

Discrimination in the Complaints Process: Introducing the *Sector Guidance to Address Staff Sexual Misconduct in UK Higher Education*

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Abstract

This article introduces our *Sector Guidance to Address Staff Sexual Misconduct in UK Higher Education*. The problem that the guidance seeks to address is that existing student complaints and staff disciplinary procedures relating to student complaints in this area fail to offer similar protections and privileges to the student complainant and the responding staff member and, as a result, students are often excluded from the process purporting to resolve their complaint. We outline the changes that would need to be made to staff disciplinary processes to follow a process more akin to civil justice than criminal justice, thus ensuring that the process accords equal rights to complainants and respondents. The article highlights points of discussion that came up in the consultation process to devise the guidance, including sharing outcomes with complainants, recording data on disclosures as well as formal reports, and proactive investigations in the absence of formal reports.

Keywords: sexual misconduct, staff, complaints, gender equality

Introduction: sexual misconduct is an equity issue

Sexual misconduct of students by academic staff in higher education (HE) has gained increasing attention in the media and higher education sector in recent years. There is evidence that this is a significant issue in the UK. A national survey found that 41% of 1839 respondents had experienced at least one instance of sexualised behaviour from HE staff, predominantly academic staff (National Union of Students, 2018). Outside the UK, larger-scale studies give an indication of prevalence, such as a major US study of 181,752 students. Out of the 41.8 percent of students who indicated they had been sexually harassed, among graduate students 24% percent of incidents were perpetrated by a faculty member or instructor, compared to 5.5% for undergraduate women (Cantor et al., 2019, xiii). Female, queer, trans, and non-binary students, and students of colour are more at risk of experiencing sexual misconduct from staff, and experience greater harms when it occurs (Cantor et al., 2019; National Union of Students, 2018). Impacts include inability to access teaching and loss of confidence, and there can also be severe health, financial and emotional impacts (Bull and Rye, 2018). All of these impacts can lead to those who experience sexual misconduct being unable to stay in their institution or progress into their profession.

Perhaps the most intractable problem to address in higher education institution (HEI) responses to staff sexual misconduct is the low reporting rate (National Union of Students, 2018; National Academies, 2018: 79). Despite these concerns, and despite the high levels of media attention on issues surrounding complaints and safeguarding processes (see for example Lee and West, 2019), there is very little research looking at students' experiences of reporting sexual misconduct to their HEI. However, students are fearful or reluctant to make complaints for a variety of reasons: it could negatively affect their studies or career; it could lead to retaliation from the perpetrator and their peers or colleagues; they fear not being believed; or they do not trust the institution to deal adequately with their report, among other reasons (Bull and Rye, 2018; National Academies of Sciences, 2018: 81-2).

Indeed, students' perceptions of institutional responses were that institutions were 'making it up as they go along' (2018, 27), i.e. there was no clear process to follow, leading to inadequate responses and adverse consequences for the complainants. One of the key actions to enable students to report is to make reporting and complaints process more accessible for students. It is to this end that we have written the *Sector Guidance to Address Staff Sexual Misconduct in UK Higher Education* (The 1752 Group & McAllister Olivarius, 2020), as one facet of a whole-institution response to sexual violence.

The authors' respective previous work in this area led to our collaboration on this guidance. Georgina Calvert-Lee, head of UK practice at discrimination law firm McAllister Olivarius, has taken legal action on behalf of students against higher education institutions under the Equality Act 2010 in relation to their handling of sexual violence and harassment complaints. Anna Bull and Tiffany Page are co-founders of The 1752 Group, a research and campaign organisation addressing staff sexual misconduct in higher education (Page et al., 2019). Our respective work provided a common understanding of the problems with complaints processes in this area: that the process itself can be discriminatory, compounding the discrimination that has already occurred.

Definition of sexual misconduct

We use the term sexual misconduct as an umbrella term to describe sexualised abuses of power by academic, professional, contracted, and temporary staff in their relations with students or staff in higher education that adversely affect students' or staff's ability to participate in learning, teaching or professional environments. The term 'sexual harassment' captures only some of the possible abuses of power that may occur within an HEI, and we felt that a wider range of sexually harmful behaviours need to be encompassed in the definition, drawing on Bull and Rye (2018), as outlined below (see also Carter and Jeffs, 1995; Lee, 1998; Whitley and Page, 2015). Therefore, sexual misconduct includes sexual and gender-based harassment (including promised resources in exchange for sexual access, coercion, sexual invitations, comments and demands either in person or electronically, and non-verbal communication such as invading personal space, inappropriate gestures, or sending sexualised images); sexual assault or rape; and boundary-blurring behaviours that transgress professional boundaries, including grooming (see Bull and Page, under review). Sexual misconduct may encompass such behaviours being directed towards other members of the university community if they inhibit a student's ability to engage in learning and teaching relationships. These behaviours may occur alongside bullying or exclusion from academic and social spaces.

We use the term sexual misconduct both to draw on this wider definition of possible harms, but also to avoid statutory terminology and underline the fact that higher education disciplinary processes are not seeking to supplant the judicial process but rather to uphold the institution's code of conduct, comply with its (contractual and other) legal obligations and to promote student welfare and safety (Pinsent Masons, Universities UK, 2016 ; UN Women: 21, 2018a; UN Women: 7, 2018b). This use of language is in no way intended to minimise the severity of some of the behaviour encompassed in the definition.

Overview of the key principles in the guidance

The problem that the guidance seeks to address is that existing student complaints and staff disciplinary procedures fail to offer similar protections and privileges to the student complainant and the responding staff member and, as a result, students are often excluded from the process purporting to resolve their complaint. We suggest that this exclusion arises because current disciplinary processes are too often modelled on the criminal justice system. We outline the changes that would need to be made to staff disciplinary processes to follow a process more akin to civil justice, thus ensuring that the process accords equal rights to complainants and respondents.

While it is beyond the scope of this article to outline all the reasons this discriminatory process exists, we focus here on just one of them: the inconsistencies between student complaints processes and staff disciplinary processes. While student complaints processes follow (in England) guidance from the Office of the Independent Adjudicator for Higher Education (OIA), staff disciplinary processes follow ACAS guidance. The OIA has one paragraph on non-academic student complaints towards staff members, which states that:

When a student makes a complaint about a staff member that complaint should normally be referred to the provider's staff disciplinary process. The outcome of the process will normally be confidential to the staff member, although the staff member may consent to information being shared with the student who made the complaint. Nevertheless, the student making the complaint should be given some resolution to their complaint. If the staff member's behaviour is found to have had an adverse impact on the student who made the complaint then the provider should offer them a remedy for that impact (OIA, 2018, 24).

This statement gives very little detail about the student's rights within such a process. It relegates the student complainant to the status of 'witness' to the institution's disciplinary process against the member of staff. This means that students incur various disadvantages during the process, such as no right of access to evidence; no right to call witnesses or demand that any be interviewed; no right to know the full outcome; and no right to oppose their complaint being dismissed or resolved by settlement between the HEI and the responding staff member, among others. This problem also exists in student-student disciplinary cases but it tends to be exaggerated within staff-student cases due to lack of dialogue between HR and student services, as well as due to the differences in status and power between staff and students.

Nor does ACAS guidance offer any detail as to the rights of complainants who are not employees. As our research in Bull and Rye (2018, 19-20) shows, the lack of rights during the process, as well as the lack of closure and justice through outcomes not being shared with complainants, was one of the factors that meant that complaints processes were extremely distressing to interviewees. In some cases this meant that interviewees abandoned the complaints process due to these issues. As we note in the guidance:

In a society where vastly more sexual misconduct complaints are made by women against men than vice versa, a process for investigating sexual misconduct complaints which gives those responding more rights than those complaining might well be thought to place women as a group at a particular disadvantage and so to

amount to indirect discrimination, in breach of the Equality Act 2010. HEIs also owe a public sector equality duty which requires them to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between people from protected groups and those that are not.¹ It is hard to see how an HEI can be said to have paid due regard to these principles if it fails to provide a fair process for handling staff sexual misconduct complaints. (The 1752 Group and McAllister Olivarius, 2020a, 4-5; see also UN Women, 2018b: 8)

Therefore, we have suggested that HEIs modify their existing disciplinary processes to provide similar protections and privileges in the process to the complainant and the responding staff member. The two key principles that the guidance puts forward are:

1. Where staff disciplinary procedures are used to address student complaints, HEIs must modify these to ensure a fair process for student complainants
2. Student complainants and responding staff members must be accorded equal rights in the complaints process

What this means in practice is that the complaints process must provide both the student complainant and responding staff member equal access to evidence (including relevant sections of the investigation report), equal opportunity to put their case (including submission of evidence and attendance in person or via video link at any formal hearings), equal opportunity to challenge the evidence of the other, and to request an appeal or review, which should have full autonomy to strengthen or overturn previous findings. This is what OIA requires of HEIs handling student complaints of student sexual misconduct (OIA 2018: 24) and there is no legitimate reason for HEIs to treat complaints of staff sexual misconduct differently, especially as they are more often liable for the unlawful actions of their staff. In addition, if the HEI decides to resolve the complaint by way of a settlement, this must be agreed by all parties rather than being solely between the institution and the staff member, as currently seems to happen. We urge that no settlement be used to resolve a complaint without the student complainant approving this mechanism, after receiving independent legal advice, and being made a party to the agreement, with rights of enforcement.

Points for further discussion

We produced a consultation edition of this guidance in September 2018. This coincided with the publication of the report *Silencing Students* (Bull and Rye, 2018), which outlined some of the difficulties students and staff faced in making complaints of staff sexual misconduct. Points we have endeavoured to address in this guidance from the consultation include showing awareness of the variety of sizes and types of HEIs; being clear on how our guidance fits in with existing guidance in the area, and where it differs explaining why; and showing sensitivity to the rights of the responding party. It became clear from the consultation that more dialogue is needed between complainants and sector organisations, as some of the points that complainants repeatedly raised in our research and advocacy work were new or unclear to sector bodies. One such point was the need for outcomes, including where disciplinary sanctions were taken against staff members, to be shared with complainants. Evidence from Bull and Rye (2018) shows that if complainants are unable to speak publicly about outcomes, their reputation and career risk being damaged by slander

¹ See Equality Act 2010, section 149.

from the responding staff member. Such retaliation can amount to victimisation contrary to the Equality Act. In relation to disciplinary actions, in sexual misconduct cases the disciplinary sanctions applied may be relevant to the remedy for the complainant. Furthermore, the complainant needs to be informed of the ways in which the environment will be adapted and changed to uphold the health and safety policy of the HEI, both for themselves and for the wider HEI community, and this may involve being informed of disciplinary sanctions taken against the responding staff member. Finally, this point is part of a wider conversation about the ways in which victim-survivors of sexual misconduct conceptualise justice, as McGlynn and Westmarland describe (2019). To establish trust in institutions to encourage reporting, the reasons why students report and what they are hoping for from the reporting process needs to be addressed. As Bull has shown (forthcoming), this is primarily being able to protect themselves and others.

Sharing of outcomes has also recently been recommended by the Equality and Human Rights Commission's (EHRC) Technical Guidance on sexual harassment and harassment at work, which notes that:

To be effective in encouraging those with complaints to come forward, the outcome to a formal complaint of harassment should be as transparent as possible. This means that wherever appropriate and possible, if a complaint is upheld then the complainant should be told what action has been taken to address this including action taken to address the specific complaint and any measures taken to prevent a similar event happening again in the future. If the complainant is not told what action has been taken, this may leave them feeling that their complaint has not been taken seriously or addressed adequately (2020, 5.66; see also UN Women, 2018b: 3)

The EHRC argues that employers 'should not assume that disclosure of the harasser's personal data will amount to a breach of the GDPR' and suggest that where possible, employers should review 'contracts, policies, procedures and privacy notices to ensure that they inform workers when the outcome of complaints and disciplinary proceedings may be disclosed' (2020, 5.68).

While the EHRC guidance is not statutory, it is intended to form the basis of a forthcoming statutory Code of Practice. The UK government's Equalities Office' Consultation on Sexual Harassment in the Workplace stated that this will be laid in Parliament following the outcome of the consultation (2019, 9). It makes sense, therefore, for HEIs to start addressing these changes before they become statutory. Not only this, but Universities UK plan to publish guidance on staff sexual misconduct during 2020, and we hope that they will address some of the issues raised in both the EHRC guidance and our sector guidance.

There are some points where our recommendations go beyond the detail given within existing guidance. For example, while Universities UK recommends that HEIs implement 'an effective, centralised process for recording incidents, collecting data and regularly reviewing this data' (2016, 39), we expand on what data should be collected. For example, if a student decides to withdraw their complaint or does not want to make a formal complaint after making a disclosure, we recommend their disclosure should still be kept on file and recorded in a central register². This is in order to examine the difference between numbers

² See also Humphreys and Towl (2020: 128-9) in relation to student-student sexual violence. For example, Durham University require staff who receive disclosures to record these for data gathering purposes, retaining the name of the responding party for three months (see reporting form at

of disclosures and formal complaints, to see whether there is a significant gap. In addition, for safeguarding purposes, if several disclosures are received about the same member of staff, the HEI may have a duty to take proactive steps to address this (see below). We argue that retaining names of staff members against whom reports or disclosures are made is in keeping with GDPR regulations due to HEI's duty to protect students and staff from a reasonably foreseeable risk of sexual misconduct and to comply with their duties under the Equality Act (The 1752 Group and McAllister Olivarius, 2020a, 13). Along with the EHRC (2019, 16) we call for clarification from the Information Commissioner's Office on this point. These recommendations also apply to third party and anonymous reports, which we also suggest can be acted on and centrally recorded. An example of this has been implemented by UCL through a process of 'environmental investigations' (Culture Shift, 2019).

There are various implications of this guidance for university administrators. First, when a concern is raised (whether formally or informally) about staff sexual misconduct, one of the major shifts from current practice that we recommend is that proactive steps should be taken by the institution towards safeguarding the whole staff and student body (The 1752 Group and McAllister Olivarius, 2020b). Second, where formal complaints of staff sexual misconduct are brought by students, student services staff and/or sexual violence liaison officers will need to be much more closely involved in the HR staff disciplinary process to ensure that students are accorded parity throughout. Thirdly, some policies and procedures may need to be revisited (ahead of the expected statutory Code of Practice and UUK guidance, as noted above) such as removing time limits on complaints about current members of staff. More generally, throughout the process, the student complainant needs to be consulted about steps that affect them within the investigation, in line with the principle of giving victim-survivors choice and control where possible.

Implementation and future work in this area

While some institutions have made good progress in implementing changes to complaints policies and processes, we understand that these recommendations may be daunting, particularly for smaller institutions without specialist or dedicated staff. For practitioners who are unsure of where to start in implementing this guidance, we suggest setting up a dialogue between HR and student services on the points raised in the guidance to find out where, if at all, difficulties may arise in implementing them. We would also strongly urge HEIs to include a member of staff or external partner with expertise on sexual and/or domestic violence in such discussions, as well as student representation.

As noted above, this guidance should be implemented as part of a larger programme of prevention and response work to address sexual and domestic abuse on campus (see for example Humphreys and Towl (2020) in relation to student-student sexual violence). However, before rolling out awareness-raising campaigns, it is crucial to ensure that the institution is prepared to receive reports through auditing and where necessary amending existing processes, in line with this guidance. Of course, clearly there are issues that need to be tackled at sector rather than institution level, such as staff members moving between institutions during investigations, and a coordinated sector-wide approach is also needed.

<https://www.dur.ac.uk/sexualviolence/report/> 'Recording form for staff who receive a disclosure' [accessed 25 August 2020]).

Finally, it is important to note that the issues that we have highlighted in the non-congruence of student complaints processes and staff disciplinary processes in higher education are also applicable to other discrimination complaints. The Equality and Human Rights Commission's report into racial harassment in higher education (2019) raises this as an area requiring urgent action. As we do not have this specific expertise we have not framed the guidance to be more widely applicable. Nevertheless, we would like to open up a discussion as to the possibility of applying this guidance to discrimination complaints in higher education, and we hope it will stimulate conversations and further research on whether complaints processes that aim to address discrimination may themselves be discriminatory.

Acknowledgements

We would like to thank Emma Chapman and Antonia Bevan, current and recent members of The 1752 Group, for their contribution to formulating the Sector Guidance. We would also like to acknowledge the courage and perseverance of all those who have shared their experiences of navigating HE complaints processes with us.

Declaration of interest statement

This research was not supported by any external funding.

Anna Bull and Tiffany Page are co-directors of The 1752 Group. They receive no remuneration, financial or in kind, for this work.

Georgina Calvert-Lee is Head of UK Practice at law firm McAllister Olivarius, where she represents students and staff members in legal claims against their higher education institutions, including claims relating to the mishandling of a complaint of sexual misconduct in ways described in the article.

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