

Office for Students consultation on a new approach to regulating harassment and sexual misconduct in English higher education

Response of the Association of School and College Leaders

A. Introduction

1. The Association of School and College Leaders (ASCL) represents over 24,000 education system leaders, heads, principals, deputies, vice-principals, assistant heads, business managers and other senior staff of state-funded and independent schools and colleges throughout the UK. ASCL members are responsible for the education of more than four million children and young people across primary, secondary, post-16 and specialist education. This places the association in a strong position to consider this issue from the viewpoint of the leaders of schools and colleges of all types.
2. ASCL welcomes the opportunity to contribute to this consultation. Our response is based on the views of our members, obtained through discussions at ASCL Council, with relevant advisory groups, and prompted and unprompted emails and messages.
3. When considering the impact of any proposals on different groups, it is ASCL's policy to consider not only the nine protected characteristics included in the Equality Act 2010, but also other groups which might be disproportionately affected, particularly those who are socio-economically disadvantaged. We have answered any equality impact questions on this basis.

B. Key points

4. While we do not oppose the idea of a condition of registration relating to harassment and sexual misconduct, it is essential that information collected on any kind of register is held on a restricted basis, adhering strictly to ICO requirements; that information about individual incidents are not published; and that data must only be used for the limited purpose for which it is collected. Inspection of any registers must be by an independent reviewer only. This is to protect both staff and students from data breach and unfair treatment.
5. We agree that the policies that HE providers use to respond to and address sexual misconduct, harassment and violence should be displayed on their websites.
6. We are concerned that the consultation does not ask about trauma-informed responses to sexual violence, meaning detailed answers cannot be included in responses. The criminal side of tackling harassment and sexual misconduct is therefore driven by safeguarding procedures, which may not adequately cover the full range of behaviours the regulation seeks to cover.

C. Answers to specific questions

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.

7. **Agree.** However, the register which universities and colleges would be required to keep under the proposal – and would be required to take action to dismiss staff who do not register a relationship – should not be an excuse for false dismissals. It is essential to ensure that a fair and due process is in place through which allegations made by students against staff are properly scrutinised and that staff members are able to challenge allegations in a fair manner, as findings made against staff members could potentially destroy their professional careers and have a wider impact on their personal lives and reputation. In particular, we wish to highlight that necessity of having robust safeguards in place to address malicious and vexatious complaints. Notwithstanding these concerns, we agree that imposing a condition of registration relating specifically to harassment and sexual misconduct is a step in the right direction and is likely to be a positive development in respect of addressing genuine allegations which are brought forward, and which plainly should be properly considered and addressed.
8. We **agree** that the victims of harassment and sexual misconduct must be supported. We also agree that a ban on use of non-disclosure agreements on victims is appropriate as they must be able to speak out, but the OfS, universities and colleges holding registers must operate strictly within the law. Staff and students must be protected from wrongful identification.

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.

9. **Yes.** An alternative approach may be to keep a list of compulsory training which all staff have undertaken in this area, much as is in the case of safeguarding registers in schools and colleges. We also suggest that greater importance is given to the use of existing policies such as whistleblowing to safeguard victims. Providers, with appropriate funding and other resources, may be willing to provide advocates to ensure appropriate behaviour amongst its staff.

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.

10. **Agree.** This is the current legal definition and must be adhered to. However, the terms must be reviewed in line with any review of the above acts and outcomes of independent reviews.

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

11. **No.** See response to 2(a) above – the proposed definition is considered to be appropriate.

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.

12. **Agree.** These terms are generally understood within the terms of these Acts.

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

13. **No.** See response to 3(a) above.

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.

14. We **agree** with the proposal that a provider should create a single document which sets out policies and procedures on subject matter relating to incidents of harassment and sexual misconduct. We are concerned, however, about the requirement to “prominently publish”, which we assume means on a website. This is because prominently publishing a document does not of itself lead to the behaviours required or to safeguarding of victims who feel their concerns are unheard. Organisations have a responsibility to train staff so they know how to avoid incidents which may lead to harassment and sexual misconduct. They also have responsibility for students who themselves are adults and whilst providing a safe learning environment, should work with student bodies to help students keep themselves safe. It is also submitted that registered providers ensure that all policies and procedures are reviewed to ensure that they comply with principles of due and fair process.

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

15. **Yes.** The provider, using appropriately trained staff, should draw staff and students’ attention to the relevant documents on a regular basis. Such documents should then be included in both staff and student handbooks and reviewed and updated annually. Regular provision of training centred around said policy and procedures may also help raise awareness and ensure staff and students remain properly informed.

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

16. **Agree.** This would help to ensure HE providers are consistent in drafting a single document. There may also be sharing of good practice in this area which OfS should facilitate. In particular we would be keen to ensure that points e-h (on page 22 of the consultation) are properly implemented by registered providers.

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

17. **No.** See response to 5(a) above.

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.

18. **Agree.** See response to 5(a) above.

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

19. **No.**

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

20. **Agree.** However, the wording of the content principles suggest that providers might willingly aim to contradict or conflict with their own policies on harassment or sexual misconduct. We do not believe this to be the case, as they will have, in general, trained professionals drafting their single document. We suggest the wording of the content principles is looked at very carefully.

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

21. **Yes.** Set the boundaries of the consequences, if individuals do not adhere to the organisations' required behaviours, within the minimum content requirement. If individuals understand the consequences of their actions they are more likely to act within the behavioural requirements.

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

22. We **neither agree nor disagree.** Both universities and colleges struggle to afford staffing capacity and resources to cover all areas of their work. This is important additional action they are being required to take and, in some cases, the capacity or resources may not be available. We suggest that OfS makes available grants for those institutions which are struggling to comply with the proposed requirement and share good practice amongst those who have the capacity and resources. This work is not an add-on. It must be resourced effectively.

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

23. **Yes.** See response to 8(a) above. OfS should make available grants for institutions which struggle to have capacity or resources to undertake this work properly and encourage the sharing of good practice.

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

24. **Agree.** Institutions will be familiar with these principles as freedom of speech principles are essentially one of the guiding principles of higher education and research.

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

25. **No.**

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.

26. **Agree.** However, while disclosure is important to the transparency of the process, we believe that this should only happen once fair process has taken place. We are not suggesting that perpetrators are shielded, rather that any accused person is properly and fairly judged. However all in all, this is in accordance with the SRA's warning notice regarding the use of NDA's – although achieving the same effect is possible through alternative options identified.

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

27. **Yes.** We believe alternatives a and b should be considered as part of a range of measures.

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

- a. **Option A as proposed**
- b. **Option B as proposed**
- c. **An option similar to Option A but with some changes (in which case please set out the changes that you would suggest in the next question)**
- d. **An option similar to Option B but with some changes (in which case please set out the changes that you would suggest in the next question)**
- e. **Any of the alternative options considered in this proposal**
- f. **None of the above.**

28. **Option A and option B** as proposed are both worth consideration. However, in relation to personal relationships, it is important for the organisation (the employer) and the individuals concerned, not to require very detailed information in relation to personal relationships. It is within the bounds of a conflict of interest and the occurrence of unfairness, misconduct or harassment, which is the issue. There are many areas of work where personal relationships occur between those in more senior positions and those in junior positions which may appear to be, but are not in practice, a power imbalance. It is important that the OfS does not require universities and colleges to take moral, religious or financial decisions about such relationships. We recognise that the options are intended to address a staff-student relationship, but it is also important that the OfS and institutions do not automatically draw judgemental conclusions until all the facts are established. It is essential that whatever option is considered, it takes into account the Article 8 right to a private life and interference to this right is for a permitted and justifiable reason

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

29. See response to 11(a) above.

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

30. **Yes.** If Proposal F is considered, to ensure consistency and protect students, a provider's single document would need to be open to independent scrutiny in the same way that the single central register is for safeguarding in schools and colleges.

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

31. **No.** If Option B is used, there should be no exemptions other than those identified for existing couples when they join the organisation.

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.

32. **Agree** with a phased approach. There must be a phased approach as some organisations may need work undertaken on their existing policies and practices and also be able to consider capacity issues. Most will need significant staff training.

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.

33. **Yes.** Whilst we understand that the OfS wishes to stamp out cases of misconduct and conflicts of interest on personal relationships in higher education, we believe the proposed timescales are too short to be effective. We suggest a transition period of a year.

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

34. **Yes.** See response to 12(b) above.

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

35. **Yes.** The policies may seem draconian and their implementation condescending, to some people considering working in the higher education sector, who might be recruited from industry. This may create some recruitment issues. There may also be some challenge forthcoming from a Human Rights (Article 8) perspective.

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

36. **Yes.** The proposed list of approaches to implementation are similar and seem to duplicate each other. It is not clear which, if any, the OfS are proposing, or which timescale is favoured.

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

37. **Yes.** The policy objectives could be delivered to new providers in the first instance, so they are aware of what is required from the outset. There would then follow a timescale for existing providers to be reviewed. We do not see how these policies could be delivered in the timescale proposed by the OfS if they are not currently available in the format proposed by the OfS.

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

38. **Yes.** There are negative impacts on students who have SEND and are therefore disabled as they are more likely to be impacted if they have a carer or support worker who is employed by the higher education institution. Equalities impact must ensure these students are not further disadvantaged.

39. We would expect a full equalities impact on the proposed changes to regulation to accompany the OfS' response to this consultation, including the impact on students from disadvantaged socio-economic backgrounds (not currently a protected characteristic).

D. Conclusion

40. As we stated in paragraph 4 above, we are not opposed to the idea of a condition of registration relating to harassment and sexual misconduct, but we are concerned that the information collected on any kind of register should be held on a restricted basis. Organisations will have registered with the ICO and the outcome of this consultation must be implemented by the OfS within the ICO good conduct code.

41. Policies and procedures should be published on HE provider websites but information about individual incidents should not, as a matter of course, be published. Data must only be used for the limited purpose for which it is collected. Inspections of any registers must be by an independent reviewer only. This is to protect staff and students, in general, from unfair treatment.

42. We again raise attention to our point in paragraph 6 above, that questions around trauma-informed responses linked to sexual violence should have been included in the consultation.

43. We hope that this response is of value to your consultation. ASCL is willing to be further consulted and to assist in any way that it can.

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3 May 2023*

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A few stylistic points

- We treat organisations, including ourselves, as singular – so ‘ASCL believes’ rather than ‘ASCL believe’; ‘Ofsted is’ rather than ‘Ofsted are’.
- The first time you use an acronym, spell it out, with the acronym included in brackets afterwards. Subsequently, just use the acronym. So ‘Research from the Education Policy Institute (EPI) tells us that... Furthermore, EPI researchers found that...’.
- Use the definite article when talking about the government and the education department – so ‘The government should...’, ‘The department should...’, ‘The Department for Education should...’. But don’t use it when you abbreviate the Department for Education to DfE – so ‘DfE should...’.
- Consider using shorter sentences. If your sentence spans more than two lines, chances are the reader will start to lose the thread. Consider whether it could be broken up into two or more shorter sentences.
- If you refer to other publications, hyperlink to them from the main text. Don’t worry about also including them as footnotes.
- Fonts and font sizes should be as in the template, i.e. Arial 14 point for the title, 12 point for the headings, 11 point for the main text (including questions and answers).
- Don’t use the ‘add space before/after paragraph’ functionality; just leave a line break.