

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

OfS consultation on harassment and sexual misconduct in higher education

This consultation runs from
9 January to 27 March 2020.

Enquiries to harassmentconsultation@officeforstudents.org.uk

Publication date 9 January 2020

The Office for Students (OfS) 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. Universities and colleges that are registered with the OfS are regulated by us and must meet certain conditions.

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.

Consultation on harassment and sexual misconduct in higher education

This consultation sets out proposals for the regulation by the Office for Students (OfS) of harassment and sexual misconduct affecting students in OfS registered higher education providers.

When is the consultation?

Start: **9 January 2020**

End: **27 March 2020**

Who should respond?

Anyone with an interest in preventing and addressing harassment and sexual misconduct affecting students in English higher education. The consultation is particularly relevant to higher education providers, students and organisations working on prevention and support.

How to respond

Please respond by **27 March 2020**.

Use the online response form available at <https://survey.officeforstudents.org.uk/s/harassmentconsultation/>

Enquiries

Email harassmentconsultation@officeforstudents.org.uk

Alternatively, call our public enquiry line on 0117 931 7317

We will be holding consultation events in **January, February and March 2020**. These events will provide an opportunity for you to ask any questions you may have. For further details, see www.officeforstudents.org.uk/news-blog-and-events/events/

If you require this document in an **alternative format**, or need assistance with the online form, please contact harassmentconsultation@officeforstudents.org.uk.

Please note: this email address should **not** be used for submitting your consultation response.

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About this consultation

1. This consultation sets out proposals for the regulation by the Office for Students (OfS) of harassment and sexual misconduct affecting students in higher education providers.
2. This consultation particularly relates to the OfS's powers under the Higher Education and Research Act 2017 (HERA) to impose conditions of registration (section 5). It is consistent with our approach to regulating ongoing conditions of registration and applying interventions and sanctions to address breach or risk of breach, as set out in the regulatory framework. The consultation has three parts:
 - **Section 1** sets out the scope of these proposals. It outlines our definition of 'harassment and sexual misconduct' for the purposes of this consultation and our proposed approach.
 - **Section 2** sets out a proposed statement of the OfS's expectations for the prevention of harassment and sexual misconduct, and then for addressing it when it occurs. We propose that all higher education providers should be accountable for meeting, or exceeding, these expectations, but they will not be directly linked to the requirements of the regulatory framework, as set out in section 3 below.
 - **Section 3** proposes an approach to assessing compliance with existing ongoing conditions of registration under the OfS's regulatory framework¹ where there is evidence that registered providers have not effectively addressed harassment and sexual misconduct cases raised through their student complaints' processes.
3. The purpose of this consultation is to propose a set of expectations of providers, and to require clear, accessible and effective complaints procedures. The intention is that students will:
 - be aware of the processes for reporting incidents of harassment and sexual misconduct
 - feel confident in reporting incidents and be supported to do so
 - know that their complaints will be addressed effectively.
4. Having these expectations and processes in place should assist in preventing harassment and sexual misconduct from occurring in the first place, as well as providing support to students affected, and clear and effective systems for redress, if harassment and sexual misconduct do occur.
5. In developing these proposals, the OfS is aware of the diversity of the sector it regulates. We expect that providers will respond to the proposals in different ways, reflecting their different circumstances. Despite this, we consider that all providers can be subject to common expectations.

The consultation questions are listed in full in Annex C.

¹ See www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/

For more information about our work and our approach to student welfare and safeguarding, please visit the OfS website². For more information and background to our regulatory approach, including our ongoing conditions of registration, please refer to the regulatory framework, also available on our website³.

Who should respond to this consultation?

We welcome responses from 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 sizes of provider.

We are also interested in the views of **employers, third sector organisations, policy bodies**, and others with an interest in tackling harassment and sexual misconduct in English higher education.

Consultation principles

We are running this consultation in accordance with the government's consultation principles⁴.

Public Sector Equality Duty

At the OfS we are committed to equality and diversity in everything we do. We have a legal obligation to show due regard to the Public Sector Equality Duty (PSED).

Central to the proposals outlined in this consultation is the aim to have a positive impact on all students, with a focus on students with protected characteristics who may be at greater risk of experiencing harassment and sexual misconduct.

Through the consultation process, we will seek to understand how these proposals may impact and can benefit students with protected characteristics. We are proactively seeking engagement through the consultation process with those individuals and groups that represent the viewpoints of those with protected characteristics.

How we will treat your response

Your response to this consultation, including any personal information you provide, may be subject to publication or disclosure under the Freedom of Information Act 2000, the Data Protection Act 2018 or the Environmental Information Regulations 2004.

Please tell us if you would like all, or any part, of your response to be treated as confidential.

² See www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/student-safety-and-wellbeing/

³ See www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/

⁴ See <https://www.gov.uk/government/publications/consultation-principles-guidance>

Your views may be reflected in any high-level summary of responses we publish. But we would not identify you or your organisation unless we had asked your permission to do so.

More information is available from the Information Commissioner's Office⁵ or from us at dp@officeforstudents.org.uk.

Next steps

We will publish a summary of responses to this consultation in summer 2020. Alongside this, we will set out next steps in the policy and implementation process.

We will explain how and why we have arrived at our decisions, and how we have addressed any concerns raised by respondents to the consultation.

Subject to consideration of consultation responses and other relevant factors, these proposals would take effect from **summer 2020**. This would mean that the OfS would have regard to **points 5, 6 and 7** of the statement of expectations (see Section 2) in determining whether ongoing conditions of registration B2 and C1 were satisfied from this date.

Providers would **not** need to submit any additional information to the OfS on the basis of these proposals. However, once the statement has been finalised following consultation, providers should ensure that their policies, processes and systems are consistent with these proposals.

Key terms and definitions used in this document

Providers: Higher education providers that are regulated by the OfS and that must meet regulatory requirements that are proportionate to the risks to student and taxpayer interests. For brevity this has been shortened to 'providers' throughout this consultation and all references to 'providers' should be read as referring only to providers who are registered with, and regulated by, the OfS.

Harassment: See page 8, paragraph 1.a

Sexual misconduct: See page 8, paragraph 1.b

Notifications: Students, staff and other people and organisations can notify the OfS of a matter that may be of regulatory interest to us.

Reportable events: Matters that need to be reported to the OfS by higher education providers. See Regulatory advice 16⁶ for more detail.

⁵ See <https://ico.org.uk/>

⁶ See www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events/

Foreword

There exists a substantial body of evidence across the UK regarding the extent and scale of harassment and sexual misconduct in the higher education sector, as well as evidence of inadequate practice within some higher education providers. We have set out some of this evidence at **Annex B**.

The National Union of Students (NUS) has campaigned on the issue of violence against women, publishing their seminal report *Hidden Marks* in 2010⁷. This was followed by work undertaken by UUK's Violence Against Women, Harassment and Hate Crime Task Force culminating in its 'Changing the Culture' series of reports⁸. The first *Changing the Culture* report, published in 2016, contained recommendations for action and established a practical framework for providers to use in shaping their systems, policies and procedures. This framework has now been in place for over three years.

There continues, however, to be widespread reports of ongoing cases of harassment and sexual misconduct which are not being adequately addressed by providers. In particular, there is evidence of a lack of consistent and effective systems, policies and procedures in place to respond to reports of such incidents. For example:

- a. Our work with the higher education sector, and the notifications we have received from individual registered providers, together with the evidence set out in *Changing the Culture* follow up reports published by Universities UK in 2018⁹ and in 2019¹⁰, show that while there has been some progress in tackling the issues, progress in adopting the recommended approaches is slow and not widespread or consistent across the sector.
- b. An independent evaluation conducted by AdvanceHE of the OfS's 119 Safeguarding catalyst projects¹¹, showed that there is still a significant level of variation in the response by providers, including by their leadership and governance teams.
- c. The Equality and Human Rights Commission's (EHRC) inquiry into racial harassment in higher education, published on 23 October 2019, highlights significant issues in relation to students experiencing racial harassment in higher education providers¹².

⁷ *Hidden Marks*, NUS, 2010:

https://www.nus.org.uk/Global/NUS_hidden_marks_report_2nd_edition_web.pdf

<https://www.nus.org.uk/en/news/1-in-7-women-students-is-a-victim-of-sexual-assault-or-violence1/>

⁸ *Changing the Culture*, Universities UK, October 2016: <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/changing-the-culture-final-report.aspx>

⁹ *Changing the culture: one year on – An assessment of strategies to tackle sexual misconduct, hate crime and harassment affecting university students*, Universities UK, March 2018:

<https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/changing-the-culture-one-year-on.aspx>

¹⁰ *Changing the Culture: two years on*, Universities UK, October 2019:

<https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/changing-the-culture-two-years-on.aspx>

¹¹ Thematic and summative evaluation reports produced by Advance HE on rounds 1 and 2 of the OfS Safeguarding Catalyst programme were published in 2018 and 2019. Available on the OfS website: www.officeforstudents.org.uk/publications/catalyst-fund-projects-evaluation/

¹² *Racial harassment inquiry: survey of universities*, EHRC, 2019:

<https://www.equalityhumanrights.com/en/publication-download/racial-harassment-inquiry-survey-universities>

Consultation proposals

Section 1: Scope

1. This consultation refers throughout to 'harassment and sexual misconduct'. Our definition for the purposes of this consultation and our proposed approach is as follows:
 - a. **Harassment** includes unwanted behaviour or conduct which makes a person(s) feel offended, intimidated or humiliated if it occurs because of, or connected to, one or more of the following protected characteristics: age, disability, gender reassignment, race, religion or belief, sex, sexual orientation (as defined by Section 26 of the Equality Act 2010). We would read harassment to also include any incidents of physical violence towards another person(s) on the basis of a protected characteristic. Under our definition, we will understand harassment to include hate crimes, as defined by the Home Office in 2016.
 - b. **Sexual misconduct** relates to all unwanted conduct of a sexual nature, including, but not limited to:
 - i. Sexual harassment (as defined by Section 26 (2) of the Equality Act 2010)
 - ii. Unwanted conduct which creates an intimidating, hostile, degrading, humiliating or offensive environment (as defined by the Equality Act 2010)
 - iii. Assault (as defined by the Sexual Offences Act 2003)
 - iv. Rape (as defined by the Sexual Offences Act 2003)
 - v. Physical unwanted sexual advances (as set out by the Equality and Human Rights Commission: Sexual harassment and the law, 2017)¹³
 - vi. Intimidation, or promising resources or benefits in return for sexual favours (as set out by the Equality and Human Rights Commission: Sexual harassment and the law, 2017)¹⁵
 - vii. Distributing private and personal explicit images or video footage of an individual without their consent (as defined by the Criminal Justice and Courts Act 2015).
2. The above definitions would include harassment or sexual misconduct through any medium, including, for example, online.
3. The regulatory focus of our proposed approach will be on how all students registered at a provider, however and wherever they may be studying, are protected from harassment and sexual misconduct from other students, staff and visitors of the provider. While our regulatory remit relates to students, we would expect that providers would take a similar approach to protecting staff and visitors.

¹³ Sexual harassment and the law: Guidance for employers, Equality and Human Rights Commission, 2017 <https://www.equalityhumanrights.com/en/publication-download/sexual-harassment-and-law-guidance-employers>

4. When considering for which students a provider is responsible, we will follow the principles for sub-contractual relationships set out in the regulatory framework. In particular, paragraph 65 of the regulatory framework states that ‘Lead providers subcontracting all or part of a course to a delivery provider retain responsibility for the students on those courses’. A provider’s responsibility extends to all students, including home, EU and international, undergraduate, postgraduate, full-time, part-time and those studying by distance learning. This also includes students studying on placements and on courses overseas where the provider is the awarding body. This is in line with paragraph 88 of the regulatory framework which states that: ‘the obligations of the registered provider extend to students for whom it is the awarding body wherever and however they study.’ Therefore, the OfS considers that a provider is responsible for protecting all students registered with it or with other providers delivering its courses under a sub-contractual arrangement. We would expect a provider to investigate (for example, as a disciplinary matter) complaints made in relation to any of these students.
5. References to harassment by ‘staff and visitors’ should include, but not be limited to, academic and non-academic staff, governors, temporary or contracted staff and visiting lecturers, whether paid or unpaid. The precise tools a provider has to deal with misconduct may differ in these circumstances but the underlying responsibility to protect students from harassment remains constant. In this area and others, providers should always ensure their disciplinary codes are effective, robust and apply to all staff, even the most senior, and governors.
6. As outlined in EHRC guidance¹⁴, published in February 2019, rules on harassment cannot be used to undermine existing legal protections for academic freedom, and exposure to course materials that students might find offensive or unacceptable is unlikely to constitute harassment.
7. Our regulatory remit does not extend to intervention in individual student cases to provide resolution or redress. These should be dealt with through a provider’s internal complaints processes. If a student feels that an issue is not resolved, they can refer their concerns to the Office of the Independent Adjudicator for Higher Education (OIA).¹⁵

Consultation questions on section 1: Scope

Question 1: To what extent do you agree or disagree with the scope of our proposed regulatory approach, as set out in paragraphs 1-7? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

¹⁴ See <https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf>

¹⁵ See <https://www.oiahe.org.uk/>

Section 2: Statement of expectations

Our proposed statement of expectations

8. Set out below is a proposed statement of expectations for the processes, policies and systems which we expect all providers to have in place to prevent and respond to harassment and sexual misconduct.
9. The expectations have been developed by drawing on the substantial work undertaken by Universities UK's Changing the Culture framework¹⁶ and on other independent published reports. We have also considered the approaches taken by other regulatory and statutory bodies¹⁷. We consider that the proposed principles could be delivered effectively in different ways by providers of different sizes, structure and missions.
10. Subject to consideration of consultation responses and other relevant factors, we propose to supplement the published version of the statement of expectations on our webpages with clear signposting to effective practice and guidance (from bodies such as the OIA good practice framework on disciplinary procedures¹⁸, the NUS on student engagement¹⁹ and relevant third sector organisations) to support all providers to develop and continuously improve their approach and to reflect upon and evaluate the effectiveness of their approach. We also plan to continue to work with providers, students and their representative bodies to further develop these resources, explore in more detail continuing issues and concerns, and facilitate sharing of effective practice which reflects the diversity of the sector.

¹⁶ Changing the Culture, Universities UK, October 2016: <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/changing-the-culture-final-report.aspx>

¹⁷ The Good Practice Framework for handling complaints and academic appeals, OIA: <https://www.oiahe.org.uk/resources-and-publications/good-practice-framework/>; Insider-outsider: The Role of Race in Shaping the Experiences of Black and Minority Ethnic Students, Sofia Akel, Goldsmiths University, October 2019: <https://www.gold.ac.uk/media/docs/reports/Insider-Outsider-Report-191008.pdf>; Independent Review of the student disciplinary and appeals processes at Warwick University, Dr Sharon Persaud, July 2019: https://warwick.ac.uk/newsandevents/independent_external_review/review/independent_external_review_10_july_2019.pdf

¹⁸ Good Practice Framework: Disciplinary procedures, OIA, October 2018: <https://www.oiahe.org.uk/media/2045/good-practice-framework-disciplinary-procedures-section.pdf>

¹⁹ For example, resources on The Student Engagement Partnership (TSEP) website; <https://www.nusconnect.org.uk/the-student-engagement-partnership-tsep>

Statement of expectations

- 1. Higher education providers should clearly communicate, and embed across the whole organisation, their approach to preventing and responding to all forms of harassment and sexual misconduct. They should set out clearly the expectations that they have of students, staff and visitors (as defined in paragraphs 4 and 5).**

We expect this to include:

- a. Visible commitment from senior leaders and the governing body to preventing and responding to all forms of harassment and sexual misconduct. There should be clear governance accountability lines to ensure that the provider's approach is embedded, upheld in practice, and remains fit-for-purpose across all of the provider's higher education activities.
- b. Providers working with students' unions, or other relevant student bodies, and student representatives deliver a clear and consistent message to students, staff and visitors that harassment and sexual misconduct will not be tolerated. This should involve making clear the possible consequences and action the provider may take in response to such instances.
- c. Providers clearly setting out behavioural expectations for prospective and current students, staff and visitors, and the possible sanctions that can be imposed where these are not followed. These expectations should be visible and easy to understand for all students, staff and visitors and be made clear to new students and staff as part of induction activities.

- 2. Governing bodies should ensure that the provider's approach to harassment and sexual misconduct is adequate and effective. They should ensure that risks relating to these issues are identified and effectively mitigated.**

We expect this to include:

- a. Activities to tackle harassment and sexual misconduct embedded within existing governance structures. For example, committees and working groups set up to tackle these issues should form part of the provider's governance structure to allow effective oversight across the organisation.
- b. The governing body routinely being given information on the provider's approach to harassment and sexual misconduct for consideration and action (as necessary). This might include periodic reporting on the types of cases and incidents, trends and outcomes of cases. Also this could include an opportunity to review and discuss preventative measures and their impact on students.
- c. Steps taken to ensure that those with a governance role have a clear understanding of the issues that are relevant to their responsibilities and, where appropriate, their obligations under the Public Sector Equality Duty. This could be achieved for example

through training and briefing of relevant staff or members of the provider's governing body and committees.

3. Higher education providers should engage with students to develop systems, policies and processes to address harassment and sexual misconduct.

We expect this to include:

- a. Proactive and meaningful engagement with students and student representatives in the development, implementation and evaluation of systems, policies and processes for preventing and responding to harassment and sexual misconduct, and in how to support students who have experienced it.
- b. Engagement with a diverse range of students, as well as learning from the experience of students who have been involved in investigations, to ensure that systems, policies and processes are adequate and effective.
- c. Engagement conducted in a sensitive manner to support student wellbeing. This means that engagement should be accompanied by appropriate support and safeguards.

4. Higher education providers should implement adequate and effective staff and student training to raise awareness of, and prevent, harassment and sexual misconduct.

We expect this to include:

- a. A clear training strategy which supports staff to respond effectively to different types of harassment and sexual misconduct incidents. This should involve an assessment of the training needs of all staff.
- b. Training made available for all staff and students to raise awareness of harassment and sexual misconduct to prevent incidents and encourage reporting where they do occur. This should consider covering areas such as bystander initiatives, consent and receiving and handling disclosures.

5. Higher education providers should have adequate and effective policies and processes in place for all students to report and disclose incidents of harassment and sexual misconduct.

We expect this to include:

- a. Provision of easy to understand information for all students and staff on how they can report, disclose or seek support and advice if they experience or witness any incident of harassment and sexual misconduct.
- b. Provision of support for students not being dependent on a formal report or complaint being made.

- c. Policies and processes for reporting communicated to all students in an accessible way; for example, as part of early communication with prospective students, inclusion in student handbooks, via the provider's website and social media.
- d. Signposting or referring students to the police, NHS, sexual assault referral centres or hate crime reporting centres if required and requested, or to local specialist services such as Rape Crisis, if specialist support is needed.
- e. An understanding and removal of any barriers to reporting that may exist for particular groups of students.

6. Higher education providers should have a fair, clear and accessible approach to taking action in response to reports and disclosures.

We expect this to include:

- a. A visible and easy to understand policy which sets out the circumstances in which a provider would initiate disciplinary proceedings against a student, staff member or visitor (including member of the governing body) where relevant, and how the provider's process addresses disciplinary issues that may also constitute a criminal offence.²⁰ The OfS considers that providers are responsible for protecting all its registered students. We would expect providers to investigate (for example, as a disciplinary matter) complaints made in relation to any of its registered students.
- b. Visible and easy to understand information for all staff and students about the provider's investigatory process, decision-making process and associated timescales. This should be explicit about the range of actions that may result from the provider's investigation process and should include information about any appeal process and how this can be accessed.
- c. An investigatory process that is demonstrably fair, independent, and free from any reasonable perception of bias.
- d. That disciplinary hearings that consider student complaints and appeals are conducted by a panel that is free from any reasonable perception of bias, is diverse and includes student representatives where appropriate. All panel members should be appropriately trained in handling complaints of this nature and be independent from the investigatory process and specific case being considered.
- e. An approach which ensures that staff respond appropriately and consistently to a disclosure about harassment and sexual misconduct.
- f. A clear explanation of how confidential information will be used and the protections in place for individuals, within investigatory and disciplinary processes.

7. Higher education providers should ensure that students involved in an investigatory process have access to appropriate and effective support.

We expect this to include:

- a. In the event of a disclosure about an incident of harassment and/or sexual misconduct, ensuring that both the reporting and responding parties have equitable access to appropriate support prior to the decision to launch a formal investigation, for the duration of any investigation, and following its outcome.
- b. An appropriate protocol for communication with reporting and responding parties.
- c. Procedures that ensure that all reports of incidents of harassment and sexual misconduct are dealt with within a clearly communicated and reasonable timeframe.
- d. That reporting and responding parties are provided with an outcome of the investigatory process where the provider is able to share this information, or an explanation of any actions the provider has taken, or not taken, as a result of learning from the complaint. Should the outcome of a process change, the reporting and responding parties should be informed of this.

Evaluating the impact of the statement of expectations

11. We propose to evaluate the impact of the publication of the statement of expectations on the practice of higher education providers in relation to harassment and sexual misconduct within two years of the publication of a finalised statement of expectations. We propose to do this through a call for evidence in which we ask any interested party to come forward with insights and evidence of whether practice has improved. The aim is to ensure that all individuals and groups with an interest can share their views, and to minimise burden on providers that are meeting these expectations. We will consider this evidence and any evidence we have gathered from reportable events and third-party notifications, whether or not these led to regulatory action.
12. This evaluation will allow us to consider both whether the expectations themselves need to be changed and whether further direct regulatory intervention may be needed. Our commitment to review progress will also ensure providers know that they need to take the opportunity before then to make improvements.

²⁰ UUK/Pinsent Masons LLP's ['Guidance for Higher Education Institutions: How to Handle Alleged Student Misconduct Which May Also Constitute A Criminal Offence'](#) may help providers develop appropriate practice in this area.

Consultation questions on Section 2: Statement of expectations

Question 2: To what extent do you agree or disagree that the OfS should publish a statement of expectations in relation to harassment and sexual misconduct for higher education providers, as set out on in pages 10-14? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

Question 3: To what extent do you agree or disagree with our proposed approach to future engagement with the sector on these issues, as set out in paragraph 10? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

Question 4: To what extent do you agree or disagree with the proposals for evaluating the impact of the statement of expectations, as set out in paragraphs 11 and 12? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

Question 5: Do you have any comments about the proposed statement of expectations?

Question for higher education providers and their representative bodies:

Question 6: To what extent do you think that the policies, processes and systems at your provider (or the providers that you represent) will need to change in order to meet the proposed statement of expectations?

Section 3: Regulating complaint handling through existing conditions of registration

13. Higher education providers are already subject to regulatory requirements in relation to the way they handle complaints from students. We consider that the approach set out in the OfS's regulatory framework, and the existing conditions of registration, provide us with the regulatory tools to intervene where we see evidence of a failure of a provider's complaint handling process to respond to reports of harassment and sexual misconduct. We have not to date set out our expectations for complaints specifically about harassment and sexual misconduct, nor how we might intervene in such cases. This section of the consultation sets out in more detail our proposals in this area.
14. For individual providers, we propose focusing on the extent to which a provider operates robust reporting and complaint handling mechanisms for harassment and sexual misconduct cases. Failure to operate such systems could constitute a breach, or an increased risk of a future breach, of initial and ongoing conditions B2 (Quality) and C1 (Guidance on consumer protection law).
15. **Points 5, 6 and 7** of the proposed statement of expectations, set out in Section 2 of this consultation, are relevant to how we propose to approach assessment of these conditions.

Condition B2: Quality

16. Condition B2 states that:

‘The provider must provide all students, from admission through to completion, with the support that they need to succeed in and benefit from higher education.’

The regulatory framework identifies that the behaviours that may indicate compliance with this condition include ‘the provider has fair and transparent procedures for handling complaints and appeals which are accessible to all students’ (page 93).

17. We will understand ‘complaints’ for these purposes to refer to complaints made by students against other students, staff and visitors (as defined in paragraph 5 of this document), as well as complaints against the provider itself.

18. When considering whether a provider’s procedures are fair, transparent and accessible to all students we propose to take account of **points 5, 6 and 7** of the statement of expectations, including the specific points identified as ways for a provider to demonstrate that it has met these principles. In broad terms, ‘fairness’ will be understood to mean both that the complaint process as a whole is operated in an effective and timely manner and that fair treatment and support is available for those involved.

19. This does not mean that failing to deliver one of the statements in **points 5, 6 and 7** of the proposed statement of expectations would automatically constitute a breach of condition B2 – we would consider the context, the reasons for the provider’s approach, and whether it had taken alternative action to ensure its complaint process was fair, transparent and accessible to all students.

Condition C1: Guidance on consumer protection law

20. Condition C1 states that:

“The provider must demonstrate that in developing and implementing its policies, procedures and terms and conditions it has given due regard to relevant guidance about how to comply with consumer protection law.”

It defines ‘relevant guidance’ as referring to the Competition and Markets Authority (CMA) guidance that can be found on the government website²¹. Section 1.18 of the CMA guidance sets out the expectations for student complaints, including setting clear timescales, not creating unreasonable barriers for pursuing complaints, clarifying routes for escalation and ensuring staff are appropriately trained.

21. As with condition B2 we will understand ‘complaints’ here to refer to complaints made by students against other students, staff and visitors as well as complaints against the provider itself.

22. Section 1.18 of the CMA guidance aligns with many of the specific points identified in **points 5, 6 and 7** of the statement of expectations. More generally, it states that providers should ensure their complaint process is ‘accessible to students’ and that complaint handling processes are

²¹ See <https://www.gov.uk/government/publications/higher-education-consumer-law-advice-for-providers>

'fair'. As in the case of condition B2, we will take **points 5, 6 and 7** of the statement of expectations into account in assessing whether a provider has regard to the CMA guidance.

23. As above, this does not mean that failing to deliver one of the statements in **points 5, 6 and 7** of the proposed statement of expectations would automatically constitute a breach of condition C1 – we would consider the context, the reasons for the provider's approach, and whether it had taken alternative action to ensure it had given due regard to relevant guidance concerning how to comply with consumer protection law.

Monitoring

24. Given the nature of the expectations set out in Section 2 of this document, we consider that the most likely sources of monitoring information will be:

- a. notifications from students or their representatives; or
- b. reportable events from providers, for example of other regulatory or legal action; or
- c. information received from other regulators or relevant bodies, in particular the OIA, which may share information where it considers there to have been a significant or systemic failure within a provider.

25. We will remain open to other potential sources and take account of any relevant information we become aware of, including for instance through reports in the media.

26. We expect that setting out our statement of expectations (Section 2 of this consultation) and clarifying our existing regulatory requirements for individual providers (Section 3 of this consultation) will encourage notifications from students and their representatives. We will work with the sector to promote the statement of expectations. This will include engaging with student representative groups to ensure there is a good understanding of the type of cases that may be of regulatory interest to us, and that there is clarity about the OfS's inability to intervene in individual cases.

27. We do not think it would be proportionate or effective to require regular submission of information from all providers about their compliance with these requirements. We are not proposing that providers should be required to submit additional information unless specifically requested to do so as part of our monitoring and intervention approach.

28. If we identify an increased risk of a future breach of conditions B2 or C1 in relation to these issues we may use any of the interventions set out in the OfS's regulatory framework and associated guidance²²: formal communication, enhanced monitoring, or specific ongoing conditions. In the case of a breach of one of these conditions we may also use our sanction powers.

29. As with all conditions of registration, we will have regard to the intervention factors set out in paragraph 167 of the regulatory framework, and other factors, as we consider regulatory action in relation to an individual provider.

²² See www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/

Consultation questions on Section 3: Regulating complaint handling through existing conditions of registration

Question 7: To what extent do you agree or disagree that the OfS should assess compliance with conditions of registration (B2 and C1), where there is evidence that providers have not effectively addressed harassment and sexual misconduct cases, as set out in paragraphs 13-29? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable]
[Any further comments]

Consultation questions on all proposals

Question 8: Do you have any comments about the interaction of these proposals with other regulatory or statutory requirements?

Question 9: Do you have any comments about the impact of these proposals for particular types of providers (e.g. proportionality)?

Question 10: Do you have any comments about the impact of these proposals for particular groups of students?

Question 11: Do you have any other comments?

Annex A: Rationale for the proposed approach and alternative approaches considered

30. We believe that the proposed approach set out in this consultation creates a clear set of expectations for all higher education providers and provides clarity about how the OfS will respond to weaknesses or failures in the way individual providers handle complaints in relation to harassment and sexual misconduct. This approach is informed by our understanding of the specific nature of the issues currently facing students, and of the sector's response as outlined in the forward of this document.
31. In formulating these proposals, the OfS has had regard to its general duties as set out in Section 2 of HERA. We consider ensuring that student complaints are heard and resolved effectively to be relevant to general duties (b), (d) and (e), which relate to quality, value for money, and equality of opportunity. Our most direct interest at the level of regulating individual providers is on the specific policies and processes for such complaints, but this is mutually supportive with expectations we are proposing for the actions providers should take to prevent and raise awareness of harassment and sexual misconduct more generally.
32. General duties (a), (f) and (g) relate to institutional autonomy, efficient use of the OfS's resources and best regulatory practice. These considerations, including our commitment to the Regulators' Code, have contributed to our judgement that, in the first instance, we should not propose new conditions of registration setting new regulatory requirements, and that the expectations we set out should be informed where possible by work done by sector groups (for instance the Changing the Culture reports by UUK). We are not requiring providers to submit additional information to the OfS as a result of these proposals unless specifically requested to do so as part of our monitoring and intervention approach.
33. The OfS is subject to the Public Sector Equality Duty (PSED) which requires that a public authority (including the OfS) in the exercise of its functions, must have due regard to the need to eliminate discrimination, harassment, victimisation, foster good relations between different groups and take steps to advance equality of opportunity. Related to this, we have also had regard to our published equality and diversity objectives and action plan which set out our objectives in relation to tackling sexual harassment, violence and hate crime²³.
34. We have had regard to guidance issued to the OfS by the Secretary of State under section 2(3) of HERA, and specifically the following guidance:
- a. **In September 2019** stating that 'I would like the OfS to prioritise work supporting students as empowered consumers. Students must be able to apply to university in the knowledge that what they are being promised will be delivered. They must be able to make their choices based on clear, comparable, and relevant information about what is being offered – and have contractual terms and conditions that are fair, as well as clear and transparent. And students must be able to access transparent and effective complaints processes when their consumer rights are not met. Beyond consumer rights, I want every student to be confident their institution stands up for free speech and that

²³ The OfS's equality and diversity objectives and action plan is available here: www.officeforstudents.org.uk/about/equality-and-diversity/

they will not experience unacceptable behaviour during their time at university, such as harassment, racial abuse, antisemitism and other forms of intolerance and prejudice’.

- b. **In February 2019** stating that ‘The OfS should continue its work supporting the student experience with a focus on wellbeing, mental health, welfare and harassment and hate crime. This includes [...] collaborating with other organisations where they are active in supporting the student experience, such as the Equality and Human Rights Commission and the Office of the Independent Adjudicator (OIA) (and where appropriate, the Domestic Abuse Commissioner).’

35. We have specifically had regard to the emphasis here on the priority issues of harassment and sexual misconduct in formulating these specific proposals, as well as furthering our collaborative approach with other regulatory and statutory bodies.

36. We consider the proposed approach set out in this consultation to be proportionate and appropriate as a first response to the remaining inconsistencies in the way providers are addressing the issues relating to harassment and sexual misconduct, specifically in relation to the handling of complaints about such incidences. If these proposals are implemented and if we do not then see greater consistency of acceptable practice across the sector on these issues, we may consider the case for setting more extensive regulatory requirements for all providers. For example, this could involve proposing a new public interest governance principle, or a new ongoing condition of registration.

37. By focusing direct regulatory intervention on a provider’s complaint handling process, the OfS is able to take a proportionate approach to monitoring compliance. Our approach to monitoring set out in paragraphs 24 to 29, will mean our focus is on those providers where students or others notify us of concerns about how reports of harassment and sexual misconduct are handled, rather than on all providers equally.

Alternatives considered

38. We considered a range of options for regulatory approaches to harassment and sexual misconduct before deciding to make the proposals set out in this consultation. These included:

Option	Consideration
<p>Create an additional condition of registration setting out specific requirements in relation to harassment and sexual misconduct</p>	<ul style="list-style-type: none"> • A new condition could require compliance with one or both parts of the statement of expectations. A new condition of this type would set explicit requirements, create clarity for students, and give the OfS strong regulatory tools to use where there was a breach or an increased risk of a breach of the condition. • However, we do not think this is the most proportionate way, in the first instance, to achieve the outcome we are seeking, and would be in conflict with our general requirement to be proportionate as well as the specific requirements of Section 7 of HERA for proportionate conditions of registration.

Option	Consideration
	<ul style="list-style-type: none"> Placing a new regulatory requirement on all providers would be more proportionate if there was evidence that the approach set out in this consultation had failed to drive improvement and consistency in the sector.
<p>Create a new public interest governance principle requiring adequate and effective policies and procedures for harassment and sexual misconduct</p>	<ul style="list-style-type: none"> Condition E1 requires a provider's governing documents to uphold a set of public interest governance principles, and condition E2 requires these principles to be delivered in practice. A new public interest governance principle could be created requiring providers to have a policy on harassment and sexual misconduct that was judged by the OfS to be adequate and effective. This would mean our approach would be consistent with other issues where we have public interest governance principles. A test of adequacy and effectiveness would be in line with our general outcomes-based approach. However, as with a new condition, a new public interest governance principle would create a substantive new regulatory requirement on every provider. The same considerations of proportionality outlined above therefore apply.
<p>Create a new public interest governance principle requiring transparency over policies on harassment and sexual misconduct</p>	<ul style="list-style-type: none"> This would relate to E1 and E2 in the same way as the previous option. However, the requirement would be for the provider to publish its commitments and policies on harassment and sexual misconduct in a sufficiently accessible context, which might then be supplemented by the OfS drawing attention to these (e.g. on the OfS Register or DiscoverUni website). This approach would rely on the effect of students acting as informed consumers – either individually or through third parties who assessed different providers' policies and rated them according to certain criteria. This would empower students to choose providers that made compelling commitments on harassment and sexual misconduct, while consumer protection law would mean those commitments had to be delivered in practice. At the present time it is not clear that this type of information would be well understood by applicants or students or would drive the type of change we are seeking. It may be that as awareness of these issues grows, this would become a more effective intervention.

Option	Consideration
<p>Take no action</p>	<ul style="list-style-type: none"> As a regulator we are required to have regard to the need to protect institutional autonomy and to ensure that our action is proportionate. This means that we must always consider the option of not involving ourselves directly in an issue. We could instead leave progress on this issue to the sector notwithstanding our view that these issues fall within the current conditions of registration. Much work has been done by the sector to identify good practice in the areas of concern highlighted in this consultation, and to establish a framework which has broad agreement across the sector, for response by providers and which has now been in place for a number of years. We have drawn on this in our work to date, and the proposals set out in this consultation. However, the evidence set out in the foreword of this document suggests that there is inconsistency in how these are put into practice. We have not seen evidence that this is because of principled differences between providers, or that it reflects diverse preferences from students on how these issues are managed: this suggests it is likely to be either a lack of clarity over expectation, or a lack of prioritisation. By setting out clear expectations we consider that we can contribute to the resolution of these issues, and by clarifying the way in which we will use evidence about complaint handling in assessing compliance with existing conditions of registration we can ensure we are in a position to intervene where necessary.

Other conditions of registration

39. We consider existing conditions B2 and C1 to have the most direct relevance to the issues set out in the proposed statement of expectations, and we propose to focus on these conditions. However, this does not mean we have set aside the possibility of taking issues relating to harassment and sexual misconduct into account when assessing compliance with other conditions. The other areas in which we might consider how a provider deals with issues of harassment and sexual misconduct (and the processes of a provider in relation to them), though they are not necessarily limited to these examples, include:

- a. We have a regulatory interest under conditions A1 and B3 when students with particular characteristics experience poor outcomes. If we identify harassment and sexual misconduct as a relevant factor in causing such poor outcomes, we may intervene and our intervention in relation to these conditions may refer to the effect of harassment and/or sexual misconduct on the outcomes.

- b. We have a regulatory interest under condition C2 in providers (a) cooperating with the OIA's student complaints scheme, and (b) making students aware of this scheme. Reports of harassment and/or sexual misconduct may raise concerns in relation to one or both of these, for example indicating that students have not been made aware that such a scheme exists.

- c. We have a regulatory interest under condition E2 in providers having adequate and effective management and governance arrangements, including upholding in practice commitments made in their own governing documents. Poor handling of issues relating to harassment and sexual misconduct, or departures from a provider's policies in relation to these issues (or a lack of such a policy), may raise concerns in relation to this condition.

Annex B: Evidence of harassment and sexual misconduct in higher education

Many higher education providers collect data in relation to disclosures and monitor the uptake of and engagement with support on offer, although currently there is not a single system to record information and approaches vary from provider to provider. There is currently no national dataset detailing the prevalence of or response to harassment and sexual misconduct in higher education.

In recent years, a significant body of evidence has developed which highlights the issues faced in higher education in relation to harassment and sexual misconduct. Key reports include:

1. NUS's Hidden Marks report, originally published in March 2010 and a second edition in March 2011, researches women students' experiences of harassment, stalking, violence and sexual assault.
2. Universities UK's Changing the Culture report, 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.
3. The Equality and Human Rights Commission's review into racial harassment in higher education, published in October 2019.
4. The House of Commons Women and Equalities Committee has carried out a range of enquiries including in relation to sexual harassment, anti-Semitism, and the use of non-disclosure agreements in discrimination cases.

Since 2015, 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. Therefore, the range and scale of statistics and evidence varies for the different protected characteristics. In addition, these surveys often are sent directly to students and so present a good opportunity to understand the student experience; however, this means that survey respondents can be self-selecting.

For more information about findings from the studies and surveys, see examples of the evidence below:

Sexual misconduct

- Students (6.4 per cent) were more likely to have been a victim of sexual assault in the year ending 2017 than adults of other occupations²⁴.
- Those aged 16 to 19 and aged 20 to 24 were significantly more likely to be victims of sexual assault in the year ending March 2017 than any other age group²⁵. In 2017-18, 73.5 per cent of students were aged under 26 on entry²⁶.
- In a 2018 national consultation into the sexual assault and harassment experienced by students and graduates from universities across the UK, 62 per cent of students and recent graduates surveyed have experienced sexual assault during their studies²⁷.
- 17 per cent of new students responding to a NUS poll in 2015 reported suffering some form of sexual harassment during their first week of higher education²⁸.
- In 2019, in a study of over 5,649 students, 49 per cent of female respondents said they had been touched inappropriately²⁹.
- In a 2018 survey of students by the NUS into staff sexual misconduct in UK higher education, around four in ten respondents had experienced at least one instance of sexualised behaviour from staff.³⁰

Harassment

- In a 2018 survey by the NUS into the experience of Muslim students, one in three respondents had experienced some type of abuse or crime at their place of study, with 20 per cent experiencing verbal abuse in person³¹.

²⁴ Sexual offences in England and Wales: year ending March 2017, Office for National Statistics, February 2018: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandanddwales/yearendingmarch2017>

²⁵ Ibid

²⁶ OfS equality and diversity dataset, accessed 18 October 2019: www.officeforstudents.org.uk/data-and-analysis/equality-and-diversity/equality-and-diversity-data/

²⁷ Sexual violence at universities statistical report, Revolt Sexual Assault and The Student Room, 2018: <https://revoltsexualassault.com/wp-content/uploads/2018/03/Report-Sexual-Violence-at-University-Revolt-Sexual-Assault-The-Student-Room-March-2018.pdf>

²⁸ NUS, 2015: <https://www.nus.org.uk/en/news/two-thirds-of-freshers-not-aware-of-sexual-harrasment-reporting-procedures-at-university/>

²⁹ Sexual Violence and Harassment in UK Universities, Brook, Absolute Research and Dig-In, February 2019: <https://legacy.brook.org.uk/press-releases/sexual-violence-and-harassment-remains-rife-in-universities-according-to-ne>

³⁰ Power in the academy: staff sexual misconduct in UK higher education, 2018: <https://www.nusconnect.org.uk/resources/nus-staff-student-sexual-misconduct-report>

³¹ The experience of Muslim students in 2017-18, NUS, March 2018: <https://www.nusconnect.org.uk/resources/the-experience-of-muslim-students-in-2017-18>

- Current research on the experiences of Jewish students shows that 26 per cent were very or fairly worried about being subject to verbal abuse, physical attack, vandalism, property damage or theft because of their Jewish belief³².
- The EHRC inquiry into racial harassment published on 23 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 addressed³³.
- 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 522 LGBT university students who took part³⁴. This report showed:
 - More than one in five lesbian, gay and bi responding students (22 per cent), who are not trans, would not feel confident reporting any homophobic, biphobic or transphobic bullying to university staff.
 - Seven per cent of lesbian, gay and bi responding students, who are not trans, faced negative comments or conduct from university staff in the last year because they are LGBT. This rises to more than one in five (22 per cent) for negative comments or conduct from other students.
 - Two in five responding trans students (39 per cent) would not feel confident reporting any homophobic, biphobic or transphobic bullying to university staff.
 - Seven per cent of responding trans students have been physically attacked by another student or member of university staff in the last year.
 - More than a third of responding trans students (36 per cent) faced negative comments or conduct from university staff in the last year because they are LGBT. This rises to three in five (60 per cent) for negative comments or conduct from other students.
 - Almost half (47 per cent) of LGBT disabled responding students have been the target of negative comments or conduct from other students.
- In a 2018 national consultation into the sexual assault and harassment experienced by students and graduate from universities across the UK, women with a long-term illness or disability were more likely to be victims of sexual assault in the last 12 months than those

³² The experience of Jewish students in 2016-17, NUS, April 2017:
<https://www.nusconnect.org.uk/resources/The-experience-of-Jewish-students-in-2016-17>

³³ Racial harassment in higher education: our enquiry, EHRC, October 2019:
<https://www.equalityhumanrights.com/en/ymchwiliadau-ac-archwiliadau/racial-harassment-higher-education-our-enquiry>

without a long-term illness or disability (5.3 per cent of students and recent graduates surveyed have compared with 2.7 per cent)³⁴.

- The risk of being a victim of personal hate crime in the 2015-16 to 2017-18 Crime Survey for England and Wales was highest among people aged 16 to 24 (0.3 per cent experienced personal hate crime)³⁵.

³⁴ Sexual violence at universities statistical report, Revolt Sexual Assault and The Student Room, March 2018: <https://revoltsexualassault.com/wp-content/uploads/2018/03/Report-Sexual-Violence-at-University-Revolt-Sexual-Assault-The-Student-Room-March-2018.pdf>

³⁵ Hate Crime England and Wales 2017/18, Home Office, October 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748598/hate-crime-1718-hosb2018.pdf

Annex C: Summary of consultation questions

Section 1: Scope

Question 1: To what extent do you agree or disagree with the scope of our proposed regulatory approach, as set out in paragraphs 1-7? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

Section 2: Statement of expectations

Question 2: To what extent do you agree or disagree that the OfS should publish a statement of expectations in relation to harassment and sexual misconduct for higher education providers, as set out in pages 10-14? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

Question 3: To what extent do you agree or disagree with our proposed approach to future engagement with the sector on these issues, as set out in paragraph 10? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

Question 4: To what extent do you agree or disagree with the proposals for evaluating the impact of the statement of expectations, as set out in paragraphs 11 and 12? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

Question 5: Do you have any comments about the proposed statement of expectations?

Question 6 (for higher education providers and their representative bodies): To what extent do you think that the policies, processes and systems at your provider (or the providers that you represent) will need to change in order to meet the proposed statement of expectations?

Section 3: Regulating complaint handling through existing ongoing conditions of registration

Question 7: To what extent do you agree or disagree that the OfS should assess compliance with ongoing conditions of registration (B2 and C1), where there is evidence that registered providers have not effectively addressed harassment and sexual misconduct cases, as set out on paragraphs 13-29? [Strongly disagree, Tend to disagree, Tend to agree, Strongly agree, Not applicable] [Any further comments]

All proposals

Question 8: Do you have any comments about the interaction of these proposals with other regulatory or statutory requirements?

Question 9: Do you have any comments about the impact of these proposals for particular types of providers (e.g. proportionality)?

Question 10: Do you have any comments about the impact of these proposals for particular groups of students?

Question 11: Do you have any other comments?



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