

INDEPENDENT HIGHER EDUCATION

IHE response to the OfS consultation on a new approach to regulating harassment and sexual misconduct in English higher education

May 2023

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.

Disagree

1. IHE does not agree with the proposal to introduce a new ongoing condition of registration.
2. It is essential that the sector works together with the Office for Students to ensure that incidents of harassment and sexual misconduct do not prevent students from participating in their higher education studies, or benefiting from them. Disproportionate effects of harassment and sexual misconduct on particular student groups necessitates attention to be focused on this area to ensure equality of opportunity, and the safety of all students within their educational environment.
3. However, regulation should only be introduced where it is possible for providers to meet the expectations within the conditions and guidance. At this time, the proposals in the consultation are not achievable.
4. While it is recognised that the independent evaluation of the Statement of Expectations made a recommendation to implement a regulatory approach, not all other accompanying recommendations have filtered through to the current OfS plans. If the OfS proceeds to implement a new ongoing condition of registration, IHE urges the OfS to implement the recommendations made by the independent evaluator to consider ways of fostering more effective partnership working, including clear, accessible and effective collaborative approaches among HE providers. The report recommended supporting the development of formal or informal shared services, such as regional support networks, and in particular regional investigation units or hubs. Here the evaluators made particular note of the benefits for small and specialist providers, and this sentiment was echoed by IHE's members who are among the smallest in the sector.

5. Importantly, there was a recommendation for clarity on good practice and 'what works' guidance. Introduction of regulation without supporting structures, risks actions being taken that are not based on sound evidence. This could result in actions having the opposite impact intended and make it more difficult for students to access the reporting structures and support they require.
6. This regulation is proposed as part of an ongoing sector dialogue that has been predominantly restricted to large universities and few others from the formerly HEFCE-funded providers who comprise less than half of providers on the OfS register. The catalyst funding to take actions in this area, which OfS notes have been too slow in coming, was provided to HEFCE-funded providers. These programmes were not accessible to IHE members or many outside of large universities. The challenge for IHE members is that now a significant regulatory burden is proposed for an area of work they have not been involved in, designed on the basis of available evidence which has come from much larger and better resourced providers, and is being undertaken on the basis that they have not taken action in proposals that they were not able to influence, nor invited to sign-up to. The recommendations of the independent evaluator are even more important for the majority of providers on the register whose operating models are not reflected in the regulatory proposals and for whom there is little to know relevant best practice or collaborative initiatives to access to support the implementation of new regulatory requirements. Regulation may be required in the future, but IHE believes that the other recommendations from the independent evaluator must take precedence.
7. IHE also disagrees with the proposed timelines for implementation of the regulation. There is insufficient acknowledgement in the proposed timelines of the complexity and breadth of procedural review and change which will need to be undertaken. It must be acknowledged that the sector will all be competing for the same expert resource, whether through third party services or in-house recruitment. Time will be needed to expand the capacity of the sector to deliver the requirements of the proposals; this is not within the gift of providers to solve within a narrow timeframe. As recent IHE research has revealed, independent providers must often turn to third party services to deliver activities which can meet the high standards expected from both students and regulators. If these services are already overburdened it will simply not be possible for many providers to comply with the regulation.
8. The proposals may also mandate specific changes to both staff and student contacts, as well as changes to policies and processes. These must be managed appropriately to avoid creating a wholly different set of risks for students and to ensure both student and staff engagement in the process.

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

9. Structures of supportive initiatives such as those provided through the catalyst funding for improving practice should continue. IHE members, and the majority of providers on the OfS register, were not able to access the initial round of funded projects, due to the timing of initiatives pre-dating access to such funding for independent providers. The consultation proposals require the same approach regardless of size, but it should not be supposed that the only benefit of collaboration is to circumnavigate logistical issues of size. In small staff teams, among small student bodies, there are logistical difficulties which can be difficult to address through procedure design alone. The option to collaborate between providers gives greater scope to create reporting structures where students feel comfortable making disclosures, and have assurance that investigations are handled in confidence. Collaboration is resource intensive, requiring capital outlay, followed by investment of human resource in the ongoing projects. To most effectively enable issues of harassment and sexual misconduct to be addressed in all parts of the

HE sector, the OfS and the Department for Education must invest in the systems that will underpin reporting and investigation, rather than leaving the burden of cost and resourcing to those providers such as SMEs who most need to establish collaborative options. Catalyst funding for this should be made available, particularly for those who have not had the opportunity to access funding for these purposes before.

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.

Disagree

10. The definitions used within the Equality Act are standard across the sector and well understood. We would support the use of these definitions as they are intended for use by public bodies such as education providers, and allow providers to make judgements on what would be reasonable for a lay-person or civil organisation to undertake.
11. The Protection from Harassment Act is not widely used or understood in comparison. The guidance for this definition and the Act that created it are for Crown Prosecution Services and police forces. Most IHE members have policies that broadly define harassment using existing sector guidance. Introduction of a legal definition, requiring staff to make assessments on criminal or judicial standards of proof, is a significant shift in regulatory burden and will deter staff from making judgements as part of a disciplinary panel. The judgement of investigation panels would be open to question by both lawyers on behalf of students, and within employment tribunals in response to the suggested termination of employment or service proposed in E6.9.b.ii. IHE members do not have the legal resources or competencies to investigate what are potentially criminal offences, nor would it be appropriate for them to do so. IHE would recommend that definitions are used which do not place institutions in situations where they have to make judicial judgements; The OfS should only use definitions which place the burden of regulation at what is reasonable for a higher education provider to undertake.

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

12. The OfS should consider encouraging the use of behaviour standards within staff contracts as an alternative method of defining expectations without relying on judicial standards of proof. Using the definitions in the Equality Act as a minimum standard, and allowing providers to establish a reasonable definition which fits their context, providers could be expected to have such behaviour standards as part of a regulatory condition. This would complement the use of setting behavioural standards for students within student contracts. IHE members noted that this is more closely aligned to their current practice with both staff and students, where expectations are clearly defined at the outset of contracts and processes are in place to make judgements which are appropriate to the provider and the staff member or student.
13. This model could be measured by a self-assessment document at registration and the implementation of the regulatory condition in the same way that OfS currently assesses governance and consumer protection. Providers would have to demonstrate the external sources they have used to establish their definitions and standards of behaviour. These could then be updated to align with the development of sector best practice in this area as relevant to the size, scale and type of provider.

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.

Disagree

14. As stated above in response to Question 2a, the definitions within the Equality Act and application of them within the higher education setting are well established and it is appropriate to use these still.
15. However, as with 2a above, use of the Sexual Offences Act 2003 would place providers and their staff in a position of needing to make judgements on criminality, IHE would recommend that definitions are used which do not place institutions in situations where they have to make judicial judgements; if definitions are used as guidance it should be clear OfS do not expect institutions to make judgements at the threshold of criminality. This is even more relevant for the Sexual Offences Act as it has the clear mandate to define criminal offences for application by police forces and the judiciary and has no civil application. Investigations which would meet the standard of proof in these cases would either interfere or seek to overturn those of the police or judiciary, for whom the act intended to be the sole investigators of these crimes.

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

16. As suggested in 2b the use of clear minimum standards for behaviour is common. In this particular case IHE members felt strongly that there were already existing legislative requirements for providers which required staff to meet clear minimum behaviour standards should there be a criminal judgement, made by the appropriate authority, for rape and assault as defined by the Sexual Offences Act 2003.
17. IHE would encourage OfS to use a self-assessment model to determine if providers were meeting their duties under the equality act and if they had addressed the circumstance where a staff member was being investigated, or convicted of rape or sexual assault by the appropriate authorities under the Sexual Offences Act 2003. This could include how appropriate definitions were being used with both staff and student contracts, codes of behaviours or charters.

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.

Disagree

19. IHE disagrees that all relevant policies and procedures should be contained within the single document proposed, although we more broadly agree that it is useful to have a set of minimum requirements for documentation, which should be published for transparency to students, staff, and the general public.
20. IHE understand that the OfS may find such a comprehensive document to a useful tool to carry out regulatory monitoring. The need for monitoring however should be considered alongside usability and accessibility for students themselves. It is not clear that such a document would improve the student experience of reporting or addressing incidents of harassment and sexual misconduct.
21. There are certain groups of students who will be better served by documentation which is less lengthily than the proposal for a single document, such as those from neurodiverse backgrounds, or those from different cultural backgrounds. Students who are in crisis will also benefit from brevity of the information they require for reporting and to seek support.

Providers should have the flexibility to work with these student groups to define the best way to provide this information, and this should be established through a sector-wide sharing of best practice in this area. It is not clear that the model presented has been evaluated for accessibility.

22. Some IHE members have voiced concerns that the single document will cause direct conflict between the different requirements for their broad education provision which can include FE, apprenticeships, short courses, and even secondary school provision. Members also have students studying under different academic partnerships, which may require different policies to be applied to different students. This is particularly acute where some students study under a subcontract and do so alongside students under validation arrangement. Single documents in these circumstances would be extremely challenging for students to follow, as support and policies can differ based on the arrangements with the awarding provider. In some cases teaching providers could do little outside of signposting, which the proposals make clear would be unacceptable.

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

23. A self-assessment document, covering the key areas which proposals seek to regulate, comprehensively drawn together as an overview with links to the relevant areas of policy and practice, could still be used to monitor compliance. It would also give greater flexibility for providers where different types of education happen alongside regulated higher education and could have conflicting regulatory requirements, such as FE, apprenticeships or secondary provision. This could be combined with a requirement for publication of core documents and information in a similar way to the OfS requirement for access and participation statements or student protection plans.
24. This would be more in keeping with other areas of OfS requirements such as CMA and governance, achieving transparency and accessibility.

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.

Agree

25. If a new condition of registration is introduced, minimum requirements for policies and processes will give clarity to providers ahead of implementing the new condition, as well as to students on what they should expect of providers..
26. However, as outlined above, IHE does not advocate the approach of containing all of the information in a single document. Instead, we would encourage OfS to identify the key information they wish to see and allow providers to publish summaries with signposting, to support individual student journeys. These can then be developed with students to ensure the information provided can be tailored to the needs of the student. It also allows providers to vary information relevant to specific students, creating signposting when the options for these students might diverge from their peers due to their age, circumstances, level of study or awarding partner. It is important for OfS guidance to be clear what they expect where students might be studying at a single provider but subject to different policies either due to legislated or contractual conditions.
27. Regulation could be enabled through a self-assessment tool, which providers will be able to use to assess how they are meeting the requirements in a similar way to current OfS regulatory processes around CMA or governance assessments. With minimum requirements clearly set students would be informed on what they should expect and be able to raise concerns where they feel information or processes are not clear or missing.

28. The OfS draw from shared best practice in the manner recommended by the independent evaluation of the Statement of Expectations, to provide guidance on what would meet the expected threshold for the minimum requirements. IHE is not confident there is sufficient best practice available for the wide range of providers on the OfS regulators, to establish these processes at this point in time. IHE would welcome the opportunity to work more closely with OfS to support the creation of a resource focusing on not only smaller provision, but on provision delivered in partnerships, an area where we have already begun work with our members.
29. We recommend that some components of the stated minimum content requirements are reviewed before the condition is re-published as they are either unclear or may not be appropriate in their current wording for all providers:
- The use of the word “taught” in paragraph 42, point d will be confusing to students. This could, for example, be exchanged for inducted, to draw a distinction with academic course content. It should be clear to students that this content will not be part of their assessed academic learning.
 - As part of the proposal for minimum content, OfS has outlined the need for providers to take significant and credible steps to reduce the likelihood of incidents occurring. While in paragraph 26 OfS recognise that this will depend on the context of the individual provider, in the a non-exhaustive list of credible steps in Appendix A, paragraph 16, suggested. This is written through a lens of larger providers, with little recognition for smaller providers or different contexts. IHE members welcome non-exhaustive lists and examples however IHE would encourage the OfS to create supplementary items which would be suitable for small setting providers, to ensure a level of comparability for students and applicants wishing to compare information across providers. For example
 - (1) IHE supports the expectation that providers would seek to engage students in development of policies and procedures in this area however this subject is sensitive and requires careful consideration and safeguarding built into any conversation with students. Many smaller providers do not have the breadth of student representatives to support conversations across different protected characteristics. We would welcome examples where students and providers sought external experts and third party organisations with experience in these areas to develop safe and supportive engagement structures for this topic or to provide feedback on based on their expertise for consideration by students. OfS would then need to recognise in the implementation timeline that it may take longer to engage students than in a provider where this type of resource exists internally or where students with experience of these issues are already engaged.
 - (2) The notion of using data to monitor activity or publishing data is also challenging in smaller providers, without identifying the individuals involved in particular incidents. In smaller providers the knowledge that data is being collected and monitored is likely to deter students from reporting as they will be aware of the size of the data and how easily a student could be identified. Data in smaller providers is unlikely to effectively inform action, although there may be some cases where it points to places for further investigation with more qualitative methods.
 - (3) The students who will be accessing published information about reported incidents must be reassured that a lack of published information for those with small cohorts is valid. OfS should take care with statements on the collection and publication of data, recognising that this could cause confusion at best, and be a deterrent to reporting at worst amongst students in smaller providers.
 - (4) We note that OfS intends to apply these principles to both international students studying in the UK and those studying abroad under transnational education

arrangements. We encourage more evaluation of this proposal for these groups as publication could lead to unintended consequences. The collection and publication of sensitive data of this nature will be interpreted differently by students from different cultural and national backgrounds. In some countries the collection of this data could pose a serious risk to students, especially where there are discriminatory laws which carry serious penalties related to sexual conduct. In these cases data collected may have less protection that we afford it here in the UK.

- (5) We would welcome greater clarity around the interpretation of the words "evidence-based evaluation" in the guidance for the condition. As the OfS is aware, within smaller cohorts the ability to gain statistically significant evidence becomes increasingly challenging. In sensitive areas such as harassment and sexual misconduct the protection of data provided by students is even more critical. Providers have felt uncomfortable providing data which they feel could identify students in other OfS contexts, but have felt forced to do so to meet regulatory requirements designed for much larger data sets.
- (6) IHE members feel strongly that the effectiveness of their activities to support students across a range of issues cannot be judged on the number of individuals participating in an activity or process as statistically this data is largely unreliable due to small numbers. Data on reporting is unlikely to be publishable. If, however, the expectation is that evidence and evaluation can take place via contextually appropriate methods such as training feedback or qualitative methods, rather than for example the current preference of the OfS to require evaluation based on Theory of Change models, then that should be made clear within the guidance. It is essential that there are appropriate examples for how smaller providers can evaluate their activity credibly as the consequences of applying processes which are designed for larger data or populations could be serious given the subject matter.

30. While we recognise that prevalence surveys are not included in this consultation they are nevertheless mentioned and we feel the need to address them in the context of data protection. We strongly encourage OfS to seek external guidance and consult with smaller providers on the collection and transfer of prevalence data in small data sets. While collectively it can be useful information, given the subject nature the collection of these data in small providers can act as a deterrent to reporting.

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

31. IHE strongly encourages OfS to implement ' recommendations from the independent evaluator for clarity on good practice and 'what works' guidance even if this delays the timeline. We have significant concerns that there is not sufficient evidence to support the safe and successful implementation of the minimum content requirements. This would be the most likely way to give effective, credible steps to all providers, not simply those who have already participated in national activity in this area.

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.

Disagree

32. Whilst including minimum content requirements is useful for guidance, the independent evaluation of the Statement of Expectations made it clear that the sector is some distance from many expectations. Implementation of a strict timeline will not address

the fundamental need for enabling recommendations for change made within the report. The sector does not yet have the knowledge or tools to meet the range of requirements listed within the proposed minimum content requirements, and the information which is available is disproportionately weighted to larger providers.

33. IHE supports proposals for clear systems on reporting, although we do not believe this can be achieved without collaboration for many providers. Further thought also needs to be given to how this operates in the case of academic partnerships. Paragraph 22a of the guidance states that clear information should be published about how and where a report can be made. Section 22e states that any actual or perceived barriers to reporting should be removed. However, paragraph 5 notes that in the cases of academic partnerships this could lead to, 'more than one registered provider being responsible for compliance with this condition in relation to the same students.' This leads to an inherent conflict with the principle of clarity, with the added concern that confusion in itself can be a barrier to reporting. The intention may be that choice can help students by being an enabler for reporting. In practice, where two (or more) partners are involved in handling complaints of any nature there must be clarity of process otherwise investigations can be delayed, and there may be a lack of outcome. It is in the best interest of students for the route of any complaint to be stipulated in an agreed policy by all parties, including students.

The proposals to ensure that students understand what support is available is useful guidance to stakeholders. However, as noted above in response to 4a, including all of this information in one place for students will be lengthy, and could make it difficult for students to find the information they need if they are at a point of crisis searching for specific detail with urgency, or for students from certain backgrounds who may find the format inaccessible. Support may also differ within an institution due to the level or model of study, age of the student and awarding partner for the course they are studying on.

34. For student training, the OfS is urged not to use attendance at such sessions as a measure of effectiveness. Flexibility in mode will allow for providers to reach a broader group of students with different characteristics. For example, in-person sessions are less frequently attended by students with caring responsibilities during induction, where they are not integral to learning outcomes. By creating mandatory synchronous components to the training, this could cause barriers to participation among certain student groups. It would be useful to allow providers to determine as part of their context which mode is appropriate for their student body. This is another area where best practice is lacking and in particular for students with protected characteristics. It would be helpful to support a greater collective understanding of what works in this area.

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

35. A phased timeline should be considered so that the sector has enough time to build up the number of experts needed to deliver the level of training required.
36. Students studying on courses with partnership arrangements should be clear from the outset which provider to approach with any concerns. This would be in line with the guidance on other areas of partnership provision from the Office of the Independent Adjudicator on Delivering learning opportunities with others.
37. It would be useful for providers to be given the option to have a template, containing signposting to further specific details, so that the entire bank of information is more navigable and appropriate to the different types of students studying at a single institution.
38. Training should be available as an option in asynchronous modes if that is appropriate in the context of the provision.

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.

Agree

39. IHE members support the need for clarity and avoiding contradictory provisions. We would welcome the opportunity to discuss where OfS's proposals make this difficult as noted above. We would encourage clear OfS guidance where possible conflict is likely such as the case with academic partnerships.

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

None.

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

Disagree

40. The OfS is asking providers to be regulated on something which is not wholly within their control.
41. It is not sufficient to stipulate that providers must have capacity and resource; there will be geographical areas where recruiting staff in-house will be challenging, or due to scale this will be unfeasible. Some providers will have to depend on external third-party services; others will opt for that for other operational reasons. Either way, the entire sector will suddenly compete for the same services. Those with more financial resource, or those able to offer larger contracts for services due to student/staff numbers, will have the ability to secure services more easily. In the worst-case scenario, there will be no way to prevent profiteering as there is a rush for contracts.
42. Without the opportunity to review 'what works' guidance and establish the best approach within each context, providers will not have the ability to determine how to plan and allocate resources. IHE members also feel that what is adequate resource has not been established for the range of provision covered by the OfS register. We feel that including this as a requirement of condition E6 is counterproductive to the aims of the overall regulation, and would encourage OfS to avoid prescriptive requirements on provider resource in favour of the development of better information on how collaborative resource could be best used.

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

43. The independent evaluation of the Statement of Expectations recommended that:
- the government facilitate development of formal or informal shared services, such as regional support networks, and in particular regional investigation units or hubs. This made particular note of the benefits for small and specialist providers.
 - 'what works' guidance should be established and shared with the sector.
 - This should be actioned by the OfS, particularly as the independent sector has not had the opportunity to participate in the projects established by the catalyst funding.
44. OfS should produce evidence of the inductive cost of resourcing this policy from available evidence, including undertaking an SME impact assessment to ensure the

proposals do not have a serious negative impact on these providers. These are student fees that will be used to resource this regulation, and they must hold the same threshold for value for money as OfS expects on other aspects of a student's experience at a provider.

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.

45. IHE welcomes the recognition that there may be challenges in balancing the duties of free-speech and harassment, especially for providers with limited legal resource in these areas. Our members would welcome more support to meet these obligations through relevant guidance and good practice case studies.
46. Providers already have a responsibility, in line with Equality Act, around free speech to determine what is reasonable, and they apply this in their context of higher education. Introducing an additional regulatory requirement is an unnecessary level of burden and will cause significant challenges for providers. In particular the proposal to add definitions risks further complicating the issues; as with the definitions in Proposal A, providers could find that they are making judgements based on judicial standards of proof.
47. Most IHE members do not currently use definitions aligned with those in the proposal; they also do not report any overt concerns around need for clarity such as that which the OfS is intending to create with this proposal. We encourage OfS to provide as much information as possible ahead of the regulation coming into force to support providers in defining harassment appropriately.

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

48. Providers are already required to comply with free speech duties, in line with the Equality Act, and the OfS should accept that providers can only be expected to evaluate a perceived breach in this area in light of information available at the time. The interplay between harassment and free speech is complex and constantly evolving. IHE members cannot be expected to have legal resource to navigate this ever changing environment.
49. As recommended by the independent evaluation of the Statement of Expectations, clear guidance, including hypothetical case studies, need to be produced to support good practice in this area before any further complexity is added through regulation. This is needed before the Higher Education (Freedom of Speech) Bill comes into force.

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.

Disagree

50. IHE agrees with the principle of ensuring that individuals are not prevented from discussing information about incidents relating to harassment or sexual misconduct. However, the necessity for regulatory action in this area does not appear to be based on evidence drawn from the whole sector.
51. The consultation states that, at the time of writing, 80 providers had signed up to the pledge to not use NDAs in cases of harassment and sexual misconduct. The linked website, <https://www.cantbuymysilence.com/uni-pledge> states that they have 132 target institutions on their list. To base regulation on such a non-representative measure is alarming. The OfS register is 418 providers, almost four times the target list of institutions.

52. When holding discussion with IHE members as part of preparation for response to this consultation, 17 members were asked about the use of NDAs in their organisations. While 2 were unsure of practices in this area, only 1 out of 17 providers responded that they used NDAs, and this was only during investigations to ensure confidentiality of processes. It is questionable, therefore, whether the majority of providers on the OfS register have been approached directly to become signatories of a pledge that is being used as a litmus test for provider behaviour and the basis for regulatory design.
53. We would welcome further engagement with OfS to ensure that expectations as they relate to third parties use of the noted provisions are clear, as through both our survey and member meetings this was raised as a key area of concern. Given the unique nature of many of our providers, their relationships with third parties may be more complex and we wish to ensure this is taken into context when OfS makes judgement on if a provider has taken "reasonable steps" to prevent or restrict the disclosure of information about an allegation.
54. This could include what is reasonable where a provider shares space with a third party organisation, or where the higher education provider is part of a larger organisation where staff may occasionally interact with students but have no teaching responsibilities.
55. In addition, the OfS should consider the conflict between precedent in employment practices, and the proposals outlined. Details of personal staff information which is shared during an investigation must be kept confidential; there must be mechanism to allow for this type of confidentiality to be maintained.

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.

56. Alternative option c: The whole sector has not had equal encouragement to demonstrate their commitment to not using NDAs; regulation should not be introduced based on a misrepresentative sample of the OfS register

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

A. Option A as proposed;

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

57. Within the IHE membership, Option A is the most aligned to common practice. IHE members have expressed some concern with lack of clarity in the definitions of relationships and note that their own practice does not reflect the broad categories presented. There is particular concern that the OfS categories could be defined too broadly. For example 'emotional and romantic intimacy' could require the disclosure of activities that are not relationships and as such the regulation could go beyond reasonable expectations of privacy. It was also noted that 'financial dependence' could include familial relationships such as child/parent, and would need to be clarified to ensure that providers have a clear rationale to require the disclosure of one relationship over another.
58. Some IHE members have existing bans on relationships between staff and students, and should the OfS introduce Option A it would be useful to have guidance on what would be expected of providers with such bans.
59. IHE members have serious concerns with the timeline of proposals. Such restrictions would need to be considered in changes to both staff and student contracts and as such cannot be taken without considerable notice and consultation.

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

None

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

60. The exemption at E6.9 of marriage or civil partnership is an unnecessarily conservative view of relationships, and has the potential to discriminate on the grounds of marriage or civil partnerships. The exemption should be re-evaluated with a view to ensuring there is no discrimination between relationships that carry different legal statuses.

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.

Disagree

61. IHE does not support the proposed timeline for implementation; should a new condition of registration come into effect, there should be a longer, phased timescale.
62. The consultation states that the intention is to allow providers to, 'properly consider, and make the changes they consider necessary to comply with, the new condition.' If the proposals go ahead as stated, there needs to be enough time for providers to consider all their policies, consult with students, establish effective methods for meeting the criteria for taking credible steps in absence of 'what works' guidance, potentially establish collaborative projects, source new staff or external expertise in what will be an incredibly competitive market, work with partners over NDAs and complaints handling; the list is both broad and resource intensive. It is likely that neither staff nor financial resource will be available to undertake all these proposals within the existing timeline.
63. Student representatives in smaller providers do not have access to student unions, so any process of implementation must be timed to allow elections in autumn term, and training to take place, before students are consulted on this complex area. Given the nature of the regulation, providers will need to consider how they support staff to engage students as there are serious safeguarding concerns as well as an overarching need to support the welfare of students discussing an area that many students will find upsetting.
64. Regardless of if OfS chooses their proposals or the recommendations we make in the response above to Question 2a and 3a staff contracts will need to be altered and, additional time will be required to implement these changes.

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.

65. The OfS should consider delaying implementation of regulation in this area until:
 - OfS or government facilitate development of formal or informal shared services, such as regional support networks, and in particular regional investigation units or hubs.
 - 'what works' guidance should be established and shared with the sector.
66. Alternatively, due consideration should be given to the complex nature of the requirements within the proposal and a phased, extended, timeline introduced over at least a 12 month period.
67. We strongly advise against implementing this regulation or students studying in transnational education environments until a specific assessment has been undertaken to ensure student safety.

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.

68. We have made several concerns about the timeline known about however we ask OfS to consider carefully if the resource required to implement these conditions will be available to providers within the timeline proposed. The training requirements alone will require expert advice that is simply not currently available on the scale required. The window will not fit the induction schedules for most providers.

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

69. Creating a requirement for mandatory training for students, including training for potential witnesses to raise awareness of and prevent sexual misconduct, has the potential to create scenarios where victim survivors are required to participate in sessions they will find traumatic. The OfS should seek advice from students, support groups and providers of bystander training about whether labelling such sessions as 'mandatory' is advisable.
70. Proposals for a single document are not flexible enough for those from neurodiverse backgrounds, or those from different cultural backgrounds. The OfS should consider seeking additional guidance from expert groups before progressing this proposal.
71. We remain concerned that this proposal is not suitable for students studying in transnational arrangements and could place students at risk.

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

72. As stated in response to questions 2a and 3a, the definitions used in proposal A could cause lack of clarity for those who need to use them in investigations, requiring judgements beyond reasonable doubt. These should be considered carefully for proportionality of burden.
73. A number of elements surrounding partnerships remain unclear within the current phrasing of the proposals and guidance
- Academic partnerships and reporting – as outlined in response to 6a, the lack of clarity around which academic partner a student should report concerns to, could cause confusion of process. The OfS should require the route of any complaint to be stipulated in a policy, to ensure timeliness of outcomes.
 - Transnational arrangements and intercultural appropriateness – The proposals use British definitions. Paragraph 2 of guidance on condition E6.1 states that proposals apply to all courses including those delivered through international partnerships. The OfS should consider whether it is realistic to implement the proposals in areas where they would be at odds with local cultures, and whether it is realistic to affect the employment practices in such scenarios. It may create antagonistic situations, or put students in a different type of dangerous situation, for example disclosure of LGBT relationships in areas of the world where these are illegal.
 - Third party interactions including where education forms part of a larger corporate entity. The proposals to extend influence to a third party assumes that a third party is a entirely external party, and that the higher education entity has the ability to exert power; it should be recognised that there are a variety of models which include HE as a smaller component of a larger corporate entity. The OfS should clarify expectations over which level the proposals apply; the entire organisation or the HE provision only.

74. Clarity is required for the types of significant, credible steps which could be taken by smaller providers, to complement those for larger providers in Appendix A paragraph 16. The types of evidence available with small cohorts, and limitations on ability to publish data while maintaining privacy, should be acknowledged by the OfS. Alternates should be provided to ensure that smaller providers have options for comparable, consistent, credible steps which will be transparent and accessible for students and applicants.

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?

75. IHE would strongly support the development of a collaborative approach to these policy objectives. Our members expressed concern that the models proposed would place not only undue burden on individual providers, but could lead to inconsistency for students, particularly those learning as part of academic partnerships

76. IHE members with students studying overseas expressed concern that the proposals and timelines could place students in danger and that OfS should undertake further research into the best way to achieve the policy objectives for students studying in countries where there are different and perhaps dangerous laws around relationships and the reporting of harassment and sexual abuse/assault.

77. IHE would support the use of staff and student codes of conduct as the basis for future regulation, rather than the more proscriptive approach of imposing definitions and processes upon providers. This would ensure that providers took a student-centred approach to the policy objective and create a clear basis for future punitive action by the provider.

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

78. As above.