Browne Jacobson

Regulating harassment and sexual misconduct in higher education

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The Office for Students (OfS) - the independent regulator for higher education in England - is proposing a new approach to the regulation of harassment and sexual misconduct affecting students at registered higher education (HE) providers in England.

A consultation was issued on 23 February 2023 setting out the background to the proposals and the changes proposed; this will run until 4 May 2023. Two consultation webinars – one for higher education providers and one for students and their representatives have now been held.

The proposals are intended to deliver increasing protection for students, but their impact would extend beyond the student body and place considerable new obligations on registered HE providers ('providers') and their staff.

The OfS is proposing to impose a new general ongoing condition of registration (E6) on providers in relation to harassment and sexual misconduct, moving from a self-regulated regime to a much more prescriptive approach.

The consultation and associated guidance is lengthy. In this update, we take a look at the key proposals of the condition and what these proposals may mean for providers.

Definition of harassment

The consultation proposes that the definition of harassment "has the meaning given in section 26 of the Equality Act 2010 and section 1 of the Protection from Harassment Act 1997 (in its entirety, and as interpreted by section 7 of the Act)". This is intentionally very widely drafted but this breadth may cause confusion in practice.

What amounts to harassment under the Equality Act 2010 (EA 2010) is very different to what amounts to harassment under the Protection from Harassment Act 1997 (PfHA 1997). For example, under the EA 2010, the conduct must relate to a particular protected characteristic; there is no such requirement under the PfHA 1997. Further, one-off acts are covered by the EA 2010 whereas the PfHA 1997 requires a course of conduct (conduct on at least two occasions). Use of the word "and" in the proposed definition (rather than "or") may therefore cause some inadvertent difficulties as to how these differences apply in practice.

Definition of sexual misconduct

The definition of "sexual misconduct" is similarly widely defined. It is proposed to mean any unwanted or attempted unwanted conduct of a sexual nature which includes (but is not limited to) sexual harassment as defined by section 26(2) of the EA 2010; assault as defined by the Sexual Offences Act 2003 (SOA 2003); and rape as defined by the SOA 2003.

The phrase "but is not limited to" is intentionally included to allow for wider offences to be caught without the need for these to be specified. There is a degree of overlap here with the harassment definition - anything under section 26(2) or 26(3) of the EA 2010 would still fall within the definition of "harassment" – but the phrase "sexual misconduct" has been specifically included given that it is a well understood term within the higher education sector.

Whilst it is understandable that avoiding a prescriptive list (where some conduct may be inadvertently missed) is the preferred approach, this could lead to inconsistent approaches between providers as to what conduct does and does not fall within this term.

For example, including a specific reference to section 26(2) (and not section 26(3)) of the EA 2010 could lead to uncertainty as to whether less favourable treatment because of the rejection of unwanted conduct of a sexual nature is or is not intended to fall within the definition of sexual misconduct. Further, whilst certain offences under the SOA 2003 have been included to make it clear that sexual violence is included, providers – and, in particular their HR and Registry teams who are most likely to be the ones dealing with harassment complaints - may well be less familiar with criminal definitions (including the contentious issue of consent) than they are with the civil provisions of the EA 2010.

A requirement to create and publish new documentation

This proposal would require the creation of one single document which comprehensively sets out the applicable policies and procedures relating to harassment and sexual misconduct. This document would need to be published in a prominent area of the provider's website (rather than being behind a password-protected section of the website), and information would need to be given annually to staff and students on its existence, content and how to access to it.

The proposal also requires certain minimum content to be included such as:

- The steps which could make a significant and credible difference in protecting students from harassment and sexual misconduct
- How reports of incidents of harassment and/or sexual misconduct can be made, and how the information received or obtained will be sensitively handled and used fairly
- How the provider ensures that students are appropriately taught
- The support that will be provided in response to incidents of harassment and/or sexual misconduct
- How staff and others involved with reports will be appropriately trained
- How fair investigations will be undertaken, and fair decisions reached, reflecting established principles of natural justice

The first of the bullet points above aligns with the current employment law proposals to introduce a "positive duty" on employers to take all reasonable steps to prevent sexual harassment of their employees in the course of their employment. However, the OfS proposal would be considerably wider in its application to students, extending to all forms of harassment rather than just sexual harassment as defined in section 26(2) of the EA 2010.

Proposals in respect of support to be offered cover both personal support (such as counselling) and academic support. They apply to alleged victims, alleged perpetrators and witnesses, regardless of whether they wish to make a formal complaint or report the incident.

Mandatory student training requirement

Although training specifically mentions those who will be involved in responding to incidents of harassment and/or sexual misconduct, the consultation makes it clear that mandatory student training would also be required – including "bystander training" to raise awareness of and prevent sexual misconduct. This training would need to include an opportunity for questions to be asked – a short online session is unlikely to be sufficient.

Sufficient capacity and resources

Each registered provider would be required to ensure that they have sufficient capacity and resources to deliver everything required by the new condition. The consultation is not prescriptive about how this is to be achieved and nor does it set any prescribed levels of resource beyond the need for them to be "sufficient". The guidance acknowledges that the capacity required will depend upon the level of prevalence of harassment and/or sexual misconduct in the particular organisation. The consultation envisages that this may introduce new capacity and resource requirements for providers.

Potential tensions between freedom of speech and academic freedom and harassment

The consultation notes that although several of the proposals included are designed to encourage a more robust approach to preventing and tackling harassment, there is a risk that some providers might interpret the proposed requirements too broadly and take action that might restrict free speech. The example included is a provider applying an "overly broad definition of 'harassment'".

As a result, the condition would oblige providers to "place significant weight on the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context". There would also be a rebuttable presumption that the

content of higher education course materials and statements made and views expressed as part of teaching, research or wider discussion about any subject matter that is connected with the content of a higher education course, is unlikely to amount to harassment.

The tensions that are noted here are not new and providers are already grappling with similar issues – including the challenges that can arise between groups with differing viewpoints, where the expression (or manifestation) of those beliefs causes offence to others. What is key is the appropriateness (or otherwise) of the way in which the beliefs are expressed; and providers should be clear on the behavioural standards that are acceptable to allow for discussion and debate whilst avoiding harassment.

Prohibition of non-disclosure agreements in certain circumstances

The use of non-disclosure agreements both within higher education and more widely has been under considerable scrutiny as a result of the #MeToo campaign and there have been various calls to restrict or limit the use of non-disclosure agreements (or confidentiality clauses), particularly in sexual harassment cases.

The proposals set out in this consultation would bar the use of non-disclosure agreements which prevent any person from disclosing information about an allegation of harassment or sexual misconduct affecting one or more students. It would also prevent a provider from relying on or enforcing any historic non-disclosure agreements which cover an allegation of harassment or sexual misconduct that affects one or more students. Lastly, it also requires providers to take all reasonable steps to prevent any other person from entering into (or enforcing) such a contract – for example, where a third party is involved because a student is on a work placement.

Confidentiality and sharing information

These proposals are very wide – albeit that they are focussed entirely on student involvement and so would not, for example, cover allegations of harassment between staff in a higher education establishment. The proposals state that the “intention here is to protect victims of harassment or sexual misconduct who may wish to share information”; however, the current proposals are not limited to disclosures by the (alleged) victim of the harassment or sexual misconduct – they apply to any person.

What then of the (alleged) victim who wishes to raise an issue and have it dealt with appropriately, but who does not want any details shared? Whilst the person accused may have no interest in actively sharing information, the same may not apply to witnesses and these proposals would prevent the provider from imposing any kind of contractual confidentiality obligations in these circumstances.

Whilst the proposed ban on non-disclosure agreements is clearly intended to prevent providers from covering up incidents or gagging their students, some further consideration may be needed as to how this should apply in practice. Ultimately, given the stated intention of these proposals (set out above), protection should also extend to a victim’s right to privacy where this is desired. It is therefore likely that some degree of confidentiality restrictions may be required moving forwards.

Relationships between students and staff

The consultation sets out two potential options here – firstly (OfS’s preferred option), disclosure and registration of any personal relationship between a relevant member of staff and a student or secondly, a complete bar against such relationships.

With the first option, any staff member who has “direct or indirect academic responsibilities” or “other direct professional responsibilities” to a student must disclose any personal relationship (whether physical, emotional or financial) with that student; the provider will need to specify the time period in which disclosures need to be made but this should be not more than three weeks.

The provider must maintain a register of any such personal relationships (including the nature of that relationship) and must manage and address any actual or potential conflict of interest and/or abuse of power. Where a relevant staff member refused to disclose any such personal relationship (note, “refused” not “failed to disclose”), the provider would be expected to terminate the staff member’s contract of employment.

With the second option, similar relationships would be entirely barred (save where the relationship is by way of marriage or civil partnership entered into before the condition came into force), with providers expected to terminate employment where a staff member refused to end the personal relationship.

Is disclosure an effective deterrent?

Whilst the first option is OfS's preferred approach, the consultation makes it clear that it hopes the disclosure obligation would deter staff members from entering into such relationships in the first place. However, this option is fairly onerous on providers – not only are they obliged to take all reasonable steps to manage any conflicts of interest (which more obviously relates to the provider's organisation), they also need to take all reasonable steps to manage and address any actual or potential abuse of power. This separate obligation strays much more into the relationship itself and the personalities of those involved, and could be viewed as effectively asking the provider to judge the morality of that relationship.

Have your say

The consultation remains open until 4 May with the OfS particularly welcoming views from students, staff, academics, leaders at higher education providers and organisations working on prevention and support or otherwise interested in harassment and sexual misconduct.

If you would like to contribute to the consultation, a response can be completed using this online response form.

Key contact

Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

Bettina Rigg

Partner

Bettina.Rigg@brownejacobson.com

+44 (0)330 045 2268

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