

The right destination.... but how to get there? Why the OfS' requirements on harassment and sexual misconduct risk failing students

12 November 2024

Published in July 2024, the Office for Students' requirements on student harassment and sexual misconduct produced a flurry of generally positive media coverage.

None of the coverage addressed the hole at the centre of the OfS' ambition to better protect students: the absence of any meaningful, binding universal procedures dictating how universities should handle these often complex and sensitive cases.

As a criminal defence lawyer, my perspective on this issue is likely to be different from others'. My clients are often young men accused of inappropriate sexual behaviour who are struggling to navigate the legal and quasi-legal procedures they are caught up in.

However, I believe that everyone involved in these matters – whether they be complainants, the complained-about or universities – is best served by procedures that are fair, transparent, and consistent.

A criminal defence perspective

A striking characteristic of university procedures I get involved in is that every one of them is different. Some are good. Others are not. They often fall down in the crucial areas of evidence gathering, handling and testing.

Issues I have encountered include:

- Record keeping. There is no general requirement for universities to log all their contacts with people involved in allegations of sexual misconduct. Record-keeping protocols can vary enormously. There may be no written record of crucial meetings between university administrators and the complainant or accused, and still less are interviews routinely recorded.
- Disclosure. There is often no formal procedure for determining what information and material should be obtained and held by a university, and what can be fairly passed to the accused so they can try to explain it. This can result in the accused not being able to see or rely on material that may support their position.
- Admissibility. 'Hearsay' evidence (broadly speaking, when one person gives evidence about what another person said) is usually admissible in university proceedings and, as such, may not be treated with the scepticism it often deserves.

- Legal representation. There is no automatic right to representation in university proceedings. Indeed, some universities actively discourage their students – whether complainant or accused – from seeking independent legal advice.
- Training. Despite significant improvement in this area over the past decade, it is often the case that university staff conducting the disciplinary process are insufficiently trained in handling such sensitive and complex matters.

The lessons of AB v XYZ

The case of AB v XYZ concerns an anonymised student who sued his university following its investigation of – and finding against him – in relation to an allegation of sexual assault.

Two High Court rulings found that the university XYZ in question had twice breached student AB's rights, firstly when it refused to allow him to be legally represented at an initial disciplinary hearing; and secondly when it ruled that hearsay evidence was admissible at a subsequent hearing.

These cases show us that:

- Universities have a duty to uphold natural justice and an accused having legal representation may be necessary to ensure procedural fairness. This is even more likely in more serious cases such as when dealing with allegations of sexual misconduct.
- Complainants' understandable reluctance to be questioned by a lawyer may be resolved by effective chairing of a disciplinary committee, for example by agreeing questions in advance or directing questions through the panel chair.
- Where the evidence of the accused is fundamentally contradicted by the complainant (as is often the case in sexual misconduct cases) it is essential that the accused has the ability to test witness evidence by questioning.

The core issue in the two AB v XYZ High Court cases was a repeated misunderstanding, on the university's part, of how it should properly conduct these proceedings, assess witness evidence and deal with the complaint in a fair way.

What should universities do?

Universities already operate under a significant – and growing – regulatory burden. But it does not reflect these cases' seriousness to ignore practices developed over decades in the criminal justice system.

In my view, the OfS should help universities by setting out a basic framework for how they should conduct sexual misconduct and harassment disciplinary investigations and proceedings.

Ideally, this would be a step-by-step guide on how to run fair proceedings into alleged sexual misconduct. It would, at the very least:

- Set out the steps a university should take when it first becomes aware of an allegation. Who should take control? When should the parties involved be contacted, and by whom? Under what circumstances should the police be informed of the matter?
- Establish protocols for evidence gathering and retention. Who should conduct interviews, and how? What types of evidential material should be obtained (interview / electronic device data / CCTV)? How will this be obtained and stored?
- Set out the framework by which evidence can be fairly (and sensitively) tested.
- Advise on universities' obligations regarding confidentiality. What information should never be divulged? What information may it be obliged to divulge to others? How will this process be managed and explained to all parties?
- Set out how to best conduct a fair hearing which is most likely to establish the truth of an allegation while also paying appropriate regard to a victim's needs.
- Explain how procedures should be open to external legal oversight as early as possible, including by allowing parties to obtain independent legal advice.

The OfS appears to have recognised a desire for more specific guidance in paragraphs 44 – 46 of a [consultation outcomes report](#) published at the same time as the new requirements under condition E6.

However, citing the “diversity of the sector and the diversity of the issues” it declined to provide this. “It is for providers to develop their own policies and procedures within the parameters of the requirements”, the OfS writes.

What next?

The new condition that universities must have a codified and accessible policy on how they run internal investigations into these matters is a positive development.

But I fear that the OfS's failure to provide step-by-step guidance on how these proceedings should properly be run means many universities will struggle to cope when they happen.

The result will be injustice: potentially for victims of any sexual assault; potentially for the accused individual; most likely for both.