

Harassment and sexual misconduct in Higher Education

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In 2020 the Office for Students (OfS), the Independent Regulator for Higher Education in England, launched a consultation setting out a proposed statement of expectations for prevention of harassment and sexual misconduct, and expectations for addressing it when it occurred. The consultation was paused owing to the pandemic but was relaunched in February 2021.

The guidance from the OfS indicated that universities should:

- clearly communicate and embed across the organisation, their approach to preventing and responding to harassment and sexual misconduct;
- set out clear expectations for students, staff and visitors;
- ensure that the provider's approach to harassment and sexual misconduct is adequate and effective and ensure that risks relating to those issues are identified and effectively mitigated;
- engage with students to develop systems and policies to address harassment and sexual misconduct;
- staff and student training should be undertaken to raise awareness;
- policies and processes should be put in place to facilitate reporting and disclosure;
- universities should have a fair, clear and accessible approach to taking action; and
- effective support should be provided for students involved in any investigation.

Notwithstanding this guidance, the BBC reported in May 2021 that women from 15 universities had signed a letter calling for a mandatory policy. They said that allegations of sexual assault were often mishandled by universities and it was not compulsory for them to implement a specific policy to deal with allegations of sexual assault. Indeed, the OfS indicated that meeting the expectations set out in the guidance is not directly connected to enforcement of providers' conditions of registration.

Irrespective of any mandatory provision however, in light of the continued focus on this issue there is clearly scope for negative publicity for any higher education provider that does not handle such allegations properly. In addition, there is a risk of litigation not only in relation

to the alleged offence itself, but also in relation to the handling of the complaint. But perhaps most importantly, dealing with these issues properly is, put simply, the right thing to do.

The application of some general principles when responding to an allegation of harassment or sexual misconduct can assist:

The first point to be clear about is the difference between an internal disciplinary process and a criminal process. The processes are different in terms of their nature and scope and also the potential outcomes, and it is crucial to maintain a clear distinction between them.

The second principle is to ensure that when an allegation is presented, no assumptions are made and that support is provided to both students.

Generally, a student reporting alleged misconduct which may also constitute a criminal offence, should be advised on their options which are generally to:-

1. Make a report to the Police;
2. Take some time to consider their options (but they may wish to attend a sexual assault referral centre to collate forensic evidence whilst making their decision about whether to report to the Police);
3. Not report the matter to the Police but request that the university deal with the matter under its internal disciplinary regulations; or
4. Take no further action.

If the student does report the matter to the Police then generally the criminal investigation will take precedence ahead of any internal disciplinary investigation given the possibility that an internal process could interfere with the criminal investigation.

Notwithstanding any criminal investigation however, the university will need to consider precautionary actions which may include placing conditions on the accused student not to contact the reporting student, excluding the accused student from certain areas, (for example accommodation blocks) or, depending on the severity of the incident could include consideration of suspending the accused student. It is however crucial to ensure that these precautionary measures are not indicative that any conclusion has been drawn in respect of the allegations. Clearly the need for and reasonableness of any precautionary measures will need to be considered on a case by case basis.

Following any criminal investigation, even if the allegations are not upheld, the university will still wish to consider whether there has been any internal breach of discipline which requires investigation. Alternatively, the reporting student may only wish the university to undertake a disciplinary investigation. Clearly the standard of proof in respect of an internal process is the 'balance of probabilities' (i.e. 51% or more) as opposed to the criminal standard of proof which is 'beyond all reasonable doubt'. It is however important to ensure that criminal terminology is not used when considering an internal disciplinary process. For example the university cannot make a finding about whether a rape occurred as only a Criminal Court can make that finding, however the university can consider whether there has been sexual misconduct.

The investigation should of course be carried out by somebody independent and appropriately trained, and the investigation should determine firstly whether the alleged facts and matters occurred, on the balance of probabilities; whether those facts and matters amounted to a breach of discipline in accordance with the Student Code of Conduct and if so, the level of seriousness of the breach of discipline and what sanction should be imposed.

Inevitably, the range of sanctions available to a university carrying out an internal investigation are limited, and it is sensible to manage the expectations of the reporting student so that they are prepared for the types of findings that may be made, which will clearly be different to those which can be imposed via the criminal process.

Any investigation, whether criminal or internal, will be difficult for both parties involved and so sufficient welfare checks and support should be put in place and reviewed carefully throughout the process to ensure that they are sufficient and fair. Perhaps less obviously, consideration should also be given to what support and/or measures should be put in place after the outcome of the investigation. Again, this will need consideration on a case by case basis.

These are difficult issues to deal with, and particularly so having regard to the impact of social media. Online harassment and abuse is a growing issue and in addition, social media posts can also interfere with investigations. Advice and guidance to students around social media interactions also need to be carefully handled as there is clearly a fine line between ensuring the fairness of an investigation to both parties and what could be misconstrued as restrictions on freedom of speech.

There is potential for a challenge around the way in which the university have handled an investigation which in itself could cause distress to either party, quite separate to any injury or distress caused by the incident itself. This can of course give rise to a civil claim for damages. In addition, be mindful that subject access requests for disclosure of information and documentation gathered in the investigation process may be made. Alternatively, other organisations involved with the university may wish to scrutinise the process for handling these issues. In light of these potential 'knock-on' consequences, it is imperative to document the investigations that are being undertaken, the information gathered and properly record any decisions made and the rationale behind them in order to be equipped to deal with any subsequent challenge that could arise.

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