Legal Briefing

Staff to student sexual misconduct

Abbreviations

The following abbreviations are used in this briefing:

CTER	Commission for Tertiary Education and Research
DPA	Data Protection Act 2018
EA	

Section 1: Introduction

Sexual misconduct is a key concern for the

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

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 IW*nBT/t1 0 0 1 70.944 7460 glludioay r,6(s)[(co-4(u)-5(r)6(t)--3(c-5(l)-4(ai)msch)-,6(s)[(r)5(e)6(g

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

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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 –

that a provider has carried out this balancing test) provides the most opportunities

Section 3:
Students – A legal overview

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)

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:

	Example

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 õ ə Ĭ

traumatising questioning by investigators

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)

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 persl

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 t.96 Tf1 0 0 1 235.4

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-

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

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.

The provider considers the matter under its staff disciplinary procedure. It undertakes an initial inve

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

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.

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

This implied

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

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”

- 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

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 1 426.79 620w%0 1 75u-3(h)-5(e)6(rwas a)-3(e)6(st)-9(o)5(f)] TJET

- 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.

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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

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 i

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*

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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

procedure to help students and staff to understand how the

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 96 9.9 -m1 71 0 5971 t100(s)6unds

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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

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
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submission of

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

the negotiations leading up to it) and others have decided to avoid using any confidentiality

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.

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.

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

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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

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

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

Section 6:
The importance of briefings and training

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.

Contact details

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