

Legal Briefing

Staff to student sexual misconduct

Contents

| | |
|---|----|
| Section 1: Introduction | 2 |
| Section 2: The legal, regulatory and governance higher education context..... | 5 |
| Legal compliance | 6 |
| Regulatory compliance..... | 6 |
| Higher education regulatory compliance in England | 6 |
| The Office for Students (OfS)..... | 6 |
| OfS statement of expectations for preventing and addressing harassment and sexual misconduct affecting students in higher education | 7 |
| Higher education regulatory compliance in Wales | 8 |
| Data protection compliance | 8 |
| What is personal data?..... | 8 |
| The Data Protection Principles | 9 |
| Lawful Basis | 10 |
| Governance | 14 |
| The interplay of higher education providers' obligations with the criminal law and criminal justice system | 15 |
| The importance of support for staff supporting students and staff | 16 |
| Section 3: Students – A legal overview..... | 17 |
| Contract and consumer law | 18 |
| Example..... | 19 |
| Negligence (duty of care) | 20 |
| Example..... | 21 |
| Statutory obligations | 22 |
| Health and Safety at Work etc Act 1974 (HSWA) | 22 |
| Example..... | 22 |
| Equality Act 2010 (EA) | 23 |
| Example..... | 24 |
| Human Rights Act 1998 (HRA) and European Convention on Human Rights (ECHR) | 25 |

Legal Briefing

Staff to student sexual misconduct

- Article 8 ECHR: right to respect for private life, family life, home and correspondence..... 25
- Article 6 ECHR: right to a fair trial 25
 - Example..... 26
- Data Protection Act 2018/UK GDPR 26
 - Example..... 28
- Confidentiality 29
 - Example..... 30
- Natural justice 31
 - Example..... 31
- Section 4: Staff – A legal overview 34**
 - Contract law 35
 - Examples of legal remedies which may be available for breach of contract . 36
 - Suspension..... 37
 - Negligence/duty of care 38
 - Unfair dismissal 39
 - Equality Act 2010 43
 - Human Rights Act/European Convention on Human Rights 43
 - Data protection 45
 - References 45
- Section 5: Student and staff codes of conduct, regulations, policies and procedures... 47**
 - The importance of codes of conduct, regulations, policies and procedures 48
 - Definitions of misconduct/sexual misconduct and the nexus between misconduct and higher education providers 49
 - Definitions of sexual misconduct and harassment..... 50
 - Interplay of staff and student procedures 51
 - What procedure should be used?..... 51
 - Settlement agreements and confidentiality 55
 - Information sharing 58
 - Staff and student relationship policies – key considerations 61
- Section 6: The importance of briefings and training 66**

This briefing is intended as a guide only. Whilst the information it contains is believed to be correct, it is not a substitute for taking appropriate legal advice and Eversheds Sutherland (International) LLP can take no responsibility for actions taken based on the information it contains.

Abbreviations

The following abbreviations are used in this briefing:

| | |
|-------------|--|
| CTER | Commission for Tertiary Education and Research |
| DPA | Data Protection Act 2018 |
| EA | Equality Act 2010 |
| ECHR | European Convention on Human Rights |
| GDPR | General Data Protection Regulation |
| HRA | Human Rights Act 1998 |
| HSE | Health & Safety Executive |
| HSWA | Health and Safety at Work etc Act 1974 |
| OfS | The Office for Students |
| OIA | Office of the Independent Adjudicator for Higher Education |
| PSED | Public sector equality duty |

Section 1:

Introduction

Legal Briefing

Staff to student sexual misconduct

Sexual misconduct is a key concern for the tertiary education sector. Higher education providers' measures for the prevention of sexual misconduct are under close scrutiny, as are their responses to instances of sexual misconduct which occur and their support for students and staff affected by such misconduct. In addition, strategies for the prevention of and response to sexual misconduct may increasingly be seen as a focus for higher education providers' environmental, social and governance agendas. This briefing outlines the legal and regulatory context for **staff to student sexual misconduct in higher education** and identifies the key legal obligations which higher education providers owe to their students and staff in this regard.

Consideration of *student to student* and *staff to staff* sexual misconduct falls outside the scope of this briefing. It is important, however, that higher education providers understand the nature of their legal and regulatory obligations in respect of *staff to student*, and *student to student* and *staff to staff*, sexual misconduct. Providers should have in place arrangements, policies and procedures which are robust and fit-for-purpose in order to assist them with their legal and regulatory compliance and to provide effective, timely and targeted support for students and staff.

Discussion of the legal obligations owed by higher education providers to third parties (such as visitors, members of the public, and in connection with collaborative and commercial partnerships) also fall outside the scope of this briefing.

Whilst the broad legal principles addressed in this briefing will be of general interest and application to higher education providers across the four nations of the United Kingdom, the legal obligations it summarises are those which arise under English law only. Legal and regulatory frameworks will differ for higher education providers in Wales, Scotland and Northern Ireland, in respect of which specific legal advice and guidance should be sought.

In this briefing:

SECTION 2: outlines the **legal, regulatory and governance context** in which *staff to student* sexual misconduct in higher education arises;

SECTIONS 3 and 4: provide a high level summary of the **key legal obligations** which higher education providers owe to their students (SECTION 3) and staff (SECTION 4) under English law in connection with the prevention of and response to *staff to student* sexual misconduct, including providers' duty of care and information-sharing obligations;

SECTION 5: discusses the role of **institutional codes of conduct, regulations, policies and procedures** in:

- the prevention of and response to *staff to student* sexual misconduct;
- legal and regulatory compliance; and

Legal Briefing

Staff to student sexual misconduct

- risk identification and mitigation

and the interplay between:

- staff and student policies and procedures and the importance of their alignment; and
- institutional rules and processes and the criminal law.

Reference is made also to the importance of:

- the development of institutional codes of conduct, regulations, policies and procedures in collaboration with students who represent the diversity of student populations and the student experience; and
- the monitoring and evaluation of their implementation and impact to ensure they are fit-for-purpose, accessible, effective and fair.

SECTION 6: highlights the importance of providing **briefings and training** to students, staff and governors to raise awareness and understanding of *staff to student* sexual misconduct.

In addition, reference is made throughout this briefing to the importance of higher education providers providing effective, timely and targeted **procedural and pastoral support** for students and staff, including support for staff who support students and staff in instances of sexual misconduct.

Section 2: The legal, regulatory and governance higher education context

Legal Briefing

Staff to student sexual misconduct

Higher education providers' compliance with their legal and regulatory obligations in connection with *staff to student* sexual misconduct requires a clear understanding of the nature and breadth of their obligations, supported by robust governance and pan-institutional arrangements, and staff awareness, to discharge them in practice. Legal and regulatory compliance underpins scholarly environments which are safe, respectful, supportive and inclusive, and conducive to teaching, research excellence and the enjoyment of a positive student experience - and free from sexual misconduct.

Conversely, non-compliance by higher education providers with their legal and regulatory obligations can result in detriment, distress and disruption for students, including physical and mental harm, academic underperformance/failure, financial loss and a poor student experience. There can also be negative impacts on the wider student community and more broadly such as on student recruitment, retention and attainment and provider and sector reputational damage. Higher education providers may also be exposed to complaints and appeals under institutional procedures, complaints to the Office of the Independent Adjudicator, court claims, regulatory investigation and enforcement action, and financial loss.

Legal compliance

Whilst there is considerable similarity in the broad legal obligations which higher education providers owe to their students and to their staff in respect of *staff to student* sexual misconduct, there are also some significant differences (summarised in **SECTIONS 3 and 4**). Higher education providers may also frequently need to balance competing legal rights of students and staff when dealing with sexual misconduct matters. Providers will also need to consider whether the decisions they are making are subject to public law principles, governed by the principles of natural justice, human rights legislation or the public sector duty under the Equality Act 2010.

Regulatory compliance

Differences exist in the regulatory frameworks and obligations of higher education providers in England, Wales, Scotland and Northern Ireland. Some key aspects of regulatory compliance for higher education providers in England and Wales are addressed below.

Higher education regulatory compliance in England

The Office for Students (OfS)

The OfS is the independent regulator of higher education in England. As explained on its website, its primary aim is to ensure that English higher education is delivering positive outcomes for past, present and future students.

Legal Briefing

Staff to student sexual misconduct

Under the Higher Education and Research Act 2017, higher education providers in England are required to register with the OfS if they wish to access public grant funding (such as funding to support teaching) and/or student support funding (such as enabling students at a provider to access student finance), apply to the Home Office for a student sponsor licence to recruit international students or to maintain an existing licence, or apply for degree awarding powers and/or university title. To register with the OfS higher education providers are required to meet initial conditions of registration, and they must meet general ongoing conditions of registration to remain registered, as set out in the OfS's regulatory framework for higher education in England. The OfS may also impose specific ongoing conditions on a provider in order for it to register or remain registered, on a risk assessed basis. The OfS monitors registered providers in respect of their registration conditions and may intervene where it considers that there is an increased risk of or an actual breach of a condition by a provider. The OfS has a range of enforcement powers including the imposition of specific ongoing registration conditions and monetary penalties, suspension of access to student support funding and/or OfS grant funding, revocation of degree awarding powers and removal from the OfS register.

OfS statement of expectations for preventing and addressing harassment and sexual misconduct affecting students in higher education

In April 2021 the OfS published its [*statement of expectations for preventing and addressing harassment and sexual misconduct affecting students in higher education*](#). The OfS explains that the statement "provides a set of consistent recommendations to support higher education providers in England to develop and implement effective systems, policies and processes to prevent and respond to incidents of harassment and sexual misconduct", and that "Underpinning this framework is the principle that all higher education students registered at a provider, however and wherever they may be studying, should be protected from harassment and sexual misconduct from other students, staff and visitors". The OfS makes clear that whilst the statement focuses on the interests of students, it anticipates that providers would seek to take a similar approach to protecting staff and visitors from harassment and sexual misconduct.

At the time of drafting this briefing the statement of expectations is not part of OfS regulatory requirements, but it is anticipated that the OfS may consider linking the statement to its registration conditions, and intervention and enforcement powers, in the future. The OfS does currently make clear in its *Student guide to tackling harassment, hate and sexual misconduct* that if providers are not meeting its expectations in responding to and preventing harassment and sexual misconduct, it wants to know why, and students may submit a notification to the OfS if they want to let it know about an issue. Higher education providers should also be mindful of events or matters that may constitute a reportable event to OfS under the OfS regulatory framework.

Legal Briefing

Staff to student sexual misconduct

Higher education regulatory compliance in Wales

Higher education providers in Wales which are charities are required to register with the Charity Commission for England and Wales, and their obligations include a requirement to report promptly to the Charity Commission serious incidents in accordance with the Commission's online guidance. A serious incident includes an adverse event, whether actual or alleged, which results in or risks significant harm to the charity's beneficiaries (which include students) or harm to the charity's work or reputation. Once reported, the Charity Commission will look for assurance that the charity has taken steps to limit the immediate impact of the incident and, where possible, prevent it from happening again.

Whilst dependent on the facts and circumstances of a particular instance, an allegation that a staff member has physically or sexually assaulted a student, or that a trustee, staff member or volunteer has been sexually assaulted by another trustee or staff member, or that a student has otherwise been the subject of sexual misconduct whilst under the charity's care, may constitute a serious incident which should be reported to the Charity Commission.

At the time of drafting this briefing the Tertiary Education and Research (Wales) Bill is awaiting Royal assent. It includes provision for the establishment of the Commission for Tertiary Education and Research (CTER) in 2023 as the independent regulatory body responsible for the funding, oversight and regulation of tertiary education and research in Wales and for the registration and regulation of tertiary education providers (with tertiary education encompassing post-16 education including further and higher education, apprenticeships and sixth forms). The introduction of CTER will not affect the regulatory position of higher education providers in Wales in their capacity as charities – those institutions that are charitable will continue to be registered charities with the Charity Commission.

Data protection compliance

Higher education providers must also bear in mind the responsibilities they have under non-sector specific regulation, and a particular area of cross over in these situations is in relation to duties under data protection legislation.

Under the data protection regime, currently the UK GDPR and the Data Protection Act 2018 (together with their updates, particularly with regards to Brexit), higher education providers are required to comply with the core principles of data protection in relation to *personal data*.

What is personal data?

Rights under this legislation only accrue if the individual in question is identified, or can be identified (i.e. they are identifiable). This might be directly from the information the

Legal Briefing

Staff to student sexual misconduct

higher education provider has, or by combining that information with other information which is reasonably available.

To be identifiable, a higher education provider does not need to know the individual's name, but instead can identify them by a form of identifier, such as a name, email address, telephone number or social media handle, or can narrow down the individual's identity to a sufficiently small number of individuals. This is important to bear in mind if higher education providers offer anonymous or similar reporting options, which should be treated as if they contain personal data until they have been reviewed to ensure that a reporting student or reported staff member is not identifiable.

The identifiers themselves, however, are not the only element of data protected – the legislation extends to all information which relates to the individual, and this could include contextual information (location, relationships, etc), and opinions about that individual. In the context of a sexual misconduct investigation, a lot of personal data will be collected and further processed.

Certain types of personal data benefit from increased protection under the data protection legislation, namely information which reveals (including indirectly) racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic or biometric data used to identify someone, health data or data relating to a person's sex life or sexual orientation. These are referred to as either "sensitive personal data" or "special category personal data". For the purposes of this Legal Briefing, we include criminal allegations or offences data within this category, although it sits separately in the UK GDPR.

The Data Protection Principles

Data protection is a principles-based legislative framework. This means that decisions about processing (including disclosing) personal data should be considered in a holistic manner, taking into account all specific circumstances and individuals impacted, on a case by case basis. There is no "computer says no" requirement of the data protection regime; instead, the law specifies the general parameters of lawful processing, and allows controllers (those taking decisions relating to personal data) such as higher education providers to apply the principles to their factual scenarios. This means that the legislation does not prohibit higher education providers from collecting or sharing information in relation to their processes, but it does mean that they must ensure that they have considered all of the principles when doing so.

Legal Briefing

Staff to student sexual misconduct

The UK GDPR data protection principles require that personal data must be:

- processed **lawfully, fairly and in a transparent** manner. This has two important aspects:
 - higher education providers must ensure that (unless an exemption applies) they have been clear to any individuals involved (for example in a sexual misconduct related investigation) how their personal data will be processed. Often this will form part of a general privacy notice, for each of staff and students, but could also usefully be provided as part of specific privacy notices relating to the process, giving more specific and timely information; and
 - as well as being lawful in general terms, the processing must be lawful under the data protection legislation itself, which limits the reasons why organisations may process personal data (referred to as the “lawful basis” for processing). Very limited bases are available for processing special category personal data, and so assessing which basis applies can often be one of the more complex aspects of data compliance in a sexual misconduct matter, including in respect of an investigation or its conclusions;
- processed for **specific, explicit and legitimate purposes**, which means that data should not be collected for one reason, and used for another, unless they are compatible;
- **adequate, relevant and not excessive, and not kept longer than is necessary**, meaning that higher education providers should only collect, store and use the minimum personal data required (for example – for the particular sexual misconduct investigation, and also for the ongoing support and dealings with the individuals involved in that matter);
- **accurate**, and where necessary **kept up to date**. Providers cannot guarantee that information provided to them is always accurate in an objective sense, especially when it forms part of an opinion presented by those involved in a matter involving alleged sexual misconduct and investigation of the allegations; however, care should be taken to ensure that such opinions are collected and recorded accurately, and that objective information is accurate. Unnecessary information should be securely deleted, as should information which is no longer required;
- **kept secure**, and out of harm’s way of unauthorised access or processing.

Lawful Basis

As indicated above, for many higher education providers, identifying the lawful basis for processing special category personal data, and in particular disclosing it, can be the most difficult area of data protection compliance in a sexual misconduct matter. However, there are very few situations where there is a complete barrier to such processing;

Legal Briefing

Staff to student sexual misconduct

similarly, a blanket policy of assuming all processing (including disclosure) is appropriate can also lead to difficulties. Providers must consider this issue on a case by case basis.

For all processing of personal data (whether special category personal data or not) – including disclosure of that data – an “**Article 6**” lawful basis must be found. For most processing which a higher education provider reasonably considers necessary in the context of these processes, the following are most likely to be appropriate:

- **Article 6(1)(a) – consent:** This is not normally a preferred option, as consent must be fully informed and freely given, which is very difficult to evidence as between (for example) employer and employee, public authority and member of the public, or provider and student. Consent can also be withdrawn at any time. Higher education providers should take care not to rely on consent where it is not necessary, as this may hamper the provider from complying with its other obligations including its duty of care where consent is refused or later withdrawn. In particular, in relation to an individual who is alleged to have engaged in sexual misconduct, a provider would not want to find its investigation hindered by a subsequent withdrawal of consent. Consent may be appropriate, however, where there is an optional course of action which requires the reporting student to be fully engaged, and where the withdrawal of their consent could be easily complied with. Note that avoiding consent does not mean that the individual’s opinion does not matter; they must still be kept informed, and in many cases will have a right to object to processing;
- **Article 6(1)(b) – contract:** a higher education provider may consider that the processing is necessary for the performance of a contract to which the individual whose data is being processed is a party, for example, complying with its obligations to a student under the contract between the student and the provider, or disclosing information to a professional regulatory body in relation to relevant courses. This may be appropriate when complying with a higher education provider’s obligations (if any) under any student contract to investigate complaints;
- **Article 6(1)(c) – required by law:** the processing is necessary for compliance with a legal obligation to which the higher education provider is subject. Legal obligations include regulatory obligations, and therefore may include complying with obligations imposed by the OfS;
- **Article 6(1)(e) – public task:** the processing is necessary for the higher education provider to perform a task in the public interest or for its official functions (e.g. as an education provider), and the task has a clear basis in law;
- **Article 6(1)(f) – legitimate interests:** where the higher education provider is acting outside its public tasks, and the processing is necessary for its legitimate interests or the legitimate interests of any third party, unless there is a good reason to protect the individual’s personal data which overrides those legitimate interests (referred to as the “*balancing test*”). This is the broadest lawful basis, and (provided

Legal Briefing

Staff to student sexual misconduct

that a provider has carried out this balancing test) provides the most opportunities for providers to collect, use and share information where they consider it to be the right thing to do; and

- **Article 6(d) – vital interests:** the processing is necessary to protect the individual's life – this is a very high standard to meet (for example, where an individual has been in a serious car crash and personal data is disclosed to the hospital treating them). This is less likely to be relevant during a disciplinary or investigatory process itself, but may be relevant where for example, there is a threat by a student of suicide, of which the provider is aware, and the provider considers that disclosure is required in order to protect the student;

In addition, for special category personal data, an additional "**Article 9**" lawful basis must be found.

Whilst dependent on the facts and circumstances of the particular matter, the most likely appropriate lawful basis are:

- **Article 9(2)(a): the explicit consent of the individual.** The same caveats about consent above apply, but the standard is even higher. This will need to be assessed on a case by case basis and a decision made as to whether it is appropriate to obtain consent and whether or not that consent can be relied upon. As above, if consent is requested and denied, it will be very difficult to rely on any other basis for the processing (including for disclosure);
- **Article 9(2)(b):** the processing is **necessary** to carry out obligations and rights of the provider in relation to **employment, social security and social protection** with a basis in law as set out in Schedule 1 Data Protection Act 2018;
- **Article 9(2)(c):** the processing is **necessary** to protect the individual's life – their **vital interests** – and they are unable to consent;
- **Article 9(2)(e):** the processing relates to personal data which are **manifestly made public by the data subject**. The individual concerned must have made the information public, and it must be clear that this is the case; it must be realistically accessible to a member of the general public, rather than a limited audience (and so, for example, not just a widely accepted rumour on campus which is not refuted);
- **Article 9(2)(f):** the processing is **necessary** for the **establishment, exercise or defence of legal claims**, or whenever courts are acting in their judicial capacity. This may be relevant in particular if there may be courses of action available to the reporting student other than an internal investigation, such as reporting the conduct to the police or considering civil action;
- **Article 9(2)(g):** the processing is **necessary** for the reasons of **substantial public interest**, with a basis in law as set out in Schedule 1 Data Protection Act 2018. Schedule 1 sets out a wide range of potential purposes which are in the public interest, including the safeguarding of children and individuals at risk, the prevention

Legal Briefing

Staff to student sexual misconduct

or detection of unlawful acts, and compliance with regulatory requirements relating to serious improper conduct. Each of these purposes have a number of requirements before they can be relied upon, but should provide a good foundation for providers who need to process special category personal data in their processes; and

- **Article 9(2)(h) or (i):** processing is **necessary** for the purposes of **preventive or occupational medicine**, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services, or for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices (in each case, with a basis in law as set out in Schedule 1 Data Protection Act 2018).

As noted above, the Data Protection Act 2018 (Schedule 1) sets out a range of options that provide the “basis in law” required by some of these conditions. However, the nature of the information to be disclosed in each case must be considered in light of its “strict necessity” for the purpose of complying with that particular condition. The overarching theme is of minimising the processing of special category personal data that takes place, but at all times considering all the surrounding circumstances. “Necessary” processing involves a consideration of proportionality – for example, when sharing data, the higher education provider should consider whether the purpose it identifies for the data sharing requires all of the proposed data to be shared, or whether the purpose can be achieved by other means which would limit the amount of data to be shared (e.g. by providing a summary or high level description rather than providing all data or detailed data). It should also identify and consider any potential risk of harm and any benefit to the data subject and the third party with whom the data is shared.

In addition to the rights to have their personal data processed in accordance with the principles above, individuals also have the right to:

- withdraw any consent given, at any time (in respect of future processing only);
- object to any processing which has been carried out on the basis of public task or legitimate interests, and have that objection complied with unless the provider can demonstrate a compelling reason why their objection should be overridden;
- access the personal data processed about them, as well as information about its sources and its processing; and
- request erasure of their personal data if the processing is based on a withdrawn consent, it is no longer necessary for the purposes it was collected or processed for, it is being unlawfully processed, or the individual has objected to the processing and that objection has not been overridden.

These rights differ depending on the lawful basis for the processing, which makes it even more important that an appropriate basis has been chosen and communicated in advance

Legal Briefing

Staff to student sexual misconduct

of processing (such as in a general privacy notice, or a specific privacy notice relating to the process) where the information is collected by the higher education provider, or within one month or at the point of first correspondence where the information is obtained from someone else. This means that proceedings are not delayed by, for example, requests to withdraw consent or for erasure when consent was never relied upon.

The right of access is particularly relevant in the context of these processes. For example, where an investigation report or hearing outcome contains the personal data of the reported staff member, reporting student or a witness, each will have the right to access their own personal data through a data subject access request, if they have not already received it during or after a formal process. The information to which each individual is entitled under a data subject access request includes a right to information about the source of the personal data.

But each individual does **not** have a right to personal data relating to any other individual involved. However, in some cases, discharging the duty to provide the data subject with their own personal data may require third party personal data to be shared with them. This can only be done where that disclosure of third party personal data is made with the consent of the third party, or where it is **reasonable** to disclose without that consent.

Higher education providers should consider issuing guidance and training to staff in relation to the circumstances in which these lawful bases can be used in advance of dealing with sexual misconduct matters, including undertaking an investigation, in order to avoid difficulties arising at critical points of the matter/investigation. Staff should record the basis of their decisions in order to protect against a risk of challenge at a later date.

Governance

In addition to the broad issues of legal and regulatory compliance summarised above, higher education providers should remain mindful of their governance obligations in connection with *staff to student* sexual misconduct, including of oversight and scrutiny of relevant arrangements, policies and procedures across the breadth of institutional functions and activities.

Governing bodies should demonstrate accountability for, and strong commitment to, the prevention of and response to *staff to student* sexual misconduct. They should be satisfied that the provider has in place robust, effective and embedded prevention, response and support measures (including for the identification and management of risks) which are legally and regulatory compliant and fit for purpose. Governance arrangements should be supported by robust reporting systems by which governing bodies are provided with regular reports as to the effectiveness and impact of these

Legal Briefing

Staff to student sexual misconduct

measures and with data (for example on prevalence and trends) for evaluation and institutional learning.

Governors should receive training to raise their awareness of the issues addressed in this briefing and to support them in understanding and discharging their legal, regulatory and governance responsibilities.

The interplay of higher education providers' obligations with the criminal law and criminal justice system

Higher education providers are essentially scholarly communities for teaching, learning and research. They regulate and manage their student and staff communities, and their relationships with and between their students and staff, pursuant to internal, institutional codes, regulations, policies and procedures, and applicable laws. Higher education providers do not – and should not – investigate suspected breaches of the criminal law, determine whether criminal offences have been committed or impose criminal sanctions. They do not act as a proxy Crown Prosecution Service or criminal court.

Higher education providers should ensure that staff and student codes of conduct contain clear definitions of what constitutes misconduct, including sexual misconduct. They should articulate plainly and unambiguously the standards of conduct required (not merely expected) of staff and students. Codes of conduct should be drafted in terms wide enough to encompass the full range of behaviours over which a higher education provider wishes to have jurisdiction, both on and off campus and in and out of term time. Whilst higher education providers may wish to include conviction of relevant criminal offences within their definitions of misconduct, the investigation, determination and sentencing of criminal offences is solely a matter for the criminal justice system.

Higher education providers should provide training to staff who draft and implement institutional policies and procedures (including staff who investigate sexual misconduct allegations and sit on panels to determine such allegations) to assist them to recognise and navigate this important institutional/criminal divide.

In addition, higher education providers should explain to students and staff the distinction between institutional processes and the criminal justice system. This will help providers to manage individuals' expectations as to the provider's powers and procedures, and timescales for and potential outcomes of its processes, and assist students to make informed decisions as to whether and, if so, when to refer matters to the police.

Legal Briefing

Staff to student sexual misconduct

The importance of support for staff supporting students and staff

Higher education providers should remain mindful of their general duty of care to staff. They should ensure that accessible and effective wellbeing support is available to staff who support students and staff in connection with *staff to student* sexual misconduct, particularly in serious and distressing cases. This may include staff who are involved in the implementation of policies and procedures (including as investigators or panel members) or report and support arrangements, and to staff who provide support more widely to students and staff affected by sexual misconduct.

Section 3:

Students – A legal overview

Legal Briefing

Staff to student sexual misconduct

The precise legal obligations which a higher education provider owes to its students in respect of *staff to student* sexual misconduct will depend on the facts and circumstances of a particular instance but the broad legal framework can be described and is outlined in this Section 3, together with example scenarios to assist illustration of each legal area described. Depending on the particular facts and circumstances of a matter, a student may bring a challenge (complaint, appeal and/or court claim) in respect of one or more of these legal areas. Whether a student would be successful in bringing a challenge, and to what redress they might be entitled if successful, will depend, including on the merits of the challenge and the nature and extent of loss or other detriment they had incurred.

Contract and consumer law

The relationship between a higher education provider and its students is typically a contractual one. Furthermore, students generally contract as consumers so that UK consumer law will apply to the relationship, both pre-contract in respect of a higher education provider's marketing and recruitment activities and to its contract formation and admissions processes, and post-contract during the life of the contract.

The UK consumer law regime is holistic in nature and applies to all information (written and verbal) that a higher education provider provides to prospective students at the pre-enquiry/research, application/admission and contract-formation stages as well as to students post-contract formation and during performance of the contract itself. This information will include marketing and recruitment materials, codes of conduct, policies and procedures, and information about pastoral support services. In the context of *staff to student* sexual misconduct, this information is likely increasingly to result in providers providing information to prospective students about their arrangements for the prevention of and response to *staff to student* sexual misconduct together with information about the support available to students affected by such misconduct. Once provided, higher education providers will need to be confident that they will fully implement and comply with the statements and commitments they make in such information, and in their student contracts, or they could face challenge for breach of contract and consumer law.

Under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), higher education providers are obliged to provide material information to prospective students and to students to assist them to make informed decisions about choice of provider, choice of course, etc and to make informed decisions during the contract. Higher education providers should provide material information in a timely manner and up front, and ensure that it is clear, accurate and unambiguous. As above, information about a higher education provider's arrangements, policies and procedures for the prevention of and response to *staff to student* sexual misconduct and the support available to students who have experienced or who are otherwise affected by such misconduct is increasingly likely to be provided to prospective students and students, and may in certain circumstances be regarded as material information.

Legal Briefing

Staff to student sexual misconduct

In addition, under the Consumer Rights Act 2015 (CRA), higher education providers are required to deliver the services they have advertised/promised, and to do so with reasonable skill and care. In light of the increasing sector emphasis on ensuring higher education providers have in place robust and fit-for-purpose policies and procedures for the prevention of and response to sexual misconduct, this requirement may potentially (depending on the particular facts) be extended to include the way in which a higher education provider delivers its services to prevent *staff to student* sexual misconduct and how it responds to sexual misconduct allegations and to the pastoral services it provides to support students who have experienced or who are otherwise affected by such misconduct. Failure to deliver advertised or promised services or to do so with reasonable skill and care could prompt a complaint or a court claim for breach of contract and consumer law, depending on the facts of the case.

A student who successfully brought a claim for breach of contract may be entitled to damages to compensate them financially for loss they have experienced arising from the breach. Further, the CRA provides statutory remedies for a student against a higher education provider if the requirement to deliver services as advertised/promised and with reasonable skill and care is not met, which would be to require the provider to re-perform the service or, where re-performance is not possible, to reduce the price paid for the service with any reduction reflecting the element and extent of non-performance.

It is also worth noting that it is a criminal offence under consumer law to mislead a student about their legal rights, including a student's common law remedies.



Example

Student A alleges that they have for some time been sexually harassed by their PhD supervisor, Professor B, and that this has negatively affected their research and academic progression and caused them upset and anxiety.

Student A makes a formal complaint of sexual harassment by Professor B to their higher education provider under the provider's student complaints procedure and as directed to do so by its dignity at work and study policy. Student A also requests that they be provided with a different supervisor as they do not consider that they can effectively continue their research under Professor B's supervision. The higher education provider undertakes a cursory consideration of the complaint and decides that there is no case to answer against Professor B and does not uphold the complaint. Student A requests an appeal under the student complaints procedure but the higher education provider dismisses the appeal request for not disclosing valid grounds for appeal.

Legal Briefing

Staff to student sexual misconduct

Disillusioned with the higher education provider's complaints mechanism, Student A brings a breach of contract claim in the courts against the higher education provider alleging breach of contract by the provider for failing to:

- provide PhD supervision with reasonable skill and care and as described in its marketing and programme-related materials and in accordance with the terms of its student contract;
- investigate and determine the complaint of sexual harassment fairly and in accordance with the provisions of its dignity at work and study policy and its student complaints procedure;
- consider the appeal request fairly and in accordance with the provisions of its dignity at work and study policy and its student complaints procedure; and
- provide a positive student experience

and claiming:

- a refund of tuition fees;
- damages for distress and inconvenience; and
- damages for loss of enjoyment of a positive student experience.

Negligence (duty of care)

In broad terms, a higher education provider owes a general duty of care to its students to deliver its educational and pastoral services to the standard of the reasonably competent higher education provider and to act reasonably to protect the health, safety and welfare of its students in respect of risks of which it is aware or ought reasonably to be aware - within the context of an essentially scholarly relationship between provider and student. Whether a duty of care arises in a specific instance will depend on the facts and circumstances of the particular case. Where a duty of care arises, a higher education provider which fails to act to the standard of a reasonably competent higher education provider will be in breach of duty.

Where breach of a duty of care by a higher education provider causes a student reasonably foreseeable loss (including, for example, psychiatric damage), a court may determine that the provider has been negligent and award the student damages to compensate them financially for the loss they have suffered.



Example

Student C (a final year student) alleges that they have been sexually assaulted by a senior lecturer, Dr. D, at a university departmental party.

Student C reports the assault to their higher education provider. They explain that they do not want to make a complaint under the provider's student complaints procedure, nor do they want to refer the matter to the police, as they consider that doing so would cause them considerable additional distress.

The higher education provider refers the matter to its HR department to investigate under its staff disciplinary process. There is some delay in the provider deciding whether and how to deal with the matter and in informing Student C of how the matter will be handled. After starting the investigation, the staff member appointed to act as investigator decides that they do not have the time or the relevant expertise or experience to investigate an allegation of this nature and seriousness and, they inform HR that they do not feel able to continue with the investigation. Further time elapses whilst HR identifies a new investigator. Eventually the provider appoints an external investigator who has experience of investigating sexual misconduct allegations in the private sector but no experience of HE. After a protracted investigation, Dr D raises a formal grievance under the provider's staff grievance policy which causes further delay.

Student C writes to the provider to say that its handling of the matter is causing them significant distress, that they are unable to focus on their studies and that they are concerned that they will not be able to complete their programme this year. They explain that they feel they have no choice but to interrupt their studies on ill health grounds but that they are also worried about how they will fund an additional year of study if they return next academic year and about having to settle into a different student cohort. In reply, HR informs Student C that the allegations against Dr D cannot be progressed until Dr D's grievance is dealt with and that there will therefore be a further delay in dealing with the matter.

Student C is finding the matter extremely distressing and it is affecting their studies, student experience and wellbeing. Having lost all confidence in the provider's handling of the matter, and before the internal procedures have been completed, Student C brings a negligence claim against the provider in the courts alleging that it has failed to act as a reasonably competent higher education provider in the way it has responded to and investigated the report of sexual misconduct and this has caused them anxiety and depression and, in addition, financial loss in connection with interruption of their studies. Student C claims damages for personal injury, wasted tuition and accommodation fees and loss of earnings.

Statutory obligations

Health and Safety at Work etc Act 1974 (HSWA)

Section 3 HSWA imposes a general duty on a higher education provider to conduct the institution in such a way as to ensure, so far as is reasonably practicable, that students are not thereby exposed to risks to their health or safety.

Alleged breaches of section 3 are regulated by the Health & Safety Executive (HSE). The HSE may take enforcement action to prevent harm when issues of non-compliance, hazard or serious risk are identified. HSE enforcement includes criminal prosecution in respect of serious cases.



Example

Student E informs their Students' Union President that they have been sexually assaulted by their supervisor Dr F and that they have made a report to the higher education provider.

Student E informs the SU President that:

- the assault has had a profound effect on them, causing them extreme distress and significantly hindering their studies and academic progression;
- the provider has not taken their report seriously or dealt with it promptly or effectively;
- the provider has not provided them with or signposted them to any pastoral or academic support;
- whilst they have been allocated a different supervisor, they still have to work and study alongside Dr F who is a high profile staff member in the department;
- the departmental culture is "toxic"; and
- they feel that the department has closed ranks around Dr F and has ostracised them.

The SU President is aware of a number of reports from other students made in the last few years of alleged sexual misconduct by staff in the same department and also in other departments in the same school. In addition, concerns are frequently raised with the Students' Union representation unit about the way in which the provider investigates allegations of sexual misconduct against staff, including of aggressive and

Legal Briefing

Staff to student sexual misconduct

traumatising questioning by investigators of reporting students and a general lack of procedural support.

The SU President reviews the provider's student complaints procedure, staff code of conduct, staff disciplinary procedure and respect for work and study policy and notes that they do not contain any specific provisions dealing with allegations of sexual misconduct or any specific signposting to pastoral support. The SU President also speaks with Registry which confirms that the provider does not collect prevalence data about sexual misconduct nor does it routinely report to the Governing Body on the implementation or effectiveness of its student or staff policies and procedures.

The SU President submits a concern form to the HSE which:

- summarises, on a no names basis, Student E's allegations, the reports and concerns raised with the Students' Union and its representation unit, and the confirmation from Registry;
- highlights the lack of specific sexual misconduct provisions and signposting to pastoral support in the provider's internal procedures and policies; and
- states that there is a systemic, endemic and pan-institution failure by the provider to respond adequately and effectively to staff to student sexual misconduct which poses a significant risk to students' health, safety and wellbeing.

The HSE considers the concern form and concludes that it raises issues which have and/or have the potential to cause significant harm to students and/or which appear to constitute a significant breach of health and safety law. The HSE emails the provider's chief operating officer to inform them as a matter of courtesy that the HSE will be attending at the provider's premises at 9am the following morning to: (1) review copies of all the provider's student and staff policies and procedures dealing with bullying, harassment, sexual misconduct, complaints and discipline; and (2) speak with senior managers about the implementation of these processes and the provider's general arrangements for the identification and mitigation of risks relating to sexual misconduct.

Equality Act 2010 (EA)

The EA prohibits the discrimination, harassment and victimisation of applicants and students by higher education providers on the basis of the relevant protected characteristics prescribed in the EA. The protected characteristics pertaining to applicants and students are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. In addition, the EA requires higher education providers to make reasonable adjustments for applicants and students with disabilities to avoid a substantial disadvantage being created for the applicant or student, in comparison with an applicant or student who is not disabled. The duty to make

Legal Briefing

Staff to student sexual misconduct

reasonable adjustments will arise where the disabled person is put at a substantial disadvantage by a provision, criterion or practice or a physical feature of the higher education provider and/or the failure to provide an auxiliary aid. The County Court has jurisdiction to determine claims by applicants and students for alleged breach of the EA.

In addition, many higher education providers (including those registered with the OfS) are subject to the public sector equality duty (PSED) which requires them in the exercise of their functions to have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the EA, (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. The relevant protected characteristics in respect of the PSED are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The Equality and Human Rights Commission is responsible for enforcement of the PSED.



Example

Student G (an international student) alleges that their tutor has for some time been making sexualised comments about Student G's appearance and suggesting that they meet for coffee after tutorials to "get to know each other better".

Student G says that the tutor's behaviour is unwanted and makes them feel uncomfortable – and that it is common knowledge that the tutor, along with other male academics in the department, regularly singles out new students, in particular international students, for this type of attention. In addition, Student G says that when they asked the tutor to refrain from such conduct the tutor's attitude to Student G became hostile and that the tutor has since sought to exclude Student G from class discussions and takes longer to provide feedback on Student G's assessments than for other students.

Student G makes a formal complaint under the provider's student complaints procedure alleging that the tutor's conduct constitutes discrimination, harassment and victimisation of Student G by the provider and demanding financial compensation for the distress, inconvenience and injury to feeling which they say the tutor's conduct has caused them. Student G also alleges that the provider is in breach of the public sector equality duty. Student G says that if their complaint is not upheld and financial compensation paid to them they will issue proceedings in the County Court for discrimination, harassment and victimisation and will refer the provider to the Equality

Legal Briefing

Staff to student sexual misconduct

and Human Rights Commission for sex and race discrimination which Student G says is systemic and endemic in the department and which they say constitutes a breach of the public sector equality duty.

Human Rights Act 1998 (HRA) and European Convention on Human Rights (ECHR)

The HRA is likely to apply to higher education providers in relation to the exercise by them of their public functions. In addition, courts have an obligation under the HRA to interpret and apply legislation, wherever possible, in a manner which is consistent with the ECHR. The ECHR, therefore, may be taken into account when considering whether the rights of students have been infringed.

Article 8 ECHR: right to respect for private life, family life, home and correspondence

Where Article 8 applies, higher education providers owe students a qualified right to respect for their private and family life, home and correspondence, which can go hand in hand with their data protection rights but extends beyond information captured about an individual. Lawful and proportionate interference by a higher education provider with a student's exercise of the right is permitted where it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 considerations may arise in *staff to student* sexual misconduct matters in a number of ways, including in respect of raising, investigating and determining sexual misconduct allegations. Higher education providers should ensure that processes for making disclosures, reports and complaints of *staff to student* sexual misconduct are accessible, proportionate and effective. Similarly, providers should ensure that the implementation of their student and staff processes when responding to, investigating and determining instances of alleged *staff to student* sexual misconduct is prompt, proportionate and not unduly intrusive, including in respect of obtaining information from texts or private email or social media accounts when evidence-gathering. In addition, reporting students and reported staff members in *staff to student* sexual misconduct cases should be provided with access to appropriate procedural and pastoral support to assist them to participate fairly in the process, including any investigation, and to exercise and defend their legal and procedural rights in connection therewith.

Article 6 ECHR: right to a fair trial

Article 6 ECHR gives the right to a fair trial "in the determination of [a person's] civil rights and obligations or of any criminal charge against [them]", including the right to

Legal Briefing

Staff to student sexual misconduct

legal representation. Article 6 is discussed at **SECTION 4** below in connection with a staff member against whom a student raises a sexual misconduct allegation.



Example

Student H made a formal complaint to their higher education provider at the start of the academic year that Lecturer I had been asking Student H questions about their personal and intimate relationships and making derogatory and lewd remarks about their sexual orientation.

In the formal complaint, Student H explained that they found Lecturer I's conduct very intrusive, disrespectful and upsetting and that it had caused them a great deal of anxiety and was negatively affecting their learning and student experience. They complained that Lecturer I's conduct was an infringement by the provider of their Article 8 right to respect for their private life including their studies and mental wellbeing.

Some considerable time has now passed since Student H submitted their formal complaint and, notwithstanding various enquiries by Student H of the student complaints team about the stage it has reached, they have received no outcome on the complaint nor any update on how the provider's investigation is progressing. Whilst Student H no longer has timetabled lectures with Lecturer I, they are concerned to receive an outcome to the formal complaint. In addition, the delay in dealing with the complaint and their ongoing concerns about Lecturer I is causing them ongoing distress and inconvenience.

Student H therefore makes a further formal complaint about the provider's complaints handling, complaining that its failure to deal with the first formal complaint in accordance with its student complaints procedure and the excessive delay has caused them additional upset and detriment to their academic progression and student experience. They complain that this is a further unlawful interference with their Article 8 right to respect for their private life including their studies and mental wellbeing.

Data Protection Act 2018/UK GDPR

A common issue which arises in relation to data protection compliance is in relation to the disclosure of information. Institutional processes, and in particular investigations, require the collection and analysis of often large amounts of personal data and, in sexual misconduct cases, of special category personal data. This data can relate not only to the nature of the alleged misconduct, but also to the impact it has on those involved, from both a mental and physical health perspective. Higher education providers must balance

Legal Briefing

Staff to student sexual misconduct

the rights of all individuals involved in the process and investigation when considering whether a lawful basis allows the disclosure to one party of special category personal data relating to another party.

A critical area here is in relation to disclosure of the outcome of an investigation. Where a higher education provider has decided that no action is to be taken in respect of an allegation of *staff to student* sexual misconduct, a reporting student may feel justifiably aggrieved and request further information. Whether provision of information is appropriate may depend on the provider's obligations to the reporting student (including its duty of care and obligations in relation to health and safety) and the nature and sensitivity of the information available to it. This will equally apply where the provider has made a finding against a reported staff member and implemented a sanction, and also where the reported staff member may be seeking information relating to the allegations made against them.

The first question that higher education providers should consider is what they are trying to achieve, and whether in order to achieve that aim any personal data is required to be disclosed. For example, depending on the circumstances, it may be possible to give adequate support to a reporting student without sharing any personal data about the reported staff member. However, if personal data does need to be disclosed, an appropriate balance can – and should – be made between: protecting the privacy of the reporting student and the reported staff member and the importance of understanding the context of the process/investigation; and conducting an open and transparent process/investigation.

Structuring the process/investigation and its decision/findings in such a way that information can (where possible) be shared between the reporting student and the reported staff member without sharing special category personal data is important, as well as ensuring that at every step of the way, those involved are clearly informed of the fact that disclosures may or will be made, and for what purposes. For example, it may be that details of a sanction could be disclosed without disclosing any information about the sex life of the reported staff member or any allegations of criminal offences.

Where providers consider disclosure is appropriate, they should avoid requesting consent for disclosure unless there is no other lawful basis available, as consent must be capable of being easily refused or withdrawn.

Unfortunately, if an appropriate lawful basis for disclosure cannot be identified, no matter how justifiable the disclosure may seem, the Information Commissioner's Office has been very clear that it "*cannot authorise the use of special category data in the absence of a condition. Adding further conditions is a matter for government and would require new*

Legal Briefing

Staff to student sexual misconduct

legislation".¹ This would therefore result in a breach of UK GDPR and potential consequential regulatory and/or court action.

As indicated in **SECTION 2** within the subsection on the Interplay of higher education providers' obligations with the criminal law and criminal justice system above, higher education providers do not stand in the shoes of a law enforcement agency or a court; if they were to do so, a modified data protection regime would apply to them, adding weight to the argument that criminal offences should be investigated only by the appropriate law enforcement body. Higher education providers should also be mindful of a growing body of case law which makes clear that whilst disclosure of the identities of those being investigated for criminal acts may be capable of disclosure (in most of these cases in the press, which is a specific basis under Schedule 1 of the Data Protection Act), this is not always the case, and an individual's right to privacy may prevail.²



Example

Student J makes a report against a Tutor of inappropriate drunken and sexual behaviour at a number of academic events. The higher education provider upholds the complaint, disciplines the Tutor and imposes a disciplinary sanction. Student J requests full details of the disciplinary sanction.

In considering what information (if any) regarding the disciplinary sanction should be disclosed, the provider must consider whether there is any restriction on its disclosure. It is likely that any sanction constitutes "personal data" of the Tutor in this case – as it is information which relates to them and has some biographical significance to them. However, the fact that it is personal data does not mean it cannot be disclosed. We are unaware of any case law or legislative discussion specifically dealing with the interpretation of the term "sex life" in the UK GDPR, and therefore must interpret the term as its natural meaning, which does not necessarily include all sexual activities in which an individual is involved, and in particular sexual misconduct. Therefore, assuming that the allegation does not equate to a criminal allegation, it would be wrong to assume that the outcome of the complaint and disciplinary process is automatically special category personal data simply because it relates to an allegation of sexual misconduct.

¹ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/what-are-the-rules-on-special-category-data/#scd3>

² *Khuja v Times Newspapers Limited and others* [2017] UKSC 49; *ZXC v Bloomberg L.P.* [2020] EWCA Civ 611

Legal Briefing

Staff to student sexual misconduct

For example, an explanation that, having concluded an investigation, the provider had found that the Tutor had acted in breach of the provider's code of conduct and policies and was to be suspended for a period of time may be disclosable where such disclosure forms part of the provider's public task, or, where it did not, it had balanced the legitimate interests of all concerned and the Tutor's rights and freedoms did not outweigh the interests of the provider in upholding its open and transparent processes, and Student J in understanding the outcome of their complaint and navigating the impact of the experience on them.

Even if this information did constitute special category personal data, the provider may still be justified in disclosing this information to Student J on grounds of substantial public interest, but the exact basis in UK law would need to be identified within Schedule 1 of the Data Protection Act 2018 and the provider would need to be satisfied it was appropriate to rely upon it, with disclosure being "strictly necessary" for that purpose.

However, if Student J were to go further and request details of evidence provided in the investigation, and such evidence included (for example) issues of alcoholism or mental health concerns on the part of the Tutor, the presumption should be that this information should not be disclosed unless there was a clear basis in law for it to be disclosed.

Confidentiality

Higher education providers are often keen to stress that their processes and investigations are "confidential" in order to reassure those involved that their privacy will be respected. However, assuring those involved in a process or investigation that what they say is confidential may result in a provider being unable to use important information at a later stage without breaching that obligation of confidentiality. Confidentiality can attach to information either under the law of confidence (where information must have the "necessary qualities of confidence") or contractually.

Statements of confidentiality can also hinder efforts to share personal data, as they reduce the transparency of future potential uses of the information provided.

Equally, higher education providers should not use confidentiality as a tool to prevent reporting students from discussing their experiences with their support networks or others, although some guidance as to how to preserve the fairness of the process or investigation until its conclusion may be useful to avoid inadvertent prejudice. However, should a reporting student wish for their report to be kept confidential, it would be best practice to respect this wherever possible, although that reporting student must be informed if that would prejudice the higher education provider's ability to investigate or

Legal Briefing

Staff to student sexual misconduct

otherwise take action, including action required to protect or support the reporting student.

However, where the higher education provider has an obligation, for example a duty of care, to act on the report whether or not the reporting student has consented to such action, committing to confidentiality obligations may result in the provider being caught between a legal or regulatory duty to act, and a duty of confidentiality to not disclose. This can lead to an internal conflict which detracts from the key safeguarding issues at hand.

Higher education providers should make clear the extent of confidentiality available to both the provider and the participants in any process/investigation, and the consequences of maintaining or breaching that confidentiality.



Example

Student K becomes aware of some rumours of serious sexual misconduct relating to Lecturer L, which reflect their own experience of Lecturer L. Student K does not want to make a complaint themselves, but wishes to ensure that the higher education provider is aware of these serious concerns about Lecturer L. Student K speaks to Tutor M, who assures Student K that anything they say is confidential. Student K discloses their knowledge of serious sexual misconduct allegations against Lecturer L which, if true, would make Lecturer L's position within higher education provider untenable. Tutor M asks Student K if Tutor M can discuss their information with those relevant senior managers and potentially also with the police. Student K says no.

Tutor M is now in a difficult situation. Tutor M needs to balance the rights and the potential trauma to Student K if they escalate this matter. But not taking any action could breach other duties of the higher education provider which Tutor M should perform. There are likely inevitably to be concerns about progressing matters when a reporting student does not want to do so, including where it could cause harm to that reporting student; however, in this scenario, there is a risk to others within the provider's community if Tutor M ignores this information. Under data protection legislation, Tutor M will be able to disclose this information, particularly if it relates to preventing or detecting unlawful acts, or allowing the provider to carry out its investigation in line with its duty of care due to the seriousness of the misconduct; but the assurance of confidence has meant that its obligations of transparency have been broken, it may breach a legal duty of confidence and, in any event, it will damage the trust of Student K, who needs the support of the provider at this point in time.

Legal Briefing

Staff to student sexual misconduct

All staff should be reminded that absolute confidentiality cannot be guaranteed, and therefore assurance of this should not be given. Staff should explain to students that whilst they will keep information confidential to the extent that they can, in some circumstances - to protect that student, and others in the community - they may need to disclose information further.

Natural justice

The principles of natural justice apply to the decision-making of higher education providers which exercise public law functions, including to the procedures that they follow to make their decisions. Natural justice requirements will apply to most higher education providers, including those registered with the OfS. In practice, the application of natural justice means that higher education providers should implement their student and staff policies and procedures and make decisions in a manner that is fair, lawful, reasonable, consistent, prompt, impartial and proportionate.

Key natural justice implications in respect of staff against whom allegations of sexual misconduct are raised by students are addressed at **SECTION 4** below.

In broad public law terms, a student may seek to challenge a decision by a higher education provider for breach of natural justice on the grounds of procedural impropriety (including bias), illegality, and/or irrationality (i.e. that the higher education provider has made a decision that no reasonable higher education provider could have made). A challenge would be made in the High Court by way of an application seeking the Court's permission to issue a substantive application for judicial review of the higher education provider's decision.

It is important to note that, whilst employment decisions are not amenable to judicial review, a higher education provider's processes, when taken as a whole, for making decisions in respect of students in *staff to student* sexual misconduct may be so amenable.



Example

Student N makes a report to her higher education provider of sexual assault by her supervisor, Dr O. Student N explains to the provider that she does not want to make a formal complaint as she feels that going through the student complaints procedure would cause her considerable additional trauma but that she does want the provider to take disciplinary action against Dr O.

Legal Briefing

Staff to student sexual misconduct

The provider considers the matter under its staff disciplinary procedure. It undertakes an initial investigation which concludes that there is no evidence in support of the allegations against Dr O other than Student N's own witness evidence. The provider decides that there is no case to answer against Dr O.

Student N is shocked and deeply upset by the provider's decision not to proceed to a full disciplinary hearing. She emails the Vice Chancellor and the Chair of Council to say that the provider's decision that there is no case to answer is:

- irrational, as there is compelling evidence of sexual assault by Dr O;
- unlawful, as the provider's processes treat female students – who are more at risk of sexual misconduct – unfavourably in comparison with male students and this constitutes indirect discrimination under the Equality Act 2010 and a breach of the provider's public sector equality duty and of Article 8 ECHR (right to respect for private and family life); and
- unfair, having been made pursuant to a process which does not provide for adequate investigation and consideration of sexual misconduct allegations against staff or participation by reporting students.

Student N states that the staff disciplinary procedure and reporting arrangements are inadequate, unfair and not fit-for-purpose including in respect of students:

- raising sexual misconduct allegations against staff;
- having their voice heard in disciplinary investigations and at disciplinary hearings;
- being informed about the progress and outcome of disciplinary investigations and hearings; and
- challenging investigatory and disciplinary decisions.

She demands that:

- the misconduct allegations are fully investigated and considered by a disciplinary panel under the staff disciplinary procedure;
- procedural adjustments are made to allow her to give evidence in writing at the disciplinary hearing, through the disciplinary panel chair, so that she does not have to attend the hearing in person, and that she is questioned by Dr O only in writing through the chair and not in person; and
- the provider undertakes, in consultation with the students' union, an immediate and full review of its staff disciplinary and related procedures to ensure they are fit for purpose to report, investigate and deal with allegations of sexual misconduct by students against staff.

Legal Briefing

Staff to student sexual misconduct

Student N says that if she does not receive written assurance from the Vice Chancellor and the Chair of Council within 48 hours that these steps will be taken immediately she will instigate court proceedings seeking judicial review of the provider's decision that there is no case to answer against Dr O.

Section 4:

Staff – A legal overview

Legal Briefing

Staff to student sexual misconduct

This section provides a high-level overview of the legal obligations which a higher education provider owes to its staff members, and the legal rights of staff, in the context of *staff to student* sexual misconduct. These legal obligations derive either from statute or from common law, including contract law. The precise legal obligations and rights engaged will depend on the specific facts and circumstances of the case. This section is intended only as a broad summary of the relevant legal framework.

The discussion in this section assumes that the staff member is the subject of a report, complaint or allegation of sexual misconduct, sexual harassment or other similar misconduct.

Contract law

Employment relationships between a higher education provider and its staff are governed by the express, implied and incorporated terms of the contract, as well as by statutory employment rights.

All employment contracts will contain termination provisions, allowing the employer to terminate the employment with notice (and often with a payment in lieu of notice) or to terminate summarily in certain circumstances, including circumstances of gross misconduct.³ The terms of the contract may allow the employer a general right of termination, i.e. to terminate the contract at any time and for any reason. Alternatively, the drafting may only allow termination for specific reasons (for example, redundancy or misconduct) or may only allow the employer to exercise its rights of termination after specific dismissal procedures have been completed.

The contract of employment may include or incorporate the higher education provider's disciplinary procedure or other HR procedures. Again, this will depend on the drafting. Disciplinary and dismissal processes may also be included in the governance documents of the higher education provider, for example its Statutes, Ordinances and Regulations or its Articles and Regulations. These may also be incorporated into the contract. Where the relevant disciplinary or dismissal procedure forms part of the contract of employment, breach of that procedure by the higher education provider will be a breach of contract.

Employment contracts are also governed by implied terms, including terms which are implied by law, because they are recognised as an intrinsic part of all employment relationships. The key implied term of this type is the duty of trust and confidence – an implied term that the employer will not, without reasonable and proper cause, conduct

³ For some higher education providers – those Chartered universities which retain, in their Statutes and Ordinances, the "Model Statute" provisions introduced under the Education Reform Act 1988, the terminology will be slightly different. Summary dismissal will be on the grounds of "good cause" as defined in their Statutes or Ordinances, for example "conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or the employment".

Legal Briefing

Staff to student sexual misconduct

itself in a manner calculated, or likely to, destroy the relationship of trust and confidence between employer and employee.

This implied term may be used by employees to challenge the handling of disciplinary cases, including suspensions, investigations and hearings. A breach of this implied term will typically, although not always, be a repudiatory breach of contract, entitling the employee to resign and claim wrongful dismissal (a common law claim for breach of contract) and/or constructive unfair dismissal (a statutory employment claim under the Employment Rights Act 1996). The implied term can be breached by a single act or omission by the employer or by a series of acts or omissions which, when considered together, are sufficiently serious to amount to a repudiatory breach of the implied term.

The remedies available to a staff member for breach of contract will vary, according to the circumstances of the breach.

Examples of legal remedies which may be available for breach of contract

- A higher education provider summarily dismisses a staff member after finding that they have committed an act of sexual misconduct. The staff member disputes that they have committed the alleged misconduct. They bring a wrongful dismissal claim (i.e. a claim for breach of contract), arguing that they had not committed gross misconduct and that there were no grounds on which to summarily dismiss them. If successful, damages would typically be awarded for loss of earnings and benefits for the period equivalent to the contractual notice period in the contract, subject to the staff member's duty to mitigate their loss.
- A higher education provider summarily dismisses a staff member on the grounds of sexual misconduct but breaches its contractual disciplinary procedure. The staff member disputes that they have committed any disciplinary offence and asserts that the summary dismissal is a breach of contract, entitling them to compensation for loss of earnings and benefits for the period equivalent to the contractual notice period in the contract. In addition, they argue that the failure to follow the contractual disciplinary procedure is a further breach of contract and seek additional compensation for loss of earnings, on the basis that, had the contractual procedure been followed, the decision to dismiss them would have been taken later than it was or not taken at all.
- A higher education provider is conducting a disciplinary process but, while that process is in train, commits a repudiatory breach of the express terms of a contractually binding procedure or of the implied duty of trust and confidence. The staff member being disciplined resigns in response to the repudiatory breach and claims wrongful dismissal, seeking damages for loss of earnings for a period equivalent to the notice period under the contract. They may also seek to bring a

Legal Briefing

Staff to student sexual misconduct

claim of constructive unfair dismissal (seeking a basic and compensatory award) – see below.

- A higher education provider is conducting a disciplinary process under a contractual disciplinary procedure but fails to comply with that procedure. The staff member seeks an injunction to require the employer to comply with that procedure or to restrain it from dismissing them until the procedure has been correctly applied. An example could be where the higher education provider has Statutes or Ordinances which allow for the dismissal of academic staff for “good cause” and a staff member facing dismissal on such grounds could seek an injunction to prevent the dismissal on the grounds that the facts alleged are not capable of supporting a finding of good cause for dismissal.

In the vast majority of cases, damages for breach of contract will be limited to financial loss arising from the breach and in cases of wrongful dismissal (including resignation in response to a repudiatory breach of contract) will be limited to the pay and benefits that would have been earned during any period of notice which was not worked or given, or (where the breach involves a failure to follow a contractual procedure) the additional period of time it would have taken to implement that procedure prior to dismissal.

However, in limited circumstances, breach of the implied duty of trust and confidence may also entitle an employee to recover damages for psychiatric injury caused by that breach. This will only be the case where the breach of the implied term relates to events prior to a dismissal (actual or constructive). Examples from the case law include:

- *Gogay v Hertfordshire CC (2000 IRLR 703)* – the claimant, a care worker, was suspended pending an investigation into allegations of child sexual abuse. The suspension was found to be a breach of the implied duty of trust and confidence because, on the facts, there was no reasonable and proper cause to make such allegation and the suspension was a knee-jerk decision without consideration of alternatives. The claimant was awarded damages for the psychiatric injury she suffered as a result of the breach.
- *Eastwood v Magnox Electric plc ([2004] UKHL 35)* – the claimant was the victim of a bullying campaign and was suspended on disciplinary allegations that were found to be spurious. He was later dismissed. The events prior to his dismissal were found to have caused psychiatric injury. The House of Lords ruled that he could be awarded damages for this harm to health as it was caused by events prior to the decision to dismiss him.

Suspension

An employer investigating concerns of sexual misconduct, or initiating a disciplinary procedure regarding such concerns, is also likely to consider whether the staff member should be suspended from work. The right to suspend may be expressly stated in the

Legal Briefing

Staff to student sexual misconduct

contract or in a disciplinary procedure which has contractual effect. However, the power to suspend may still exist even when there is no express power under the contract. Full suspension may involve restrictions on carrying out work, attending campus and participating remotely in work or work events, as well as prohibitions on contacting staff and/or students.

Suspension is typically described in disciplinary procedures as a “neutral act”. However, the courts and tribunals recognise that suspension – particularly full suspension – may have an adverse impact on an employee, their health and wellbeing and their reputation. For that reason, employers are required to exercise powers of suspension in a way which is consistent with the implied duty of trust and confidence.

In particular, the case law highlights that employers need to take considered decisions regarding suspension, as opposed to “knee-jerk” or automatic decisions to impose suspension when particular types of serious misconduct are alleged. Higher education providers should always identify the nature of the concerns and risks which make it relevant to consider suspension in the specific circumstances of the case. In the context of *staff to student* sexual misconduct, these will primarily be concerns about the risks to staff and students, including (but not limited to) the reporting student. Secondary factors may include concerns that, without suspension, evidence relevant to the case may be compromised. Having carried out this risk assessment, the employer should consider whether suspension is a necessary and appropriate way of managing these risks and, if so, the extent of the suspension and its terms. For example, the employer will need to consider whether a full suspension from work is required, or whether the risks can be mitigated by suspension from only some of the employee’s duties (often referred to as “partial suspension” or “restricted duties”) or through other alternative measures.

This is not to suggest that full suspension will be inappropriate in cases where concerns of sexual misconduct are being investigated, only that employers should arrive at that decision after considering and rejecting measures short of full suspension.

The grounds for suspension should be clearly articulated to the staff member. Suspension – the need for it and its extent – should be kept under regular review.

Negligence/duty of care

Under common law, employers have a duty (under the tort of negligence) to take reasonable care of the health and safety of their employees at work. This is in addition to duties owed under the Health and Safety at Work Act 1974 in relation to workplace safety.

A staff member who is the subject of an investigation or a disciplinary process in relation to sexual misconduct or sexual harassment may experience stress or other impacts on

Legal Briefing

Staff to student sexual misconduct

their mental and physical health and wellbeing. In itself, that is not sufficient to amount to a breach of the duty of care or give rise to an entitlement to compensation.

To succeed in a claim for breach of the common law duty of care, the staff member will need to establish that:

- in the circumstances of the case, there was a specific and foreseeable risk of harm to health. This requires knowledge on the part of the employer, whether from warnings given by the employee or from other signs, of an impending harm to health. The employer must be aware of a specific vulnerability and not just that a particular situation is potentially stressful. The signs must be “plain enough for any reasonable employer to realise that something should be done about it” (*Hatton v Sutherland, Court of Appeal, 2002*)
- there was a breach of the duty to take such steps as were reasonable, in the circumstances of the case, to remove or reduce the risk of harm to health. What steps are reasonable in the circumstances will depend on the foreseeability of the harm; the magnitude of the risk and the gravity of the harm which may occur; the cost and practicability of preventing that harm from occurring; and the justification for running the risk that the harm will occur
- the staff member has suffered injury to mental or physical health (rather than simply stress and anxiety) and that this injury was caused by the employer’s failure to take a reasonably practical step to avoid that injury occurring

In the context of *staff to student* sexual misconduct, it is unlikely that stopping the investigation or deciding not to pursue disciplinary action would be a reasonable step. The duty of care, if triggered, is more likely to include considering (including through a stress risk assessment) how the process can be adapted to reduce the stress on the employee and therefore reduce the risk of harm occurring. Support arrangements, such as employee assistance programmes, confidential counselling and occupational health, are also likely to be relevant as measures which can potentially discharge (or help to discharge) the employer’s duty of care.

Unfair dismissal

A staff member who is dismissed may be entitled to claim unfair dismissal. This will typically require them to have at least two years’ continuous service at the date of dismissal. This continuous service requirement does not apply when it is alleged that the principal reason for the dismissal was a prohibited reason, for example because the staff member has previously made protected disclosures (i.e. whistleblowing disclosures) or has taken part in trade union activities.

Compensation for unfair dismissal is in two parts:

Legal Briefing

Staff to student sexual misconduct

- a basic award – dependent on length of service, age, and weekly pay (subject to a maximum amount) and calculated in the same way as a statutory redundancy payment
- a compensatory award for loss of earnings – which is ordinarily capped at the lower of a year's pay or a statutory maximum (currently £93,878 for dismissals occurring on or after 6 April 2022)

The basic and compensatory award can be reduced (including to zero) to reflect the employee's misconduct. Where the dismissal is unfair on procedural grounds, the tribunal can also reduce compensation to reflect the likelihood that the employee would have been dismissed in any event regardless of the procedural breach.

The key issues which an employment tribunal will consider when deciding whether a dismissal for misconduct was fair will be as follows:

- whether misconduct was the reason for the dismissal – the employer needs to show that it had a genuine belief that the employee had committed misconduct and that it dismissed as a result of that belief
- whether the employer acted reasonably or unreasonably in dismissing the employee for that reason – this is assessed by reference to all the facts and circumstances of the case, including the size and administrative resources of the employer, and by reference to equity and the substantial merits of the case

Whether the decision to dismiss was reasonable or unreasonable will involve consideration of the fairness of the substantive decision to dismiss. The key considerations are:

- whether the employer had reasonable grounds for believing that the employee had committed misconduct
- whether that belief was reached after carrying out as much investigation as was reasonable, including through the disciplinary investigation and the consideration of the evidence at the disciplinary hearing
- whether the decision to impose the sanction of dismissal was reasonable in all the circumstances

In addition, a tribunal will consider the issue of procedural fairness, i.e. whether the employer's investigatory process and its conduct of the dismissal and appeal hearings was fair.

In assessing these issues, the tribunal will consider the statutory Acas Code of Practice on Disciplinary and Grievance Procedures, which sets out principles for handling disciplinary and grievance situations at work and a procedural framework for doing so. If the employer unreasonably fails to comply with this Code, compensation can be

Legal Briefing

Staff to student sexual misconduct

increased by up to 25%. A reduction in compensation by up to 25% can also be made if the employee unreasonably fails to follow the procedure, for example failing to appeal.

The key concept in unfair dismissal cases is "reasonableness". An employment tribunal should not decide the case by reference to its own views on what it would have done had it been the employer. Instead, it must consider whether the employer's actions fell within the range of reasonable responses which a reasonable employer could have adopted in the circumstances. Put another way, the question is whether no reasonable employer could have dealt with the situation in the way that the employer did – a test of "unreasonableness" rather than whether there was a "more reasonable" option.

In disciplinary cases, it will almost always be necessary to carry out an investigation into the concerns or allegations of misconduct, to gather evidence about what happened, the accounts of those involved and any witnesses, and to enable a decision about whether the case should proceed to a disciplinary hearing. Where there is a case to answer, the investigation will also assist in the formulation of the disciplinary allegations to be considered at the disciplinary hearing and the evidence to be considered at that hearing.

The question of whether a reasonable investigation has taken place is highly fact specific. Case law has established that this question should be considered in the context of the gravity of the allegations and the potential consequences for the employee. While employers are not required to exhaust every possible line of enquiry, where the allegations are particularly serious and could blight (or end) the employee's future career (both factors are very pertinent to the issue of sexual misconduct), tribunals will scrutinise very carefully the procedure followed by the employer and require a high standard of fairness and thoroughness in relation to the disciplinary investigation.

A key element of a fair investigation is that it should take an even-handed approach, not just focusing on gathering evidence against the staff member but also considering and seeking evidence that points towards innocence and evidence of any mitigating circumstances (for example, a health condition which may have impacted on conduct or behaviour).

Other core elements of a fair disciplinary process are that:

- the staff member should be informed of the case against them – in advance of the disciplinary hearing, they should be told the allegations that they will face and provided with the evidence that will be referred to
- the employer should make it clear to the staff member that a potential outcome from the disciplinary hearing is that they may be dismissed
- the staff member should be able to respond to the allegations of the disciplinary hearing by having a reasonable opportunity to make representations, present evidence, call relevant witnesses and ask questions (either directly or through the disciplinary panel) of witnesses called in support of the allegations

Legal Briefing

Staff to student sexual misconduct

- the decision should be set out in writing, explaining the findings made and the reasons for dismissal
- the staff member should have a right of appeal against the disciplinary findings and the decision to dismiss (or penalty imposed, if less than dismissal)

Employers are also usually expected to follow their own internal procedures, whether contractual or otherwise, and a substantive failure to do so may make the dismissal unfair.

The principles of natural justice are relevant to the question of reasonableness.⁴ These are:

- no one should be a judge in their own cause
- a person should be informed of the allegations against them and be given an opportunity to answer those allegations before a decision is made
- a person is entitled to have their case heard by an unbiased and impartial tribunal

Whether dismissal was a reasonable sanction in the circumstances will involve considering, for example, the gravity of the misconduct and its impact, any mitigating circumstances and the employee's prior disciplinary record (especially if the case is not one of gross misconduct). In cases where sexual misconduct is established, it is highly likely that dismissal will be a sanction that will fall within the range of reasonable responses open to a reasonable employer. However, the employer will still need to be able to show that they have made a reasoned decision, rather than automatically moving from a finding of gross misconduct to a decision to dismiss.

Inconsistency is another factor which may impact on the fairness of the dismissal, for example where an employer has dismissed the claimant for a particular kind of offence but has taken a more lenient approach to another employee who committed the same (or a more serious) form of misconduct. However, tribunals recognise that cases are rarely exactly the same and that, even when cases are truly similar, the correct question is whether no reasonable employer could have dismissed the claimant on the facts of their case.

A different argument in relation to inconsistency might arise where other employees have committed substantially similar misconduct but have not been disciplined or dismissed – this could create room for an employee to argue that the employer has created an environment or culture in which such misconduct was known to be condoned or in which it was assumed that disciplinary rules would not be enforced.

⁴ The principles of natural justice – or “justice and fairness” – may also be referenced in the disciplinary and dismissal procedures of higher education providers, particularly Chartered Universities

Equality Act 2010

The principal relevance of the Equality Act in the context of *staff to student* sexual misconduct is that the Act contains the legal definitions of unlawful discriminatory conduct – for example, harassment and sexual harassment – and makes higher education providers liable for acts of harassment and sexual misconduct by their staff towards students (as well as towards other staff) unless it can show that it had taken all reasonable steps to stop it happening.

In the context of disciplinary investigations and disciplinary action against staff, the provisions of the Equality Act in relation to disability discrimination may be relevant. Where the staff member has a mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities (as may be the case, for example, in relation to anxiety or depression or a neuro-diverse condition), the duty to make reasonable adjustments may be triggered. This could be, for example, where the arrangements for the investigation or disciplinary hearing place the disabled staff member at a significant disadvantage compared to those who are not disabled. In such cases, the higher education provider would have a duty to take such steps as are reasonable to remove the disadvantage. This may require that the process is adjusted, for example by providing regular breaks during meetings, providing information in advance of meetings or hearings, or allowing the staff member to provide written evidence and responses rather than through a face-to-face meeting.

In some cases, there may be a link between the behaviour under investigation and a mental impairment which constitutes a disability under the Act. In these cases, disciplinary action may give rise to potential claims under section 15 Equality Act for discrimination arising from disability – this type of discrimination occurs where the employee is treated unfavourably because of something (for example, their conduct) arising from the disability. Action taken by the employer – including disciplinary sanctions and dismissal – will be lawful provided that it can show that the action is objectively justified as a proportionate means of achieving a legitimate aim.

Human Rights Act/European Convention on Human Rights

The Human Rights Act 1998 (“HRA”) is unlikely to be directly relevant to a higher education provider’s treatment of a staff member during a disciplinary investigation or process. The employment relationship is part of the higher education provider’s private, rather than public, functions and so outside the direct scope of the HRA.

However, rights under the European Convention on Human Rights (“Convention Rights”) will be taken into account by courts and tribunals when they are considering whether statutory employment rights have been infringed. Courts and tribunals have an obligation

Legal Briefing

Staff to student sexual misconduct

under the HRA to interpret and apply legislation, wherever possible, in a manner which is consistent with Convention Rights. So, for example, an employment tribunal considering a claim of unfair dismissal may take Convention Rights into account when determining the reasonableness of the employer's disciplinary process and its decision to dismiss.

Article 6 of the Convention gives the right to a fair trial "in the determination of [a person's] civil rights and obligations or of any criminal charge against [them]", including the right to legal representation. Article 6 is, however, very unlikely to entitle a staff member to be legally represented at a disciplinary hearing or to lead a tribunal to conclude that the absence of such representation made the dismissal unfair.

Article 6 is focused on criminal trials and the determination of civil rights. Case law has established that an employer's internal disciplinary process does not involve the determination of any civil rights, merely the exercise of a contractual power. The relevant civil rights are those which will be determined in the courts or tribunals in subsequent legal action, for example for unfair dismissal or breach of contract. Consequently, Article 6 is not engaged at the disciplinary stage.

In some cases, it has been argued that rights under Article 6 – including the right to legal representation – are triggered at a disciplinary hearing where the sanction of dismissal may lead to additional consequences, for example a referral to a professional regulatory body, such as the GMC, regarding fitness to practise. This creates a risk of further regulatory sanctions, such as being barred from carrying out their profession. However, case law illustrates that if the regulatory body would make its own assessment of the facts and evidence, and of the seriousness of the misconduct, before taking a decision on professional registration, the employer's internal disciplinary process will not have a substantial influence or effect on the employee's civil rights to practice their profession, again with the result that Article 6 is not engaged.⁵

Article 8 of the Convention confers the right to respect for "private and family life" requires that any interference with this right by public authorities must be "in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of public health or morals, or for the protection of the rights and freedoms of others".

Article 8 considerations may be relevant to misconduct dismissals in a number of ways, for example where the evidence gathered and considered in the disciplinary process includes information obtained from work or private email accounts or social media accounts, or involves the employee's personal or sexual relationships. Staff dismissed for breaches of personal relationships policies – for example, for having intimate or sexual

⁵ Note that some University disciplinary and dismissal procedures do allow legal representation in disciplinary hearings – for example where the "Model Statute" procedures under the Education Reform Act 1988 have been retained.

Legal Briefing

Staff to student sexual misconduct

relationships with other staff or students, or for failing to declare such relationships – may also seek to argue that the dismissal is unfair on the grounds of a disproportionate interference with their Article 8 rights.

In such cases, employers will seek to argue that any interference with Article 8 rights is proportionate, to protect the rights and freedoms of others, and so does not render the dismissal unfair.

Data protection

Investigations and disciplinary processes will inevitably trigger rights and obligations under the Data Protection Act 2018 and the UK GDPR.

Information gathered, and generated, during the investigation or disciplinary process, and information contained in outcome letters, will include personal data of the reported staff member, the reporting student and others (for example witnesses). Some of this information – for example, information relating to physical or mental health or a person's sex life or sexual orientation – may constitute special category personal data and will be subject to additional restrictions on processing. Data protection legislation will therefore impact on how personal data can be used, shared or recorded, both during and after the investigation or disciplinary process.

Data protection legislation is a highly complex area. The key principles which apply to the processing of personal data by data controllers (in this context, the higher education provider) are summarised in [SECTION 2](#) of this briefing, at a high level.

References

There is no legal obligation on an employer to provide a reference for a current or existing staff member. (There are some regulated sectors, such as financial services where regulatory rules apply to the giving of references and their content, but HE is not such a sector).

If an employer does provide a reference, it will have duties of care to the recipient of the reference and the person who is the subject of the reference – the content should be honest and accurate and should not mislead by inclusion or omission.

In the context of sexual harassment and sexual misconduct in HE, there are concerns that established practices in relation to references, particularly in relation to academic staff, are inadequate and may not lead to a new or prospective employer being made aware of previous findings of harassment or sexual misconduct or that the staff member resigned during an investigation into allegations of such misconduct. These risks may arise, for example, where the focus is on academic references and a reference is not obtained from the current or former employer, i.e. an institutional reference.

Legal Briefing

Staff to student sexual misconduct

It would be lawful for a prospective employer to specifically ask an institutional referee whether the person they are considering employing had any live disciplinary warnings at the time their employment ended or was dismissed on the grounds of misconduct. Those questions could also more specifically reference any disciplinary warnings or dismissals for harassment or sexual harassment or misconduct or conduct breaching a dignity or respect procedure (or equivalent). It would also be legitimate for a specific question to be asked as to whether the person was the subject of any such complaint, or of an investigation into such a complaint, at the time when their employment ended or they gave notice to end that employment. Higher education providers answering such questions in references would need to take account of their data protection obligations and other confidentiality considerations, but in principle it is likely to be lawful for them to provide answers to these questions (for example, on a "yes/no" basis and stating, if it is the case, that allegations or complaints under investigation are disputed), given their legal obligations to the new employer when providing a reference and the new employer's lawful interest in understanding the disciplinary record of the prospective employee.

Recruitment application forms could also request candidates to make a self-declaration on these issues, with the proviso that false or misleading information could lead to withdrawal of any offer or termination of employment.

The data protection principles of transparency and the right to access do not apply to confidential references given for the purposes of education, training, employment, placement as a volunteer, appointment to office of an individual, or the provision of any service by that individual.

Section 5:

Student and staff codes of conduct, regulations, policies and procedures

The importance of codes of conduct, regulations, policies and procedures

Higher education providers' codes of conduct, regulations, policies and procedures play a crucial role in the prevention of and response to *staff to student* sexual misconduct, including the identification, assessment and mitigation of risk. They also assist providers to comply with their legal and regulatory obligations. As such, they should be drafted in terms which reflect relevant laws and regulation and implemented fairly and lawfully in practice. They should be fit for the purpose of dealing with *staff to student* sexual misconduct.

A higher education provider's policies should set out clearly its strategy for the prevention of *staff to student* sexual misconduct, and its codes of conduct should make clear the standards of behaviour required of its staff and definitions of what constitutes misconduct, including sexual misconduct. Further, its regulations and procedures should explain how the provider will respond to allegations of *staff to student* sexual misconduct (including the investigation and determination of allegations), its powers to take precautionary action (such as suspension or to impose no contact measures) and to stay internal processes in light of police investigation or criminal proceedings, what sanctions may be imposed where allegations are upheld, and the procedural and pastoral support available to staff and students in the relevant process.

Higher education providers should also make clear how students can make disclosures, reports and complaints of *staff to student* sexual misconduct, the procedural and pastoral support available to them to do so, and their entitlements to information (for example, about investigation findings or disciplinary decisions) and outcomes in the relevant process. Where a student brings a complaint of *staff to student* sexual misconduct under a student complaints procedure, they will be a party in the process (the complainant) and entitled to a decision on the complaint, redress where appropriate if the complaint is upheld and a right of review or appeal (with an opportunity to complain to the OIA where the complaints process has been exhausted), in accordance with the complaints procedure.

By contrast, where an allegation of *staff to student* sexual misconduct is dealt with under a staff process (for example, a staff disciplinary procedure), the reporting student will not be a party or a complainant as under a student complaints procedure but, rather, a witness in the staff process – and their entitlements under the staff procedure to participate in the process and to receive information and an outcome are likely to look very different. Where the allegation was raised by the reporting student as a complaint as defined by the provider's student complaints procedure but is dealt with under a staff procedure, the provider should be mindful to "circle back" to the student complaints procedure at the end of the staff process in order to provide the student with a decision on the complaint (and redress if appropriate where the complaint is upheld) and to

Legal Briefing

Staff to student sexual misconduct

remind the student of any right to request a review or appeal under the student complaints procedure and of the opportunity to complain to the OIA, as relevant. Higher education providers should consider their staff processes to assess whether they provide adequately for the “voice” of the reporting student to be heard in matters of *staff to student* sexual misconduct and the impact of such processes on reporting students’ wellbeing and academic and student experiences.

Codes of conduct, regulations, policies and procedures should be developed in collaboration with a higher education provider’s students’ union and other student representatives representing the diversity of its student population and student experience, and with the provider’s trade unions. It is also good practice for higher education providers to equality impact assess and data protection impact assess staff and student codes of conduct, regulations, policies and procedures.

In addition, higher education providers should evaluate and monitor the implementation and impact of their codes of conduct, regulations, policies and procedures to ensure they are accessible, fair, effective and fit-for-purpose. Regular reports on their implementation, impact and effectiveness should be provided to governing bodies to assist governors to exercise their obligations of oversight and scrutiny.

Definitions of misconduct/sexual misconduct and the nexus between misconduct and higher education providers

Staff codes of conduct should set out clearly the standards of behaviour that staff are required (not merely expected) to meet. Higher education providers should consider the nature and scope of conduct over which they wish to have jurisdiction by reference to the nexus between the conduct and the provider. This nexus will typically capture conduct which the higher education provider regards as unacceptable or inappropriate because it interferes with, or otherwise harms or puts at risk, the higher education provider’s:

- maintenance of a safe, respectful, inclusive and supportive environment conducive to teaching, learning and research and the enjoyment of a positive student experience;
- activities, interests and reputation; and
- exercise of its legal and regulatory obligations.

Codes of conduct should provide non-exhaustive illustrative lists of what constitutes misconduct, including sexual misconduct.

Codes of conduct should be drafted in layperson’s terms, avoiding legal terminology and definitions as far as possible including those under the criminal law such as offences under the Sexual Offences Act 2003 (e.g. rape). Higher education providers’ procedures

Legal Briefing

Staff to student sexual misconduct

are not court processes and student and staff expectations should be managed in this regard including as to the possible outcomes of such procedures. Higher education providers do not act as the police or as a proxy Crown Prosecution Service and it is not their role to investigate, determine or sentence breaches of the criminal law.

Definitions of sexual misconduct and harassment

Whilst higher education providers should avoid using legal terminology and definitions as far as possible when drafting codes of conduct, they may wish to consider including (and widening) the various definitions of harassment contained in section 26 of the Equality Act 2010.

Section 26 defines harassment in three ways. The first definition is unwanted conduct, related to a relevant protected characteristic which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for a person.

The relevant protected characteristics under the statutory definition are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. Higher education providers may consider it more appropriate for their policies to define harassment in a way which does not require the conduct to relate to a protected characteristic, on the basis that any unwanted conduct which has the purpose or effect described above is inappropriate.

Section 26 Equality Act 2010 also defines the following conduct as "harassment":

- unwanted conduct of a sexual nature which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for a person;
- where there has been unwanted conduct of a sexual nature or that is related to gender reassignment or sex; that unwanted conduct has the purpose or effect described above; and because a person has rejected or submitted to this conduct, they are treated less favourably than they would be treated if they had not rejected or submitted to that conduct.

In all three definitions of harassment under s26 Equality Act, the issue of whether unwanted conduct has the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them is decided by taking into account the perception of the claimant and all the relevant circumstances of the case, including whether it is reasonable for the conduct to be treated as having that effect.

In drafting their definitions of sexual misconduct higher education providers should also consider the definitions of sexual misconduct and harassment set out in the OfS

Interplay of staff and student procedures

What procedure should be used?

Higher education providers will typically have a range of policies and procedures relevant to the issue of *staff to student* sexual misconduct. These may include:

- **a student complaints procedure** – for complaints (as defined in the student complaints procedure) made by students against the higher education provider
- **a dignity and respect and/or bullying and harassment policy and procedure** – the form of these varies between higher education providers. For example, some providers may have a dignity and respect at study policy and procedure (applicable to students) and a separate policy and procedure for dignity and respect at work (applicable to staff). Other providers may have a dignity and respect at study and work procedure (applicable to both staff and students). These policies and procedures will typically set out expected or required standards of conduct, definitions of unacceptable conduct (including bullying and harassment), and the right of students to be able to study in an environment free from harassment and sexual misconduct. They will also typically explain how incidents or concerns can be raised or reported, how support and advice can be accessed and how allegations will be investigated and dealt with
- **a staff disciplinary policy procedure** – setting out expected or required standards of conduct and definitions of unacceptable conduct and the procedural framework for disciplinary investigations, suspension, discipline and dismissal on conduct grounds and appeals

The interface between these policies and procedures can be complex. It is often the case that student and staff processes have developed independently of each other and are not necessarily easy to align or to apply alongside each other. This complexity risks making it difficult for students and staff to understand how the procedures may be applied in practice and, therefore, to identify a clear procedural pathway from the raising of a concern or complaint through to decision and outcome, including the circumstances in which consideration of the issue may switch from a student-focused procedure to a staff disciplinary procedure.

This complexity and procedural interplay also risks delay and duplication of process, especially where different aspects of the issue need to be addressed by different decision-makers or panels. For example, a decision-maker or panel established to adjudicate on student complaints will typically not have authority, when a complaint is upheld, to impose sanctions, such as dismissal or warnings, on the staff member.

Legal Briefing

Staff to student sexual misconduct

Similarly, a disciplinary panel established under a staff disciplinary procedure will not have a remit to adjudicate on a student complaint arising in relation to that misconduct or to provide redress to the student where the misconduct allegation is upheld.

In many cases, a higher education provider will wish to deal with an allegation of *staff to student* sexual misconduct primarily under its staff disciplinary procedure. Depending on its internal procedures and the position under the employment contract, suspension of the staff member may only be possible once a decision has been taken to initiate a disciplinary investigation process under the staff disciplinary procedure. There may also be concerns that an investigation commenced outside of the staff disciplinary procedure will lack the same procedural safeguards for the staff member as are set out in the disciplinary process or that if a substantive decision is taken on the allegation outside the staff disciplinary procedure, the issue will need to be assessed afresh in any subsequent disciplinary process because the staff member is entitled to have the disciplinary allegations heard by a disciplinary panel. Commencing the disciplinary process also allows an earlier decision to be taken regarding the continued employment of the staff member, if misconduct is established.

However, the decision to deal with the issue under the staff disciplinary procedure will typically have important consequences for the position of the reporting student, including in terms of their status and role in the process, their access to information and to redress where the misconduct allegations are upheld, and their ability to challenge the decisions taken. There are important issues here about transparency and the voice of the reporting student in the process, as well as a loss of agency for the reporting student when the decision over what process is applied is taken by the higher education provider.⁶

These issues can be illustrated by contrasting the position of a reporting student under a student complaints procedure and the position of the reporting student under a staff disciplinary procedure:

- **student complaints procedure** – the reporting student is a complainant in the process - i.e. a party to the process. They will typically be interviewed as a party and (depending on the provisions of the procedure) will receive a copy of any investigation report, in addition to a decision on the complaint. When the process involves a hearing, they will typically have the right to attend (in person or virtually, as appropriate), make representations, present evidence and call witnesses, and to hear and respond to the evidence presented by the reported staff member. They will receive a decision letter explaining (with reasons) whether or not their complaint has been upheld and (where the complaint is wholly or partially upheld) informed of any

⁶ The potential disadvantages caused for students who report staff-student sexual misconduct which is then considered under staff disciplinary procedure have also been highlighted in the "Sector Guidance to Address Staff Sexual Misconduct in Higher Education" by the 1752 Group and McAllister Olivarius (March 2020) which also contains suggested reforms to staff disciplinary procedures in this context.

Legal Briefing

Staff to student sexual misconduct

redress. They will also have a right to request a review or appeal of the decision, and (once the process has been exhausted) to complain to the OIA

- **staff disciplinary procedure** – in contrast, under the staff disciplinary procedure, the reporting student will be a witness, not a party/complainant. They will be interviewed during the investigation, but they will not typically be provided with a copy of the investigation report. If a decision is taken that there is no disciplinary case to answer, they will have no right of appeal of that decision. If a disciplinary hearing is held, they will attend (in person or virtually, as appropriate) as a witness and only for that part of the hearing which relates to their evidence. They will therefore attend to answer questions, including from the reported staff member or their representative. They will not have the opportunity to make representations or call evidence or to be represented if and when they give evidence (in contrast, the staff member will have a statutory right to be accompanied at a disciplinary hearing by a trade union representative or work colleague of their choice). Typically, they will not receive an outcome letter (as that will be sent to the staff member) and may receive only limited information about the disciplinary outcome or any sanction. If the allegations are not upheld, they will not have the right to appeal that decision.

Higher education providers may wish to consider making changes to staff disciplinary procedures to address these issues. The type of amendments which may be considered include:

- (subject to any considerations regarding the disclosure of personal data) making express provision for reporting students to receive a copy of /relevant extracts from a disciplinary investigation report, so that they have access to the findings and recommendations made in respect of the allegations they have made about the reported staff member
- providing the reporting student with an opportunity to make comments on the investigation report before a final decision is taken about whether a disciplinary hearing should take place. In cases where the investigation report concludes or recommends that there is no case to answer, this would allow a reporting student an opportunity to contest that decision or recommendation, for example by making representations (as relevant) that the investigator has not properly assessed the evidence, has carried out an incomplete, inadequate or flawed investigation, or has acted unreasonably in assessing that there has been no breach of the higher education provider's disciplinary rules or codes of conduct
- alongside the higher education provider's general precautionary powers, providing the reporting student with an opportunity to request that specific precautionary measures be put in place (e.g. a replacement supervisor to be provided or no-contact order)
- in relation to any disciplinary hearing, allowing the reporting student (if they wish) to attend the hearing (in person or virtually), with a supporter or representative (as

Legal Briefing

Staff to student sexual misconduct

appropriate), in order to have the opportunity to make representations, question witnesses, or ask questions of the reported staff member (for example, after the staff member has been questioned by whoever is presenting the disciplinary case, and through the reporting student's representative or through the panel chair)

- (subject to any considerations regarding the disclosure of personal data) allow the reporting student to receive a copy of a provisional decision from the disciplinary panel so that they can understand the panel's assessment of the evidence and whether it is minded to uphold the disciplinary allegations. The reporting student could be allowed to make comments or representations on this provisional outcome before the panel confirms its decision or before the panel's provisional decision is reviewed by a senior manager and a final decision is taken. This could include the submission by the reporting student of an impact statement which the disciplinary panel would consider in connection with determining any sanction to be imposed on a staff member where the misconduct allegations are upheld. In cases where the panel is minded not to uphold the allegations, this would allow the reporting student the opportunity to challenge that view and comment on the panel's assessment of the evidence or its conclusions on whether the relevant disciplinary rules or codes of conduct have been breached
- in cases where the panel upholds the allegations, making provision for consideration of redress (for example, as appropriate, an apology, refund of tuition fees, and/or financial compensation for distress and inconvenience) to be afforded to the reporting student
- where the disciplinary allegations are upheld by the panel, and the reported staff member appeals, the reporting student could be provided with a copy of the grounds of appeal (as relevant to findings of fact, the assessment of evidence and the application of the higher education provider's disciplinary rules) and given the opportunity to comment on these. The reporting student could also be allowed to attend the appeal hearing to make representations
- ensuring that the process, at all stages, provides for appropriate procedural and pastoral support for both the reporting student and the reported staff member

We have suggested that the reporting student be given a right to make comments or representations on the investigation report or a provisional disciplinary outcome, before a final decision is made, rather than a right of appeal of a final decision. Our view is that if a reporting student was allowed an appeal – whether against a decision of “no case to answer” following an investigation or against a disciplinary panel's decision not to uphold the disciplinary allegations – this could be more difficult to square with principles of fairness for the reported staff member. An appeal mechanism for the reporting student would mean that the reported staff member could face disciplinary action despite an investigation having concluded that there was no case to answer or of being the subject of a further disciplinary hearing in circumstances where a disciplinary panel has already decided not to uphold the allegations against them.

Legal Briefing

Staff to student sexual misconduct

Our view is that the modifications to traditional staff disciplinary procedures suggested above would increase the voice and participation of the reporting student in the disciplinary process and provide greater transparency, without impacting on the fairness of the disciplinary process under the Employment Rights Act 1996 or the legal rights of the reported staff member. The position of the reporting student, their access to information and their rights to make representations, would be similar to that of a complainant under a staff grievance procedure.

Higher education providers should also review their student complaints procedures (including the definitions they contain of what constitutes a complaint) and the alignment of those procedures with staff procedures to ensure that reporting students are not denied the rights afforded to them under student complaints procedures and that student and staff procedures do, in fact, align.

Higher education providers should be mindful that a student who discloses or makes a report of sexual misconduct against a staff member may not wish to make a “complaint” as defined by the student complaints procedure under that procedure. Where a reporting student does not make a complaint, the higher education provider will need to consider how the allegation raised by the student by way of a disclosure, report or otherwise should be addressed and the student best supported.

Settlement agreements and confidentiality

Historically, when resolving disputes, it has been standard practice for settlement agreements between a higher education provider, a staff member and a student to contain confidentiality provisions (sometimes referred to “NDAs” or “gagging clauses”).

The traditional scope of confidentiality clauses in staff related settlement agreements has been:

- to make confidential the terms of the settlement agreement, including any financial payment, and the negotiations leading up to it (which may in any event be legally confidential under the “without prejudice” rule)
- to make the existence of the settlement agreement confidential
- to make the subject matter of the dispute confidential – typically covering in the context of *staff to student* sexual misconduct, for example, confidentiality in relation to the allegation of harassment or sexual misconduct and how the higher education provider has dealt with it, or a requirement that any comment which the parties to the agreement might make must be consistent with a mutually agreed statement
- to create an obligation not to make disparaging or derogatory remarks about the higher education provider or its staff and students

Legal Briefing

Staff to student sexual misconduct

There is currently no specific legislation governing or restricting the use of such confidentiality provisions in settlement agreements, with the exception that s43J Employment Rights Act (the "ERA") makes void and unenforceable any provision in any contract between an employer and a worker (as defined in s 230 ERA and s43K ERA) in so far as it purports to exclude the worker from making a protected disclosure (i.e. a "whistleblowing disclosure" as defined in the ERA). It is also worth noting that the use of a confidentiality agreement or settlement agreement would also need to be consistent with consumer law principles in the context of an agreement between a provider and a student, to avoid challenges of unfair commercial practices being used pursuant to the CPRs.

However, over recent years, the use of confidentiality clauses in settlement agreements has come under considerable scrutiny and received widespread criticism, given that their use can "silence" those who have experienced or reported sexual harassment, sexual misconduct, bullying, harassment or victimisation by preventing them from speaking up about what happened to them and how any report or complaint was dealt with. These confidentiality obligations can also perpetuate power imbalances, for example where a reporting student enters into a settlement agreement containing confidentiality clauses but the reported staff member is under no similar restrictions.

These concerns were highlighted in an inquiry by the Women and Equalities Select Committee (launched in November 2018) and a UK Government consultation on the use of confidentiality clauses in settlement agreements in 2019, which led to proposals to regulate their use by:

- legislating to ensure that confidentiality clauses cannot prevent an individual from disclosing to the police, regulated health and care professionals or legal professionals
- legislating to ensure that the scope and terms of confidentiality clauses are clear to those signing them, including the scope of disclosures that can be made
- legislating to make it a condition of a settlement agreement being legally valid and enforceable that an individual has received legal advice on any confidentiality terms included in the agreement
- producing guidance on the drafting of confidentiality clauses

However, no legislation has yet been tabled to take forward these proposals, although [guidance on the use of confidentiality agreements in discrimination cases](#) was published by the Equality and Human Rights Commission on 17 October 2019 and by [ACAS on non-disclosure agreements](#) on 10 February 2020.

Within the higher education sector, there have been changes over recent years to the practice of using confidentiality clauses in cases involving allegations of sexual misconduct and sexual harassment or other forms of discrimination. Some higher education providers have decided to narrow the scope of confidentiality clauses in such cases (for example, only seeking to make confidential the terms of the agreement and

Legal Briefing

Staff to student sexual misconduct

the negotiations leading up to it) and others have decided to avoid using any confidentiality provisions when settling such cases.

This trend has been reinforced by the “Can’t Buy My Silence” campaign, which in early 2022 (with endorsement from the Universities Minister) asked higher education institutions to sign up to a pledge, under which they would commit not to use confidentiality clauses in settlement agreements “to silence people who come forward to raise complaints of sexual harassment, abuse or misconduct, or other forms of harassment and bullying.” For those institutions which have signed up to the pledge, the use of any confidentiality clause which prevents a student or staff member speaking about their experience of sexual harassment or misconduct, or how the institution responded to it, would be inconsistent with that commitment. Confidentiality clauses regarding the terms of the settlement agreement or the negotiations leading up to it would not be incompatible with the pledge, in our view. However, higher education providers should always consider the extent to which it is appropriate to include any form of confidentiality clause in the agreement, including where confidentiality was requested by the reporting student.

In addition, it should be noted that lawyers regulated by the Solicitors Regulation Authority (SRA) (including in-house lawyers) are under professional obligations in relation to their conduct in advising on, drafting, negotiating and enforcing NDAs. An SRA warning notice issued in 2018 and updated in 2020:

The warning notice defines “improper use” of NDAs as:

- using them as a means of preventing, or seeking to impede or deter, a person from:
 - co-operating with a criminal investigation or prosecution
 - reporting an offence to a law enforcement agency
 - reporting misconduct, or a serious breach of our regulatory requirements to us, or making an equivalent report to any other body responsible for supervising or regulating the matters in question
 - making a protected disclosure under the Public Interest Disclosure Act 1998
- using them to influence the substance of such a report, disclosure or co-operation
- using them to prevent any disclosure required by law
- using them to prevent proper disclosure about the agreement or circumstances surrounding the agreement to professional advisers, such as legal or tax advisors

Legal Briefing

Staff to student sexual misconduct

and/or medical professionals and counsellors, who are bound by a duty of confidentiality

- using them (or other terms in an agreement which contains an NDA or confidentiality clause), which stipulate or give the impression to the person expected to agree the NDA, that reporting or disclosures of the types set out above are prohibited
- including or proposing clauses known to be unenforceable
- using warranties, indemnities and clawback clauses in a way which is designed to, or has the effect of, improperly preventing or inhibiting permitted reporting or disclosures being made

The SRA warning notice also sets out expectations that, in dealing with NDAs, those covered by the warning notice will:

- use standard plain English and to make sure that the terms are clear and relevant to the issues and claims likely to arise
- be clear in the NDA what disclosures can and cannot be made and to whom
- provide clear advice to their clients about the terms of the NDA to help ensure that there is no confusion about what is or is not permitted.

Information sharing

Over recent years, there have been calls for higher education providers to be more transparent about the outcome of disciplinary hearings involving allegations of *staff to student* sexual misconduct, particularly by sharing with reporting students whether the allegations were upheld and what sanction was applied. Higher education providers have also been considering the steps they can take to increase transparency in these areas. Research funding bodies have also been seeking disclosures from higher education providers about findings of sexual misconduct against staff involved in funded projects, at the time of grant application and during the grant.

Decisions by higher education providers on what information can be shared, with whom, and in what detail will need to be taken in the context of the legal rights of the reported staff member and others, particularly obligations owed under data protection legislation and any legal obligations of confidentiality that have arisen during the internal disciplinary process.

For example, the sharing of information regarding disciplinary outcomes and sanctions will involve the sharing of personal data – and potentially special category personal data – about the staff member who has been disciplined. Sharing will constitute processing of the data and the higher education provider will need to be able to demonstrate that such

Legal Briefing

Staff to student sexual misconduct

processing was for a lawful purpose, fair and transparent, proportionate and necessary and in line with its privacy notices.

Higher education providers will also need to be mindful that different considerations will apply to different categories of personal data. So, for example, the conclusions reached on whether harassment or sexual misconduct has occurred will be personal data of the reported staff member (because it represents a finding or opinion about their conduct) and of the reporting student (because it represents a finding or opinion about whether or not they have experienced harassment or sexual misconduct). However, information about the disciplinary sanction that has been applied is likely only to comprise the personal data of the reported staff member and not personal data of the reporting student. (There may be exceptions to this, for example where the disciplinary panel imposes or recommends restrictions or conditions on the reported staff member's future contact with the reporting student). These distinctions will impact on the assessment that will need to be made about whether, and on what legal basis, different categories of information can be shared and with whom.

Under data protection principles, higher education providers should take decisions on data sharing on a case by case basis rather than taking an automatic or blanket approach. It is important for a higher education provider to put in place the appropriate privacy and data governance infrastructure to enable data sharing, by identifying in advance the lawful bases for data sharing on which it will rely for the processing of personal data and to reflect these in the wording of its policies and procedures and privacy notices.

Potentially relevant lawful grounds for sharing this information (although this would need to be assessed on a case by case basis) may be that it is:

- in the legitimate interests of the reporting student – for example to understand the conclusions reached by the higher education provider on their report or complaint or in the interest of safeguarding their health, safety or wellbeing; and/or
- in the legitimate interests of the higher education provider – in terms of dealing transparently with reports or complaints of this nature and/or ensuring that its systems and processes for managing and regulating this area are robust, effective and fit for purpose.

Where such lawful bases are relied on, the higher education provider would have to carry out a "legitimate interests assessment", considering whether the rights of the reported staff member should outweigh the interests of the reporting student. The reasonableness of this approach may be reinforced where the higher education provider's procedures governing investigations and hearings in this area explicitly state that such information will be shared with the reporting student.

Legal Briefing

Staff to student sexual misconduct

Other lawful bases for disclosure may also exist, depending on the facts, such as where disclosure is in the “vital interests” of the reporting student. However, higher education providers should always consider on a case by case basis precisely what information needs to be disclosed and in what form and the relevant lawful basis for that disclosure. Where special category personal data – for example about someone’s sex life or where an allegation amounts to a criminal offence – is to be disclosed, an additional basis for processing as set out in Schedule 1 of the Data Protection 2018 will also need to be met.

Sharing information with the reporting student about any sanction or restriction applied to the reported staff member, depending on the circumstances, is likely to require a separate assessment. The higher education provider would need to identify a lawful reason for sharing this data with the reporting student. Arguably, the same “legitimate interests” reasons for the disclosure as mentioned above could be relied on here as well, but the higher education provider would need to consider whether it would be more proportionate to say only that a sanction had been applied, without specifying the nature of that sanction in detail.

Higher education providers may be on even firmer ground in making such disclosures if they can demonstrate that regulatory obligations (for example, from the OfS) require them, as this would constitute a legal obligation and be another lawful basis open to them. Alternatively, they may consider that an open and transparent process is pivotal to their public task, and therefore falls within this lawful basis.

Investigation reports and disciplinary outcomes will also contain the personal data of other individuals, such as witnesses. Again, the higher education provider would need to identify the lawful basis for sharing such data with a reporting student or reported staff member and consider what information should be shared, and how, consistently with that lawful basis and whether any redactions are required in order to take the least privacy intrusive route to achieving its lawful objective.

It is also important that higher education providers keep good records of their processing activities, including the lawful bases on which they have relied on for the sharing of personal data. This is particularly important when dealing with sensitive matters such as those relating to sexual misconduct.

Higher education providers should also consider whether common law or contractual obligations of confidentiality have arisen under their internal student or HR procedures. This may be the case where the procedure specifies that it is a confidential process, or where express statements are made in the procedure that information will not be shared with others or will only be shared for specific purposes with specific classes of third parties.

Information which is legally confidential (i.e. protected by a legal obligation of confidentiality) must not be disclosed without a valid consent or other lawful justification. Higher education providers’ internal staff and student procedures typically stress that

Legal Briefing

Staff to student sexual misconduct

they are confidential processes and this creates a likelihood of a common law duty of confidentiality arising. A disclosure which is not expressly envisaged under the terms of the relevant procedure may therefore involve a breach of common law confidentiality; conversely, a disclosure which is expressly envisaged in the relevant procedure would not. In the case of contractual complaints and disciplinary procedures, disclosures made in breach of the terms of the procedure may give rise to an actionable breach of contract or constructive dismissal claim. More information on the conflict between confidentiality assurances and disclosure requirements can be found in the section on Confidentiality in **SECTION 3** above.

In summary, data sharing in the context of *staff to student* sexual misconduct is a complex area and the question of how far a higher education provider can go in sharing information will need to be considered in the context of its existing internal procedures and privacy notices. These will be highly relevant to the application of the relevant data privacy principles and other legal considerations. Higher education providers who are seeking to increase transparency and to share information more widely than has traditionally been the case may need to review and amend their existing policies and procedures and privacy notices, to remove barriers to information sharing and ensure that their procedures and privacy notices are aligned with, and enable, the nature and extent of the disclosures which they are seeking to make.

Staff and student relationship policies – key considerations

Higher education providers may have policies or codes of behaviour relating to personal relationships between staff and students, as well as to relationships between members of staff. These have traditionally focused on addressing conflicts of interest, and perceptions of favouritism or bias, for example by requiring the declaration of personal, intimate or sexual relationships between a staff member and a student where the staff member has direct responsibility for, or involvement in, the student's academic studies or personal welfare. Declarations of such relationships would typically lead to a management of conflicts of interest plan being developed and steps taken to remove the staff member from roles or activities relating to the student's studies or welfare.

While that approach remains common, it is now recognised that romantic, intimate or sexual relationships between members of staff and students for whom they have academic or pastoral responsibilities may well involve abuses of power, create dynamics in which sexual harassment or other sexual misconduct may occur, and inherently breach professional and ethical responsibilities. There is therefore a shift away from a perspective which focuses on managing conflicts of interest towards a recognition that romantic, intimate or sexual relationships between staff and students are inherently problematic and should not occur. As a result, more recent policies or codes will strongly discourage such relationships and may also prohibit staff from having, or pursuing, such

Legal Briefing

Staff to student sexual misconduct

relationships with students for whom they have academic, welfare or other professional responsibilities. There are also sector examples of policies which prohibit any romantic, intimate or sexual relationships between staff and students.

Policies and codes of behaviour regarding staff-student relationships are now likely to contain the following provisions:

- introductory statements which explain the higher education provider’s policy and the rationale for the rules of behaviour set out in the policy or code
- definitions – these will include definitions of personal relationships (typically focused on family connections and relationships) and romantic, intimate or sexual relationships. “Students” and “staff” will also need to be defined, including whether post-graduate students and other students who are engaged to teach, or to carry out other work, are regarded as “staff” under the policy
- a statement that, under the Sexual Offences Act 2003, it is a criminal offence for an adult to engage in sexual activity with a person under the age of 18, where the adult is in a position of trust and that the higher education provider’s staff are considered to be in a position of trust
- a statement that romantic, intimate or sexual relationships between staff and students are prohibited or prohibited in circumstances where the staff member has responsibility for, or involvement in, the student’s academic studies or welfare or has direct interaction with the student in their role with the higher education provider. The circumstances in which relationships are prohibited will need to be set out clearly. In addition, the policy may state that it will also be considered misconduct for a staff member to pursue or seek to initiate such a relationship
- the policy may also require that, where a prohibited relationship occurs, the staff member must remove themselves from academic or pastoral responsibilities relating to the student and that a failure to do so will also be an act of misconduct. Consideration should be given to including a non-exhaustive list of the duties or tasks that the staff member should not undertake (for example, supervision of a student). These provisions recognise that there are two issues of misconduct here – firstly, entering into the relationship and secondly carrying out professional responsibilities in circumstances where there is a conflict of interest and a power dynamic which may be abused.
- a requirement for other relationships (i.e. those which are not prohibited) between staff and students to be declared, for example to ensure that no conflict of interest exists and to allow any such conflicts to be managed. This would include close personal relationships (e.g. family connections) as well as non-prohibited intimate or sexual relationships
- details of how relationships are to be declared and to whom, as well as who should make the declaration. Higher education providers should take into consideration

Legal Briefing

Staff to student sexual misconduct

whether requiring such a disclosure may impact on the staff member or student's right to a private life, or require the processing of excessive personal data, as well as if or how they will verify information provided should it only be received from one party involved. The policy will need to explain what will happen after the declaration is made (for example, a conflict of interest assessment and mitigation plan). The policy should explain how the information provided will be used and with whom it will be shared, and give assurance that this information will be kept securely and confidentially. The policy should also explain whether a staff declaration will lead to the student being contacted about the relationship, for example to explain any steps required to mitigate actual or potential conflicts of interest. It may be useful for this policy to also cover all the necessary requirements of transparency under the data protection legislation, including for how long this information will be retained, with whom it may be shared with, and the lawful basis which applies to its processing. Higher education providers will need to consider how and when students (including prospective students) are made aware of the policy and of the potential processing of their data in this regard.

- the policy will also need to specify the consequences of breaching these rules, including disciplinary action and potential dismissal.

Where a higher education provider changes its rules on relationships between staff and students, for example by introducing a prohibition on romantic, intimate or sexual relationships, the higher education provider will need to recognise that such relationships may already exist, or have existed, between members of staff and current students. The policy will need to explain what staff members are expected to do in relation to such relationships. It is common for staff to be asked to confidentially declare these relationships by a specified deadline and for the prohibition of relationships under the new policy to apply to relationships commenced after the date on which the new policy takes effect. Higher education providers should bear in mind that such declarations from staff will involve the provision of personal data relating to a student to which the student has not consented, and of which the provider may not be in a position to verify its accuracy. As noted above, it will be important to ensure that students are made aware of this possibility and that this is set out in the relevant policies with an appropriate level of transparency.

Policies or codes of conduct on relationships between staff and students can also be used as a vehicle to set out standards of professional behaviour and conduct and how staff are required or expected to behave when interacting with students, to maintain appropriate professional boundaries. This may include guidance and/or disciplinary rules which identify and prohibit "boundary crossing" behaviour. Such rules play an important part in addressing and preventing sexual harassment and other sexual misconduct, by tackling behaviour which often accompanies such misconduct or creates the circumstances and dynamics in which this type of misconduct occurs. Identifying and prohibiting such boundary crossing behaviour is an important part of developing a culture of zero

Legal Briefing

Staff to student sexual misconduct

tolerance for sexual misconduct and the patterns of behaviour in which it is likely to occur. The clear communication of such rules also empowers other staff and students to call out behaviour which is professionally inappropriate, potentially enabling a disciplinary or other appropriate intervention before an incident of sexual misconduct has occurred. Such guidance and/or disciplinary rules could include:

- forbidding staff from conducting meetings (e.g. supervision meetings) with students in their, or the student's, home and requiring in-person meetings to take place on campus and during working hours
- prohibiting the consumption of alcohol during academic, supervisory, welfare and other work-related meetings between staff and students
- setting an expectation that staff will not initiate contact with students outside of reasonable working hours
- requiring staff to use the higher education provider's communication systems and facilities for all communications with students, and discouraging or prohibiting the use of personal email or mobiles for such contact. Direct personal messaging on social media (e.g. WhatsApp) may also be discouraged or prohibited, outside of group chats where messages are visible to another staff member. This can also be justified on the grounds of data governance and data protection compliance, as messaging taking place outside of approved systems is unprotected and incapable of monitoring
- prohibiting staff from engaging students to carry out personal tasks for them such as baby-sitting or child-minding, dog-walking, and house sitting

When drawing up and implementing policies relating to personal relationships, higher education providers should be mindful of the following key legal considerations:

- **data protection rights** – the legal framework under the UK GDPR rules is set out earlier in this briefing. It will govern the collecting, use and retention of personal data under the policy. Information regarding family connections or other personal relationships will constitute personal data and information about intimate or sexual relationships may constitute special category personal data, for example information about the sex lives of the staff member and student and their sexuality. Higher education providers will need to ensure that they have a lawful basis for all processing activities regarding this data, including a lawful basis for requiring this information to be declared and for sharing it with others within the higher education provider under the policy. The relevant UK GDPR considerations, and potential lawful grounds for data processing, in relation to declarations of intimate or sexual relationships where the staff member has a professional relationship with the student will be different to those which apply to such declarations where no professional relationship is present. The policy will need to set out, or be consistent

Legal Briefing

Staff to student sexual misconduct

with, the lawful grounds on which the higher education provider is relying for the processing of the data in each scenario

- **unfair dismissal** – as discussed above, personal relationships policies will set out required standards of behaviour and disciplinary rules. Where disciplinary action results in dismissal, this may be challenged through a tribunal claim for unfair dismissal. Higher education providers will be well-placed to defend such claims where the expected standards of conduct are clear and have been communicated, along with the potential consequences of breach, and a fair disciplinary procedure has been followed. If these factors are present, the remaining substantive issue in defending an unfair dismissal claim is likely to whether the dismissal was a reasonable and proportionate sanction to apply in all the circumstances of the case
- **human rights considerations** – personal relationships codes, whether they prohibit particular relationships or require them to be declared, will involve some interference with rights under Article 8 of the ECHR to respect for private and family life. Higher education providers will need to ensure that the rules set out in their policy are proportionate and justifiable in order to protect the rights and freedoms of others (including students). In the case of staff dismissals, these considerations may be part of the assessment made by an employment tribunal when applying the statutory tests of reasonableness in unfair dismissal legislation.

Section 6:

The importance of briefings and training

Legal Briefing

Staff to student sexual misconduct



Higher education providers should provide briefings and general training to all staff and students, across the institution, to raise awareness and understanding of *staff to student sexual misconduct*. This should include reference to the higher education provider's strategy, arrangements, policies and procedures for the prevention of and response to *staff to student sexual misconduct*, how instances of *staff to student sexual misconduct* can be reported and complaints made, and sources of institutional and external support available for individuals who have experienced or otherwise been affected by *staff to student sexual misconduct*.

More detailed and tailored training should be provided to those members of staff who are involved in devising, drafting and updating, implementing, and monitoring and evaluating higher education providers' prevent, response and support strategies, arrangements, policies and procedures. This may include staff who act as investigators or panel members under disciplinary or complaint procedures, manage report and support schemes, or provide pastoral and wellbeing support services (including personal tutors). Appropriate training should also be provided in respect of the sharing and other processing of personal data (including special category personal data) including in connection with the investigation of *staff to student sexual misconduct allegations*.

Governors should also receive training to assist them to understand their legal and regulatory obligations in respect of *staff to student sexual misconduct* and to exercise their duties of oversight and scrutiny.

Legal Briefing

Staff to student sexual misconduct

| | |
|---|--|
|  | <p>Nicola Bennison</p> <p><i>Partner</i></p> <p>M: +44 776 892 3459</p> <p>E: nicolabennison@eversheds-sutherland.com</p> |
|  | <p>Chris Mordue</p> <p><i>Partner</i></p> <p>M: +44 738 754 4154</p> <p>E: chrismordue@eversheds-sutherland.com</p> |

Contact details

HEIs requiring any advice on the issues in this briefing should contact:



Nicola Bennison
Partner

M: +44 776 892 3459
nicolabennison@eversheds-sutherland.com



Chris Mordue
Partner

M: +44 738 754 4154
chrismordue@eversheds-sutherland.com

eversheds-sutherland.com

© Eversheds Sutherland 2022. All rights reserved.
Eversheds Sutherland (International) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.
cloud_uk\205120947\1