impact of the statement of expectations.<sup>33</sup> The following research questions were considered:
  - a. How is the statement changing provider behaviours (systems, policies and processes) in relation to preventing and addressing harassment and sexual misconduct affecting students?
  - b. What have been the initial changes?
  - c. How are students experiencing these changes?
  - d. What is the anticipated longer-term impact for providers and students?
  - e. What are the limitations or risks for providers and students with this current approach?
  - f. How has alignment with the statement shown an immediate impact on student outcomes, e.g., significant changes in disclosures and cases?
  - g. What is the current picture regarding prevalence data and what quantitative measures could be developed to best measure prevalence going forward?

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<sup>32</sup> See [www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/prevent-and-address-harassment-and-sexual-misconduct/statement-of-expectations/](https://www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/prevent-and-address-harassment-and-sexual-misconduct/statement-of-expectations/).

<sup>33</sup> Baird, H. et al, 2022, 'Evaluation of the Initial Impact of the Statement of Expectations – Final Report'. SUMS Consulting. Available at: [www.officeforstudents.org.uk/publications/evaluation-of-statement-of-expectations-final-report/](https://www.officeforstudents.org.uk/publications/evaluation-of-statement-of-expectations-final-report/).

7. SUMS Consulting took a mixed methods approach, drawing on a range of research and evaluation techniques, including findings from multiple available published and unpublished documentary and data sources, findings from an online survey of a large, stratified sample of higher education providers, and consultation with a wide range of key stakeholder groups. The evaluation, which was published in November 2022, found that the statement has led to:
  - a. Improvements in the policies, systems and processes that providers use to tackle this issue.
  - b. Increased attention to addressing harassment and sexual misconduct, particularly in providers' senior leadership teams and governing bodies.
  - c. Some excellent practice, including recruitment of specially trained staff to support victims of sexual misconduct; implementation of mandatory bystander and consent training; and work with schools and communities to ensure a joined-up approach to tackle harassment.
8. However, the evaluation also found that progress is inconsistent across the sector, and that there is substantial variation in the approaches of higher education providers. We have summarised concerns identified in the report:
  - a. Some universities and colleges have been slower to prioritise this issue than others, with clear variations and levels of strategic maturity.
  - b. There is a lack of standardised practice across the sector, including in preventing and responding to incidents. In addition, there is limited evidence that interventions are being evaluated either at the sector or individual provider level to identify what works.
  - c. There is a significant lack of consistent quantitative data available about harassment and sexual misconduct affecting students, with reporting considered to be far below prevalence.
  - d. Disclosures of sexual misconduct are being made, but these are not translating into formal reports and complaints.
  - e. The effectiveness of providers' approaches to harassment and sexual misconduct reports is highly variable. For example, 'reporting students' outcomes and experiences of investigatory and disciplinary processes once they make a report or a formal complaint is inconsistent and generally felt to be poor and not of the professional standard that a student reporting party may reasonably anticipate'.
  - f. The majority of respondents to the provider survey provide training for students and staff, but in most cases this is not mandatory. Only 70 per cent of respondents have mandatory training for at least some staff in relation to handling incident disclosures.
  - g. Universities and colleges have prioritised student-to-student sexual misconduct, with more limited interventions in relation to other forms of harassment and sexual misconduct.
9. The evaluation concluded that the statement of expectations has resulted in progress, but further regulatory intervention is needed to ensure universities and colleges address this issue.

In particular, the evaluation pointed to the need for further interventions and greater regulation in order to address the variability in the sector.

## Annex E: Evidence of harassment and sexual misconduct in higher education

1. There is a substantial body of evidence which points to the extent and scale of harassment and sexual misconduct in higher education and the impact of incidents on students. Key reports include:

- a. NUS's Hidden Marks report,<sup>34</sup> originally published in March 2010 and a second edition in March 2011, researches women students' experiences of harassment, stalking, violence and sexual assault.
- b. Universities UK's Changing the Culture report,<sup>35</sup> published in October 2016, includes extensive evidence from a range of sources on:
  - violence against women and sexual harassment affecting students
  - homophobia and gender-identity based harassment and hate crime
  - harassment/hate crime on the basis of religion and belief
  - hate crime on the basis of other characteristics.

Universities UK has also published follow-up reports examining the progress made in the sector.

- c. The Equality and Human Rights Commission's inquiry into racial harassment in higher education, published in October 2019.<sup>36</sup>
- d. The House of Commons Women and Equalities Committee has carried out a range of inquiries including in relation to sexual harassment, anti-Semitism, and the use of non-disclosure agreements in discrimination cases.<sup>37</sup>
- e. The 2020 Crime Survey for England and Wales statistics show that full-time students are more likely to have experienced sexual assault in the previous year than people in any other occupation type (8.0 per cent of students, based on combined data from the three years to March 2020 (see Figure 9)). This same figure showed a substantial difference in prevalence of sexual assault by gender for students (4.2 per cent for male students, and 11.6 per cent for female students).<sup>38</sup>

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<sup>34</sup> NUS, 2011, 'Hidden Marks', available at: <https://www.nusconnect.org.uk/resources/hidden-marks-2011>.

<sup>35</sup> Universities UK, 2016, 'Changing the culture: Report of the Universities UK Taskforce examining violence against women, harassment and hate crime affecting university students'. Available at: <https://www.universitiesuk.ac.uk/what-we-do/policy-and-research/publications/changing-culture-tackling-staff-student>.

<sup>36</sup> Equality and Human Rights Commission, 2019, 'Tackling racial harassment: universities challenged'. Available at: <https://www.equalityhumanrights.com/en/publication-download/tackling-racial-harassment-universities-challenged>.

<sup>37</sup> The Women and Equalities Committee, available at: <https://committees.parliament.uk/committee/328/women-and-equalities-committee/>

<sup>38</sup> Sexual offences prevalence and victim characteristics, England and Wales, Office for National Statistics, 2021, available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/sexualoffencesprevalenceandvictimcharacteristicsenglandandwales>, Figure 9

Data from the 2020 Crime Survey for England and Wales also revealed that fewer than one in six victim-survivors have reported sexual assault to the police. Among those who had told someone but did not report it to the police, the most common reasons given were embarrassment, not thinking that the police could help, thinking that it would be humiliating, and thinking the police would not believe them.<sup>39</sup>

2. In addition to these reports there have been a number of studies and surveys on the experience of higher education students and staff in relation to harassment and sexual misconduct. These surveys are often produced in response to particular issues or as part of a specific research focus. This means that the range and scale of statistics and evidence varies for students with different characteristics. For more information about findings from the studies and surveys, see examples of the evidence below.

## Sexual misconduct

3. We note that the following surveys are often sent directly to students and so present a good opportunity to understand their experience. However, this means that respondents to these surveys can be self-selecting. We also note that these surveys can report on student characteristics that do not properly match the protected characteristics in the Equality Act 2010.
  - Between January and May 2022, UniSAFE coordinated the implementation of a survey among 46 participating universities and research organisations in 15 countries across Europe (three from England). This collected measurable evidence on prevalence of gender-based violence in academia and research with 42,186 respondents, 57 per cent of whom were students. 31 per cent of respondents reported experiencing sexual harassment. Students who had experienced gender-based violence were likelier to miss classes and consider leaving university.<sup>40</sup>
  - A research briefing published by the House of Commons library in February 2022 drew on research which identified LGBTQ+ and disabled students to be disproportionately affected by unwanted sexual behaviour.<sup>41</sup> A study by the NUS into further education students showed that disabled students and LGBT+ respondents were more likely to have experienced sexual harassment.<sup>42</sup> Furthermore, the House of Commons report cited research indicating that 61 per cent of non-binary university students had experienced sexual violence, and that transgender people experience sexual harassment at very high rates.
  - In 2019, Brook conducted a survey of 5,469 UK university students. 49 per cent of female respondents said they had been touched inappropriately and only 5 per cent had reported

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<sup>39</sup> Nature of sexual assault by rape or penetration, England and Wales: Year ending March 2020, Office for National Statistics, 2021, available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassaultbyrapeorpenetrationenglandandwales/yearendingmarch2020>, section 8

<sup>40</sup> UniSAFE, 2022, 'Gender-based violence and its consequences in European Academia'. Available at: [https://unisafe-gbv.eu/wp-content/uploads/2022/11/UniSAFE-survey\\_prevalence-results\\_2022.pdf](https://unisafe-gbv.eu/wp-content/uploads/2022/11/UniSAFE-survey_prevalence-results_2022.pdf).

<sup>41</sup> House of Commons library, 2022, 'Sexual harassment and violence in further and higher education'. Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-9438/>.

<sup>42</sup> NUS, 'Sexual Violence in Further Education', 2019. Available at: <https://feweek.co.uk/wp-content/uploads/2019/06/June-Report-Sexual-Violence-in-FE.pdf>.

it. Respondents were self-selecting in response to an email invitation to participate in the survey.<sup>43</sup>

- In 2018 an online survey conducted by the NUS and the 1752 Group, with 1,839 survey respondents made up of current and former students, 41 per cent of respondents had had at least one experience of sexualised behaviour from staff, and a further 5 per cent knew of someone else experiencing this. The report on the findings also found that students with some characteristics (for instance relating to sex, sexual orientation or level of study) are disproportionately likely to experience sexual misconduct in higher education. Just under a fifth of women who had experienced sexual misconduct reported experiencing mental health problems. Survey respondents were self-selected following an email invitation to participate and via advertising through social media. They were also incentivised to take part.<sup>44</sup>

## Harassment

- The Equality and Human Rights Commission inquiry into racial harassment published in October 2019 highlighted that 24 per cent of ethnic minority students have experienced racial harassment on campus. It also reported that two-thirds of students who responded to the inquiry and had experienced racial harassment had not reported the incident to their university, stating that they lacked confidence that the incident would be addressed. The inquiry also identified a significant impact on students who experienced racial harassment, including leading 8 per cent to feel suicidal.<sup>45</sup>
- Furthermore, the Equality and Human Rights Commission inquiry found that around a quarter of students from ethnic minority backgrounds (24 per cent) and 9 per cent of white British students had experienced racial harassment since starting their course, which equates to 13 per cent of all current students. The figures were highest for black students (29 per cent) and Asian students (27 per cent). A fifth of students (20 per cent) reporting experiencing physical attacks, and nearly a third (32 per cent) of students who had experienced harassment reported seeing racist material and displays during the 2018-19 academic year.<sup>46</sup>
- The Community Security Trust recorded 150 antisemitic incidents in the higher education community over the last two academic years. 47 incidents occurred on campus or university property with 21 occurring away from campus and the remaining 82 taking place

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<sup>43</sup> Brook, Absolute Research and Dig-In, 2019, 'Sexual Violence and Harassment in UK Universities'. Available at: <https://legacy.brook.org.uk/press-releases/sexual-violence-and-harassment-remains-rife-in-universities-according-to-ne>.

<sup>44</sup> National Union of Students and the 1752 Group, 2018, 'Power in the academy: Staff sexual misconduct in UK higher education'. Available at: <https://1752group.com/power-in-the-academy-report/>.

<sup>45</sup> Equality and Human Rights Commission, 2019, 'Racial harassment in higher education: our enquiry'. Available at: <https://www.equalityhumanrights.com/en/ymchwiliadau-ac-archwiliadau/racial-harassment-higher-education-our-inquiry>.

<sup>46</sup> Equality and Human Rights Commission, 2019, 'Racial harassment inquiry: survey of university students'. Available at: [www.equalityhumanrights.com/en/inquiries-and-investigations/racial-harassment-higher-education-our-inquiry](http://www.equalityhumanrights.com/en/inquiries-and-investigations/racial-harassment-higher-education-our-inquiry).

online. The number of incidents in 2020-21 is the highest number recorded for a single academic year, at 95.<sup>47</sup>

- In 2017, Stonewall commissioned YouGov to carry out a survey asking more than 5,000 lesbian, gay, bi and trans (LGBT) people across England, Scotland and Wales about their life in Britain today. One of its reports investigated the specific experiences of the 522 LGBT university students who took part (self-selected panel, supplemented by advertising to specific groups). This report suggested that 22 per cent of LGB students and 39 per cent of students who identified as trans reported that they would not feel confident reporting any discriminatory bullying to university staff. It also suggested that almost half (47 per cent) of LGBT students with disabilities responding to the survey had been the target of negative comments or conduct from other students. 14 per cent of students who identified as trans either dropped out of a course or considered dropping out as a result of experiencing discrimination or harassment.<sup>48</sup>
- In research conducted in 2021, commissioned by Unite Students, on the experience of black students in accommodation, more than half of black students surveyed reported having been the victim of racism in their accommodation and 64 per cent of all student respondents reported having witnessed acts of racism. Almost a quarter (23 per cent) of black students disagreed with the statement 'There are clear and accessible policies promoting equality, diversity and inclusion in student accommodation' compared with just one in ten (11 per cent) of white students. Three-quarters of black students reported some level of impact on their mental health due to racism.<sup>49</sup> This was a self-selected survey using a panel database provided by the market research company, YouthSight (now Savanta).
- In 2018 the NUS conducted a survey of 578 Muslim students. One in three respondents had experienced some form of crime or abuse at their place of study, both online and in person, that they believed to be targeted because of their Muslim identity, with 20 per cent experiencing verbal abuse in person.<sup>50</sup> This was a self-selecting incentivised survey completed through the NUS Extra database.
- In a 2021 report, the HARM network estimated that 162,073 higher education students in the United Kingdom per year experience domestic abuse.<sup>51</sup>

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<sup>47</sup> 'Campus Antisemitism in Britain 2020-2022', 2023, available at: <https://cst.org.uk/news/blog/2023/01/19/cst-report-shows-22-increase-in-campus-antisemitism>.

<sup>48</sup> Stonewall and YouGov, 2018, 'LGBT in Britain - University Report'. Available at: <https://www.stonewall.org.uk/lgbt-britain-university-report>.

<sup>49</sup> Unite Students, 2022, 'Living Black at university'. Available at: <https://www.unitegroup.com/living-black-at-university>.

<sup>50</sup> National Union of Students, 2018, 'The Experience of Muslim Students in 2017-18'. Available at: <https://www.nusconnect.org.uk/resources/the-experience-of-muslim-students-in-2017-18>.

<sup>51</sup> Roxanne Khan, 2021, 'Domestic Abuse Policy Guidance for UK Universities' p. 10. Available at: <https://clock.uclan.ac.uk/37526/>.



# Annex F: Legislation used in proposed definitions of harassment and sexual misconduct

## Equality Act 2010

### Section 26 Harassment

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
  - (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are—
  - age;
  - disability;
  - gender reassignment;
  - race;
  - religion or belief;

sex;

sexual orientation.

## **Protection from Harassment Act 1997**

### **Section 1 Prohibition of harassment.**

- (1) A person must not pursue a course of conduct—
- (a) which amounts to harassment of another, and
  - (b) which he knows or ought to know amounts to harassment of the other.
- (1A) A person must not pursue a course of conduct —
- (a) which involves harassment of two or more persons, and
  - (b) which he knows or ought to know involves harassment of those persons, and
  - (c) by which he intends to persuade any person (whether or not one of those mentioned above)—
    - (i) not to do something that he is entitled or required to do, or
    - (ii) to do something that he is not under any obligation to do.]
- (2) For the purposes of this section or section 2A(2)(c), the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
- (3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows—
- (a) that it was pursued for the purpose of preventing or detecting crime,
  - (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
  - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

### **Section 2A Offence of stalking**

- (1) A person is guilty of an offence if—
- (a) the person pursues a course of conduct in breach of section 1(1), and
  - (b) the course of conduct amounts to stalking.
- (2) For the purposes of subsection (1)(b) (and section 4A(1)(a)) a person's course of conduct amounts to stalking of another person if—

- (a) it amounts to harassment of that person,
  - (b) the acts or omissions involved are ones associated with stalking, and
  - (c) the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.
- (3) The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking—
- (a) following a person,
  - (b) contacting, or attempting to contact, a person by any means,
  - (c) publishing any statement or other material—
    - (i) relating or purporting to relate to a person, or
    - (ii) purporting to originate from a person,
  - (d) monitoring the use by a person of the internet, email or any other form of electronic communication,
  - (e) loitering in any place (whether public or private),
  - (f) interfering with any property in the possession of a person,
  - (g) watching or spying on a person.
- (6) This section is without prejudice to the generality of section 2

**Section 4** Putting people in fear of violence.

- (1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.
- (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.
- (3) It is a defence for a person charged with an offence under this section to show that—
  - (a) his course of conduct was pursued for the purpose of preventing or detecting crime,
  - (b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
  - (c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

## **Section 7 Interpretation of this group of sections.**

- (1) This section applies for the interpretation of sections 1 to 5A.
- (2) References to harassing a person include alarming the person or causing the person distress.
- (3) A “course of conduct” must involve—
  - (a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or
  - (b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.
- (3A) A person’s conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another—
  - (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and
  - (b) to be conduct in relation to which the other’s knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.]
- (4) “Conduct” includes speech.
- (5) References to a person, in the context of the harassment of a person, are references to a person who is an individual

## **Sexual Offences Act 2003**

### **Part 1 Sexual Offences**

#### **1 Rape**

- (1) A person (A) commits an offence if—
  - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
  - (b) B does not consent to the penetration, and
  - (c) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.

- (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

## **2 Assault by penetration**

- (1) A person (A) commits an offence if—
- (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
  - (b) the penetration is sexual,
  - (c) B does not consent to the penetration, and
  - (d) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

## **3 Sexual assault**

- (1) A person (A) commits an offence if—
- (a) he intentionally touches another person (B),
  - (b) the touching is sexual,
  - (c) B does not consent to the touching, and
  - (d) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.



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