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# SECTOR GUIDANCE TO ADDRESS STAFF SEXUAL MISCONDUCT IN UK HIGHER EDUCATION

Recommendations for reporting,  
investigation and decision-making  
procedures relating to student  
complaints of staff sexual misconduct

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**For all the survivors and everyone  
working on making  
higher education more equitable,  
we hope this is helpful.**

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## Executive Summary

UK higher education currently lacks specific guidance on procedures to address student complaints about staff sexual misconduct. This guidance aims to fill that void, drawing on evidence and research from the sector, both in the UK and internationally. It is intended to help higher education institutions (HEIs) resolve the tension arising from having distinct procedures for handling student complaints and staff discipline; to provide a framework that engenders trust in HEIs to respond effectively to student complaints; to meet regulatory requirements; and to provide fair and equitable outcomes for both students and staff.

The guidance has emerged from our combined ongoing research and work in this area. It gives recommendations to HEIs on how to adapt or modify their current processes to ensure a fair and transparent procedure for all parties involved, taking into account and referring to existing guidance from the Office of the Independent Adjudicator for Higher Education (OIA), The ACAS guide, Universities UK/Pinsent Masons Guidance for Higher Education HEIs (2016) and an independent review into the University of Sussex conducted by Professor Nicole Westmarland (2017). It addresses points six and seven of the 'statement of expectations' from the Office for Students' consultation on harassment and sexual misconduct in higher education (2020).

The catalyst for this guidance arose from the central problem 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 propose that this exclusion arises because current disciplinary processes are modelled on the criminal justice system. In contrast, this guidance proposes a process more akin to civil justice, following two key principles:

**Key Principle I: HEI disciplinary processes must be modified to ensure they are fair for complainants**

**Key Principle II: The process must accord equal rights to complainants and respondents**

This guidance provides detailed recommendations for HEIs processing student complaints and makes key recommendations during the main steps within the end-to-end procedure.

- A. Initial submission of complaint and risk assessment
- B. The Investigation
- C. The decision-making procedure
- D. The review process
- E. Confidentiality of outcomes and protection of the complainant
- F. Data recording and management



## Policy Recommendations Rationale

The purpose of this guidance is to recommend good practices for institutional processes relating to complaints by students about the sexual misconduct of staff employed or contracted in UK HEIs. The guidance has emerged from research undertaken on complaints processes relating to sexual misconduct by staff (“staff sexual misconduct”). It draws on evidence from The 1752 Group’s research in this area, legal expertise and practice, the emerging international evidence base, and ongoing discussions with higher education sector bodies, survivors, and external experts<sup>1</sup> to recommend how HEIs can improve the experience for students, work towards just outcomes, and prevent the occurrence of sexual misconduct.

In England, the Office for Students has recently published a consultation document with a ‘statement of expectations’ as to how HEIs should address sexual violence and harassment. This guidance addresses the statement’s points six and seven:

6. Higher education providers should have a fair, clear and accessible approach to taking action in response to reports and disclosures
7. Higher education providers should ensure that students involved in an investigatory process have access to appropriate and effective support (Office for Students, 2020, pp.13-14)

by giving recommendations to HEIs on how to adapt or modify their current procedures to ensure a fair and transparent process for all parties involved.

The guidance has been formulated to address issues arising in the complaints process relating to staff sexual misconduct, but we suggest that it may also be appropriate for addressing student-staff complaints that relate to other aspects of the Equality Act. We welcome discussion and further consultation on its applicability to other types of student-staff complaints.

The guidance is required because of serious problems with current complaints processes for staff sexual misconduct. Currently, most students who are subjected to sexual misconduct from staff do not make a formal complaint<sup>2</sup>. In the National Union of Students/The 1752 Group’s report *Power in the Academy*, fewer than one in ten respondents (9.6%) who experienced sexualised behaviour from higher education staff reported this to their HEI (2018, p.31). If students did make a complaint<sup>3</sup>, they often waited months or years after the event before they reported, for example, choosing to wait until marks are received

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<sup>1</sup> The evidence drawn on includes The 1752 Group’s 2018 report, ‘Silencing Students: HEI responses to staff sexual misconduct in UK higher education’. The report included an examination of HEI investigation processes, and found evidence of inadequate internal processes for investigating staff sexual misconduct and conducting disciplinary procedures, which had adverse and long-lasting effects on student complainants. It also draws on The 1752 Group’s research with the National Union of Students, ‘Power in the Academy,’ a national survey of 1839 current and former students in UK higher education, and discussions at The 1752 Group event ‘Addressing staff sexual misconduct in higher education’ (conference held at the University of Portsmouth, 4 May 2018).

<sup>2</sup> See the appendix for definitions of key terms, including sexual misconduct.

<sup>3</sup> The term ‘complaint’ is used in this document to refer to a formal notification to the HEI, seeking action according to its formal complaints process. A ‘disclosure’ refers to an informal sharing of information, which the person disclosing has not provided in expectation of any action and which they may consider private. See the appendix.



or they have graduated, or they disclosed their experiences informally to someone within the HEI without making a formal complaint (see *Silencing Students*, Bull and Rye, 2018).

Once complaints or disclosures are received by HEIs, the next steps are often unclear. Both *Power in the Academy* and *Silencing Students* found that most students who did go through formal reporting and investigation of staff sexual misconduct were highly dissatisfied with the process and outcomes. Corroborating these findings, Professor Nicole Westmarland's report into the handling of a high-profile domestic violence case between a staff member and a student at Sussex University found that the university failed to carry out an adequate risk assessment and failed to operationalise adequately and follow its own policies (2017, p.5). It is crucial that HEIs have a clear and well-communicated process in place for how they will receive complaints and disclosures and a plan for the safeguarding and risk assessment actions they will take when complaints are received, before implementing reporting systems.

Despite the complexities of dealing with staff sexual misconduct complaints and disciplinary processes, it is in the interests of HEIs to encourage complaints in this area so that the reporting student as well as other students and staff can be kept safe. This requires building trust with students and staff by demonstrating that complaints will be acted on quickly, transparently and fairly. This guidance is designed to support HEIs in doing this. It should be adopted as part of wider cultural and policy reform, including consideration of professional boundaries, HEI culture change and support systems for complainants. The guidance is designed to make the process fair for all parties involved: staff also benefit from transparent, detailed procedures.

## Existing guidance

This guidance is designed to work alongside and supplement the following existing guidance in UK higher education, and is largely consistent with it except where indicated:

- OIA Good Practice Framework: Handling student complaints and academic appeals (OIA, 2016)
- OIA Good Practice Framework: Disciplinary procedures (OIA, 2018a)
- OIA briefing note on 'Complaints involving sexual misconduct and harassment' (OIA, 2018b)
- Discipline and grievances at work: The ACAS guide (ACAS, 2019a)
- Conducting workplace investigations (ACAS, 2019b)
- Discrimination: what to do if it happens (ACAS, 2015)
- Universities UK/Pinsent Masons Guidance for Higher Education HEIs: How To Handle Alleged Student Misconduct Which May Also Constitute A Criminal Offence (UUK, 2016)
- Professor Nicole Westmarland's Independent Review into The University of Sussex's Response to Domestic Violence (Westmarland, 2017)
- Office for Students' consultation on harassment and sexual misconduct in higher education, points six and seven from the 'statement of expectations' (Office for Students, 2020)
- Equality and Human Rights' Commission 'Sexual harassment and harassment at work: Technical Guidance' (EHRC, 2020)

Within this list, the OIA guidance relates to how HEIs treat their students; while ACAS guides employers on how to treat employees. Both are relevant because a student complaint of staff sexual misconduct will impact not only the student and their experience but also the staff member's position and rights as an employee. It is also not uncommon for postgraduate students to have a dual status as student and



employee, implicating both OIA and ACAS guidance. It makes sense for HEIs to follow the same principles in handling complaints of sexual misconduct regardless of whether made by or against a student or staff member.

We do have concerns about a central recommendation or assumption of the OIA Good Practice Framework: Disciplinary Procedures, which states:

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, 2018a, p.24).

We consider that the practice of directing student complaints of staff sexual misconduct through the staff disciplinary process, without any modification, is the reason for many of the specific problems which arise in the way such complaints are currently handled, leading to potential breaches of the Equality Act and other duties of care, discussed more below.

The staff disciplinary process tends to be modelled on a (criminal) prosecutorial system, with the HEI assuming the role of prosecutor in relation to an accused employee who faces disciplinary charges which can lead to sanction. Since the accused or responding staff member stands to lose certain privileges, including potentially their job, if the charge is upheld, it follows that they should be accorded the normal protections of a fair trial – the right to know of allegations raised against them, to have adequate time to prepare a defence, to see and challenge the evidence and to adduce their own, to attend and be accompanied or represented at a hearing where they can set out their own case, to know the findings and decision of the decision-maker, and then to appeal it in certain circumstances.<sup>4</sup> This is uncontroversial and we do not suggest abrogating these fundamental 'fair trial' rights.

A number of problems arise, however, when this model is adopted wholesale for investigating and adjudicating on complaints of staff sexual misconduct:

- It relegates the complainant to the subsidiary role of 'witness' in the HEI's disciplinary prosecution of the responding staff member. As a 'witness' (rather than a party) the complainant is not given the protections accorded to the responding staff member, and while this disparate treatment may seem superficially justified since the responding staff member is facing formal institutional sanction while the complainant is not, the impact of the investigation and outcome on the student complainant may be just as professionally and personally damaging to the complainant as a formal institutional sanction.
- 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

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<sup>4</sup> European Convention on Human Rights, Art. 6.

Equality Act 2010.<sup>5</sup> 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.<sup>6</sup> 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.

- A prosecutorial system does not tend towards adducing the best evidence for the HEI anyway. In criminal prosecutions, the state can rely on the police with their enhanced powers of investigation and expertise to adduce the best evidence reasonably available, so there is some reason to be confident that any decision will be the fairest one reasonably available. HEIs do not have the powers (or usually the expertise or resources) to mount a police-style investigation to unearth the best evidence, however. Instead, we suggest that they are more likely to adduce the best evidence if they allow the two parties most likely to have relevant evidence and most motivated to provide it – the student complainant and the responding staff member – equal access to the process, including the right to advance relevant evidence, see each other's statements and evidence, and then the right to state their own positions before a decision-making panel.

For these reasons, we suggest that HEIs modify their existing disciplinary processes to provide similar protections and privileges in the process to the complainant and the responding staff member. In this way, the process will be more analogous to a civil rather than criminal justice system, which seems more appropriate to the institutional setting and industry guidance anyway.<sup>7</sup>

Our recommendations seek to improve the complaints handling process for students, and at the same time reduce HEIs' exposure to lawsuit for potential breach of their legal obligations.

## Acknowledgements

We thank the following people and organisations who attended a workshop meeting in December 2018 and/or provided feedback on the first edition of this guidance, as well as others who wish to remain confidential:

- Office of the Independent Adjudicator for Higher Education
- Universities and Colleges Union
- National Union of Students
- Equality Challenge Unit/AdvanceHE
- GuildHE
- AMOSSHE
- University of Bristol

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<sup>5</sup> See Equality Act 2010, sections 19 and 91.

<sup>6</sup> See *Ibid*, section 149.

<sup>7</sup> For example, UUK (2016, p.7): 'The nature and scope of an internal disciplinary process and the nature and scope of a criminal process are fundamentally different. It is therefore important to maintain a clear distinction between them. The internal disciplinary process is a civil matter ...' While the UUK publication relates specifically to the student disciplinary process, the principle would seem to apply equally to staff disciplinary processes.





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## Key Principles

In recognition of differences between HEIs, key recommendations are given in bold, with explanatory notes below. **The recommendations act as general principles that should be adapted by HEIs to their own structures and processes.** We acknowledge that HEIs may in practice make only gradual improvements towards implementing this guidance. However, if institutions wish to ensure they are fully upholding the Equality Act, we would recommend they implement all of the recommendations below.

These recommendations do not purport to provide legal advice but are drafted with an eye to the various legal duties affecting HEIs.<sup>8</sup> In our view, the more of the recommendations followed, the more closely HEIs will be aligned with their legal obligations.

### Key Principle I: HEI disciplinary processes must be modified to ensure they are fair for complainants

- Where student complaints are investigated and decided under a staff disciplinary process, as recommended by the OIA (2018a, p.24), students suffer various disadvantages which flow from not being a party to the process, including:
  - No right of access to evidence;
  - No right to call witnesses or demand that any be interviewed;
  - No right to attend the hearing;
  - No right to representation;
  - No right to know the outcome;
  - No right to discuss the outcome or process;
  - No right to oppose their complaint being dismissed or resolved by settlement between the HEI and the responding staff member;
  - No right of appeal.
- This is clearly unsatisfactory and inconsistent with the overall student complaints process envisaged by the OIA (or ACAS), which requires that the process be fair to all parties, and for the complainant to have the right to seek a review of the original decision if dissatisfied. The disparity of treatment could also expose the HEI to lawsuit for breach of the Equality Act 2010 and other legal obligations.
- Processing a student complaint of staff sexual misconduct through the staff disciplinary procedure has the advantage, however, of avoiding a duplication of investigations, first to determine the allegations in the complaint and then to determine whether this requires a disciplinary sanction. This duplication could lead to inconsistent outcomes, a delay in reaching resolution and an extra burden on all involved - complainant, responding staff member and witnesses.

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<sup>8</sup> Note is taken in particular of potential duties arising under the Equality Act 2010, consumer protection law, data protection law and at common law, but these recommendations are not intended to provide a detailed analysis of the precise parameters of these legal obligations, some of which have yet to be given clear definition by the courts.

- To reap the benefits of using an established framework and to avoid duplication, we recommend that HEIs continue to use their staff disciplinary processes but modified, as described below, to recognise that there are (at least) two individuals involved in the process, which is civil in nature not criminal, and to ensure that this process is fair to both.

### Key Principle II: The process must accord equal rights to complainants and respondents

Any sexual misconduct complaints handling process, whether stand-alone or a modified staff disciplinary procedure, should include the following to ensure a fair process:

- It 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) and equal opportunity to challenge the evidence of the other. This is what OIA requires of HEIs handling student complaints of student sexual misconduct (OIA 2018a, p.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.
- It must provide the student complainant with a full resolution to their complaint. Currently, ACAS guidance states that disciplinary action taken must remain confidential, without being shared with the complainant (ACAS, 2015, p.14).<sup>9</sup> The justification given by ACAS for this confidentiality is the assertion that ‘allegations of discrimination can polarise a workforce and negatively affect an organisation’s productivity’ (*Ibid.*). While these observations may sometimes be true, we do not think they justify silencing any discussion of the discrimination and management’s response to it, nor do we think that these commercial considerations should trump the human and equality rights of someone subjected to sexual misconduct. We suggest that ACAS gives undue priority to the privacy of the responding staff member and the commercial expedience of the employer over the welfare and rights of the student complainant and the wider community. The staff member’s privacy must be tempered anyway by the guidance from the OIA (2018a, p.24) that a student complainant should be given a resolution to their complaint as well as a remedy for the impact of the staff member’s behaviour.
- Refusing to provide the student complainant with the full findings and outcome of the process determining their own complaint, while providing it to the staff member, contributes to making the process unfair and potentially discriminatory towards the complainant, which can itself affect staff and student morale. ACAS guidance also fails to recognise that discriminatory behaviour such as sexual misconduct takes place within a wider HEI community, and remedies may require notification of all or part of the outcome to the department, research group or wider HEI community.
- We do not see any absolute legal prohibition on informing complainants of the outcome of their complaint, even where this includes disciplinary action taken against the responding staff member, and think that a fair complaints process requires that both complainant and responding staff member be provided the outcome. We therefore recommend this, and would

<sup>9</sup> This is echoed in OIA 2018a, p.24.

welcome modification of the ACAS guidance on this point, to acknowledge not only the commercial expedience of employers but also the equality and human rights of the various parties to the process, including the complainant and the responding staff member.<sup>10</sup>

While awaiting clarification from ACAS, we recommend that HEIs at least inform complainants of the following:

- What immediate or near-term measures are being taken to ensure their safety and any other parties that may be impacted;
- What process is being used to determine their complaint, including an outline of the steps to be taken and a reasonable estimate of the timeline;
- The outcome to their complaint, including findings of fact and reasons behind that outcome, and an explanation of the right to seek a review/appeal and the right to subsequently complain to the OIA if dissatisfied with the outcome of the review; and of any remedies or measures taken by the HEI in response to or as a result of the complaint, whether specific to themselves or to all or part of the wider HEI community.
- Conversely, HEIs should not require complainants to keep their complaint or the fact that the HEI is investigating it, or any measures taken by the HEI, whether preliminary or after the outcome, confidential, unless the complainant requests this for their protection.<sup>11</sup>
- Unless dismissing a complaint for lack of threshold credibility, the HEI must always notify the complainant if it wishes to discontinue the complaints process before reaching findings of fact and a final outcome on the complaint. The complainant's express consent must be obtained for a discontinuation of the complaints process. If the HEI wishes to discontinue its complaints process in order to enter a settlement agreement with the responding staff member, it must ensure that the complainant is given the option of becoming a party to the agreement with full rights of enforcement, after receiving independent legal advice (*see also* Recommendation C4 below). In addition, the HEI must keep complainants informed of developments relevant to the case post-hoc, for example if the sanction is altered.

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<sup>10</sup> See EHRC (2020), pp. 76-77, points 5.66-5.68)

<sup>11</sup> We acknowledge that this publicity may prejudice an HEI's ability to gather independent witness evidence, and also that publicity may lead to harassment or bullying of the parties involved. This can be explained to the complainant and is likely to act as a natural restraint on publicity, but should not be expressed in such a way as to lead the student to believe the HEI is imposing its own duty of confidentiality, breach of which will be treated as a disciplinary matter.

## Detailed complaints process recommendations

### A. Initial submission of complaint and risk assessment

#### Recommendation A1: Appoint a named, trained first point of contact for student complainants

- Different staff members within the HEI may receive disclosures or complaints of staff sexual misconduct, and so all members of the HEI community must be aware of who they should contact or signpost if they receive a complaint or disclosure of staff sexual misconduct from a student.
- With the permission of the student, the staff member to whom the complaint or disclosure was made should pass on the information to a designated individual within the HEI. This person may be the HEI's Safeguarding/Student Welfare Lead<sup>12</sup> or may be in a role that reports to this person. Their contact details should be easily available online and publicised in student and staff induction and ongoing training literature.
- This designated individual should have specialist training in dealing with disclosures of sexual misconduct and detailed knowledge of investigations processes and referral pathways within the HEI (see also the Westmarland Report, 2017, p.13, recommendation 7 and 8).
  - This designated individual and the Safeguarding and/or Student Welfare Lead (or equivalent role) remains party to the process until its conclusion, and ensures the safeguarding of all students and staff, including the complainant.
- HEIs should be aware that students may only wish to disclose their experiences to a member of staff who shares a similar identity to them, for example trans or non-binary students may wish to disclose to a staff member who is trans or non-binary. HEIs should have student support staff who are representative of their student population and trained in receiving disclosures of sexual violence and the steps to follow. We recognise that smaller HEIs may not immediately have the capacity for this, however.

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<sup>12</sup> All HEIs should have a dedicated safeguarding and/or student welfare lead in a senior position within the HEI, reporting to the Board of Governors (directly or through an assigned member of the Board), and this person should be notified of all reports of staff-student sexual misconduct. There should also be a member of the Board of Governors with responsibilities for safeguarding and student welfare (as recommended by the Committee of University Chairs). We acknowledge, following Universities UK, that 'although there is no legislation at present that sets out a distinct and formal statutory duty on universities to safeguard their students (given that many students are adults), the legal framework created by the legislation and the underlying general duty of care created towards staff and students at common law do require universities to be mindful of the risks of breaching this duty.' (UUK, 2019, p.17)

## Recommendation A2: HR and student services must ensure coherent management of the process

- Management of staff sexual misconduct complaints should include clear ownership for informing, supporting and regularly updating complainants about the status and progress of the process.
  - The student must have one point of contact for the complaints process within the HEI whose responsibility is to keep the student updated.
    - We recommend that the point of contact for student complaints sits within student services, with close links with HR, and reports to the Safeguarding/Student Welfare Lead.
    - This person must also have training in dealing with disclosures/complaints and supporting survivors of sexual violence.
- In line with ACAS guidance, the student must be given the opportunity to be accompanied (whether by a students' union adviser, companion or other advocate) at all investigation meetings and at any hearing.<sup>13</sup> Where the staff member is legally represented, the HEI should provide or pay for the student complainant to have legal representation too, separate from the HEI's own advocate or legal representative.<sup>14</sup>
- A clear timeline must be given to all parties at the start of the complaints process. The OIA recommends that disciplinary procedures, including any review/appeal, are concluded 'as quickly as possible, and normally within 90 calendar days of the start of the investigation' and that at the end the student should be given a Completion of Procedures letter, allowing a complaint to the OIA (OIA, 2018a, pp. 6 and 33).<sup>15</sup>
  - To adhere to these timelines, it may be appropriate for an HEI to hire dedicated officers for investigating and project managing complaints (see below).
- The student complainant must be provided with an advocate who has expertise in the investigatory/disciplinary process and who also has training in supporting survivors of sexual misconduct. This guidance draws on the model of Independent Sexual Violence Advisors, who

<sup>13</sup> ACAS guidance notes that it will benefit an investigation to allow an interviewee to be accompanied even where there is no statutory right. (ACAS, 2019b, p.19).

<sup>14</sup> Currently HEIs sometimes use lawyers to mount a disciplinary charge against an employee, while the employee may access legal representation through a union. In line with a quasi-criminal process, the 'prosecuting' lawyer acts formally on behalf of the HEI. Since these Recommendations envisage the criminal justice model being replaced by a civil model, HEIs do not need to mount a case themselves, and so could divert the saved resources to the provision or funding of legal representation for the student complainant. Some HEIs prohibit any legal representation within the disciplinary process, and in such cases the Recommendation here is simply premised on the key principle that both parties should be treated equally.

<sup>15</sup> The OIA have indicated that in cases where the student's complaint 'remains unresolved as far as the student is concerned after an unreasonable length of time, we will consider accepting it for review even if the student does not have a Completion of Procedures letter' (OIA, 2018b, p.3).

support witnesses through the criminal justice system.<sup>16</sup> This is an advocacy role, different from a **bystander intervention officer** or a **counselling role**. The ISVA should be funded by the HEI (or for smaller providers, it can be shared between several HEIs) but may sit within a local sexual violence organisation such as Rape Crisis or the Survivors Trust in order to ensure **independence from the HEI and access to specialist sexual violence support services** for the student complainant.

### Recommendation A3: **There should be no time limit for making a report of staff sexual misconduct**

- **Students experiencing sexual misconduct may not initially recognise the harm it is causing them or may take months or years to make a complaint.** In the meantime, they and other students are placed at risk. Evidence (Cantalupo and Kidder, 2017; Bull and Rye, 2018) shows that **staff perpetrating sexual misconduct are likely to engage in serial behaviour and target multiple students over extended periods of time, presumably enabled or assisted by lack of complaint.** It is therefore in the interests of the HEI to hear about and receive complaints, even where **delayed**, so that all students, and staff, can study or work in an environment free from sexual violence and harassment.
  - **Policies should not include a time limit within which a complaint can be made to an HEI<sup>17</sup>.** However, they should make it clear that there are legal avenues of redress too which do have deadlines, sometimes as short as three months from the date of the last incident complained of.<sup>18</sup> However, for **HEIs to ensure they are enabling equal access to education and upholding their duty of care to current students**, such time limits should not be applied to their acceptance of sexual misconduct complaints.

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<sup>16</sup> The [Home Office guidance on the ISVA role](https://www.gov.uk/government/publications/the-role-of-the-independent-sexual-violence-adviser-isva) (https://www.gov.uk/government/publications/the-role-of-the-independent-sexual-violence-adviser-isva) states that their role includes, but is not limited to the following:

- tailor support to the individual needs of the victim or survivor
- provide accurate and impartial information to victims and survivors of sexual violence
- provide emotional and practical support to meet the needs of the victim or survivor
- provide support before, during and after court
- act as a single point of contact
- ensure the safety of victims and survivors and their dependants

<sup>17</sup> This position is also taken by the Equality and Human Rights Commission technical guidance (EHRC, 2020, 5.41). They further state that ‘target timescales for each stage of the process should be set and communicated to the complainant’ (5.43).

<sup>18</sup> **Students generally have six months to bring a discrimination complaint under the Equality Act, while employees have three months, although these limits can be extended by a court or tribunal.** Both limitation periods are short compared to deadlines for bringing civil claims for rape/assault or breach of contract, and are open to criticism. A recent government consultation has suggested extending this three-month deadline. The consultation responses are currently being considered by the government. See: <https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace> [accessed 27 January 2020]. Similarly, the EHRC has called at least for an extension of the three-month limitation period applicable to workplace harassment, in its report: *Turning the Tables: Ending Sexual Harassment at Work* (2020, p. 18). <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf> [accessed 27 January 2020]

- Complaints by alumni about current staff members should be dealt with in the same way as complaints by current students, with no time limit for making the complaint.

#### Recommendation A4: Reports must be acted on and centrally recorded, regardless of formal complaint

- Students may not wish to go ahead with a formal complaint unless there are other complainants. This does not mean that the HEI cannot take precautionary measures to protect students and to proactively investigate the disclosure of sexual misconduct. It owes a duty of care to protect its students and staff from reasonably foreseeable harm and so, if the disclosure indicates a risk of such harm, the HEI should initiate its own investigation to address and mitigate that risk.
- In this situation, the HEI must be careful to maintain the anonymity of the disclosing student, however, since disclosing the student's identity could lead to further harm.
- The Safeguarding/Student Welfare Lead and/or HR, with or without the help of the Head of Department, should take proactive steps to establish the credibility of the disclosure and the extent of the risk, and depending on this preliminary assessment, potentially appoint an independent investigator (see The 1752 Group/McAllister Olivarius briefing note 1 (The 1752 Group and McAllister Olivarius, 2020)).
- In the meantime, with the student's permission, the disclosure of sexual misconduct should be recorded on a central register, including records of any informal actions taken.
- The central register of disclosures/complaints, maintained by the Safeguarding/Student Welfare Lead and/or HR, should be kept confidential with access limited to a small group of designated individuals, for the purpose of a) tracking trends in disclosures of staff sexual misconduct across departments and schools or b) checking for corroborative evidence in relation to a report or disclosure of staff sexual misconduct.
- In maintaining a carefully controlled central register, we believe HEIs reconcile their data protection obligations with those arising under other statutes and common law since they require such registers to protect their students and staff from a reasonably foreseeable risk of sexual misconduct and/or to comply with their duties under the Equality Act, and so for reasons of substantial public interest and to prevent or detect unlawful acts. They must, however, maintain an appropriate policy document, compliant with the Data Protection Act 2018. This recommendation conforms with the OIA's recommendations that HEIs record and learn from disclosures and complaints,<sup>19</sup> but goes beyond it by calling for the retention of some identifying data. In its recent report on tackling racial harassment at universities,<sup>20</sup> the EHRC calls for UUK, the Information Commissioner's Office and HEIs' data protection officers to work together to increase understanding of the scope of data protection laws in relation to handling student complaints, and we recommend that these discussions seek clarification for the purpose of establishing a central register also. While HEIs' primary business purposes may be research and

<sup>19</sup> OIA (2016, p. 27).

<sup>20</sup> EHRC, 'Tackling racial harassment: Universities challenged', 2019, p. 16 (Recommendation 6). <https://www.equalityhumanrights.com/sites/default/files/tackling-racial-harassment-universities-challenged.pdf> [accessed 27 January 2020]



education, HEIs should acknowledge that these purposes can only be pursued in the context of their common law and statutory duties.

- While any individual who believes that the central register records information about them may make a data subject access request, in responding the HEI must take care not to disclose the personal data of someone else, including the disclosing individual's name and anything which may identify them.

#### Recommendation A5: Third party and anonymous reports should also be acted on and centrally recorded

- HEIs should have protocols in place to allow confidential, anonymous reports of staff sexual misconduct from both the student and other individuals (third parties) to be made.
- Members of staff may become aware of student disclosures of sexual misconduct that have not led to a formal complaint. This may occur through a direct disclosure from a student, or from information provided by third parties.
- If in contact with the disclosing student, the staff member should explain to the student that the student can make a confidential, anonymous disclosure to the Safeguarding/Student Welfare Lead (or similar role), and that this would allow the HEI to carry out a risk assessment and potentially instigate its own investigation and implement safeguarding measures. Alternatively, the staff member can make a disclosure to the Safeguarding/Student Welfare Lead directly without naming the student, to trigger the same procedure.
- This guidance does not support mandatory reporting of disclosures. There is evidence from the US under Title IX suggesting that mandatory reporting is ineffective in addressing sexual misconduct and is not in the best interests of survivors (Newins, et al., 2018). All responses to sexual misconduct should be survivor-led and enacted only with permission, unless there is reasonable fear for the safety of the survivor or others.
- An HR protocol should be in place to deal with third party or anonymous reports, for example, the report should be reviewed by a senior HR member and named HEI lead and recorded with the Safeguarding/Student Welfare Lead. This protocol should have the power to launch an investigation, as is already the case at some universities in the UK.<sup>21</sup> This is a crucial part of a robust process for safeguarding students as, often, students fear risk of reprisals if they make a complaint.
- Where investigations are launched after third party or anonymous reports, students and staff have no obligation to participate in the investigation process or to give evidence to a hearing.

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<sup>21</sup> Third party reporting refers to reports by members of the HEI community or people connected to the HEI community, about sexual misconduct they have witnessed or been told about. Anonymous reporting refers to reports that are made without a named complainant. Anonymous reports should allow for named staff members to be reported, and should enable an HEI to act and investigate the report. However, anonymous reporting mechanisms currently available at some UK universities prevent students from providing sufficient data for any direct action to be taken.

It is up to individuals whether to do so, and they must be reassured of this. But, equally, the HEI must have in place and inform students and staff of measures to protect them from victimisation for having chosen to participate.<sup>22</sup> It must also be explained to students and staff that a failure to participate in the process may jeopardise the fairness of its outcome, or the ability of the HEI to take effective action.

- It may be difficult to balance the wishes of a complainant not to be involved in an investigation with the wider duty of care owed to the HEI community if there is evidence of a wider problem. In this case we recommend proactive steps are taken by the HEI to contact potential complainants, as outlined in Briefing Note 1 (The 1752 Group and McAllister Olivarius, 2020).<sup>23</sup>
- Anonymous reports must be kept on the central register by the Safeguarding/Student Welfare Lead and/or HR (see Recommendation A4 and data recording and management section, below).

#### Recommendation A6: Mediation must not be required in cases of sexual misconduct

- Policies must not require or pressure student complainants to go through mediation in order to make a formal complaint. Mediation is unlikely to be an appropriate option in cases of staff sexual misconduct, because of the imbalance of power inherent in the staff/student relationship. Furthermore, ACAS notes that mediation is not suitable where a decision about right or wrong is needed (ACAS, 2015, p.17).

#### Recommendation A7: Measures should be taken to ensure the safety of the student and others

- A complaint of staff sexual misconduct that is received must always trigger a safeguarding risk assessment (UUK, 2016, p.8; Westmarland, 2017, p.12).<sup>24</sup>

<sup>22</sup> See EHRC (2020, pp.74-75) points 5.58-5.63.

<sup>23</sup> Some HEIs are also instigating 'environmental investigations' to gather evidence on the wider culture of a department, lab, field site or area and this could be utilised in place of or in addition to investigations of specific individuals. The EHRC also take this stance, stating that 'Employers should proactively seek to be aware of what is happening in the workplace' (2020, p.61, point 5.19), and suggests that anonymous reports should be acted on where possible. Points 5.49-5.52 (pp.72-73) discuss the issues of whether to take formal action when the complainant does not wish this to happen, noting that 'it may be appropriate to take further action [against the wishes of the complainant] where the harassment is so serious that that there is an immediate risk to the safety of the complainant, their colleagues or anyone else that the harasser may come into contact with' (point 5.51). The sensitivity of such decisions emphasises the importance of staff having training in supporting survivors of sexual violence.

<sup>24</sup> Professor Westmarland also recommends that 'all risk assessments involving violence, abuse, harassment or other issues linked to power, gender, and any of the other protected characteristics under the Equality Act should be documented and include input from a) an external expert b) a representative from another department – with a specialism in the area of the complaint if possible and c) representation from the person making the complaint – either the complainant themselves or a person supporting them. Information gathering should be an active not passive part of the process' (p.17). The Pinsent Mason guidance notes that 'the risk assessment and any precautionary measures that are put in place should be reviewed at regular intervals and reconsidered as the case develops' (UUK 2016, p.8). Both of these recommendations should be followed. There is no sector-wide risk assessment tool currently available.

- This should be carried out immediately after a complaint is received to decide if safeguarding measures should be put in place, including suspension of the staff member or contact restrictions, such as a no-contact arrangement. The suspension policy must be clearly stated, including what happens to the duties of the staff member once a complaint is made; and at what point the suspension takes place.
- Students may be putting themselves and their career/studies at risk by making a complaint of staff sexual misconduct. Therefore, following a complaint, the HEI must consider whether action should be taken to ensure:
  - The safety of the student(s) reporting, e.g., from retaliation by the responding staff member(s) and/or their supporters.
  - Interim support measures are taken to ensure the reporting student(s) is able to cope with both the trauma resulting from the incident(s) and the demands of the investigation and complaints process.
  - The safety of other students in contact with the staff member(s).
  - The safety of staff members working with the responding staff member in varying professional relationships.
- If there are safeguarding concerns about a current staff member in the absence of a complaint, it is the HEI's responsibility to assess the need for further investigation and potential safeguarding measures, as noted above and in Briefing Note 1 (The 1752 Group and McAllister Olivarius, 2020).

#### Recommendation A8: HEIs must discuss options with complainant when the complaint alleges a criminal offence

- Where an HEI knows that the police are investigating staff sexual misconduct, ACAS allows that the HEI may still carry out its own investigation if it believes it reasonable to do so (ACAS, 2019b, p.12; see also EHRC, 2020, p.74, point 5.57). However, it expresses caution that the HEI be careful not to prejudice the criminal proceedings, and also notes that an employee is less likely to cooperate with an internal investigation where it might prejudice their defence (*Ibid.*). ACAS (2019b, p.12) states that an employer 'may decide to put their investigation on hold until the criminal proceedings have concluded' but does not suggest that the complainant's wishes should also be consulted.
- The guidance on student-student cases issued by UUK (2016, p.9) states that it will likely be prudent in most cases for an HEI to put its own investigation into student misconduct on hold pending the outcome of the police investigation, while nevertheless implementing any precautionary safeguarding measures required by its risk assessment. This conflicts in part with the ACAS guidance and therefore HEIs have some discretion in this area.
- We suggest that the risks of prejudicing the criminal investigation are discussed with the complainant, in order to give control and choice to the complainant (Bull, Bullough and Page, 2019).

## B. The investigation

### Recommendation B1: Avoid duplicate investigations via different HEI processes

- Where complaints are made initially to student services (or the equivalent part of the HEI), they should be channelled directly into the student-staff non-academic complaints/disciplinary process. Student services should not carry out their own investigation prior to this referral.

### Recommendation B2: Investigators should be trained and independent

- Ideally investigations into staff-student sexual misconduct should be carried out by an independent investigator, trained in trauma-informed investigation techniques and in handling sexual misconduct investigations. They should be external to the HEI, to ensure the necessary impartiality and expertise. A trained external investigator<sup>25</sup> hired for the sole purpose of carrying out the investigation is more likely to complete the investigation in a timely fashion, which will help the HEI complete its full process (including any review/appeal) within 90 days, as recommended by the OIA. At present, investigations are often carried out by a senior member of academic staff, or HR or senior personnel. This is inappropriate because the member of staff may have prior knowledge of the student, staff member or witnesses involved and feel otherwise constrained by professional relationships within the HEI, constituting a potential conflict of interest. They may also lack the skills, training and expertise to carry out such an investigation, which may include the need to interview survivors of sexual and/or gender-based violence.
- The investigator should meet with the student complainant(s) to define and agree the issues to be investigated at the outset and to explain the range of possible outcomes.

### Recommendation B3: Minimise the impact of the investigation on the student

- The investigator should carry out a proportionate investigation, which may include interviewing staff and/or students. They should try to minimise the number of interviews or communications with each witness (including a complainant), in order to minimise the impact on those involved, subject always to seeking the most complete evidence available. This may require gathering evidence via the student's advocate. The witness should have adequate notice of such meetings, with counselling support offered by the HEI and travel expenses reimbursed where necessary.
- During the investigation the complainant(s) should not be prohibited from discussing the sexual misconduct or the impact it has had on them with others. A sense of control over their own information and experiences can be important to recovery and welfare, as well as allowing

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<sup>25</sup> It should be noted that external investigators may not be trained in carrying out sexual misconduct investigations, or in trauma-informed investigations, and HEIs should take care to instruct only those with appropriate training. We deem these skills to be necessary for sexual misconduct investigations. Consideration should also be given to the gender and other demographic characteristics of the investigator, based on the preferences of the complainant.

them to guard against victimisation, which is often enabled by imposing silence on the complainant (see section E).

- It is acknowledged that some aspects of the investigation may benefit from confidentiality, however. For example, a witness may only be prepared to provide evidence under assurances of confidentiality, or witnesses' credibility generally may be called into question if it is suspected they have been discussing the incident with the complainant. Where the HEI wishes to impose confidentiality over some aspects of the investigation in order to preserve its integrity and fairness, the reasons must be explained clearly to the complainant(s).

#### Recommendation B4: Clearly set out the responsibilities of the investigator

- The terms of reference for the investigation should reasonably reflect concerns and risks expressly or implicitly raised by the disclosure or complaint, including the breach of policy implicated.
- Many cases of staff sexual misconduct involve multiple students or staff members. The investigator should contact and seek evidence from any witness with potentially relevant evidence named by the complainant or otherwise disclosed by the investigation, unless the cost or difficulty of doing so is disproportionate to the likely materiality of the potential evidence. This includes witnesses external to the HEI. Failure to contact all potential witnesses, as evidenced in *Silencing Students* (Bull and Rye, 2018), means that findings may be compromised and open to being overturned at review/appeal stage.
- Complainants and responding staff members should not be asked to contact witnesses directly, to avoid allegations of collusion or victimisation.
- The investigator should write up an investigation report, setting out the terms of reference, the evidence reviewed, and investigation findings. ACAS guidance states that the investigator provides recommendations for formal action, informal action or no further action (ACAS, 2019, pp.30-32). However, it is noted here that the disciplinary panel is the final decision-maker recommended in this guidance and the panel may therefore fully or partly accept or overrule the investigation report.
- The investigation report and copies of the information considered should be shared with the complainant(s) and/or their representative (OIA, 2016, p.15) as well as the responding staff member.

#### Recommendation B5: Potential complainants should be informed of corroborative reports

- A crucial issue for many complainants in deciding whether to go forward with a formal complaint is discovering that the sexual misconduct they experienced is not an isolated incident but potentially part of a pattern of misconduct by the staff member. If a situation arises where an investigator is aware that there are multiple potential complaints, it is possible to inform potential complainants that there are or have been other complaints against the same perpetrator, without revealing the identities of the other complainants. This can help create an

environment in which victims of sexual misconduct feel empowered and supported to disclose and report sexual misconduct.

### Recommendation B6: Anonymous testimony should be considered alongside a formal complaint

- Investigators can take account of evidence provided anonymously or where the witness wants to remain confidential to the responding staff member. The investigator must consider carefully how the evidence can be tested for credibility, and assessing this may take into account the reasons why the witness wants to remain anonymous. Ideally, the investigator should seek corroborative evidence.<sup>26</sup> The evidence of an anonymous or confidential witness should be taken in writing and provided to the responding staff member with the name and other identifying details redacted. If the statement cannot be provided in a way that preserves anonymity, it may be possible for the decision-making panel to put questions to the responding staff member which test the statement's credibility without disclosing the identity of the witness.
- Since it will usually not be fair to put much if any weight on evidence which has not been put to the responding staff member in any way, it will only rarely be reasonable for the HEI to take account of an anonymous statement which cannot be put to the responding staff member in any form.

### Recommendation B7: If the staff member resigns, the investigation should be completed and findings recorded

- The outcomes of this investigation (with necessary caveats), including the responding staff member's resignation and level of involvement in the process, will then be recorded on the central register of complaints, held by the Safeguarding/Student Welfare Lead (or similar role), in line with the HEI's document retention policy, and included on future reference letters for that staff member (see Recommendation E3).

## C. The decision-making procedure

Following the investigation, the investigation report should be submitted to a disciplinary panel or decision-maker for final determination, at or after a disciplinary/complaint hearing or meeting.

### Recommendation C1: Hearing panels must be balanced and trained

- It will usually be more appropriate for the decision to be taken by a panel rather than a single decision-maker. If a panel is used, it should be independent and fairly constituted, for example with a gender and racial balance. All decision-makers must be vetted for conflicts of interest (for example, a panel should not include members of the same department as the staff member

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<sup>26</sup> Guidance was given by the Employment Appeal Tribunal in *Linfood Cash and Carry v Thomson* [1989] IRLR 235, on the approach to be taken with anonymous informants.

under consideration in the process). (See also OIA 2018a, p. 28, paragraph 139 which states that panel members should be properly trained and include student representation where possible). Training for panel members and decision-makers should include understanding typical perpetrator behaviour as well as issues connected to victim-blaming and rape myths.

- The names and titles of panel members/decision-makers should be provided in advance to both parties, giving both adequate time to raise potential conflicts of interests. Accordingly, the constitution of the panel or the decision-maker may need to be changed prior to the hearing.

### Recommendation C2: The welfare needs of all parties must be considered during a hearing

- At the disciplinary hearing, the complainant should not be required to be in the same room or to be questioned by the responding staff member (OIA, 2018b, p.2). Questions from either party for the other or for any witness should be submitted to the panel in advance, who will carry out the questioning at the hearing.
  - The OIA briefing note states that if students are asked to give evidence at a staff disciplinary hearing, 'care must then be taken to ensure that the student feels safe and in some cases it may be appropriate to use a video link' (2018, p.2). See also UUK's directory of case studies (2017, p.47) for an example of this in practice. The right to be accompanied also applies to giving evidence.
- It is the responsibility of the panel Chair to ensure that the questioning does not involve bullying of witnesses or disclosing identities of any anonymous evidence, and to prevent any party bringing witnesses or evidence that are not relevant to the investigation.

### Recommendation C3: Remedies should consider severity of harm and impact on complainant and HEI community

- The OIA's recommendations on remedy aim 'to return the student to the position they were in before the circumstances of the complaint'.<sup>27</sup> To this end, the OIA suggests that 'remedies' are offered to the student which may be practical and/or financial. Remedies may include an apology, but only if the complainant wants this, and if the responding staff member offers one.
- In the case of staff sexual misconduct, it is very difficult to return the student to the position they were in before the circumstances of the complaint. As a result, a single remedy will rarely suffice. Remedies should be both practical and financial and should take into account time lost; interruptions and changes to courses and learning; the impact on mental health and career progression; and loss of trust in the HEI and/or the profession of higher education research and teaching, if relevant.

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<sup>27</sup> See OIA, Putting Things Right: What are practical remedies? <https://www.oiahe.org.uk/about-us/reviewing-complaints/what-happens-when-a-student-complains-to-us/putting-things-right/what-are-practical-remedies/> [accessed 27 January 2020]

- Mechanisms for remedy may need to be collective as well as individual, taking into account the impact that staff sexual misconduct has on the culture and learning/working environment of a department, work area and wider HEI.
- We suggest that further discussion within the sector is needed to lay out what remedies, both individual and collective, may be appropriate in cases of staff sexual misconduct.

#### Recommendation C4: Outcome letters should recognise the contribution of complainants and offer support

- The final outcome should be written and provided to the complainant and responding staff member. This letter may acknowledge the impact to individuals as a result of going through the complaints process, for example by thanking the complainant for their actions in attempting to improve the culture and environment of the HEI. This letter should also include:
  - Notification of the right to go to the review/appeal stage (see recommendation D1).
  - Grounds to seek review/appeal (such as procedural irregularity during the formal stage; unreasonable outcome; new material).
  - The review/appeal procedure, which should be equally accessible for both parties.
  - Where and how to access support, both within and outside the HEI.
- Where the complaint is resolved or the process is ended at this stage,<sup>28</sup> the HEI should provide a Completion of Procedures Letter to the student complainant and an explanation of legal rights to both parties, as well as information on the OIA. The Completion of Procedures Letter allows a student complainant to access complaints services such as the OIA but is not a precondition of pursuing a legal avenue.

#### Recommendation C5: Any settlement must be agreed by all parties, including the complainant

- There may be occasions where the complainant wishes to reach a settlement without completing the full complaints or appeals process. It is never acceptable for the HEI to enter a settlement agreement with a responding staff member which involves dropping the disciplinary charge or complaint unless this is approved by the complainant. The complainant must be given the option of becoming a party to the agreement with rights of enforcement, after receiving independent legal advice.<sup>29</sup> No settlement agreement should impose a duty of confidentiality on a student complainant unless they request or agree it, after receiving independent legal

<sup>28</sup> For instance, where the complainant has failed to trigger the review procedure in time.

<sup>29</sup> Independent legal advice for those signing such settlements is part of the government's recent response to the consultation on non-disclosure agreements. It is unclear under the proposed legislation who is responsible for paying for this independent legal advice, and we look forward to clarification on this point from the Department for Business, Energy and Industrial Strategy. See <https://www.gov.uk/government/news/crack-down-on-misuse-of-non-disclosure-agreements-in-the-workplace> [accessed 27 January 2020].



advice, and HEIs should adhere to the EHRC good practice guidance on use of confidentiality agreements in settlements of discrimination complaints.<sup>30</sup>

## D. The review process

### Recommendation D1: Complainants and respondents must have equal rights to request a review/appeal

- Both the OIA and ACAS envisage that **those who complain of sexual misconduct should be able to appeal the way their complaint was resolved**, while stating that a complainant cannot appeal a specific disciplinary sanction imposed on someone else (OIA 2018a, p.33, point 166; ACAS 2019a, p.51). **Where the resolution of a complaint involves the imposition of disciplinary sanctions against a staff member, it is hard to see how an appeal of a complaint's resolution can be effective unless it can include a review of the disciplinary sanction imposed on a staff member.**
- **The complainant and responding staff member should be allowed to appeal the disciplinary sanctions proposed as well as other aspects of the decision.** Indeed, an appeal of the outcome which results in a new outcome is likely to warrant a different disciplinary sanction anyway.
  - An independent panel should be allocated to the review. This may include members from within the HEI but should not be from the same department as the staff member or student and should be comprised of the same categories of trained panel member as the first-instance panel.
  - The parameters of the review must be clearly explained to the complainant and responding staff member.

### Recommendation D2: The review/appeal panel must be independent, and empowered to impose new sanctions

- Procedures should set out whether the reviewer can overturn the previous outcome and substitute a new decision, or simply refer the process back to the formal stage for reconsideration. In order to ensure fairness, the review or re-consideration should include the option to overturn the previous outcome and substitute a new decision, to protect against outcomes being locked-in despite a successful review/appeal.
- In line with OIA guidance, the outcome must be communicated in writing to the complainant and responding staff member within 28 days of instigation of the review, with a Completion of Procedures letter for a student complainant and explanation of legal rights to both parties. This must notify a complainant of:

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<sup>30</sup> This recommendation aligns with the EHRC's recommendations in its 'Guidance: The use of confidentiality agreements in discrimination cases', October 2019, pp. 18-21. <https://www.equalityhumanrights.com/sites/default/files/guidance-confidentiality-agreements-in-discrimination-cases.pdf> [accessed 27 January 2020].

- The right to submit a complaint to the OIA
- The time limit for doing so (12 months from the date of the Completion of Procedures letter)
- The right to take legal action under the Equality Act and other law, for which the deadlines can in some cases be as short as three months from the date of the incident/s specified in the complaint.<sup>31</sup>
- Where and how to access support, both within and outside the HEI.

## E. Confidentiality of outcomes and protection of complainant

- Evidence from *Silencing Students* (Bull and Rye, 2018) demonstrates that if complainants are not able to speak publicly about upheld outcomes, their reputation and careers risk being damaged by slander from the responding staff member. Such retaliation can amount to victimisation contrary to the Equality Act, and ACAS warns employers to be vigilant to prevent this (ACAS, 2015, p.17).
- Furthermore, the Equality and Human Rights Commission Technical Guidance on sexual harassment at work states that where possible, employers 'should take steps to enable disclosure of the outcomes to complainants where it is appropriate to do so', and discusses the steps that employers can take to ensure that this is compliant with GDPR considerations (EHRC, 2020, pp.76-77, points 5.66-5.68).

### Recommendation E1: Disciplinary sanctions should be shared with complainants

- As noted above, in Key Principle II, we do not see any overriding legal reason why disciplinary outcomes imposed because of the sexual misconduct raised in the complaint cannot be shared with complainants. However, ACAS states (2015, p.14) that disciplinary outcomes are private to the employee being disciplined. We would therefore welcome a modification of their guidance on this point. To ensure equal treatment, we recommend that the outcome be shared with both parties.
- In particular, 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 to uphold the health and safety policy of the HEI, both for themselves and for the wider HEI community. This may involve being informed of disciplinary sanctions taken against the responding staff member.

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<sup>31</sup> Information about time limits for legal action should also be made available in all HEI materials about complaints processes.

- As noted above, this is consistent with OIA guidance which requires a complainant to be given a resolution to their complaint, and it brings the handling of non-academic complaints about staff conduct more in line with the OIA's general complaints-handling regime.

### Recommendation E2: Complainants must have the right to disclose the outcome of their complaint

- Complainants must be free to discuss the outcome openly if they wish to do so, subject only to the usual constraints imposed by law.<sup>32</sup> Due process is served by openness, and we recommend that HEIs be prohibited from trying to impose their own duties of confidentiality on the outcome or the complainant.<sup>33</sup> There may, however, be cases where the complainant wishes to keep the complaint and the outcome confidential to protect their reputation and/or safety.

### Recommendation E3: Upheld complaints should be stated in staff reference letters

- Where complaints of sexual misconduct are upheld, references for the responding staff member concerned should include this fact where it seems relevant to future safeguarding concerns. Such references should also be provided to academic and professional societies that request information for the purposes of upholding their own codes of conduct.
- If a responding staff member leaves an HEI during an investigation and before the outcome has been given, references should state this. As noted in Recommendation B8, where possible the investigation should be completed, with relevant caveats, even after the staff member has left.
- More generally, prospective employers should always request a reference from a candidate's most recent employer, not solely research and teaching references.

## F. Data recording and management

### Recommendation F1: Data on complaints should be centrally recorded, analysed and reported on

- Data relating to all formal and review stages should be recorded centrally within the HEI, as noted in Recommendation A4, in line with the HEI's own data protection and processing policies.<sup>34</sup>
- Regular analysis of trends (for example, looking at numbers of complaints and outcomes of complaints) should be carried out within the HEI on data to identify systemic problems and the

<sup>32</sup> For example, complainants like everyone else will be subject to the constraints of privacy and defamation law or contract law if they freely choose to enter a confidentiality agreement.

<sup>33</sup> HEIs should therefore not provide outcomes to complaints on condition this information is kept confidential.

<sup>34</sup> The Universities UK *Changing the Culture* report recommended that 'Universities should take reasonable and practicable steps to implement a centralised reporting system' (2016, p.39).



need for training and other policy, procedure and culture change activities.<sup>35</sup> This data, and the associated analysis, should be shared with the Safeguarding and/or Student Welfare Lead.

- Data on numbers of complaints, and non-identifying outcomes of complaints per faculty/department (where possible) and per HEI should be published annually. This should include at least the number of complaints (including complaints and disclosures, named, third party and anonymous); number of investigations; category of investigation (staff-student, student-student, staff-staff, student-staff); and outcome category (informal, preliminary warning, final warning, or dismissal).<sup>36</sup>

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<sup>35</sup> The Scottish Higher Education Model Complaints Handling Procedure, page 18, notes the value of recording and analysing past complaints data for the purpose of “Learning from complaints.”

<sup>36</sup> Several HEIs in the UK are already publicly reporting data in this way, including UCL and Goldsmiths. See UCL’s data reporting here: <https://report-support.ucl.ac.uk/support/annual-reports-on-bullying-harassment-and-sexual-misconduct> [accessed 27 January 2020] and Goldsmiths, University of London 2018 data reporting here: <https://www.gold.ac.uk/news/report-and-support-data-2018/> [accessed 27 January 2020].



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## Appendix: Definitions

**Disclosure** refers to a member of the HEI community telling anyone within the HEI about their experience of sexual misconduct. Students who disclose may not wish to make a formal complaint. This guidance does not recommend or support mandatory reporting of disclosures in order to ensure the student disclosing remains in control of their experience and further actions.

**Complaint** refers to a student formally notifying the HEI of their experience in order to trigger action by the HEI.

**Sexual Misconduct** We use the term sexual misconduct as an umbrella term to describe 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<sup>37</sup>. The term 'sexual harassment' captures only some of the possible abuses of power that may occur within an HEI, and in order to comply with the Equality Act (2010) a wider range of sexually harmful behaviours need to be encompassed in the definition, drawing on Bull and Rye (2018), as outlined below. Therefore, sexual misconduct includes sexual or 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 (as outlined below). 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. Sexual misconduct impacts students of all gender identities and sexualities.

We use the term sexual misconduct both to draw on this wider definition of possible harms, but also to avoid language that is commonly used in the criminal justice system so as to underline the distinction between higher education disciplinary processes and the criminal justice process. This use of language is in no way intended to minimise the severity of some of the behaviour encompassed in the definition.

The *Silencing Students* report (Bull and Rye, 2018) identified five ways in which sexual misconduct occurred among interviewees, but there may also exist forms of misconduct that do not fall into any of these categories, most notably racialised sexual misconduct:

- Sexual assault or rape
- Sexual harassment including sexualised touch, sexual jokes, comments or questions; coercion behaviours including promising or implying threats or rewards in return for sexual access
- Grooming or boundary-blurring behaviours that lead to the weakening of professional boundaries between staff and students, such as disclosure of intimate personal information by a staff member; encouraging a student to disclose personal information that is irrelevant to the professional relationship; setting up or attending meetings (especially where involving consumption of alcohol or outside of working hours) where this is unnecessary for the professional relationship; or attempting to control aspects of a student's personal life that are not relevant to their professional relationship with the student.

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<sup>37</sup> Other staff members may also be subjected to such behaviours. However, in this guidance we focus on the teaching and learning relationship between HE staff and students.



- Sexual relationships between students and staff that are consensual but result in harm to the student or that inhibit the student's ability to engage in teaching or learning, either during the relationship or after the relationship ends.
- Sexual relationships between students and staff that the student appears to be consenting to because of a power imbalance in place where they may not have freedom to say no.

**Grooming.** This guidance draws on the definition from Survivors UK, a registered UK charity for male survivors of rape and sexual abuse:<sup>38</sup>

Grooming can be defined as the process that an abuser uses to desensitise you – to make you less likely to reject or report abusive behaviour. Grooming can happen when there is a power differential within a relationship, which the abuser exploits for their own gratification. This is most commonly recognised as a tactic used by perpetrators of child sexual abuse, both on children and parents [...]

While grooming is most associated with child sexual abuse, it is also possible for adults, especially vulnerable adults to be groomed – or prepared – for abuse. As with children, this is more common in situations where there is a power differential – for example by someone older or physically stronger, or by a professional who has a measure of control over you, such as a doctor or a teacher.

One of the key results of grooming is that the survivor is left carrying the shame of the events, often represented in a sense of complicity – that you let it happen. This self-blame once again makes the abuse difficult to talk about. Grooming makes it more difficult to identify when abuse is happening, and more difficult to identify and talk about in retrospect. The law is clear; when consent to sex is coerced, including emotionally coerced sex, it is not consent.

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<sup>38</sup> Taken from the Survivors UK website: <https://www.survivorsuk.org/question/grooming/> [accessed 27 January 2020]





## About the Authors

**The 1752 Group** is a UK-based research and lobby organisation established in 2016 to address staff sexual misconduct in higher education. Our members are academics working in higher education. As part of our research and institutional change activities we partner with UK and international academics, research and support organisations, sector bodies, student unions and others working across higher education to end sexual and gender-based violence, and ensure equal access to education for all. Visit: [www.1752group.com](http://www.1752group.com). Email: [contact@1752group.com](mailto:contact@1752group.com)

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