



Briefing no. 1: In cases of suspected sexual misconduct can a university pro-actively investigate and speak to potential witnesses in the absence of any formal complaint or complainant? (February 2020)¹

This is a guidance document and is not intended as legal advice

In cases of staff sexual misconduct, situations can arise where members of a university community are aware of behaviour that seems to contravene university policies and is having a harmful effect on students or the workplace, but in the absence of any formal complaint, the department or institution does not seem to have a mandate to take any action, or any clear procedure to follow. This includes situations where there already is a complainant or reporter but no formal complaint.

In this situation, universities have been put on notice of a risk to their students or staff, and given that they owe a duty of care to their staff and students to protect them from foreseeable risk, we believe they would be liable for any injury or damage caused by this risk if they take no action. In other words, their duty to act should not just be triggered by a formal complaint, but also on receipt of sufficient information to put them on notice of a reasonably foreseeable risk. We therefore urge universities to take the following proactive steps.

1. When a report gives enough information to identify a department/team/individual as ‘at risk of harming or being harmed,’ either the Safeguarding Lead or HR should take proactive steps to establish the credibility of the report and the extent of the risk. For example, the Safeguarding Lead or HR might email all staff and students within the department or relevant research group stating that they have received report/s of sexual misconduct, and ask those with any concerns to contact the Safeguarding Lead, a named member of HR, or another independent staff member located outside the department. This email should also give information clarifying:
 - a. The point of contact for potential complainants to voice informal concerns and learn about alternative options
 - b. The types of actions that constitute sexual misconduct
 - c. That bystander reports and informal reports will be accepted

Where a head of department or equivalent manager becomes aware of concerns about the conduct of one or more individuals in their department or under their management, it is their responsibility to proactively report the concern to the designated internal specialist – the Safeguarding Lead or designated recipient within HR.

2. If the preliminary investigation by the Safeguarding Lead and/or HR, as envisaged in point 1 above, reveals a credible risk (that policies are being breached and/or that staff or students are being placed in harm’s way) an investigator should be appointed by the Safeguarding Lead

¹ This briefing document provides guidance for managers and HR staff on how higher education institutions can take proactive steps to address staff sexual misconduct in the absence of formal complaints. It is designed to work alongside The ACAS Guide on Discipline and Grievances at Work (2019a) as well as the ACAS guidance on Conducting Workplace Investigations (2019b).



- and/or HR. This should happen regardless of whether a formal complaint has been made to the university.
- a. The institution should decide the risk threshold for appointing a formal investigator, and apply this consistently. The risk threshold should be informed by both the severity of the behavior reported and/or the number of reports received. One report of serious sexual misconduct should be enough to trigger an investigation.
 - b. The terms of reference for the investigation (ACAS, 2019b, p.12) should be sufficiently flexible to allow a full investigation into any issues of sexual misconduct, or related grooming, victimization or bullying of the individual/s under investigation, and their potential impact on students or staff with whom they have had professional contact. In the case of staff on student grooming or sexual misconduct, the investigator should be open to investigating social contacts with students too, since the blurring of professional and social boundaries is a device frequently arising in cases of sexual misconduct. As noted in the ACAS guidance on conducting workplace investigations (2019b, p.13) 'an investigator should be prepared to modify their investigation plan as and when further evidence comes to light that may be relevant to the investigation'.
 - c. The report should be included in the central register of disclosures/complaints, maintained by the Safeguarding and/or Student Welfare Lead and/or HR, in line with The 1752 Group McAllister Olivarius Sector Guidance to Address Staff Sexual Misconduct in UK Higher Education, Recommendation A4.
 - d. The investigation report, with its outcome and recommendations should be delivered to the disciplinary panel or relevant decision-maker for final determination, at or after a disciplinary/complaint hearing or meeting, in line with The 1752 Group McAllister Olivarius Sector Guidance to Address Staff Sexual Misconduct in UK Higher Education, Part C.
3. Regardless of the outcome of the disciplinary process and any sanctions imposed, the safeguarding lead, HR and/or management of the department or team in question should consider whether to take any other proactive steps to mitigate risk or improve staff and student care. These may include:
- a. A climate survey by an independent external party or organization, using methods that will enable students to raise sensitive concerns.
 - b. Awareness-raising workshops on what constitutes sexual misconduct, what options are available for people to report concerns or seek support, and how the institution addresses this issue.
 - c. Undertaking cultural change work across the department/team, including discussing and agreeing on acceptable behaviours.
 - d. Development of departmental-level policy and reporting procedures.
 - e. Mentoring and peer support programmes, supported by equality and diversity and HR staff within the university in order to address systemic issues that are brought to light through this work.



References

ACAS. 2019a. Discipline and grievances at work: https://m.acas.org.uk/media/1043/Discipline-and-grievances-at-work-The-Acas-guide/pdf/DG_Guide_Feb_2019.pdf [accessed 27 January 2020]

ACAS. 2019b. Conducting workplace investigations. https://m.acas.org.uk/media/4483/Conducting-workplace-investigations/pdf/Conducting_Workplace_Investigations.pdf [accessed 27 January 2020]