

Office for Students (OfS) consultation on new proposals for regulating sexual misconduct and harassment: AMOSSHE response



About us

1. AMOSSHE is the UK's Students Services Organisation. We are the professional membership association for leaders of Student Services in UK higher education.
2. We exist to inform and support Student Services leaders in the UK, and represent, advocate for, and promote the student experience worldwide.

Why we are responding

3. We welcome the opportunity to respond to OfS proposals which set out how they intend to regulate the sector in relation to dealing with sexual misconduct and harassment.
4. Our members are committed to tackling sexual misconduct and harassment at their institutions.
5. To respond to this consultation, AMOSSHE consulted widely with members. This included establishing a working group that has provided feedback on specific proposals within the consultation document.
6. Although AMOSSHE welcomes a new condition of registration in principle, it is vital that the proposals are proportionate, realistic, and well evidenced. Sensible regulation should also get the right balance between providing guidance on how institutions can achieve good practice and ensuring that proposals are not too prescriptive or 'one size fits all', given the diversity of institutions across the sector and the different contexts they operate in.
7. Ultimately, HEPs will often have a more accurate perspective of what the key challenges are at their institution and what interventions are needed to deal with possible concerns.
8. Therefore, OfS should avoid being prescriptive where possible and instead focus on providing clear guidance for how HEPs can achieve certain practices and standards.

Proposal A: new condition of registration

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.

9. Whilst AMOSSHE **agrees with the proposal to introduce a new condition of registration in principle**, the subsequent **proposals need revising** to it to be workable for the sector.
10. AMOSSHE **does not oppose introducing a new ongoing condition of registration**. It recognises that more needs to be done by HEPs, membership organisations, other representative bodies and regulators to implement good practice across the sector.
11. It also recognises many of the concerns raised in the independent evaluation published by SUMS Consulting.
12. AMOSSHE understands that good practice is inconsistent across the sector and that HEPs need to continue to review and refine their approaches to tackling sexual misconduct and harassment.
13. However, AMOSSHE is disappointed that more time wasn't allowed for HEPs to implement changes against the voluntary statement of expectations. Many of our members have undertaken significant areas of work since the statement of expectations were published.
14. The voluntary statement of expectations has only been in place for approximately a year and more time would have been useful for evaluating the merits of the voluntary approach.

15. AMOSSHE also believes that the consultation has been a missed opportunity for OfS to set out a more constructive approach to supporting HEPs to improve their practices.
16. A consistent theme in the feedback from AMOSSHE members was that the proposals were overwhelmingly punitive and based on assumptions that the sector was clearly responsible for failing to protect students.
17. AMOSSHE is disappointed that OfS has focused on prescriptive regulation and compliance at the expense of sector guidance and support to improve practices across the sector.
18. AMOSSHE acknowledges that there is a pressing need for improved standards across the sector. This includes support from OfS, the Department of Education (DfE) and other relevant bodies as outlined in the SUMS Consulting review.
19. **In principle, therefore, AMOSSHE would welcome a new condition of registration, subject to several of the subsequent proposals (B-F) being reviewed and revised.**
20. This would include a revision of the proposed implementation period of no less than three months, following a final decision being made.
21. AMOSSHE would like to see a staggered approach to implementation which reflects the fact that some institutions will need to do more than others in the months ahead. Some of the requirements will require more time and resource from HEPs than others. More detail on our alternative suggestions will be given in response to the specific proposals in the consultation document.

How could the condition of registration be improved?

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.

22. Whilst AMOSSHE is willing to support a condition of registration in principle, **there are several caveats to a potential endorsement.**
23. Firstly, AMOSSHE is disappointed that the consultation proposals have largely focused on compliance at the expense of providing practical support to HEPs.
24. Practical support and compliance are interlinked and focusing on compliance without committing to the publication of guidance and resources is likely to lead to HEPs being risk adverse and unwilling to disclose when they are having difficulty in meeting certain requirements.
25. OfS should be taking a carrot and stick approach, however the emphasis of the proposals is very much on the stick.
26. Whilst AMOSSHE understands that the regulatory requirements need to be underpinned with strong enforcement powers, we are concerned that there is limited emphasis on how OfS can further support HEPs to achieve good practice if potential issues arise.
27. We support a risk-based approach to regulation, but managing risk should also revolve around improving standards and practice, not just penalties for potential breaches.
28. The failure to produce further guidance and funding risks HEPs taking a risk adverse approach and increases the likelihood that institutions will not disclose difficulties in meeting the condition or seek further support and guidance.
29. This is disappointing because the SUMS Consulting review repeatedly referenced the need for guidance to be produced to support HEPs.

30. SUMS Consulting recommended that the DfE and/or **OfS should look to consider commissioning or developing central resources for improving and standardising practice** across the sector¹.
31. AMOSSHE supports this recommendation and **calls for OfS (or a relevant organisation) to establish good practice toolkits which can be used and adapted by institutions of different sizes from across the sector (additional support may be needed for small and specialist institutions)**².
32. This should be worked on and published in advance of the condition of registration taking effect.
33. Subsequently, OfS should consider a longer, staggered implementation period instead of the three-month suggestion in proposal G. This would enable HEPs to implement the relevant changes with reference to guidance.

Proposal A: the proposed definitions for harassment and sexual misconduct

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.

34. AMOSSHE welcomes OfS attempts to provide a clear and universally understood definition of harassment.
35. **AMOSSHE supports the inclusion of the definition set out in Section 26 of the Equality Act (2010).**
36. However, AMOSSHE has concerns about the inclusion of the Protection from Harassment Act (1997).
37. Whilst we acknowledge that OfS has good reason for including a definition that includes a wider range of people than those with protected characteristics, there are some unhelpful components to the Act.
38. For instance, in Section 4, the Act states that ‘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’³.
39. This would be very restrictive in a HEP setting. A HEP would not typically wait for two incidents to occur before taking action against their policies.

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.

40. AMOSSHE welcomes the attempt to provide clear and consistent definitions of sexual misconduct and harassment throughout the consultation document.
41. However, we **are deeply concerned about OfS use of criminal language to define offences with regards to the Sexual Offences Act (2003).**
42. Members told us that this was deeply unhelpful to include criminal language because HEPs are not able to adjudicate on sexual offences.

¹ SUMS Consulting (November 2022). *Evaluation of the Initial Impact of the Statement of Expectations – Final Report*

² SUMS Consulting (November 2022). *Evaluation of the Initial Impact of the Statement of Expectations – Final Report*. P.11

³ Office for Students (2023). *Consultation on a new approach to regulating harassment and sexual misconduct*.

43. It is also contrary to Pinsent Masons 2016 guidance which set out clearly that HEPs cannot make a finding about whether a student committed a criminal offense because only a criminal court can make that decision⁴.
44. One AMOSSHE working group member put it succinctly 'we are not the Crown Prosecution Service... we will never have the ability to determine something beyond reasonable doubt'.
45. HEPs do not have the same range of powers e.g., they cannot compel students to attend investigations and will not have the same access to evidence.
46. HEPs should only be establishing whether a breach of their policy has been committed. The inclusion of criminal language is therefore unhelpful.
47. There is a danger that the inclusion of criminal language could lead to 'criminal justice drift' where HEPs design policies that increasingly resemble quasi- criminal investigations, which would cause additional trauma for students⁵.
48. AMOSSHE is also concerned about some of the terminology used by OfS throughout the consultation document.
49. AMOSSHE members also provided general examples of language used throughout the consultation that has not been trauma informed. For example, OfS frequently uses the term 'victim' instead of a survivor.
50. OfS also does not refer to trauma-informed approaches with regards to training and investigation requirements. This is not in keeping with the recommendations in SUMS Consulting's review which regularly called for HEP providers to take a trauma-informed approach⁶.

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

Proposed requirement to create and publish a 'single document'

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.

51. **AMOSSHE disagrees with the current proposed format for a single document** which comprehensively sets out a HEPs policies and procedures relating to incidents of harassment and sexual misconduct.
52. Whilst AMOSSHE agree with OfS that students must be able to access and understand their HEPs policies and procedures, we **believe the single document will not be accessible to students in its current form.**
53. HEPs were to publish their full list of policies and procedures in a single document, it would be extremely long and difficult for students to follow.
54. The minimum content requirements are comprehensive and providing detailed information in relation to all the proposed requirements would create additional barriers to accessibility for students, rather than removing them.

⁴ Pinsent Masons and Universities UK (2016). Guidance For Higher Education Institutions: How To Handle Alleged Student Misconduct Which May Also Constitute A Criminal Offence (p.10)

⁵ Sharon Cowan and Vanessa E. Munro. *Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct*. Vol 48 Issue 3.

⁶ SUMS Consulting (November 2022). *Evaluation of the Initial Impact of the Statement of Expectations – Final Report*.

55. This would make it extremely difficult for HEPs to comply with OfS prominence principles and it would make it harder for students to digest and understand.
56. There were also concerns from members that a long document could be overwhelming for students, particularly for students suffering from trauma and distress.
57. In the words of an AMOSSHE member, the single document **'would be overwhelming, it would not be understandable, and it would need to effectively be written with students which will take loads of time'**.
58. AMOSSHE members also questioned whether students would really be the primary audience for the single document.
59. AMOSSHE's consultation working group and other members engaging with our response, consistently questioned whether this proposal had been designed with student input and whether students would actually want a list of policies in this format.
60. In the words of another member **'this won't help students. The only party that will benefit from it is OfS because they will have lots of documents to check.'**
61. The proposal also risks undermining the work that has already been done by many HEPs to create accessible policies, procedures, and training for their students.
62. Several members told AMOSSHE that they already have accessible policies and relevant training links on a web portal and so, a new single document would, in the words of one member, constitute **'unnecessary duplication.'**
63. Several members told AMOSSHE that they had already done plenty of work to create accessible summaries and online training resources that provide clear and digestible information to students.
64. **However, AMOSSHE does believe that resources linking to all of a HEPs relevant policies would be workable and could be valuable to students.** However, our members are clear that this would need to be designed with student input to ensure that it is easy to understand and follow.
65. This would require detailed engagement with students to ensure that the resources are accessible to find and understand.
66. This could be designed as a separate resource to the accessibility summary and be aimed at students rather than OfS.
67. **AMOSSHE does broadly agree with the prominence principles** outlined by OfS.
68. AMOSSHE supports the principle that HEPs policies and procedures should be clearly visible and accessible to all their students and prospective students.
69. AMOSSHE also agree that any document or series of documents/resources should not be behind a password or have restricted access.
70. AMOSSHE also does not foresee any obvious issues with the requirement that HEPs disseminate their policies and procedures to students once per calendar year (although HEPs should be communicating with their students on a more regular basis than this).
71. However, we do not believe that the current format is the best way of HEPs setting out their policies and procedures to students.
72. AMOSSHE believe it would be more appropriate for HEPs to provide this through a different means to the single document proposal, for instance through their communication channels or by sharing the accessible summary.

How the single document accessibility proposal could be improved

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

73. OfS **could ask HEPs to provide an accessible summary of their policies and procedures**. This could meet and be linked to their policies and be compliant with the prominence principles outlined by OfS.
74. **AMOSSHE also suggests that HEPs are given discretion to design resources for students that link to their existing policies and procedures**. This should be designed with students and be compliant with the prominence principles and minimum content requirements in the consultation document. **AMOSSHE would support this being linked to the condition of registration**.
75. HEPs will need to work with their students to deliver these resources. This would take significant time and care to be delivered properly. Therefore, we recommend that HEPs should be given at least 12 months to create this resource.
76. AMOSSHE also suggests that **OfS consults with students and student representatives to get a clear understanding of what formats would be helpful for both the accessible summary and student-facing resources**. Any learning outcomes could then be shared with the sector to support HEPs with their work.

The proposed minimum content requirements

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.

77. **AMOSSHE broadly supports the minimum content requirements** that OfS proposes HEPs should maintain.
78. **AMOSSHE agrees that the minimum content requirements should be tied to the condition of registration (with the notable exception of the training requirements in their current form)**.
79. **AMOSSHE supports introducing minimum content requirements for an accessible summary of the key policies and procedures that HEPs provide** (see Question 4b feedback for alternatives to the single document proposal).
80. AMOSSHE understands the rationale behind why OfS has set out minimum content requirements. Many of the expectations laid out in the requirements outlined are reasonable and proportionate.
81. For instance, it is reasonable to expect that HEPs should be able to guarantee that investigations are credible, fair and reflect the principles of natural justice, that they are able to provide appropriate support to students, and that both students and staff are able to both recognise the signs of, and report concerning behaviour.
82. Many of our members have expressed that they have done a lot of detailed work to meet the existing statement of expectations and they are confident that they are already meeting most of the requirements outlined in the consultation document.
83. However, **AMOSSHE is concerned about the impact and supposed efficacy of several of the suggestions within the minimum content training requirements** for staff and students.
84. There is a danger that HEPs could be overburdened with extensive training requirements, which are not well evidenced.
85. AMOSSHE would like to see OfS provide clear evidence of what interventions have worked well (or could work well) and ensure that they are scalable for HEPs, before supporting the training requirements.

86. Whilst AMOSSHE accepts some of the key principles around the training requirements, several of OfS examples of good practice are likely to provide significant practical, logistical, and resourcing challenges.
87. AMOSSHE currently has 186 organisational members. Over half of AMOSSHE's membership has at least 10,000 students, with 20% of members having over 20,000 students.
88. The amount of time and resources needed to provide detailed training for every student will be substantial and many HEPs will need to obtain additional resources to comply with the proposal.
89. This would be **impossible to achieve within three months for most HEPs**.
90. Whilst AMOSSHE addresses the timescale for implementation in more detail in relation to Proposal G, this is an excellent example of why the current implementation timeline proposal needs to be revised.
91. To paraphrase the words of one member:
92. **'To expect HEPs to train all students, say 20,000 students in three months including bystander, consent training with question and answers sessions is completely unrealistic and unworkable'**.
93. AMOSSHE is also concerned that the many HEPs would need to procure the services of third-party providers to deliver staff and student training and that this would be unrealistic within three months due to the likely sudden increase in demand because of the new condition.
94. An illustrative example of the waiting list issue was provided by an AMOSSHE working group member. They needed to procure a third party to help them deliver their training. When they contacted a specialist training provider, they were told it would take another four months to get support.
95. There are significant cost implications for developing the resources needed for compliance with the condition, particularly with regards to small and specialist institutions. For instance, many small and specialist institutions rely on using third parties such as InterSol for investigations and LimeCulture for training requirements.
96. This will be a substantial expense for many small and specialist institutions and OfS may need to look at allocating further resources to support their work.
97. Members were also concerned that OfS has not given enough consideration to what works with regards to bystander training. Although AMOSSHE welcomes that OfS is not overly prescriptive about the specifics of this training, several members remarked that the available evidence suggests that bystander training will only work if it is regularly reinforced and built into students learning. This appears to be supported by existing academic literature⁷.
98. OfS will also need to recognise that mandatory training for students, although it could be a reasonable requirement, will not guarantee widespread student input and engagement.
99. One member explained why they felt this proposal would not lead to widespread student uptake. 'We can't even get students to attend mandatory lectures so how can we realistically force students to attend detailed training?'

⁷ Joana Kuntz and Freya Searle (2022). *Does Bystander Intervention Training Work? When Employee Intentions and Organisational Barriers Collide*. Volume 38, Issue 3-4.

100. Although mandating training will likely to lead to greater student participation, OfS will need to recognise that HEPs may find it difficult to enforce their mandatory policy without considering penalties for non-compliance for students, which would have unwelcome implications of their own.
101. Therefore, OfS should recognise that there are limitations to HEPs ability to engage with students and take this into consideration as a regulator.
102. Finally, whilst AMOSSHE welcomes the minimum content requirement setting out the multiple steps HEPs should take to tackle sexual harassment and misconduct, it does take issue with some of the metrics that OfS gives as examples of a successful approach such as reducing prevalence.
103. The relationship between prevalence and reporting can be complex and multifaceted. It is well established that sexual misconduct is substantially underreported at universities^{8 9}. For the sector (and society), a higher rate of reporting should be a positive development and it should not be conflated with prevalence.
104. For instance, if a HEP improves its reporting mechanisms and trains students well, it could see a spike in reports. Although this may seem alarming, it could be an indication that students have more confidence in their provider's ability to tackle sexual misconduct and harassment. Whilst this may mean that HEPs need to consider additional resources, it may not reflect an increase in the prevalence of incidents.

How the proposal could be improved

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

105. AMOSSHE strongly argues that **more evidence is needed for it to consider supporting the proposed OfS training requirements for students.**
106. Whilst AMOSSHE recognises the importance of requiring interactive and well evidenced training, more work is needed to understand the best ways of delivering this across the sector, before the condition comes into effect.
107. AMOSSHE argues **OfS should conduct further research into establishing 'what works?' in student training**¹⁰, as outlined in the SUMS Consulting review¹¹. This should include best practice guidance with regards to student awareness, consent and bystander training.
108. OfS should consider the efficacy of these types of training, how they can be most effectively and realistically delivered by HEPs all of sizes and establish a body of best practice.
109. This type of research will be critical for HEPs if they are to comply with the proposals. Multiple members have told AMOSSHE that there is a dearth of expertise and good practice in the sector.
110. AMOSSHE recommends that OfS (or a relevant commissioned organisation) identify the commission of this research as an urgent priority, ideally before the condition comes into effect.
- 111.** This would enable HEPs to produce targeted training that is well evidenced and targeted.

⁸ Tracy L Tamborra and Fadia M Narchet (2011). *A university sexual misconduct policy: Prioritizing student victims' voices*. Volume 13, Issue 16-33.

⁹ Margo Kaplan (2017). *Restorative Justice and Campus Sexual Misconduct*. 89 Temple L. Rev. 701 (2017) (Symposium)

¹⁰ SUMS Consulting (November 2022). *Evaluation of the Initial Impact of the Statement of Expectations – Final Report*.

¹¹ SUMS Consulting (November 2022). *Evaluation of the Initial Impact of the Statement of Expectations – Final Report*.

112. **AMOSSHE also recommends that OfS develops specific guidance in consultation with the sector to support HEPs with any areas that are identified by practitioners as cause for potential concern¹².** This was highlighted in SUMS Consulting review and should be taken forward as soon as possible.
113. AMOSSHE also calls on **OfS to produce guidance for HEPs on the disclosure of outcomes at the end of the disciplinary process.** This was another suggested action for OfS highlighted in SUMS Consulting's review.
114. **Given the resource-intensive nature of several of the requirements (if they are taken forward in their current form) OfS should also actively consider introducing targeted funding to support HEPs procure additional resources.** This could include ringfenced funding for purposes linked to requirements within the condition of registration.
115. Particular consideration should be given to small and specialist institutions which are likely to face disproportionately high costs in recruiting external support due to their limited in-house budgets.

Proposal C: requirements relating to capacity and resources

Question 8a: Do you agree or disagree with the proposals 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.

116. **AMOSSHE agrees in principle that HEPs should have the resources needed to comply** with the condition of registration.
117. HEPs must be able to support students and take clear action to support the creation of safer learning and pastoral environments.
118. AMOSSHE does believe **that there are potential dangers to introducing a resource requirement.** A resource requirement could encourage HEPs to focus on minimum levels of compliance (e.g. maintaining a tick box approach) instead of putting in place a comprehensive strategy for supporting students which may take more time and require careful engagement with students.
119. This risk could be exacerbated for several reasons such as HEPs having to manage their resources very carefully or if the timeframe for implementing changes to be compliant with the condition is too short (see AMOSSHE response to Proposal G).
120. AMOSSHE also strongly **argues that OfS and other sector organisations need to do more to support HEPs in creating resources and promoting standards for good practice.**
121. In the final evaluation produced by SUMS Consulting, there was an acknowledgement that some HEPs would need more time than others to implement changes to their policies, procedures and training.
122. After speaking to members, it is clear that some institutions, particularly small and specialist institutions, need access to further support from OfS and/or other appropriate organisations.
123. Several small and specialist institutions informed AMOSSHE that they were concerned about the requirements because they would need to bring in third parties to deliver training and support. They are particularly concerned about the cost of training due to the size of their available budgets.
124. Whilst AMOSSHE welcomes recognition from OfS that HEPs have different access to resources through their capacity and resources definition, it doesn't address the fact that externally provided training can be disproportionately expensive for smaller institutions.

¹² SUMS Consulting (November 2022). *Evaluation of the Initial Impact of the Statement of Expectations – Final Report.*

125. This would not be addressed by the option for HEPs to share or pool resources under the condition.
126. To paraphrase the words of one small and specialist member **'We feel a bit lost. Although we are in contact with a large HEP, they have enough difficulty in generating resources for their own student population'**.
127. This was not limited to smaller institutions. Across our membership, there were concerns that the cost of procuring external training and third-party providers would be very expensive.
128. For example, it will be particularly expensive and time-consuming to train every student in relation to awareness training, consent training and bystander training.
129. Whilst this does not mean that HEPs should not be providing detailed training, OfS must recognise that this is a significant body of work and more guidance and support is needed.
130. **OfS should also consider the impact of the resources requirement on the capacity HEPs have regarding other important thematic areas of their work.**
131. HEPs will still need to ensure that they are putting in place appropriate support for students in other areas, for example with regard to mental health and wellbeing resources or cost of living support. To paraphrase the words of one AMOSSHE working group member **'OfS are regulating for a protected budget where they are effectively taking away an institution's right to make day-to-day management decisions about where to allocate resources based on need.'**
132. Whilst this does not prevent AMOSSHE from supporting the resource requirement, consideration needs to be given to the fact that many institutions may be facing significant pressures to maintain or develop services in other areas, and (without further sector support) this could lead to providers having to make difficult decisions to comply with the condition.
133. Finally, OfS needs to acknowledge that HEPs may have sufficient budgets but still not be able to procure the right training and resources due to sector scarcity and a lack of clear information about where to find specialist support and expertise.
134. As outlined in AMOSSHE's response to proposal G, we believe HEPs need significantly more time to comply with the condition if the minimum content requirements are taken forward. We anticipate that HEPs would need no less than 12 months to complete this work.

Proposal D: requirements relating to freedom of speech

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?

135. AMOSSHE **supports introducing a requirement that providers should be required to comply with the proposed condition in a manner that is consistent with the proposed freedom of speech principles.**
136. However, this is a complex area for HEPs and OfS should publish guidance to support providers in navigating any potential conflicts or issues that may arise.
137. In the consultation document, OfS rejects the claim that 'an emphasis on freedom of speech is at odds with work to tackle unlawful harassment in higher education.'¹³
138. We asked members about whether the proposal would be likely to cause any challenges or conflicts.
139. Members were concerned that freedom of speech and harassment claims could be contestable in relation to real world debates.

¹³ Office for Students (2023). *Consultation on a new approach to regulating harassment and sexual misconduct*. P.29

140. For instance, conversations around trans rights and gender critical views are very emotive subjects and there could be scenarios where the lines between freedom of speech and harassment become less clear.

How the proposal could be improved

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.

141. AMOSSHE does not have any alternative suggestions for this proposal.

142. However AMOSSHE does **recommend that OfS produces guidance to support HEPs make informed decisions in this area.**

143. This should include any legal considerations and how to respond to complex scenarios where freedom of speech principles and harassment claims could come into conflict.

144. It would be useful for OfS to provide case studies to help HEPs work through their approaches.

145. Whilst it is helpful that OfS gives examples of restrictions that could undermine freedom of speech, some of the language is quite abstract and HEPs will need more practical examples and case studies to help them work through their approaches.

Proposal E: requirements relating to restricting the disclosure of information

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.

146. **AMOSSHE supports OfS setting their regulatory requirements so that they refer to compliance with legal requirements in the Higher Education Bill** (subject to the Lords Amendment being taken forward in its current wording at the stage of Royal Assent).

147. AMOSSHE agrees that HEPs should not be using non-disclosure agreements (NDAs) or other contractual agreements to prevent students from disclosing information relating to sexual misconduct and harassment cases.

148. AMOSSHE understands that more needs to be done across the sector to end the use of NDAs for the purpose of restricting students from disclosing information.

149. There has been significant movement in the sector on the issue in the last couple of years. In January 2022, the then Minister for Higher and Further Education, Michelle Donelan and Can't Buy My Silence called on all university leaders to commit to not using legally binding contracts to prevent students from speaking out in cases of sexual misconduct and harassment¹⁴.

150. As of the date of this submission, Can't Buy My Silence report that 83 of the English universities on their target list have signed the pledge¹⁵. This equates to 63% of their English target list.

151. Universities Scotland and Universities Wales have already put out statements on behalf of their members that they do not use NDAs for the purposes of restricting information in these cases¹⁶
¹⁷.

152. AMOSSHE spoke to their working group and their wider membership to get an understanding of how widespread the use of NDAs for sexual misconduct and harassment cases are across the sector.

¹⁴ Department for Education (2022). *Universities pledge to end use of non-disclosure agreements*.

¹⁵ Can't Buy My Silence (2023). *Universities Pledge Update*. Accessed 11 April 2023.

¹⁶ Universities Scotland (2022). *Confidentiality clauses in Scottish higher education*.

¹⁷ Universities Wales (2022). *Welsh universities publish statement on use of NDAs*.

153. Amongst the members AMOSSHE has engaged with, not a single HEP confirmed that they were using NDAs to restrict students from talking about a case of sexual misconduct and/or harassment.
154. Therefore, we do not believe that the use of NDAs for the purposes being addressed in this proposal are widespread or used to prevent student disclosures amongst our membership.
155. However, several HEPs have told AMOSSHE that there are limited circumstances where students may deem it to be in their best interests to choose to freely enter an NDA.
156. For instance, a student (after seeking legal advice) may wish to freely enter an NDA with their HEP for several reasons.
157. To give just one example, a student may decide that they do not want their case to be potentially the subject of public discussion and may prefer to take a different approach.
158. Some of the previous arrangements may involve complex cases and there is a danger of unintended consequences emerging as a result of the primary proposal.
159. Therefore, AMOSSHE believes that **the alternative proposal is preferable to the main proposal which sets out requirements for HEPs to monitor third-party agreements and ban retrospective agreements.**
160. AMOSSHE also want clarification on the scope of the proposals with regards to whether confidentiality agreements for investigations will be covered by bans.
161. HEPs will often use confidentiality agreements in investigations to ensure that they are fair and not affected by outside influences. These agreements should not be included in the scope of regulation and OfS should consider issuing guidance to make this clear to HEPs.
162. Therefore, we would welcome OfS taking this into consideration if they do decide to put in place additional regulatory requirements that go beyond the law.

AMOSSHE position on the proposals

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 views.

163. AMOSSHE supports OfS setting their regulatory requirements so that they refer to compliance with legal requirements in the Higher Education Bill.

164. The justification for AMOSSHEs position is outlined in question 10a.

Proposal F: requirements relating to personal relationships between staff and students

Question 11 a: 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.

165. AMOSSHE agrees that HEPs should be proactively addressing potential risks in relation to power imbalances in staff-student relationships.
166. However, the approach laid out in Proposal F is too prescriptive and undermines OfS commitment to a risk-based approach to regulation.
167. AMOSSHE **does not oppose Option A in principle** and believes it is preferable to introducing an outright ban on staff-student relationships.
168. There is already a plethora of guidance and practical support on this subject in the sector, notably UUK's Changing the Culture (2016) which establishes that HEPs should actively discourage staff-student relationships and collect and keep records of staff-student relationships¹⁸.
169. In several respects, the proposal is broadly aligned with the recommendations in UUK's guidance.
170. UUK's guidance states that HEPs should require 'relevant staff' to declare relationships and that they should actively take steps to remove staff from positions where there may be conflicts of interest and address possible abuses of power.
171. AMOSSHE believes **that these are practical and sensible steps for HEPs to take and it would support them being tied to the condition of registration.**
172. AMOSSHE supports **OfS attempt to discourage 'relevant staff' from pursuing relationships with students.**
173. The definition of relevant staff' is broadly helpful, however, OfS should consider the language used for several of its examples as they risk coming across as prescriptive rather than as illustrative. Ultimately HEPs will need to conduct risk assessments and decide how to address abuses of power through their policies.
174. However, AMOSSHE is concerned about two elements of Option A.
175. Whilst AMOSSHE does not oppose the introduction of a register in principle, it anticipates that it will be very difficult for some HEPs to maintain and enforce if it were introduced.
176. Multiple AMOSSHE members hold registers, but they find it difficult to monitor relationships on a regular basis and keep account of how relationships change over time. It would take additional resource to put in place and maintain systems so that a register could be updated promptly¹⁹.
177. There is also a danger that HEPs would end up over-policing consensual, adult relationships, when potential conflicts of interest and risks could be better addressed through policies and training.
178. Secondly, AMOSSHE believes that OfS needs to revise its wording around the 'all reasonable steps' that HEPs would be required to take to manage personal relationships. OfS is clear that

¹⁸ Universities UK (2022). *Changing the culture: tackling staff-to-student sexual misconduct.*

¹⁹ Office for Students (2023). *Consultation on a new approach to regulating harassment and sexual misconduct.*

this would 'include, but not be limited to a provider terminating a relevant member of staff's contract of employment or service'²⁰.

179. Whilst AMOSSHE agrees that dismissal may be appropriate in certain circumstances, the failure to comply with a HEP policy may not always be cause for immediate dismissal.
180. AMOSSHE would welcome further clarification around how this would work with reference to employment law.
181. AMOSSHE would prefer that any contractual or policy breaches were treated as a potential 'disciplinary matter' in line with a provider's policies and UUK's guidance.
182. Ultimately AMOSSHE argues that HEPs are best placed to weigh up potential risks and decide the best steps to removing conflicts of interest and uphold professional conduct and this should be addressed through their own policies and risk assessments.
183. **AMOSSHE also believes that strengthening professional frameworks would be a more effective way of challenging and changing behaviours.**
184. It would be reasonable to expect that HEPs should be mandating training for staff over what behaviours are required in relevant roles, where conflicts of interest are more likely to emerge, how they will be managed and what the consequences are for breaching the HEPs policy.
185. This is covered effectively in UUK's guidance, and this would be a better lynchpin for a regulatory principle.
186. **OfS should consider mandating several of UUKs Changing the Culture recommendations as an alternative to introducing Option A²¹.**
187. This could include mandating that HEPs have clear policies to tackle sexual misconduct and harassment, that they are understood by staff and students, that HEPs have a responsibility to discourage close personal relationships and ensuring that relevant staff declare relationships so that they can be removed from direct positions of power over a student where there are possible conflicts of interest.
188. **AMOSSHE does not support an outright ban on staff-student relationships (option B).** Whilst some AMOSSHE members have made the choice to implement a ban as a policy, this approach would have several drawbacks if it were taken forward as prescriptive regulation for the sector as a whole.
189. Firstly, as one of our members told us 'human beings are not infallible, they are not robots'. Staff will continue to enter relationships with students, regardless of sector regulation or an organisation's policy so the ban would be an ineffective deterrent in many cases.
190. Multiple AMOSSHE members believed that enforcing a ban was unlikely to work and it could push the issue 'underground' by encouraging some staff to pursue relationships secretly.
191. The proposal also fails to address the nuances of power in relationships between consenting adults.
192. Ultimately, HEPs should be focusing on a risk-based approach to manage potential power imbalances where there is a potential for a conflict of interest or abuse.

²⁰ Office for Students (2023). *Consultation on a new approach to regulating harassment and sexual misconduct*. P.44

²¹ Universities UK (2022). *Changing the culture: Tackling staff-to-student sexual misconduct*.

193. The proposal to ban student-staff relationships would not be in keeping with a risk-based approach to regulation. It would also reduce the agency of students to make freely made decisions in their personal lives.
194. AMOSSHE does recognise that a lot of students would welcome an outright ban on staff-student relationships²².
195. Therefore, AMOSSHE accepts that some HEPs may decide that an outright ban is the most appropriate approach for their institution.
196. However, this would cause a significant burden for many HEPs and it would be difficult to implement effectively on a sector wide basis.
197. Finally, AMOSSHE are concerned about the potential implications of introducing an outright ban on relevant human rights legislation such as the Human Rights Act (1998). Any proposal taken forward should be in accordance with relevant human rights and data protection legislation.

Proposal G: proposed timeframes for implementation and compliance with the condition

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.

198. AMOSSHE disagrees with the current proposals for the implementation of any new condition of registration.

199. AMOSSHE believes that the proposed timeframes are unrealistic and unworkable for many of our members and the wider sector.
200. Members have told AMOSSHE that it will take an enormous amount of additional resource to comply with certain proposals if they are taken forward.
201. Some of the training proposals, for example, are likely to require HEPs to recruit more staff, and find additional resources, given the size of their student populations and the need to offer interactive training.
202. Some HEPs may be able to comply with several of the proposals within three months (or be in a position to do so already) however, it is very unlikely that the resource and training requirements are going to be achievable in this timeframe.
203. This could also lead to the unintended consequence of HEPs commissioning third parties to provide key services such as counselling, investigations, or training, without first conducting significant due diligence into these providers, because of the acute time constraints.
204. There is a danger that HEPs could procure the services of providers that are not equipped to meet the needs of students and therefore rushed regulation could actually increase the likelihood of student safety being compromised.
205. Whilst AMOSSHE recognises that OfS wants does not want delay introducing regulation given the seriousness of the subject matter, it is critically important that the regulatory approach enables HEPs to put in place the right support at appropriate intervals, rather risk rushing their approaches and getting it wrong.

²²WonkHE(2022). *Staff-student relationships should be banned, not managed*.

How the proposal could be improved

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.

206. AMOSSHE recommends that **HEPs have no less than 12 months to implement all relevant changes to comply with the new condition.**
- 207. AMOSSHE also recommends that OfS introduce a phased approach to the implementation of the condition.**
208. Whilst we understand that OfS wants quick progress in implementing the proposals, it is vital that the proposals are proportionate and scalable for HEPs.
209. For instance, one AMOSSHE member said that if they were going to try to comply with the training requirements within three months, 'they would have to consider taking out academic content' to achieve this.
210. A three-month period would also have implications for the types of approaches HEPs take. A three-month period would make it more likely that HEPs would try and meet a minimum standard rather than putting in place the most effective policies, procedures and training for their students.
211. As noted in AMOSSHEs response to question 12 a, it also increases the risk that HEPs select external providers for training and investigations quickly and without conducting sufficient due diligence in order to meet the requirements of the condition as soon as possible.
212. A revised timeframe would also enable OfS and/or other commissioned organisations to carefully consider how they could produce guidance, and toolkits and build a body of evidence of good practice to help HEPs to put in place well targeted support for students.
213. However, we acknowledge that HEPs may be able to comply with several of the proposals more quickly than others.
214. For instance, HEPs may be able to put in place a ban on NDAs reasonably quickly.
215. Therefore, we would support a staggered approach to implementing the proposals with earlier compliance deadlines for certain requirements.
216. Several components of the proposed requirements will undoubtedly take longer than others to address for HEPs.
217. For instance, if OfS were to proceed with the training requirements in their current form, it would be unrealistic to expect them to have this in place within three months.
218. Other requirements such as the resourcing expectation and the need to create links to existing policies and procedures will also be significant pieces of work for many HEPs.
219. Therefore, AMOSSHE anticipates that HEPs would need more time to carry out these pieces of work and the full 12 months should be made available to achieve these objectives.
220. OfS will also need to consider that HEPs may find it harder to implement changes against the condition during certain periods of the year.
221. For example, AMOSSHE members were clear that they would have fewer staff available during the summer months as it coincides with holidays and childcare duties.
- 222. OfS should therefore undertake further engagement with the sector to determine the best timescales for delivery against the condition as a whole and for specific proposals where a staggered approach is needed.**