

Sexual Harassment in Education

Berkeley Center on Comparative
Equality and Anti-Discrimination Law

October 28 - 29, 2021

WRITTEN CLE MATERIALS

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Title IX & the Civil Rights Approach to Sexual Harassment in Education

Nancy Chi Cantalupo

BCCE 2021 Conference
on Sexual Harassment in
Education – Oct. 28, 2021





U.N. Secretary-General:

“The scope and extent of violence against women are a reflection of the degree and persistence of discrimination that women continue to face. It can only be eliminated, therefore, by addressing discrimination, promoting women’s equality and empowerment, and ensuring that women’s human rights are fulfilled.”

-- *Ending Violence Against Women:
From Words to Action* (2006)

https://www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf

Contrasting Title IX's Equality Approach & the Criminal Law



- | | | |
|--|-----|--|
| 1. Establishing equal educational opp/climates | VS. | 1. Community safety/ Justly incarcerating perpetrators |
| 2. Accommodations, etc., for the victim | | 2. Fairly punishing the perpetrator |
| 3. Victim chooses investigation or not | | 3. Police/Prosecutorial Discretion |
| 4. Procedural equality | | 4. Victim Not a Party, Only a Witness |



DARVO: Deny, Attack,
Reverse Victim & Offender
-- Dr. Jennifer Freyd & colleagues

Downward Spiral of SV & Trauma for Victims

- Health (→ educational consequences):
 - increased risk of substance use and re-victimization
 - Eating disorders & sexual risk behaviors
 - Pregnancy, self-harm, & suicidality
- Education (→ diminished future earnings):
 - declines in educational performance & grades (→ financial aid loss)
 - taking time off (→ loss of tuition dollars)
 - dropping out of school (→ loss of tuition dollars)
 - transferring schools (→ loss of tuition dollars)
- Annual, national cost of sexual violence: est. \$127 bil. (\$34 bil. more than next highest cost criminal victimization)

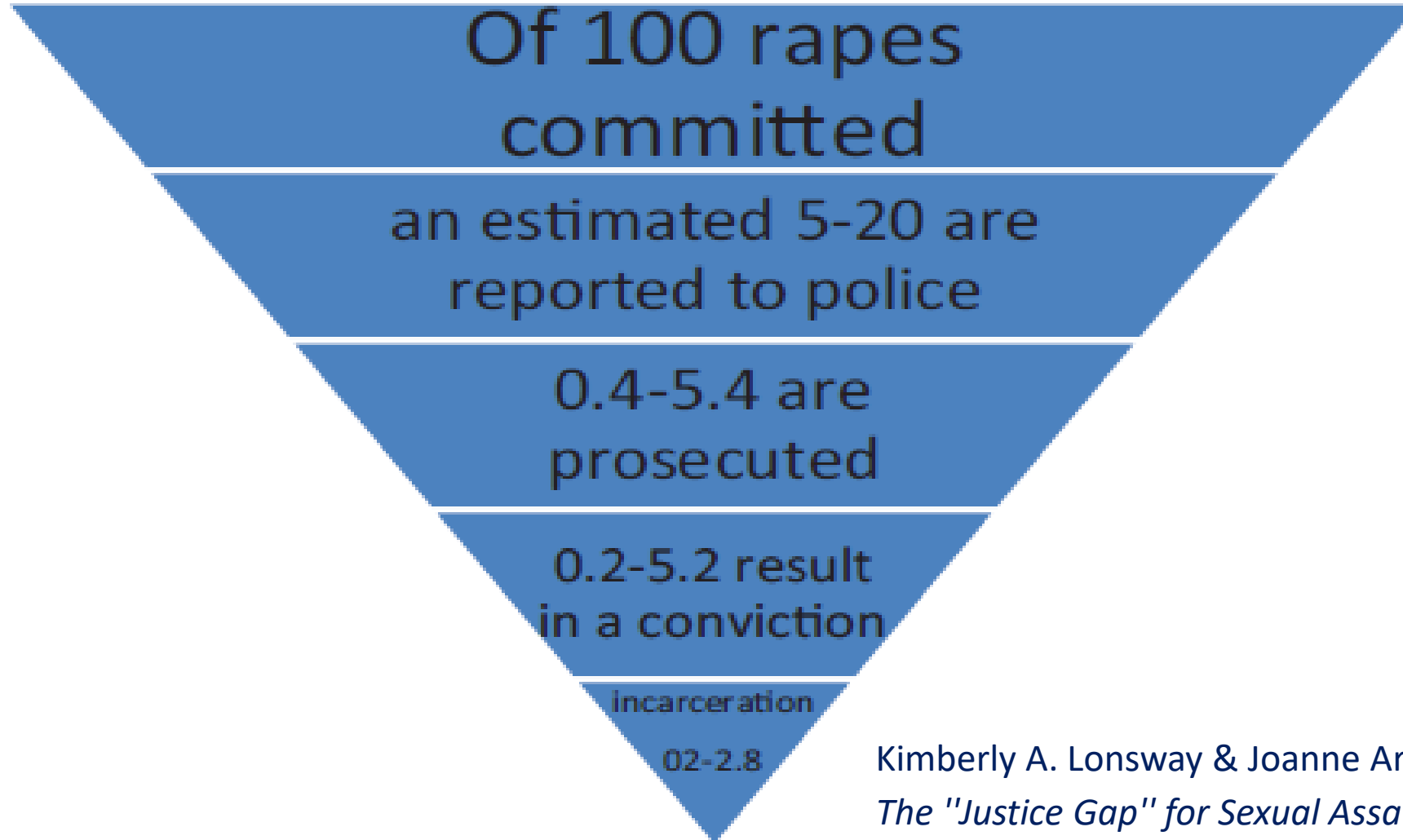


Title IX Accommodations

- No-contact orders & Safety-planning
- Housing/Living Arrangements, e.g.:
 - Changing residence halls
 - Letting out of housing contract
 - Giving alternative access to building
- Academic Arrangements, e.g.:
 - Changing class sections
 - Allowing withdrawals & tuition refunds
 - Adjusting transcripts
- Working, Transportation, Immigration Status, Financial Aid, etc.



Case Attrition in the Criminal Legal System

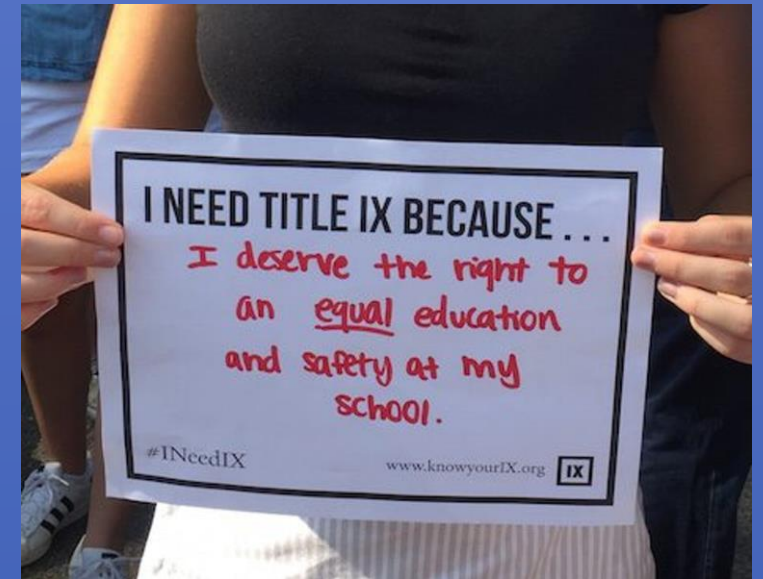


Kimberly A. Lonsway & Joanne Archambault,
The "Justice Gap" for Sexual Assault Cases

The Victim's Veto:

“The individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through non-reporting...”

– Professor Doug Beloof



Reasons for not engaging with the CJS:

- Desire to retain privacy
- Concern about participating in a system that may do victim more harm than good
- Inability of the system to effectively solve many crimes
- Victim's lack of participation, control, and influence in the process
- Victim's rejection of the model of retributive justice



Reasons College Survivors Don't Report

- Fear of hostile treatment or disbelief by legal and medical authorities (24.7% of survivors)
- Not thinking a crime had been committed or what happened was serious enough to involve law enforcement
- Not wanting family or others to know
- Not wanting to get assailants who victims know in trouble
- Lack of faith in or fear of police, police ability to apprehend the perpetrator, court proceedings
- Lack of proof
- Fear of retribution from the perpetrator
- Belief that no one will believe the victim and nothing will happen to the perpetrator



Ability to Control Report/Info for Victims: OCR Title IX FAQs & Multiple Reporting Paths

- 2 paths should be available for victims to disclose/report
- Confidential options:
 - Persons with Statutory Privilege (confidential by state law)
 - Persons with Confidentiality (confidential by school policy)
 - Responsible Employees (not confidential → required to advance report to Title IX Coordinator)
- T9 Coordinator will do an investigation
 - unless victim requests confidentiality
 - and T9C does not have other reasons (e.g. evidence of repeat perpetration) to investigate w/o victim's cooperation





Procedural Equality

- Gen'l principle: both parties in proceeding get equal rights w/in proceeding's rules
- Specific rights equal under Title IX, unequal under criminal law:
 - Party or "complaining witness" status
 - Representation by attorney/advisor
 - Access to evidence (incl. exculpatory evidence)
 - Privacy protections
 - Presence at full hearing
 - Appeal



DARVO: Deny, Attack,
Reverse Victim & Offender
-- Dr. Jennifer Freyd & colleagues

The Procedurally Equal Standard of Proof: Preponderance of the Evidence

- Preponderance:
 - Equal presumptions of truth-telling for both parties
- Clear & Convincing
 - Strong presumption of truth-telling favoring the accused & against victim
- Beyond a Reasonable Doubt:
 - Strongest presumption of truth-telling favoring the accused & against victim



The Procedurally Equal Standard of Proof: Preponderance of the Evidence

- Preponderance:
 - Equal risks of false negatives (inaccurate findings of wrongdoing) and false positives (inaccurate rejections of allegations)
- Clear & Convincing:
 - High risk of false acquittals tolerated to ensure low risk of false convictions
- Beyond a Reasonable Doubt:
 - Highest risk of false acquittals tolerated to ensure lowest risk of false convictions



COLLEGE 07/28/2014 03:44 pm ET | Updated Jul 28, 2014

Brandon Austin, Twice Accused Of Sexual Assault, Is Recruited By A New College



By Tyler Kingkade

braska at Omaha
ons@UNO

Criminology and Criminal Justice Faculty
Publications

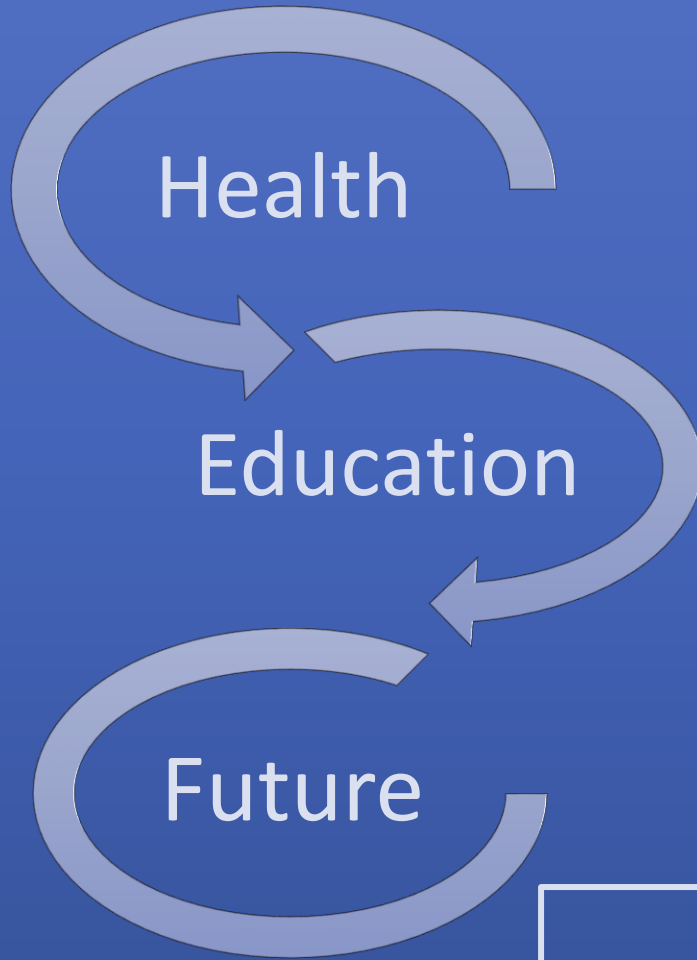
School of Criminology and Criminal Justice

2-2019

No Evidence of “Weaponized Title IX” Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes

Tara N. Richards

Research on Sexual Trauma's Downward Spiral



Health

E.g. Substance abuse; self-harm; suicide;
& re-victimization

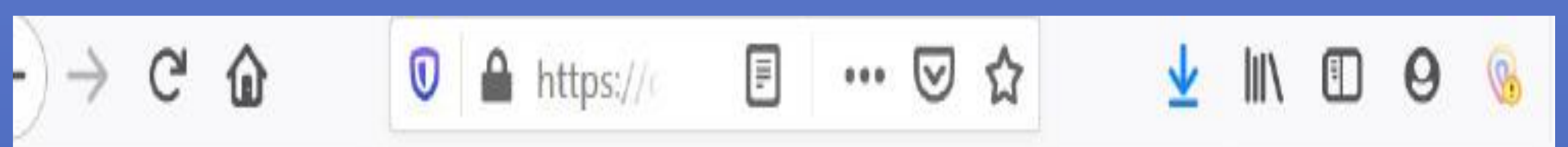
Education

E.g. Taking time off; transferring schools;
declines in grades; & dropping out

Future

E.g. Decreased earning potential

Annual, national cost: est. \$127 bil.
(\$34 bil. more than next highest cost criminal victimization)



Standard of Proof

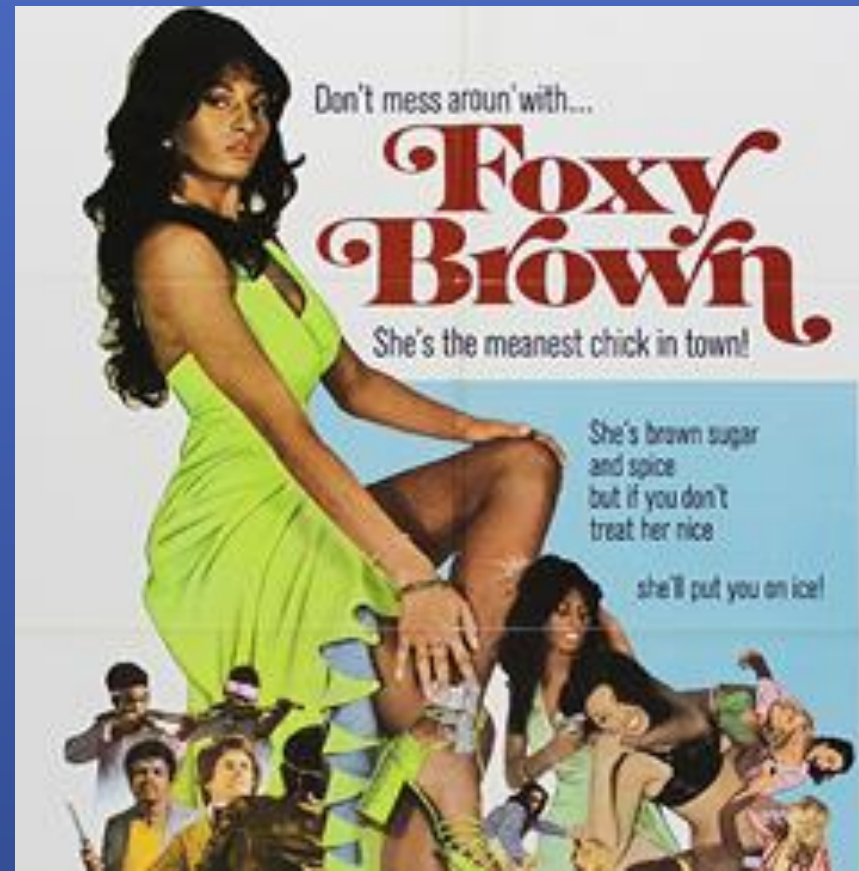
The proposed rules would force many schools to use the clear and convincing evidence standard in sexual misconduct cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence standard, even if they carry the same maximum

I'll get right to the point, since the objective is to give you, in writing, a clear description of what I desire.... Shave between your legs, with an electric razor, and then a hand razor to ensure it is very smooth.... I want to take you out to an underground nightclub.... Like this, to enjoy your presence, envious eyes, to touch you in public.... You will obey me and refuse me nothing... I was dreaming of your possible Tokyo persona since I met you. I hope I can experience it now, the beauty and eroticism.

-- Note from white male professor to Japanese female student, quoted by Professor Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong* (1997)

Stereotypes about women of color, prostitution & promiscuity

- “**Jezebel**”: incorporating “slavery, degradation, sexual availability and natural lasciviousness” (Williams)
- “**Hot-blooded Latin**”: “readily available & accessible for sexual use” (Ontiveros)
- “Exotic, submissive, and **naturally erotic Asian woman**” (Ontiveros)
- American Indian/Native American “**sexual punching bag**” (Merskin)
- “**Tragic and vulnerable**” multiracial woman, “product of sexual and racial domination” (Harris)



Six Special Rules for Criminal Rape

(Michelle Anderson,
President of Brooklyn
College)

1. *A general suspicion based on the fear of false claims* leading to cautionary instructions (1600s)
2. A resistance requirement
3. A corroboration requirement
4. A prompt complaint requirement
5. *Chastity requirement* (1200s)
6. The marital rape exception

Maxwell et al., The Impact of Race
on the Adjudication of Sexual Assault &
Other Violent Crimes (2003)

“[In] 41,151 cases... [from] the 75 most populous United States counties... minorities were treated more punitively compared to whites when they were charged with an assault, robbery, or murder, but they were treated more leniently when they were charged with a sexual assault.”

2013-14 Department of Education Civil Rights Data Collection

- General discipline rates differed by nearly 13% (18% of black boys sanctioned with out-of-school suspensions versus 5.2% of white boys)
- Discipline rates for sexual harassment differed by only 0.1% and were quite low across the board (0.2% for white boys and 0.3% for black boys)

Rescission of Obama-era Racially- Discriminatory
Discipline
Guidance
(12/21/18):



Essential education reporting across America



**It's official: DeVos has axed
Obama discipline guidelines
meant to reduce suspensions
of students of color**



[\[Read the full transcript here: Betsy DeVos remarks on campus sexual assault\]](#)

In an [interview with CBS](#) after the speech, she was asked if she was

THE CUT

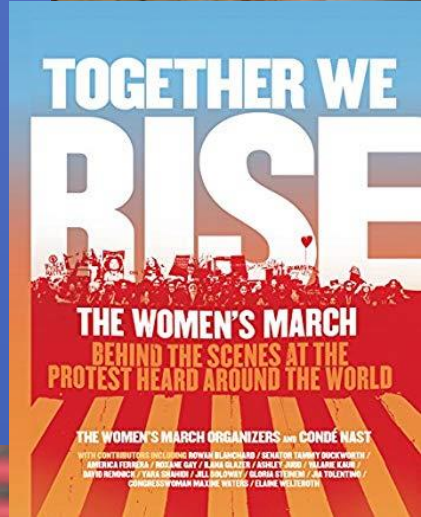
CAMPUS SEXUAL ASSAULT | SEPT. 5, 2017

Betsy DeVos Is Expected to Make a Major Announcement on Campus Sexual Assault

By Claire Landsbaum [@landsbaumshell](#)

Biden Executive Order & 4/6/21 Announcement

- **Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity:** <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/>
- **Department of Education's Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to Fulfill President Biden's Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination:** <https://content.govdelivery.com/accounts/USED/bulletins/2cb4dd0>





Sojourner Truth,
during the debates over
Passage of the 15th amendment:

“There is a great stir about colored men getting their rights, but not a word about the colored women. And if colored men get their rights and colored women not theirs, the men will be masters over the women...”

The Opinion Pages
ROOM for DEBATE






Doing Enough to Prevent Sexual Assault on College Campuses?

Legislators are attempting to address the problem of sexual assault at colleges and universities. What else could be done?

[Read More »](#)

DEBATERS

-  **We Need More Than Transparency**
JANE STAPLETON, PREVENTION INNOVATIONS
-  **Surveys Reveal the True Numbers**
DANIELLE DIRKS, END RAPE ON CAMPUS
-  **Law Enforcement Must Take the Lead**
SAMANTHA HARRIS, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

Accurate Reporting of Sexual Assault on Campus Without Shame



[Nancy Chi Cantalupo](#) is a researcher at Georgetown University Law Center.

UPDATED JANUARY 3, 2017, 5:41 PM

The legislative proposals to require anonymous climate surveys about sexual violence on campus will help achieve goals of safe and equal educational opportunity. Public, standardized surveys will enable Americans to see how much violence is actually happening among students and show the gaps between victim-reporting and rates of violence.

Requiring that each school reports the results of these anonymous surveys is not designed to shame the institutions about their sexual violence rates. Rather, it places all schools on an even playing field and allows them to concentrate on violence

Low numbers of victim reports should not make anyone feel better



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Civil Rights Investigations & Comprehensive Prevention of Campus Gender-Based Violence

in Claire M. Renzetti & Diane R. Follingstad, Adjudicating Campus Sexual Misconduct and Assault: Controversies and Challenges (eds.) (2019).

27 Pages • Posted: 17 May 2019 • Last revised: 23 Jun 2021

[Nancy Chi Cantalupo](#)

Wayne State University Law School (Aug. 2021)

Date Written: April 18, 2019

Abstract

This manuscript articulates the reasons why institutions of higher education should use “civil rights investigations” models to conduct fact-finding in cases involving gender-based violence, including “sexual misconduct,” sexual harassment, domestic violence, dating violence, and stalking, reported to have occurred



AMERICAN BAR ASSOCIATION™

Commission on Domestic
& Sexual Violence

Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence

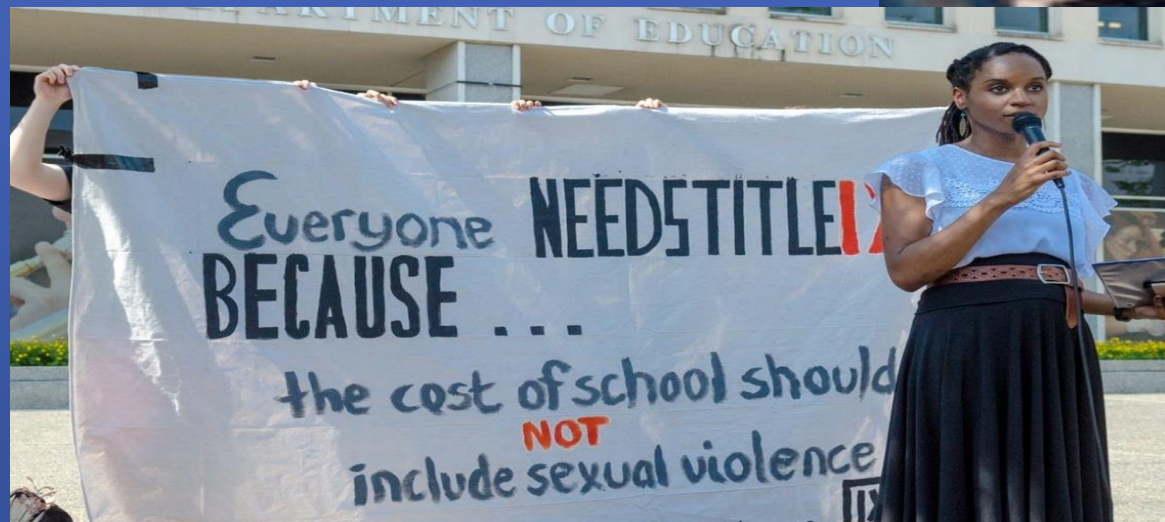


Thank You!

Nancy Chi Cantalupo

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<http://ssrn.com/author=884485>



Federal Title IX Regulations and University Policy

Suzanne Taylor, Systemwide Title IX Director,
University of California

2020 Amendments to Title IX Regulations – Trump Administration

- published for public comment November 2018
- 120,000+ comments
- issued in final form May 2020
- effective August 14, 2020
- prescriptive about grievance process schools must provide

2020 Amendments to Title IX Regulations – Biden Administration

- Executive Order April 2021
- Public Hearings June 2021
- Q&A July 2021
- Amended regs for public review and comment anticipated May 2022

Problematic Regulatory Provisions -- Examples

- narrow definition of sexual harassment
- schools held to lower standard
- cross-examination requirements
- exclusionary rule
- confidentiality requirements
- hearings for employees

Tenets Guiding Sexual Harassment Policy Development -- Examples

- encourage complainants to come forward
- treat parties both fairly and kindly
- provide just and reliable outcomes
- promote accountability
- minimize burden on parties, employees and institution
- provide clarity
- reflect institutional values

Due Process Rights -- Examples

- detailed notices
- advisors
- identify witnesses and submit evidence
- pose questions
- review and respond to evidence

Shifting Legal Landscape

- resource drain
- confusion
- human toll
- undermines credibility and integrity of work
- divisive

**NATIONAL
WOMEN'S
LAW CENTER**



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Director of Justice for Student Survivors
& Senior Counsel

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The Trump Title IX Rule

(Brief) Summary of Trump Title IX policies

- Rescinded 2001, 2011, and 2014 guidances
- Relies on toxic stereotypes and rape myths
- Created many harmful requirements that don't apply to any other type of student or staff misconduct—only sexual harassment
 - Schools can (sometimes must) ignore or dismiss survivors' complaints
 - Schools can (sometimes must) mistreat survivors whose complaints are not dismissed
 - Schools can (sometimes must) use uniquely unfair and traumatizing procedures to investigate sexual harassment.

Lawsuits Challenging the Trump Title IX rule

- **There have been 5 lawsuits challenging the Title IX rule**
 - 3 have been dismissed on technical grounds
 - 1 has been put on hold
 - 1 has issued a decision (NWLC)
- **NWLC lawsuit**
 - Argument: the rule is illegal because it is “arbitrary and capricious” and is motivated by the toxic and false sex stereotype that survivors, especially women and girls, lie about rape => violates federal law, including the Constitution
 - **July/August 2021: The judge vacated one provision of the Trump rule because it was arbitrary and capricious.** This provision, which was part of 34 CFR 106.45(b)(6)(i), had required postsecondary schools to ignore all oral or written statements made by any party or witness who did not submit to cross-examination at a live hearing.

What's Next?

President Biden and the Department of Education's Actions:

- **3/8/21:** Biden ordered Dept of Education to review all Title IX policies in 100 days and to “consider” rescinding the Trump Title IX rule
 - Those 100 days ended on 6/16
- **4/6/21:** Dept of Education [announced](#) plans to (1) hold a public hearing, (2) issue a Q&A doc about the Trump rule, and (3) propose a new Title IX rule
- **6/7-6/11:** Dept of Education held 5 days of [public hearings](#) to hear from members of the public about how to improve Title IX enforcement
 - Majority of commenters were strongly pro-survivor
- **6/10/21:** Dept of Education issued its [regulatory agenda](#), which indicates they plan to propose a new Title IX rule in May 2022
- **7/20/21:** Dept of Education issued [Q&A](#) on Title IX regulations
- **8/24/21:** Dept of Education issued letter in light of decision in *VRLC v. Cardona*.

#ED Act Now

DEMAND #EDACTNOW

DEMANDS:

1. **ISSUE PROPOSED CHANGES TO THE TITLE IX RULE BY THE END OF OCTOBER.**
2. **ISSUE A NONENFORCEMENT DIRECTIVE ON PORTIONS OF DEVOS' TITLE IX RULE THAT HARM SURVIVORS.**
3. **ENSURE THAT SURVIVORS CAN FILE COMPLAINTS WHEN THEIR RIGHTS ARE VIOLATED.**

I NEED TITLE IX BECAUSE...

“ Had I waited a little longer, I wouldn't have been able to report my sexual assault under the new rule. ”

– ITHACA COLLEGE

I NEED TITLE IX BECAUSE...

“ My school refused to enforce my no-contact order even after my assailant broke it. ”

– RENSSELAER POLYTECHNIC INSTITUTE

I NEED TITLE IX BECAUSE...

“ Local law enforcement would not investigate one of their own officers for rape and said "if you were unconscious, then how do you know you didn't consent?" ”

– ST. MARY'S UNIVERSITY SCHOOL OF LAW

Sign the petition: EDActNow.org

#INeedIX

Sign the petition: EDActNow.org

#INeedIX

Sign the petition: EDActNow.org

#INeedIX

I NEED TITLE IX BECAUSE...

“ When I was raped my sophomore year of college, my school refused to issue basic protections to keep me safe (for nearly three years). I spent the majority of my college years restructuring my life to avoid my rapist. The impact of experiencing gender violence in college didn't end with my graduation. I'm still navigating the fallout five years later. ”

– UNIVERSITY OF CINCINNATI

I NEED TITLE IX BECAUSE...

“ I want to feel supported as a survivor. ”

– WOODGROVE HIGH SCHOOL

I NEED TITLE IX BECAUSE...

“ When I experienced sexual assault in 2016, nearly nothing was done. We had laws in place but no one to enforce them and nearly 4 years later, I am still dealing with the repercussions of what happened to me. ”

– LOYOLA UNIVERSITY NEW ORLEANS

Sign the petition: EDActNow.org

#INeedIX

Sign the petition: EDActNow.org

#INeedIX

Sign the petition: EDActNow.org

#INeedIX

Title IX 50th Anniversary and Statutory Amendment?

- **Title IX's 50th Anniversary – June 2022**
- **Title IX Take Responsibility Act**
- **Intersectional responses to harassment**

Berkeley Center of Comparative Equality and Anti-Discrimination Law Sexual Harassment in Education Plenary I

October 28, 2021

Hailyn Chen

Overview

- What is the legal and regulatory landscape facing K-12 schools, colleges, and universities?
- What trends do we see in the case law and regulatory enforcement?

Enforcement Agencies and Regulators

- U.S. Department of Education's Office of Civil Rights
- The U.S. Department of Health and Human Services' Office of Civil Rights
 - Resolution agreement with Michigan State University (August 2019) [link](#)
- The U.S. Department of Justice
 - Settlement with San Jose State University (September 2021) [link](#)
- State Auditors, State Law Enforcement and State AG Monitors
 - California State Auditor Report re UC and Cal State (2014) [link](#)
 - St. Paul's School Settlement with New Hampshire AG (2018) and Independent Compliance Overseer's Reports (2020-2021) [link](#)
- U.S. SafeSport
 - [link](#)

Independent Internal Investigations

- Ohio State (2019)
 - “Ohio State released a report from independent investigators that details acts of sexual abuse against at least 177 former students by Dr. Richard Strauss during his employment with the university from 1978 to 1998.”
 - [Link](#)
- UCLA (2020)
 - “The incidents described in this report are deeply upsetting and reflect alleged conduct that is completely antithetical to our values.”
 - [link](#)
- University of Michigan (2021)
 - “Although the information these [University] individuals received varied in directness and specificity, Dr. Anderson’s misconduct may have been detected earlier and brought to an end if they had considered, understood, investigated, or elevated what they heard.”
 - [link](#)
- Louisiana State (2021)
 - LSU’s handling of sexual misconduct complaints was a “serious institutional failure.”
 - [link](#)

Respondent Litigation

- Writ petitions
 - Seek to vacate findings and sanction
 - Basis for relief
 - Lack of a fair hearing or due process
 - School acted in excess of jurisdiction (failed to follow its own policies)
 - Findings not supported by substantial evidence
 - Severity of sanction
- Claims for damages
 - Gender discrimination (Title IX)

Complainant and Survivor Litigation

- Extended statutes of limitation for civil claims of sexual assault
 - California Code of Civil Procedure § 340.1 (child); § 340.16 (adult)
- Treble damages for sexual assault resulting from entity's "cover up" – any effort to conceal evidence of sexual assault
 - California Code of Civil Procedure § 340.1
- Title IX
 - Pre-assault theory: [Karasek v. Regents \(9th Cir. 2020\)](#)
- Class action and mass tort cases involving serial perpetrators

Best Practices and Common Errors in Investigation – A Simulation

Alezah Trigueros, Oppenheimer Investigations Group LLP

Brenda Star Adams, Equal Rights Advocates

Marcie Fitzsimmons, Gordon & Rees Scully Mansukhani

About us



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Marcie Isom Fitzsimmons
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Partner
GRSM

Overview

- Mock investigation scenario
- Overview of the investigation process
 - Investigation planning
 - Evidence gathering
 - Making findings
 - Evaluating credibility
- Evaluating liability in investigations
 - Investigation scope
 - Advisors
 - Timing
 - Supportive measures
 - Concurrent criminal investigations
 - Outcomes

Our Investigation

- Complainant: Abbie Allen
- Respondent: Ben Brown
- Investigation conducted by ABC Investigations for XYZ City University

Summary of Allegations

- Abbie Allen alleged that on Saturday, October 16, 2021, at an off-campus house party, Ben Brown, an XYZ City junior, put his arm around Allen, made unwelcome sexual comments to her, physically blocked her exit from a room, and grabbed her arm to prevent her from walking away. Allen further alleged that Brown later sent Allen an unwanted nude photo over Snapchat.

Investigation Planning

Policy Considerations

- Be clear on the scope of your investigation ***before*** sending the Notice of Investigation
- Keep in mind the need to re-notice if additional allegations are raised during the investigation process
- Keep in mind the timing and deadlines imposed by the applicable Title IX policy and make sure you are sending out timely notices if extensions are needed
- Right to a support advisor

Supportive Measures

- The Title IX Coordinator is responsible for coordinating the effective implementation of Supportive Measures
- Be alert to requests that might be raised during interviews □ direct that information to the Title IX Coordinator

Our Investigation

- Complaint is filed September 6, 2021
- XYZ City University issues a mutual No Contact Order against both Allen and Brown
- XYC City University retains ABC Investigations October 26, 2021
- Notice letters issued to parties October 26, 2021

Evidence Gathering

Trauma Informed Practices

- Supportive measures
- Create a safe, comfortable environment
- Advocate or support person
- Allowing complainant to pace, fidget, take breaks
- Giving complainant space to tell their story in a less directed, nonconfrontational manner
- Understand effects of trauma on memory formation
- Try to trigger complainant's sensory memories
- Giving complainant some control in the process

Identifying Witnesses

- Who to interview?
- Deciding not to interview a named witness
- Allowing witnesses to review their statements
- Reluctant witnesses

Authenticating Evidence

- Perils of relying on screenshots
- How to authenticate
- Limitations

Our Investigation

- Brown requested that the investigator interview all nine other students who were part of the same mentor group as Allen so that they could provide their recollection and assessment of Brown and Allen's interactions.
- Allen mentioned that one of her roommates, Davey Dune, would be reluctant to be interviewed as part of the investigation because she is seeking an executive board position for a sorority that is closely affiliated with the fraternity of which Brown is vice president.
- On Sunday, September 5, 2021, Brown sent Allen an inappropriate/obscene Snapchat photo, subsequently apologizing and saying the message was meant for someone else. Allen did not respond and blocked Brown on Snapchat. She no longer has access to those messages.

Making Findings

How Much Evidence is Sufficient?

- Evidence review by the parties
- Is there evidence that a party requested you gather that you have found to be unavailable? What steps did you take?
- Decision not to interview a particular witness – document reasoning

Evaluating Credibility

- Necessity of making credibility determinations
- Credibility factors to consider
 - Plausibility
 - Motive
 - Corroboration
 - Ability to perceive/recall
 - History of honesty/dishonesty
 - Habit/consistency
 - Inconsistent statements
 - **Manner of testimony/demeanor**
- Remember to consider the effects of trauma
 - Complainant's memory might not be linear
 - Trauma might impact demeanor
 - Factor this in when assessing credibility

Types of Findings/ Investigation Reports

- Evidence report
- Factual findings
- Policy determinations
- Resolution/outcome

Evaluating Liability in Title IX Investigations

General concepts to consider when evaluating liability

TOP 8

1. **Prompt** investigation and resolution
2. Timely provision and **effectiveness of interim measures**
3. Entitled to process that promotes **accountability**
4. Effectiveness of school's efforts to **end harassment, prevent its recurrence, and remedy its effects** is the measure.
5. What was **sloppy or incomplete** v. thorough and transparent?
6. Any **conflicts** of interest?
7. Credentials/ **experience of investigators?**
8. Ignored **credibility markers?**
Trauma-informed approach?

New investigators: highly recommend you read the ABA Recommendations on adjudicating gender-based misconduct cases

What are the red flags in our mock investigation?

Scope of the Investigation

1. Scope of the Investigation

- Was this properly routed outside of T9 policy?
- What was the school's reasoning for this?
- Is it documented?
- When should this assessment be made?

Advisor

2. Right to an Advisor

- Has complainant been notified of their right to an advisor?
- Have they been copied on all correspondence?
Connected with an advocate?
- Has this been documented? What happens when advisor was on a list of recommended advisors but party thinks they are insufficient?

Timing

3. Timing

- Delay of 1.5 months before initiating investigation - better to collect evidence and interview witnesses closer to the event
- Delays can be reasonable
- Important to document reason

Mutual NCO

4. Mutual No-Contact Order

- Can constitute unlawful retaliation.
- Often used as retaliatory tool by Respondent. What factors?
- Look at SB 493 - prohibits mutual NCO's unless specific reasons
- What enforcement?
- How should T9 offices handle NCO violation allegations during pendency of investigation?
- Consider violation in context of investigation?

Other Supportive Measures

5. Other supportive measures

- School should provide any measures necessary to end/prevent recurrence of/remedy effects of harassment.
- Examples of what this can look like:
 - Academic accommodations
 - Housing accommodations
 - Additional support (emotional; reach out to professors)
 - Remove him as her mentor/from the mentorship program
 - What training was provided to the mentors in this program? What consideration did the school give to the position of authority and power they had over these vulnerable populations? What training provided to the mentees?
- Who is the party that gets moved/changed?
- Can be difficult while the investigation is ongoing – case by case basis.

Ongoing Criminal Investigation

6. Ongoing Criminal Investigation

- Should not delay investigation, but often can for logistical reasons
 - Note SB 493 prohibits consideration of evidence at a hearing by a party who did not participate in the investigation if they plead 5th
- Tricky situation when law enforcement directs school to stop investigating
- To what degree should schools be relying on police reports? It depends...
 - Be aware of unconscious bias.

Physical Evidence

7. Physical Evidence

- School's responsibility to gather relevant evidence and to assess whether conduct occurred by preponderance of the evidence - burden not on the parties
- Is there a dispute as to snapchat messages? If so, gathering evidence could help with credibility. If no dispute, what will snapchat show us?
- Practical considerations when it comes to gathering evidence: cost, time, ability, access to information. Consider other ways to corroborate evidence.

Outcome

8. Is it supported by the evidence?

- Is the support well-documented?

9. Does it promote accountability?

- Good case for early resolution? C seeks safety and not punishment; however consider the school's duty (and complainant's desire) to protect other mentees - can that be included in the agreement?
- Is the complainant being notified of the sanctions and are they being offered an opportunity to object to them?
- What if complainant changes her mind?

10. Were there procedural issues with the case?

- Did the investigator refuse to consider evidence that was clearly relevant?
- Did they spend significantly more time interviewing one party or their witnesses than the other?
- Did they show a copy of one party's statement to the other party before interviewing them?
- Did they fail to follow the school's prescribed policies?

Outcome (cont'd)

11. Did investigator exhibit bias?

- Bias = inequitable = Title IX violation
- Why only consider Respondent's proposed witnesses?
- How to balance these? What to do with evidence about the victim's past sexual conduct?
 - SB 493's prohibition on considering past sexual conduct of victim.

12. Was there new evidence?


- Was this evidence properly excluded?
 - Note: SB 493 prohibits parties from introducing evidence at a hearing or before another decision-maker if that evidence could have been but was not provided earlier in the process.
- Communicating the outcome timely and appropriately

Questions?

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Litigating Title IX from a Survivor Perspective

Lauren Groth
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Intro

- ❑ Plaintiff's Attorney
- ❑ Represent students/parents in Title IX administrative proceedings
- ❑ Represent students in federal civil litigation
- ❑ Advise students on their Title IX rights

The Basics



Federal law, which allows litigation across the country.

Primary claims arise from deliberate indifference to known sexual harassment

Also utilize state law claims and Section 1983 as compliments.

Also increasing use of Title IX official policy claims and class actions



Why Do Survivors Pursue Litigation?

- ❑ Institutional and Systemic Change
- ❑ Protect Other Students From Similar Experiences
- ❑ Have Their Story Heard
- ❑ Fight Back Against Institutional Betrayal
- ❑ Broaden the Discussion



What's New In the World of Litigation

- ❑ Culture/Official Policy Claims
- ❑ Utilizing Erroneous Outcome
- ❑ Rise of K-12 Litigation
- ❑ Increasing Polarization of Federal Circuit Courts



Thanks!

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GIVING *DAVIS* ITS DUE: WHY THE TENTH CIRCUIT HAS
THE WINNING APPROACH IN TITLE IX’S DELIBERATE
INDIFFERENCE CONTROVERSY

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ABSTRACT

Civil claims under Title IX are an increasingly effective legal mechanism for addressing sexual harassment and discrimination in educational settings. Because a private right to action under Title IX was only established by the Supreme Court in 1992, Title IX jurisprudence is often subject to conflicting and varied interpretations, leading to inconsistencies in how it is applied across different jurisdictions. This Article addresses one such conflict—whether plaintiffs who experience sex discrimination must plead that an educational institution’s failure to address such harassment led them to experience further harassment, or if a plaintiff’s vulnerability to further harassment is sufficient under Title IX. After reviewing the history and intent of Title IX, as well as the recent development of a circuit split on this issue between the Tenth and Sixth Circuits, this Article argues for the adoption of the Tenth Circuit standard, which permits plaintiffs to plead further harassment or vulnerability to further harassment. This standard is most consistent with the plain language of Title IX and the policy considerations that led to Title IX’s adoption, and this approach best protects students from ongoing discrimination in their educational environment.

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INTRODUCTION

In the last few decades, our society's response to complaints of sexual assault and sexual violence has shifted. While these issues were once relegated to shameful whispers and reputational stigma, the incredible work of the #MeToo movement, Times Up, and countless other activist organizations has brought sexual violence into the light and continues to demand safer communities, workplaces, and educational experiences for women across the country.¹

Buttressing these collective efforts are a myriad of laws and statutes promising women equality in public spaces and the right to be free from sex-based discrimination.² Within the educational realm, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, has increasingly been recognized as an important means of providing redress for young women who experience discrimination in K–12 educational settings, as well as on university campuses.³ Applicable wherever an educa-

1. See Lesley Wexler, Jennifer K. Robbenolt & Colleen Murphy, *#MeToo, Time's up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 47, 51–53, 110 (2019).

2. *#MeToo, Time's up and the Legislation Behind the Movement*, BILLTRACK50 (Feb. 15, 2018), <https://btfgatsby.revivedesignstudios.com/blog/social-issues/civil-rights/metoo-times-up-and-the-legislation-behind-the-movement/>.

3. See, e.g., Lee Green, *Nine Ways Title IX Protects High School Students*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (May 15, 2018), <https://www.nfhs.org/articles/nine-ways-title-ix-protects-high-school-students/>. The Authors recognize that Title IX applies to all genders and that survivors

tional institution receives federal funding, Title IX provides a private right of action for individual plaintiffs who have experienced discrimination by an educational institution or its employees, including in instances where students are subjected to discrimination by virtue of a school's failure to respond to known discrimination or harassment by a third party.⁴

For many, Title IX conjures ideas of equality in sports and the right to an equal opportunity to participate in extracurricular activities traditionally offered exclusively, or at least disproportionately, to male students. Only in the last two decades has Title IX emerged as an effective means of combating sexual violence.⁵ As a result, despite some measure of guidance by several significant U.S. Supreme Court decisions, Title IX jurisprudence remains enigmatic at times; different and often conflicting interpretations of the statute continue to emerge within the lower courts.⁶

This Article addresses one such controversy, one in which the Tenth Circuit has taken on a significant role. A circuit split has emerged between the Tenth Circuit and Sixth Circuit in the context of claims based on a school's failure to respond to known harassment.⁷ Specifically, the question is (a) whether plaintiffs bringing Title IX claims must show that after their initial reports placing the school on notice of assault, harassment, or both, they continued to experience acts of harassment, or (b) whether it is sufficient for plaintiffs to allege that the school's deliberate indifference simply made them vulnerable to further harassment.⁸ While the disagreement of the courts hinges on the interpretation of one small phrase⁹ set forth by the Supreme Court, the implications of these differing interpretations are enormous, and resolution of the circuit split will

of sexual harassment and assault are not exclusively female. However, because a significant majority of survivors are female, this Article refers to "women" and uses the pronouns "she" and "her."

4. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281, 290 (1998).

5. See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (concluding that Title IX protections include sexual harassment and abuse as a form of sex discrimination).

6. See, e.g., *Current Circuit Splits*, 14 SETON HALL CIR. REV. 91, 104–05 (2017) (describing a split between the Fifth and Seventh Circuits and the First, Third, and Fourth Circuits regarding whether Title IX provides a remedy to individuals alleging employment discrimination on the basis of sex in federally funded educational institutions).

7. See *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1109 (10th Cir. 2019); *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 623–24 (6th Cir. 2019).

8. *Farmer*, 918 F.3d at 1106; *Kollaritsch*, 944 F.3d at 623–24.

9. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–45 (1999) ("If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." (emphasis added) (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966))).

likely impact the willingness of plaintiffs to bring Title IX claims for decades to come.¹⁰

To provide context for the close evaluation of this circuit split, this Article begins by providing background on the legislative intent that drove the passage of Title IX, including the hope that it would serve to eliminate a broad swath of discriminatory behaviors within educational institutions.¹¹ The Article then turns to the early Supreme Court interpretations of the statute that established a private right of action for damages under Title IX and articulated the standards plaintiffs must meet in bringing such claims.¹² In particular, the Article focuses on the Supreme Court's language in *Davis v. Monroe County Board of Education*,¹³ which requires that when a school does not engage in harassment directly, Title IX plaintiffs must show that the school's deliberate indifference to third-party harassment "'cause[d] [students] to undergo' harassment or '[made] them liable or vulnerable' to it."¹⁴ Although the language may appear straightforward, courts have struggled since 1999 to reach a consensus on how it should be interpreted, for reasons described below.¹⁵

The remainder of the Article focuses on the circuit split that has emerged between the Tenth Circuit and the Sixth Circuit and why, in the context of both the statutory purposes and current events, the Tenth Circuit's approach should be adopted by the majority of the circuit courts, or by the Supreme Court, moving forward. The Article will look closely at the reasoning behind the Tenth Circuit's decision in *Farmer v. Kansas State University*¹⁶ as well as the Sixth Circuit's reasoning in *Kollaritsch v. Michigan State University Board of Trustees*,¹⁷ examining the ways these opinions are consistent and inconsistent with the purpose and intent of Title IX.¹⁸ In light of principles of legal and statutory interpretation, as well as the practical implications of the two decisions for victims of sexual violence, the Article argues the Tenth Circuit's approach conforms

10. As discussed below, the phrase at issue is the language in *Davis* indicating that plaintiffs must be made "liable or vulnerable" to further harassment. *Id.* at 645.

11. See *infra* Part I.

12. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281, 290 (1998); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 716–17 (1979).

13. 526 U.S. 629 (1999).

14. *Id.* at 645.

15. Compare *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103 (10th Cir. 2019) ("Davis, then, clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively either that KSU's deliberate indifference to their reports of rape caused Plaintiffs 'to undergo harassment or ma[de] them liable or vulnerable' to it." (emphasis omitted) (quoting *Davis*, 526 U.S. at 645)), with *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 623–24 (6th Cir. 2019) ("We hold that the plaintiff must plead, and ultimately prove . . . some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment.").

16. 918 F.3d 1094 (10th Cir. 2019).

17. 944 F.3d 613 (6th Cir. 2019).

18. See 20 U.S.C. § 1681 (2018).

best with the legislative intent that drove the adoption of Title IX and the legal analysis of the Supreme Court in *Davis*. This approach best ensures female students are broadly protected from sex discrimination during their pursuit of an education, whether in primary school or at college.

I. TITLE IX: A BRIEF HISTORY

A year after the Supreme Court brought the force of the Equal Protection Clause to bear on arbitrary gender distinctions,¹⁹ and a year before that same Court affirmed a woman’s right to terminate her pregnancy,²⁰ Congress passed Title IX of the Education Amendments of 1972, just as states began considering ratification of the Equal Rights Amendment.²¹ Title IX, which prohibits educational institutions receiving federal financial assistance from discriminating on the basis of sex, was enacted at the height of second-wave feminism, during a historic push to enshrine gender equity in law and institutions.²² Once primarily known for placing female scholar-athletes on equal footing with their male counterparts, Title IX has also become a powerful means of addressing gender discrimination in the form of sexual harassment and assault at educational institutions across the country.²³

The relevant statutory text is brief in phrasing but broad in scope: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁴

Because “federal financial assistance” includes receiving funds from federal student financial aid programs, Title IX applies to K–12 schools and school districts as well as nearly all U.S. colleges and universities—both public and private.²⁵ In 1971, Congresswoman Patsy Mink, an early author and champion of Title IX, explained:

Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access If we really believe in equality, we must begin to insist that our institutions of higher learn-

19. See *Reed v. Reed*, 404 U.S. 71, 76 (1971).

20. See *Roe v. Wade*, 410 U.S. 113, 154 (1973).

21. 20 U.S.C. §§ 1681–88.

22. See Sarah T. Partlow Lefevre, *Second Wave Feminism*, in *THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS* 1579, 1579–80, 1582–83 (Mike Allen ed., 2017).

23. See *Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> (last visited Dec. 26, 2020) (“[I]t is the application of Title IX to athletics that has gained the greatest public visibility”); *Title IX and Sexual Violence in Schools*, ACLU, <https://www.aclu.org/title-ix-and-sexual-violence-schools> (last visited Dec. 26, 2020).

24. 20 U.S.C. § 1681(a).

25. See *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Jan. 20, 2020); *Title IX Frequently Asked Questions*, *supra* note 23.

ing practice it or not come to the Federal Government for financial support.²⁶

Senator Birch Bayh, Title IX's chief Senate sponsor, introduced the legislation noting that "the impact of this amendment would be far-reaching," offering women "an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work."²⁷ Senator Bayh's remarks clearly situate Title IX within the larger push for women to achieve their full educational and professional potential. Moving beyond tokenism, he emphasized that women's mere presence on campus was not enough; equality meant full participation and the opportunity to engage meaningfully in one's education.²⁸ Anything less, he recognized, hurt not only women's schooling but their future careers and economic horizons as well.²⁹ Thus, schools allowing discrimination or placing additional obstacles in the way of women's ability to get the most out of their education—to "develop the skills they want"—runs counter to the spirit and intent of Title IX and its broad directive to ensure a national policy that prohibits sex-based discrimination in education.³⁰

II. "A SWEEP AS BROAD AS ITS LANGUAGE": TITLE IX IN THE SUPREME COURT

It is in this spirit that the Supreme Court recognized schools' failures to address sexual harassment and sexual assault as actionable sex discrimination prohibited under Title IX. In 1979, the Court found a judicially-implied private right of action in Title IX, acknowledging that the statute "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."³¹ This legal conclusion acknowledges a more practical reality: while Title IX targets schools as potentially discriminatory actors, the consequences of that discrimination are borne by individuals whose advocacy on their own behalf is essential. Moreover, the statutory text's focus on ensuring that "[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination" clearly centers the potential victim of discrimination and her needs.³²

26. 117 CONG. REC. 39,252 (1971).

27. 118 CONG. REC. 5,808 (1972).

28. *See id.*

29. *See id.*

30. *Id.*

31. *Cannon v. Univ. of Chic.*, 441 U.S. 677, 704 (1979).

32. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting) (quoting 20 U.S.C. § 1681(a)).

In 1992, the Court further strengthened Title IX enforcement when it unanimously held in *Franklin v. Gwinnett County Public Schools*³³ that victims may seek monetary damages to remedy a violation of rights—there, a Georgia school district failed to respond to plaintiff’s sexual assault at the hands of her high school teacher despite knowledge of the abuse.³⁴ The court in *Franklin* both acknowledged teacher-on-student harassment as a form of sex-based discrimination under Title IX and spoke plainly about the financial consequences of inaction in the face of such discrimination: “Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.”³⁵ Justice Stevens’s dissent in *Gebser v. Lago Vista Independent School District*,³⁶ a later teacher-on-student harassment case, echoed this notion that Title IX tasks schools with “an affirmative undertaking that is more significant than a mere promise to obey the law.”³⁷ Past decisions, he noted, gave the far-reaching statute “a sweep as broad as its language.”³⁸

III. DAVIS AND THE MODERN TITLE IX STANDARD

The broad sweep of Title IX finally encompassed student-on-student harassment with the 1999 Supreme Court case *Davis v. Monroe County Board of Education*.³⁹ There, the Court held that a plaintiff seeking damages stemming from harassment by a fellow student must establish that:

[T]he funding recipient act[ed] with deliberate indifference to known acts of harassment in its programs or activities [And] that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bar[red] the victim’s access to an educational opportunity or benefit.⁴⁰

Specifically, plaintiff’s daughter suffered such severe and prolonged harassment at the hands of a fifth grade classmate that her grades dropped, and her fear that she “didn’t know how much longer” she could keep her assailant at bay led her to write a suicide note.⁴¹ As she suffered for months on end, the school did nothing about her complaints other than allowing her to move to a different seat in class and verbally reprimanding the perpetrator.⁴² Such “deliberate indifference,” the court

33. 503 U.S. 60 (1992).

34. *Id.* at 63–64.

35. *Id.* at 75.

36. 524 U.S. 274 (1998).

37. *Id.* at 297 (Stevens, J., dissenting).

38. *Id.* at 296 (internal quotations omitted) (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)).

39. 526 U.S. 629 (1999).

40. *Id.* at 633.

41. *Id.* at 634.

42. *Id.* at 635.

found, was unacceptable in light of the “concrete, negative effect” on the victim’s “ability to receive an education.”⁴³ Significantly, the *Davis* court further elaborated on its deliberate indifference requirement: “If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference ‘subject[s]’ its students to harassment. That is, the deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.”⁴⁴

In the years since *Davis*, lower courts have adopted divergent interpretations of this standard, ultimately creating a conflict over whether Title IX requires a student to undergo additional harassment as a result of her school’s indifference. This split over how much suffering the law requires young women to undergo before the impact on their education is cognizable goes to the very heart of Title IX—a piece of legislation enacted to move women forward, not hold them back.

IV. *SUBJECTED TO INTERPRETATION* – COURTS DIFFER ON *DAVIS* CRITERIA

Some circuits, looking to the language in *Davis*, have held that vulnerability to further harassment is sufficient for Title IX liability and that victims need not actually undergo further harassment due to a school’s deliberate indifference.⁴⁵ In 2007, the First Circuit adopted this view in *Fitzgerald v. Barnstable School Committee*,⁴⁶ a case brought by the parents of kindergartener Jacqueline Fitzgerald.⁴⁷ Plaintiffs’ daughter alleged that an older student was bullying her into lifting her skirt and spreading her legs on the school bus.⁴⁸ Her school conducted an investigation but took no disciplinary action against the other student, offering only to move the victim to a different bus.⁴⁹ While plaintiffs stopped the skirt-lifting by driving their child to school, she continued to encounter the bully throughout the school year and was at one point required to interact with him in gym class; she subsequently stopped attending that class altogether.⁵⁰ The district court held that the school was not liable as “a Title IX defendant could not be found deliberately indifferent as long as the plaintiff was not subjected to any acts of severe, pervasive, and objectively offensive harassment *after* the defendant first acquired actual

43. *Id.* at 653–54.

44. *Id.* at 644–45 (first quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966); then quoting *Subject*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1961)) (providing definitions of “subject”).

45. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007), *cert. granted*, 553 U.S. 1093 (2008), *rev’d*, 555 U.S. 246 (2009).

46. 504 F.3d 165 (1st Cir. 2007), *cert. granted*, 553 U.S. 1093 (2008), *rev’d*, 555 U.S. 246 (2009).

47. *Id.* at 169.

48. *Id.*

49. *Id.* at 169–70.

50. *Id.* at 170.

knowledge of the offending conduct,” and plaintiffs’ daughter’s subsequent encounters with the bully did not rise to the level of harassment.⁵¹

The First Circuit, however, disagreed. It took issue with the district court’s reasoning, concluding, “its formulation of the law overly distills the rule set forth by the *Davis* Court. [In *Davis*], the Court stated that funding recipients may run afoul of Title IX not merely by ‘caus[ing]’ students to undergo harassment but also by ‘mak[ing] them liable or vulnerable’ to it.”⁵² The court found that the victim’s continued, albeit minimal, post-notice interactions with her harasser could render her more vulnerable to harassment, satisfying the latter half of *Davis*’s *subjects* definition.⁵³

This broader formulation clearly sweeps more situations than the district court acknowledged within the zone of potential Title IX liability. Under it, a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution’s response, after learning of it, unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity.⁵⁴

The plaintiff’s Title IX claim ultimately failed when the court found the school’s response was not deliberately indifferent.⁵⁵ However, the First Circuit’s adoption of its “broader formulation” approach notably contemplates a legal universe in which schools must respond to the first known instance of harassment—not wait for more.

The Eleventh Circuit took an even more expansive view of what it means to *subject* students to harassment in the case of Tiffany Williams, a University of Georgia (UGA) student who was assaulted by several of the school’s basketball players.⁵⁶ After the assault, one of the players called Williams repeatedly.⁵⁷ She reported her assault and subsequent harassment to the university and the police and subsequently withdrew from school.⁵⁸ The university waited months to conduct a disciplinary hearing—at which point two of the alleged perpetrators were no longer students—and declined to impose any discipline.⁵⁹

In finding that Williams had adequately alleged deliberate indifference by the university, the Eleventh Circuit held that although Williams withdrew from school the day after her assault, “UGA continued to sub-

51. *Id.* at 172 (citing *Hunter ex rel. Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255, 263–64 (D. Mass. 2006)).

52. *Id.* (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999)).

53. *See id.* at 172–73.

54. *Id.* (citation omitted) (citing *Wills v. Brown Univ.*, 184 F.3d 20, 27 (1st Cir. 1999)).

55. *Id.* at 173–75.

56. *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1288 (11th Cir. 2007).

57. *Id.* at 1289.

58. *Id.*

59. *Id.*

ject her to discrimination” when it “failed to take any precautions that would prevent future attacks from [her assailants] or like-minded hooligans should Williams have decided to return.”⁶⁰ In essence, the *Williams v. Board of Regents of University System of Georgia*⁶¹ court evaluated a student’s vulnerability in light of the assumption that she might reenroll, making actions like failing to discipline her assailants a form of deliberate indifference that could make her more vulnerable to future incidents.⁶²

While this approach is far-reaching, it is also commonsense; a significant number of college dropouts eventually return to finish their degrees.⁶³ Sexual assault survivors in particular experience specific barriers to completing their education, such as the continued presence of the perpetrator or a lack of institutional support.⁶⁴ It is logical that, absent these barriers, they would return—if schools provide a safe environment for them in which to do so.

Other courts have seemed to suggest a more restrictive approach, requiring victims to have suffered actual harassment after a school’s deliberately indifferent response. For example, in *Reese v. Jefferson School District No. 14J*,⁶⁵ the Ninth Circuit hinted at such a position.⁶⁶ In this case, a group of high school girls was suspended for throwing water balloons at boys; they argued their actions were retaliation for harassment by the boys and sued their school district over the earlier alleged harassment.⁶⁷ In holding that the girls failed to allege deliberate indifference by their school, the Ninth Circuit found that the girls had not provided notice of alleged harassment until late in the school year, and “[t]here [was] no evidence that any harassment occurred after the school district learned of the plaintiffs’ allegations.”⁶⁸ Implicit in this conclusion: post-notice harassment, not just vulnerability, is necessary for deliberate indifference.

In contrast to *Fitzgerald*, the Middle District of Tennessee confronted another case of school bus harassment and reached a very different outcome.⁶⁹ An autistic middle school student was sexually assaulted on

60. *Id.* at 1297.

61. 477 F.3d 1282 (11th Cir. 2007).

62. *See id.* at 1297.

63. *See* SHAPIRO, D., RYU, M., HUIE, F. & LIU, Q., NAT’L STUDENT CLEARINGHOUSE RSCH. CTR., SIGNATURE REP. 17, SOME COLLEGE, NO DEGREE: A 2019 SNAPSHOT FOR THE NATION AND 50 STATES 1 (2019).

64. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY, <https://publicintegrity.org/education/a-lack-of-consequences-for-sexual-assault/> (July 14, 2014, 4:50 PM).

65. 208 F.3d 736 (9th Cir. 2000).

66. *See id.* at 740.

67. *Id.* at 738.

68. *Id.* at 740.

69. *See* *Stahling ex rel. Stahling v. Metro. Gov’t of Nashville & Davidson Cnty.*, No. 3:07-0797, 2008 WL 4279839, at *4–13 (M.D. Tenn. Sept. 12, 2008).

the school bus by a fellow special education student.⁷⁰ As in *Fitzgerald*, the abuse stopped after her parents reported the assault to the school—this time because the school removed the perpetrator from the bus.⁷¹ However, plaintiffs disputed that the school took any other significant action in response to the assault and brought a Title IX claim, alleging that the school’s failure to adequately investigate and take remedial measures, such as ensuring bus safety, constituted deliberate indifference.⁷²

Rather than evaluating plaintiffs’ daughter’s vulnerability to further abuse based on the school’s inaction, the court reasoned that “a school is not liable under Title IX if no harassment occurs after a school receives notice of the harassment.”⁷³ Plaintiffs’ Title IX claim did not survive summary judgment, as the court concluded that their daughter had not been subjected to post-notice sexual harassment.⁷⁴

It is against this backdrop of uncertainty as to exactly how the *subjected* standard in *Davis* should be applied that a definitive circuit split has emerged. Two recent decisions directly address the intent of *Davis*—and in direct opposition: a Tenth Circuit holding in *Farmer* and a Sixth Circuit holding in *Kollaritsch*.

V. TITLE IX IN THE TENTH CIRCUIT

The Tenth Circuit has long been home to groundbreaking opinions concerning the application of Title IX to student reports of sexual harassment and sexual assault. After a lengthy history of adhering closely to the holding in *Davis* without many affirmative steps further, the Tenth Circuit took a stand in its *Farmer* holding.⁷⁵

Prior to its groundbreaking decision in *Farmer*, the Tenth Circuit examined the “vulnerable to” harassment issue in several key cases.⁷⁶ Previous Tenth Circuit decisions hinted at the requirement of a victim’s being exposed to something more than simply being made vulnerable to further harassment—an interpretation that would later be solidified in *Farmer*.⁷⁷

70. *Id.* at *1.

71. *Id.* at *12.

72. *Id.* at *11.

73. *Id.* (first citing *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1123 (10th Cir. 2008); then citing *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000); and then citing *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007)).

74. *Id.* at *11–12.

75. *See, e.g.*, *Farmer v. Kan. State Univ.*, 918 F.3d 1094 (10th Cir. 2019) (holding that student’s vulnerability to harassment is sufficient for showing of institution’s deliberate indifference).

76. *See* discussion *infra* Sections V.A–C.

77. *Farmer*, 918 F.3d at 1104–05.

A. *Murrell v. School District No. 1, Denver, Colorado*

The first of these decisions was *Murrell v. School District No. 1, Denver, Colorado*,⁷⁸ decided in 1999.⁷⁹ In *Murrell*, a mother filed suit against a Denver, Colorado school district following multiple instances of student-on-student sexual harassment and assault of her daughter, a student with cerebral palsy and developmental disabilities that required special-education services.⁸⁰ The mother notified the school about the assaults, but the school denied that the assaults could have happened and failed to perform any investigation.⁸¹ When her daughter returned to school, she was immediately battered again by the same student and harassed by others who had learned of the sexual assaults.⁸²

In reversing the district court's dismissal on Title IX grounds, the Tenth Circuit did not take up the question of whether a plaintiff must allege more than vulnerability to further harassment.⁸³ However, the court appeared to base its holding, at least in part, on the severe circumstances of the case, noting that, following the assaults, plaintiff's daughter became such a danger to herself that she required hospitalization and that the school suspended plaintiff's daughter when plaintiff requested an investigation into the assaults.⁸⁴ The *Murrell* court also took into consideration the fact that plaintiff's daughter ultimately became homebound as a result of her experience at school, and thus plaintiff's daughter had been "totally deprived" of educational benefits as a result of the school district's deliberate indifference.⁸⁵

Given that plaintiff's daughter was immediately subjected to further harassment and assaults upon her return to school,⁸⁶ and the proximity in time between *Murrell* and *Davis*,⁸⁷ it is perhaps unsurprising that the Tenth Circuit did not take up the vulnerability analysis. However, this left the door open for later decisions to further explore the language set forth in *Davis*.

B. *Escue v. Northern Oklahoma College*

The second landmark Title IX opinion to shape the vulnerability analysis in the Tenth Circuit came approximately seven years after *Murrell*. In *Escue v. Northern Oklahoma College*,⁸⁸ plaintiff filed suit against Northern Oklahoma College (NOC), alleging that her professor had

78. 186 F.3d 1238 (10th Cir. 1999).

79. *Id.* at 1243.

80. *See id.* at 1242–43.

81. *Id.* at 1244.

82. *Id.*

83. *See id.* at 1246, 1249.

84. *Id.* at 1248–49.

85. *Id.* at 1249.

86. *Id.* at 1244.

87. *Id.* at 1245.

88. 450 F.3d 1146 (10th Cir. 2006).

touched her inappropriately and made inappropriate sexual comments towards her.⁸⁹ Before the Tenth Circuit, plaintiff argued that NOC was deliberately indifferent to her allegations of harassment, which deprived her of educational opportunities.⁹⁰

The Tenth Circuit ultimately concluded that NOC's response to Ms. Escue's allegations was not "clearly unreasonable."⁹¹ In so holding, the court detailed the actions NOC took to prevent further harassment: removing plaintiff from her professor's classes, questioning two students about plaintiff's allegations, and permanently ending her professor's tenure at the end of the semester.⁹² The Tenth Circuit quoted *Davis* to underscore its finding that NOC was not deliberately indifferent,⁹³ and stated the following:

Significantly, we note that Ms. Escue does not allege that further sexual harassment occurred as a result of NOC's deliberate indifference At no point does she allege that NOC's response to her allegations was ineffective such that she was further harassed. Although [her harasser] attempted to contact her once the day that she reported her allegations to [NOC], he was unsuccessful and this incident did not lead to sexual harassment. Summary judgment on these facts is therefore appropriate, as Ms. Escue has not shown that NOC's response was clearly unreasonable nor has she shown that it led to further sexual harassment.⁹⁴

Based on this language, it appeared that the Tenth Circuit might require something more than vulnerability to further harassment.

C. *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*

Not long after *Escue*, the Tenth Circuit decided *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*.⁹⁵ In that case, plaintiff filed suit against Steamboat Springs School District RE-2 following years of sexual abuse of her daughter at the hands of several of her classmates.⁹⁶ When her daughter disclosed to a school counselor that classmates had coerced her into sexual conduct, the counselor told the school resource officer and principal.⁹⁷ Because the principal determined that none of the incidents occurred on school grounds and had occurred before the students matriculated to the high school, he had the school resource officer

89. *Id.* at 1149.

90. *Id.* at 1152-53.

91. *Id.* at 1155.

92. *Id.*

93. *Id.* ("The Supreme Court has stated that 'the deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.'" (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644-45 (1999))).

94. *Id.* at 1155-56.

95. 511 F.3d 1114 (10th Cir. 2008).

96. *Id.* at 1117.

97. *Id.* at 1117-18.

investigate the reports.⁹⁸ The school resource officer interviewed some of the students involved, but his investigation was slowed by plaintiff's refusal to allow her daughter to communicate further about the incidents on the advice of counsel; after listening to the officer's report, the district attorney refused to prosecute.⁹⁹ A few weeks after reporting the sexual abuse, plaintiff's daughter suffered a series of psychotic episodes, likely resulting from the trauma.¹⁰⁰

In considering whether the school district was deliberately indifferent to plaintiff's daughter's reports of sexual harassment, the Tenth Circuit appeared to base its decision at least in part on its finding that, following the reports, plaintiff's daughter was not actually subjected to further harassment.¹⁰¹ Notably, though the Tenth Circuit's reasoning clearly referenced the fact that no further harassment occurred, the court did acknowledge that its "sister circuits have rejected a strict causation analysis which would absolve a district of Title IX liability if no discrimination occurs after a school district receives notice of discrimination."¹⁰² Thus, because the school's response "did not cause [plaintiff's daughter] to undergo harassment or make her liable or vulnerable to it," the school district was not deliberately indifferent.¹⁰³ More specifically, the court held that the district "took steps to prevent further harassment" by trying to find safe educational alternatives for plaintiff's daughter, and plaintiff's rejection of those alternatives had no bearing on whether the district's response was appropriate.¹⁰⁴

VI. VULNERABILITY IS SUFFICIENT: *FARMER V. KANSAS STATE UNIVERSITY*

In *Farmer*, the Tenth Circuit finally addressed the vulnerability question and determined that, under the plain language of *Davis*, "Plaintiffs can state a viable Title IX claim by alleging alternatively either that [the school's] deliberate indifference to their reports of rape caused Plaintiffs 'to undergo' harassment or 'ma[d]e them liable or vulnerable' to it."¹⁰⁵

A. *Facts and Procedural History*

The Tenth Circuit's analysis came about largely because defendant, Kansas State University (KSU) forced the analysis. Two plaintiffs filed

98. *Id.* at 1118.

99. *Id.*

100. *Id.*

101. *Id.* at 1123 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–45 (1999)).

102. *Id.* (first citing *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172 (1st Cir. 2007); and then citing *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007)).

103. *Id.* (citing *Davis*, 526 U.S. at 645).

104. *Id.* at 1124.

105. *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103 (10th Cir. 2019) (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

suit against KSU under theories of Title IX post-assault indifference.¹⁰⁶ Both plaintiffs alleged that they had been sexually assaulted by classmates at KSU and that, after reporting their rapes to KSU, the university failed to investigate or take action to hold the student-assailants responsible.¹⁰⁷ As a result, both plaintiffs' educations were negatively impacted, including a lost sense of security on campus, panic attacks, depression, plummeting grades, and lost scholarships.¹⁰⁸

KSU filed a motion to dismiss the Title IX claims in each case, which the district court denied in both instances.¹⁰⁹ In rejecting KSU's arguments, the district court concluded:

[T]he courts in *Escue* and *Rost* did not state that further harassment was a requirement that all Title IX claimants must establish, but simply noted the absence of further harassment, and in *Escue* explained that it was "significant" to its determination on deliberate indifference. Declining to impose a strict further harassment requirement is consistent with *Davis*, in which the Court explained that funding recipients "may be held liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment."¹¹⁰

Accordingly, the district court determined that, where the other required elements under Title IX were clearly alleged, it was "not inclined to require that the plaintiff additionally allege that post-report assault or harassment actually occurred," so long as the school's deliberate indifference made the plaintiff "'liable or vulnerable to' further harassment pursuant to *Davis*."¹¹¹

Following the denial of its motions to dismiss, the district court granted KSU's request for interlocutory appeal to the Tenth Circuit pursuant to 28 U.S.C. § 1292(b)¹¹² to determine the following "controlling questions of law":

(1) [W]hether Plaintiff was required to allege, as a distinct element of her Title IX claim, that KSU's deliberate indifference caused her to suffer actual further harassment, rather than alleging that Defendant's

106. *Id.* at 1099–1101.

107. *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1159–60 (D. Kan. 2017); *Farmer v. Kan. State Univ.*, No. 16-CV-2256-JAR-GEB, 2017 WL 980460, at *3–4 (D. Kan. Mar. 14, 2017).

108. *Weckhorst*, 241 F. Supp. 3d at 1163–64; *Farmer*, 2017 WL 980460, at *5.

109. *Weckhorst*, 241 F. Supp. 3d at 1159–60; *Farmer*, 2017 WL 980460, at *3–4.

110. *Weckhorst*, 241 F. Supp. 3d at 1174 (quoting *Davis*, 526 U.S. at 646–47).

111. *Id.* at 1175; *Farmer*, 2017 WL 980460, at *13.

112. The statute provides in relevant part:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b) (2018).

post-assault deliberate indifference made her “liable or vulnerable to” harassment; and (2) if Plaintiff is required to plead actual further harassment, whether her allegations of deprivation of access to educational opportunities satisfy this pleading requirement.¹¹³

B. Holding

The Tenth Circuit began its analysis by noting that “[t]he Supreme Court has already answered [this] legal question,” quoting *Davis* for the proposition that a funding recipient under Title IX’s “deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.”¹¹⁴ The court determined that in these cases, the plaintiffs sufficiently alleged that KSU’s deliberate indifference made them vulnerable to further harassment, for it allowed the plaintiffs’ student-assailants to continue attending KSU without ramifications.¹¹⁵

In concluding that a plaintiff need not experience a subsequent sexual assault or further harassment prior to bringing suit, so long as she was made vulnerable to such harassment,¹¹⁶ the *Farmer* court relied primarily on *Davis*, reasoning that *Davis* “clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively either that KSU’s deliberate indifference to their reports of rape caused Plaintiffs ‘to undergo’ harassment or ‘ma[d]e them liable or vulnerable’ to it.”¹¹⁷ The court reasoned that KSU’s argument—that a plaintiff must state that she underwent actual further harassment before a viable claim ripens—“simply ignores *Davis*’s clear alternative language” providing that the “deliberate indifference must . . . ‘cause students to undergo’ harassment or make them ‘liable or vulnerable to’ sexual harassment.”¹¹⁸ The *Farmer* court further noted that this alternative pleading requirement is consistent with Title IX’s objectives, including protecting students against discrimination.¹¹⁹

113. *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1102 (10th Cir. 2019).

114. *Id.* at 1097 (emphasis omitted) (internal quotations omitted) (quoting *Davis*, 526 U.S. at 644–45).

115. *Id.*

116. *Id.* at 1103–05.

117. *Id.* at 1103 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

118. *Id.* at 1104 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

119. *Id.* (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)). The *Farmer* court also quoted *Karasek v. Regents of the University of California* for the proposition that:

The alternative offered by the University—i.e., that a student must be harassed or assaulted a second time before the school’s clearly unreasonable response to the initial incident becomes actionable, irrespective of the deficiency of the school’s response, the impact on the student, and the other circumstances of the case—runs counter to the goals of Title IX and is not convincing.

Karasek v. Regents of the Univ. of Cal., No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015). As set forth more fully below, the Tenth Circuit’s interpretation, which mirrors that of *Karasek* and other circuits, better fits the purpose of Title IX and the Supreme Court’s holding in *Davis*. See *infra* Part IX.

In an effort to address concerns that the vulnerability language would expose schools to expanded liability, as the Sixth Circuit would later argue,¹²⁰ the Tenth Circuit placed a significant guardrail on its holding by requiring that a plaintiff's alleged fear or vulnerability must be "objectively reasonable."¹²¹ Thus, plaintiffs merely alleging that a school's deliberate indifference left them vulnerable is insufficient—plaintiffs must allege evidence to show that their fear is an objectively reasonable one.¹²² Here, the plaintiffs alleged "that the fear of running into their student-rapists caused them, among other things, to struggle in school, lose a scholarship, withdraw from activities KSU offers its students, and avoid going anywhere on campus without being accompanied by friends or sorority sisters."¹²³ The Tenth Circuit concluded that "[f]uture cases will undoubtedly be asked to draw lines on when a victim's fear of further sexual harassment is sufficient to deprive that student of educational opportunities," but given the "horrific circumstances alleged here," this was not an issue the Tenth Circuit needed to reach.¹²⁴

VII. FURTHER HARASSMENT IS REQUIRED: *KOLLARITSCH V. MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES*

Nine months after the Tenth Circuit's *Farmer* opinion, the Sixth Circuit reached a dramatically different decision in *Kollaritsch*.¹²⁵ As in *Farmer*, *Kollaritsch* presented a Title IX fact pattern involving student-on-student assault and harassment, requiring analysis under the *Davis* test.¹²⁶

A. *Facts and Procedural History*

In 2017, four female students brought an action against Michigan State University, alleging that "they were sexually harassed or assaulted by other students while they were students at [the university]."¹²⁷ Each reported their experiences to the university, which, according to their

120. See *infra* Part VII, for an analysis of *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019) and its requirement that a plaintiff allege actual further harassment before a colorable Title IX claim arises.

121. *Farmer*, 918 F.3d at 1105.

122. *Id.* at 1104–05.

123. *Id.* at 1105.

124. *Id.* Future plaintiffs would be well-advised to take heed of the court's reasoning underpinning their conclusions that the plaintiffs in this case met their pleading requirements:

Plaintiffs' allegations are quite specific and reasonable under the circumstances. Plaintiffs allege more than a general fear of running into their assailants. They allege that their fears have forced them to take very specific actions that deprived them of the educational opportunities offered to other students. In addition, they have alleged a pervasive atmosphere of fear at KSU of sexual assault caused by KSU's inadequate action in these cases.

Id.

125. *Kollaritsch*, 944 F.3d at 618–24.

126. *Id.*

127. *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 298 F. Supp. 3d 1089, 1096 (W.D. Mich. 2017), *rev'd and remanded*, 944 F.3d 613 (6th Cir. 2019).

lawsuit, failed to adequately respond.¹²⁸ After the district court refused to dismiss the plaintiffs' Title IX claims, the university sought an interlocutory appeal to address the question of "whether a plaintiff must plead further acts of discrimination to allege deliberate indifference to peer-on-peer harassment under Title IX."¹²⁹

B. Holding

In *Kollaritsch*, the Sixth Circuit acknowledged that the test in *Davis* was the proper analysis of the Title IX claims.¹³⁰ Unlike the Tenth Circuit in *Farmer* (and the Sixth Circuit itself in a number of prior actions),¹³¹ however, the *Kollaritsch* court determined that the *Davis* formula "clearly has two separate components, comprising separate-but-related torts by-separate-and-unrelated tortfeasors: (1) 'actionable harassment' by a student; and (2) a deliberate-indifference intentional tort by the school."¹³² In so doing, the Sixth Circuit attempted to map traditional tort principles onto an already complicated area of law. Under common law tort application, the Sixth Circuit determined that the "deliberate-indifference-based intentional tort" required "(1) knowledge, (2) an act, (3) injury, and (4) causation."¹³³ The *Kollaritsch* court found—consistent with *Davis*—that in order to meet the first two elements, the defendant-school must have "had 'actual knowledge' of an incident of actionable sexual harassment that prompted or should have prompted a response," (knowledge) and the school's response must have been "clearly unreasonable in light of the known circumstances" (the act).¹³⁴ The *Kollaritsch* court also held the injury required in a Title IX context was "the deprivation of 'access to the educational opportunities or benefits provided by the school,'"¹³⁵ a requirement also lifted verbatim from *Davis*.¹³⁶

As to causation, although the *Kollaritsch* court determined that the act must cause the injury, consistent with established tort principles, it proceeded to insert an additional, new, and seemingly unrelated requirement into the causation analysis.¹³⁷ Rather than requiring simply that the

128. *Id.*

129. *Kollaritsch*, 944 F.3d at 619.

130. *See id.* at 618.

131. *See* *Gordon v. Traverse City Area Pub. Schs.*, 686 F. App'x 315, 323 (6th Cir. 2017); *Stiles ex rel. D.S. v. Grainger Cnty., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016); *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir. 2012); *Patterson v. Hudson Area Schs.*, 551 F.3d 438, 444–45 (6th Cir. 2009), *abrogated by* *Foster v. Bd. of Regents of Univ. of Mich.*, No. 19-1314, 2020 WL 7294759 (6th Cir. Dec. 11, 2020); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258–59 (6th Cir. 2000); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999).

132. *Kollaritsch*, 944 F.3d at 619–20 (citation omitted) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643, 651–52 (1999)).

133. *Id.* at 621.

134. *Id.* (first citing *Davis*, 526 U.S. at 650; and then quoting *Davis*, 526 U.S. at 648).

135. *Id.* at 622 (quoting *Davis*, 526 U.S. at 650).

136. *Davis*, 526 U.S. at 650.

137. *See Kollaritsch*, 944 F.3d at 622.

plaintiff show that a school's unreasonable response (the act) resulted in deprivation of access to educational opportunities (the injury), the Sixth Circuit concluded that the injury must be "attributable to the post-actual-knowledge further harassment, which would not have happened but for the clear unreasonableness of the school's response."¹³⁸ The *Kollaritsch* court, therefore, determined that for a school to be liable under a deliberate indifference intentional tort, a plaintiff's injury in the form of lost educational opportunities had to be a result of both a school's deliberate indifference *and* further actionable harassment of the student-victim.¹³⁹ Faced with the disjunctive language in *Davis* which suggested no further harassment was required, the Sixth Circuit explained that under its analysis, the Supreme Court was not suggesting that plaintiffs must either experience further harassment or be made vulnerable to it, but that further harassment could occur by virtue of wrongful conduct by "*commission* (directly causing further harassment) [or] *omission* (creating vulnerability that leads to further harassment)."¹⁴⁰ Because the victim-plaintiffs in *Kollaritsch* did not allege that their respective encounters with their assailants on campus *after* the original assaults and school actions had taken place were sexual, severe, pervasive, or objectively offensive, no further harassment had been suffered, and there was no actionable Title IX claim against the university.¹⁴¹

Judge Thapar echoed this sentiment in his concurring opinion.¹⁴² Judge Thapar joined with the majority's decision in full and offered further rationale to support the majority's adding further harassment as an element for an actionable deliberate indifference Title IX claim.¹⁴³ Relying on the majority's finding that *Davis* requires a showing that a student was subjected to further harassment, either by commission or through omission, Judge Thapar explained that schools can cause harassment directly by sending disparaging emails or cause harassment by omission by failing to respond appropriately.¹⁴⁴ In either scenario, the concurrence argued, the victims could not be said to have been subjected to harass-

138. *Id.* (citing *Davis*, 526 U.S. at 644). Because "*Davis* [did] not link the [defendant school's] deliberate indifference directly to the injury," that is, the deprivation of access to educational opportunities, but rather linked the "school's 'deliberate indifference'" to the plaintiff-student's "harassment," that this "necessarily mean[t] further actionable harassment." *Id.* (citing *Davis*, 526 U.S. at 644).

139. *Id.*

140. *Id.* at 623.

141. *Id.* at 624–25. The Sixth Circuit's departure from the analysis undertaken by other circuits was less surprising in context. The decision followed, and cited, the 2016 decision *Thompson v. Ohio State University*, a Title VI action for deliberate indifference to racial discrimination. *Thompson v. Ohio State Univ.*, 639 F. App'x 333, 334 (6th Cir. 2016). As in *Kollaritsch*, the Sixth Circuit in *Thompson* found that the victim-plaintiff had not alleged any "further harassment or discrimination" subsequent to the allegedly inadequate efforts by the university. *Id.* at 343–44. And as in *Kollaritsch*, the requirement for subsequent harassment was something new in the Title VI arena.

142. *Kollaritsch*, 944 F.3d at 630 (Thapar, J., concurring).

143. *Id.* at 627–29.

144. *Id.* at 628.

ment unless the harassment actually occurred.¹⁴⁵ The problem with Judge Thapar's illustration is that causing harassment directly takes the school's conduct outside of the purview of *Davis* entirely. That is, the standard set forth in *Davis* explicitly addresses circumstances where the school does not *itself* engage in harassment, but rather where the school is deliberately indifferent to the harassment of another.¹⁴⁶ Thus, the alternative explanation of *Davis* offered by the Sixth Circuit is inconsistent with the Supreme Court's focus only on circumstances where a university has no part in the *commission* of the harassment itself.

In sum, the majority opinion and concurrences in *Kollaritsch* reflected an intent to take a narrow reading of Title IX, as opposed to the broad scope articulated by the Tenth Circuit in *Farmer*. Relying on Justice Kennedy's dissent in *Davis* and Title IX's enactment under the Spending Clause, the Sixth Circuit cautioned against expanding liability under Title IX and argued that any ambiguity must be construed in favor of state actors to avoid imposing "more sweeping liability than Title IX requires."¹⁴⁷ Likewise, the *Kollaritsch* court's invocation of tort principles to deny the applicability of Title IX to the claims raised by the victim-plaintiffs did more than merely restrict who can plead a deliberate indifference claim. By explicitly adopting tort theories of recoverability, the Sixth Circuit in *Kollaritsch* attempted to reconstitute Title IX's broad mandate of equal opportunity in education to a narrow, strict construction of causation and harm that has no basis in the statute itself.¹⁴⁸

VIII. WHERE DO WE GO FROM HERE?

The split between the Sixth Circuit and the Tenth Circuit as to what constitutes being *subjected* to further harassment creates a largely irreconcilable difference in the interpretation of the language set forth in *Davis*. Because the courts' reasonings were so fundamentally different, it is

145. *Id.* at 628–29.

146. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999).

147. *Kollaritsch*, 944 F.3d at 629 (Thapar, J., concurring) (quoting *Davis*, 526 U.S. at 652). The Sixth Circuit in *Kollaritsch* argued that Title IX's enactment under the Spending Clause meant that while states agreed to comply with the obligations imposed by Title IX for federal funding, compliance could not be imposed on them if it was ambiguous what exactly was being expected of them. *Id.* Likewise, the Sixth Circuit concluded with Kennedy's recital of the long-held rallying cry of the opposition to Title IX itself: "Particularly prescient here is the *Davis* dissent's comment that '[o]ne student's demand for a quick response to her harassment complaint will conflict with the alleged harasser's demand for due process,'" putting the school in a position where it is "beset with litigation from every side." *Id.* at 627 (Kennedy, J., dissenting) (quoting *Davis*, 526 U.S. at 682).

148. In the months since the *Kollaritsch* opinion, this narrowing has been evident in subsequent decisions out of the Sixth Circuit. *See, e.g., Doe v. Univ. of Ky.*, 959 F.3d 246, 248, 251 (6th Cir. 2020) (citing *Kollaritsch*, 944 F.3d at 622–24 when it stated that a student who brought a Title IX action against her school, alleging deliberate indifference to student-on-student sexual harassment, had to show "that a school's clearly unreasonable response subjected the student to further actionable harassment"); *Meng Huang v. Ohio State Univ.*, No. 2:19-cv-1976, 2020 WL 531935, at *1, *9, *12 (S.D. Ohio Feb. 3, 2020) (holding that the victim-plaintiff in a teacher-on-student sexual harassment Title IX deliberate-indifference action failed to allege further harassment subsequent to the plaintiff's reports to the university and granted the university's motion to dismiss).

unlikely that a common ground will be reached between the two. Rather, it is likely that courts throughout the country will continue to stake their positions at either end of the spectrum. It may be that uniformity emerges among additional circuits and district courts as to the preferred interpretation, giving Title IX plaintiffs some sense of predictability as to the legal standards likely to be applied to their claims. Or a patchwork approach may develop, propelled by the increasingly ideological nature of the judiciary, leaving plaintiffs at the geographical mercy of the court in which they, or their school, reside.¹⁴⁹

Within the Tenth Circuit, the controlling power of stare decisis is likely to generate increasing uniformity among the district courts as they consider the question of whether further actionable harassment is required. Although a petition for writ of certiorari was filed by the plaintiff in *Kollaritsch*, certiorari was denied.¹⁵⁰ Accordingly, there will be no further Supreme Court review at this stage and *Farmer* will remain the precedential decision within the Tenth Circuit.

Indeed, the District of Colorado has already addressed the question of whether to adopt the *Farmer* or the *Kollaritsch* approach. In *Doe v. Brighton School District 27J*,¹⁵¹ the plaintiff was raped by a fellow classmate.¹⁵² For almost a week after the rape was reported, the school did not offer the plaintiff any accommodation to protect her from her rapist while at school, and as a result, she faced intimidation from her rapist and his friends.¹⁵³ She alleged that she lived in fear of going to school and suffered from such serious stress that she came home in hives.¹⁵⁴ In response to her Title IX lawsuit, the school district filed a motion to dismiss, arguing that the plaintiff had not adequately alleged that the district's deliberate indifference caused her to undergo additional harassment.¹⁵⁵ While the defendant argued in favor of the District of Colorado adopting the *Kollaritsch* approach, the plaintiff advocated for an approach dictated by the precedent of *Farmer*.¹⁵⁶ Judge Martinez concluded that he would follow *Farmer*'s pleading standard, which he summarized as requiring the plaintiff to allege that his or her vulnerability to further harassment required her "to take very specific actions that deprived [her] of the educational opportunities offered to other students,"

149. See, e.g., Petition for Writ of Certiorari, *Kollaritsch*, 944 F.3d 613 (6th Cir. 2020), cert. denied, No. 20-10, 2020 WL 6037223 (Oct. 13, 2020) (requesting the U.S. Supreme Court to resolve the circuit split as to what constitutes "vulnerability" to further sexual harassment).

150. *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 141 S. Ct. 554 (2020) (mem.) (denying the petition for a writ of certiorari).

151. No. 19-cv-0950-WJM-NRN, 2020 WL 886193 (D. Colo. Mar. 2, 2020).

152. *Id.* at *1.

153. *Id.* at *1-3.

154. *Id.* at *2.

155. See *id.* at *5.

156. *Id.* at *4-5, *7.

and that any fear be “objectively reasonable.”¹⁵⁷ Rather than simply relying on stare decisis, Judge Martinez stated that “the *Farmer* decision is better-reasoned and legally sounder [than] the Sixth Circuit’s approach to this issue.”¹⁵⁸

The *Brighton School District* decision did not discuss at length why it considered *Farmer* the better reasoned of the two, nor did it expound on *Farmer* to provide further clarity to the Tenth Circuit’s decision. It is clear that certain aspects of the *Farmer* standard remain unresolved and that questions will continue to arise as lower courts, and perhaps sister circuits, flesh out the nuance of what constitutes sufficient pleading of vulnerability to future harassment. In particular, it remains unclear how courts will determine when a plaintiff’s fear is objectively reasonable or unreasonable. Nor is it clear how plaintiffs will adequately meet the *Farmer* standard in factual circumstances such as those set forth in *Williams*, where the plaintiff immediately leaves the school and has no clear plans to return.

Nationally, a circuit split will continue to exist between *Farmer* and *Kollaritsch* until other courts coalesce around a preferred approach, or the issue is ultimately resolved by the Supreme Court. It has not been lost on other courts in recent decisions that the current circuit split is a significant one that is likely ripe for review. In *Karasek v. Regents of the University of California*,¹⁵⁹ for example, the Ninth Circuit skirted directly addressing the question of what causes a plaintiff to undergo further harassment, but noted the existing circuit split between the Sixth and Tenth Circuits.¹⁶⁰

IX. ENSURING LEGAL FRAMEWORKS CONSISTENT WITH THE PURPOSE AND INTENT OF TITLE IX BY ADOPTING THE TENTH CIRCUIT APPROACH

As circuit courts continue considering this issue, and should the Supreme Court consider it, it is important to ensure the developing case law is consistent with the language and intent of Title IX. This Article proposes that following the Tenth Circuit’s approach in *Farmer* best effectuates this purpose and is the best path forward for three reasons. First, the *Farmer* approach is most consistent with standards of legal interpretation and the plain language in *Davis*. Second, the *Farmer* approach best protects the policy goals that were envisioned by Congress, including the intent to provide broad protection from sexual discrimination. Third, this approach is the most logical approach in practice and ensures that victims are not forced to subject themselves to additional harassment.

157. *Id.* at *7 (internal quotations omitted) (quoting *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1105 (10th Cir. 2019)).

158. *Id.*

159. 948 F.3d 1150 (9th Cir. 2020).

160. *Id.* at 1162 n.2.

A. Legal

First and foremost, the Tenth Circuit’s approach is supported by the fundamental principles of legal interpretation. Where a select word or phrase appears ambiguous, such words must be interpreted through the lens of the full text.¹⁶¹ In *Davis*, the Supreme Court specifically defined *subjecting* students to harassment as “caus[ing] [students] to undergo” harassment or “mak[ing] them liable or vulnerable to it.”¹⁶² This definition is provided by the Court within the context of considering student-on-student harassment and a theory of liability premised on a school’s deliberate indifference to such harassment.¹⁶³ This is significant because the conduct being considered is not direct discriminatory acts by an educational institution itself, but rather secondary discrimination resulting from the failure to respond appropriately to the discriminatory acts of another. As the Court itself stated, “[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference ‘subject[s]’ its students to harassment.”¹⁶⁴ As such, when the *Davis* Court defined *subjected* as “caus[ing]” or “mak[ing] . . . vulnerable” to future harassment, it was not referencing the school itself causing the harassment, as that would place the conduct at issue outside of the purview of the *Davis* test entirely, but that the institution’s deliberate indifference caused further harm or made students vulnerable to further harassment.¹⁶⁵ The *Kollaritsch* decision ignored this broader context by suggesting that the *Davis* definition of *subjected* was intended to address either direct action by a school that causes harassment or a failure to take action thereby subjecting a student to further harassment.¹⁶⁶

Moreover, the Tenth Circuit’s approach adopts an interpretation that ensures that language within the *Davis* decision is not rendered superflu-

161. See, e.g., *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . .”).

162. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999) (internal quotations omitted) (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966)).

163. *Id.* at 641, 644–45.

164. *Id.* at 644.

165. *Id.* at 645. This is the inherent problem with Zachary Cormier’s argument in *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1 (2017). Mr. Cormier posits that if viewed in the context of the entire phrase, the first segment of the *Davis* Court’s definition, “‘cause [students] to undergo’ harassment,” should be viewed as a “causation trigger” and the second definition “‘make them liable or vulnerable’ to it” should be viewed as the “vulnerability trigger” but that both definitions require affirmative discriminatory conduct by the educational institution. *Id.* at 23 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645). That is, he argues that the phrase should be read to mean that an institution subjects a student to harassment where it takes action that causes the student to experience further harassment or fails to take action which leads to further harassment. *Id.* But this contextual argument, ironically, ignores the broader context of the test in which the element of *subjected to* is situated.

166. See *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 623 (6th Cir. 2019).

ous. As the Tenth Circuit and other courts have noted, the *Davis* test specifically uses the disjunctive “or” in defining what it means to be *subjected* to harassment.¹⁶⁷ Reading the components of the Supreme Court’s decision as requiring the school’s deliberate indifference to cause additional harassment would render the Court’s disjunctive approach as superfluous. Although the Sixth Circuit attempted to circumvent this issue by proposing that *Davis* intended to suggest that an educational institution can either cause further harassment or fail to take action in a way that causes further harassment, this is a distinction without difference.¹⁶⁸ In either situation, the institution’s deliberate indifference has not made a student more vulnerable to harassment, it has caused actual harassment, an approach that fails to give any meaning to *Davis*’s use of the alternative more vulnerable definition.

Finally, the Tenth Circuit’s approach is also most consistent with the Supreme Court’s language that “at a minimum” students must be made liable or vulnerable to sexual harassment.¹⁶⁹ This language suggests that the Supreme Court deliberately set a low threshold for what constitutes being *subjected to* additional harassment. Interpreting *Davis* as requiring plaintiffs to plead specific, actual acts of harassment to satisfy this standard would be inconsistent with the “at a minimum” language.

By contrast, the *Kollaritsch* decision ignored these fundamental approaches to interpretations of legal precedent by interjecting unique tort requirements into the plain language of Title IX.¹⁷⁰ The Sixth Circuit’s approach attempted to convert the broad liability of Title IX into the highly specific elements of a “deliberate indifference intentional tort.”¹⁷¹ This is problematic for several reasons. First, it is not at all clear that Title IX can, or should, map cleanly onto the traditional elements of a common law tort claim. Certainly nothing within the statute explicitly suggests that this should be the case.¹⁷² Second, even if the application of tort law was appropriate in this context, the Sixth Circuit wrongly applied the very principles it attempted to impose, as discussed above.¹⁷³ Under the Sixth Circuit’s tort approach, the analysis should address whether the school (1) had actual knowledge of harassment, (2) to which it responded with deliberate indifference, (3) which caused a student to experience, (4) a deprivation of access to education.¹⁷⁴ This approach, though reductionist, tracks closely with the language of *Davis*. And un-

167. See, e.g., *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103 (10th Cir. 2019).

168. *Kollaritsch*, 944 F.3d at 623.

169. *Davis*, 526 U.S. at 645.

170. See *Kollaritsch*, 944 F.3d at 619–20.

171. *Id.* at 620.

172. See *Civil Rights Law—Title IX—Sixth Circuit Requires Further Harassment in Deliberate Indifference Claims*.—*Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019), 133 HARV. L. REV. 2611, 2615–17 (2020).

173. *Id.* at 2617.

174. See *id.* at 2618.

der such a tort analysis, it is clear that deliberate indifference to harassment could result in impact to educational opportunities because it causes a student to experience further harassment *or* because it makes a student vulnerable to additional harassment such that her educational experience is fundamentally altered. To avoid such an outcome, the Sixth Circuit imposed an unrelated and previously unmentioned element into its novel tort claim.¹⁷⁵ Not only must a school's deliberate indifference result in impact to educational opportunities, but according to the Sixth Circuit, that causation must result solely from "further actionable harassment."¹⁷⁶ But actionable is not present anywhere in the statute or the language of *Davis*,¹⁷⁷ and the Sixth Circuit's need to engage in such gymnastics emphasizes how poorly this tort claim approach fits.

B. Policy

Interpreting *Davis*'s requirements consistent with *Farmer* also best effectuates the purpose and policy of Title IX, ensuring that the judiciary gives effect to the intent of Congress and upholds the principle of legislative supremacy.¹⁷⁸ To the extent that the statute and directive of the Supreme Court can even be considered ambiguous, which, as argued above, it does not appear to be, the tenets of purposivism also support the adoption of the *Farmer* approach.¹⁷⁹ Purposivism is guided by the principle that "legislation is a purposive act, and judges should construe statutes to execute that legislative purpose," and that, to the extent that a text is ambiguous, it should be interpreted "in a way that is faithful to Congress's purposes."¹⁸⁰ Here, the purpose of Title IX is broad; Congress wanted to prevent federal funds from being used to support discriminatory practices and it wanted to provide individuals "effective protection against those practices."¹⁸¹ The Supreme Court recognized the extent of the protections that Congress sought to provide, directing courts "that the text of Title IX should be accorded 'a sweep as broad as its language.'"¹⁸²

The *Farmer* approach recognizes the breadth of the Supreme Court's directive, which aimed to encompass as much potentially dis-

175. *See id.*

176. *Kollaritsch*, 944 F.3d at 622.

177. *See* 20 U.S.C. § 1681(a) (2018); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640–54 (1999).

178. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542–43 (1940); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("[T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.").

179. ROBERT A. KATZMANN, *JUDGING STATUTES* 31 (2014).

180. *Id.*

181. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979); *see also* 118 CONG. REC. 5,806–07 (1972) (Senator Birch Bayh stating: "The amendment we are debating is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . As a matter of principle . . .").

182. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting) (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)).

criminy conduct as possible, rather than requiring schools to take action only in the most limited circumstances when a plaintiff can allege that she has alleged additional specific actionable harassment as a result of a school's deliberate indifference, or a deliberate-indifference intentional tort. In *Farmer*, the Tenth Circuit recognized that there are a myriad of ways that a student can be subjected to harassment in an educational program, and the Supreme Court's interpretation of *subjected* as including both "to cause" and "to make . . . vulnerable," was an effort to include as much of that harassment within the protections of Title IX as possible.¹⁸³ By contrast, the reductionist approach of the Sixth Circuit in *Kollaritsch*, which seeks to collapse the Supreme Court's broad descriptors into one narrow requirement that a plaintiff show she was subjected to actionable, specific additional harassment, is inconsistent with the broad congressional intent of Title IX.¹⁸⁴

While the Sixth Circuit noted that private causes of action require a high standard to be met, the Supreme Court has long taken that standard into consideration—finding the sweep of Title IX to be broad even within the context of private remedies and monetary damages.¹⁸⁵ In requiring actual, rather than constructive, knowledge of harassment by defendants and directing that defendants' conduct must be clearly unreasonable for a private action to lie, the Supreme Court has ensured that these high standards are maintained.¹⁸⁶ An unduly narrow definition of *subjected to discrimination* need not be applied to ensure that educational institutions escape overly burdensome liability standards, and it is inconsistent with the antidiscriminatory purpose of the statute.

Finally, keeping the definition of potential discrimination that a student may be subjected to as broad as possible is also consistent with the true focus of Title IX, which is on educational institutional compliance and ensuring a discrimination-free educational environment, not the exact nature of the harassment perpetuated by the third parties within the institution's control. The crux of liability is whether the educational institution, with actual knowledge of harassment, chooses to remain idle and deliberately indifferent to such harassment.¹⁸⁷ Rather than focusing on the conduct of the institution, the *Kollaritsch* approach centers the inquiry on the third-party student committing the harassment—that student must decide to harass again in order for a school or university to be lia-

183. See *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103 (10th Cir. 2019).

184. See *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 618 (6th Cir. 2019).

185. See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005); *Gebser*, 524 U.S. at 292–93.

186. The Supreme Court has issued several opinions placing boundaries on the reach of Title IX, while notably choosing not to do so in the context of the *subjected to* analysis in *Davis*. For example, in *Gebser*, the Supreme Court rejected the application of vicarious liability to Title IX, finding that institutions are responsible only for their own deliberate indifference. See *Gebser*, 524 U.S. at 288.

187. See *id.* at 290.

ble, even when that institution has already responded with deliberate indifference to an original report of harassment.¹⁸⁸ Such an approach fundamentally undermines the very purpose of Title IX: to protect students from all forms of sex discrimination in institutional settings.¹⁸⁹

While the plaintiff must show that the school's deliberate indifference caused her to experience some type of damage in the form of impact to educational opportunity, denying liability where that damage takes the form of being made vulnerable to further harassment only discourages broad institutional compliance and encourages universities to unduly scrutinize their students' claims of discrimination.

C. Practice and Ethics

Finally, any court considering the intent of the Supreme Court in defining *subjected* in *Davis* must assume that the Court understood the practical consequences of its interpretive efforts at the time it was evaluating Title IX.¹⁹⁰ If the goal of Title IX is ultimately to ensure an end to discrimination within educational environments, it is most certainly antithetical to that goal to require a student to continue to subject herself to additional harassment in order to be afforded the protections provided by Title IX. Such a requirement has the opposite effect of ending discriminatory experiences at school—it *increases* discrimination by asking a plaintiff to show that she was first subjected to actionable harassment to which a school was deliberately indifferent and then subjected to additional actionable harassment after the initial abuse. As one can easily imagine, after experiencing a rape, assault, or sexual harassment in a school environment, many students chose to leave that environment to escape the psychological impacts of a traumatic event or to ensure that they are not subjected to further abuse.¹⁹¹ This is itself “discrimination under any education[al] program or activity,” as the victim navigates the fear of further harassment within her educational experience or is required to bear the consequences of her lost educational opportunities.¹⁹² The *Farmer* approach recognizes it as such, acknowledging that the fear

188. See *Kollaritsch*, 944 F.3d at 624–25.

189. See *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1098 (10th Cir. 2019).

190. See, e.g., Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1107 (1992) (noting that “practical considerations play an important role in the [Supreme] Court’s statutory cases”).

191. See Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. COLL. STUDENT RETENTION: RSCH., THEORY & PRAC. 234, 244 (2015) (finding that students who experience sexual violence were more likely to leave school compared with students who experienced physical or verbal violence); Sharyn Potter, Rebecca Howard, Sharon Murphy & Mary M. Moynihan, *Long-Term Impacts of College Sexual Assaults on Women Survivors’ Educational and Career Attainments*, 66 J. AM. COLL. HEALTH 496, 499, 502 (2018) (finding that only 35.8% of study participants who experienced a college sexual assault completed their degree without disruption, and 67% reported a negative impact on academic performance).

192. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a) (2018)).

of further harassment can be almost as damaging as the harassment itself.¹⁹³

By contrast, under the Sixth Circuit's approach, this vulnerability is not enough.¹⁹⁴ Instead, plaintiffs must willingly continue at the same educational institution where the trauma occurred and actively put themselves in harm's way so that they can be subjected to the additional harassment that *Kollaritsch* would require. For example, in a situation where a female student who is raped by a fellow classmate reports the rape, but the school does nothing, the student would be required to continue to go to school with her rapist and deliberately subject herself to retraumatization and further harassment by that rapist to establish a claim for civil damages under Title IX. Even more disturbingly, if a small child is sexually assaulted by a fellow student but the school does nothing to address the assault, the parents would be placed in the unconscionable position to have their young child continue attending school with the assailant if they wanted to seek private action against the school for its obvious failures under Title IX. If they acted, as most parents would, to protect their child from any future harassment by removing their child from the school environment, they would also forgo any right to a Title IX claim, despite the school's clear deliberate indifference.¹⁹⁵

As multiple courts have noted, this would be a perverse distortion of Title IX.¹⁹⁶ Rather than offering students the protection of the federal government to prevent ongoing discrimination and ensure environments free of harassment, this interpretation of Title IX would require students to actually subject themselves to additional harassment and discrimination to assert their statutory rights. Certainly, this cannot be what legislators intended in enacting the statute, nor the Supreme Court in interpreting it. Preserving the most inherent antidiscriminatory principles of Title IX necessitates following the *Farmer* approach.

CONCLUSION

The passage of Title IX was a historical moment in our nation's collective effort to combat sexual discrimination in educational institutions and ensure that female students have equal access to the educational opportunities that they seek. The purpose of Title IX was broad, and the Supreme Court's interpretations of Title IX have consistently recognized the breadth of the protections that should be afforded to female students.¹⁹⁷ While a circuit split currently exists between *Farmer* and *Kollaritsch* as to whether the *subjected* language of *Davis* permits plaintiffs

193. *Farmer*, 918 F.3d at 1105.

194. *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 624–25 (6th Cir. 2019).

195. *See id.*

196. *See, e.g., Farmer*, 918 F.3d at 1104; *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015).

197. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).

to plead vulnerability to harassment, or if additional specific actionable harassment is required, this Article argues that the broad mandate of Title IX should prevail.¹⁹⁸ Whether looking to the plain language meaning in *Davis*, the policies and purposes behind Title IX, or the practical implications of Title IX jurisprudence, the Tenth Circuit's approach to vulnerability in *Farmer* best ensures the protection of women on campus and at school and continues to hold educational institutions accountable when they fail to provide such protection under law.

198. See *supra* Parts VI, VII.

Chapter 21*

Afghan Woman & #MeToo: A Story of Struggle and Strength

Zulaikha Aziz¹ and Nasrina Bargzie²

Afghan Path

In 2017, a group of teenage Afghan girls took the robotics world by storm. An all-girls team from Herat, Afghanistan, in the shadow of war, travel difficulties, and family heartbreaks, went toe-to-toe with teams across the world and took first place in a top robotics competition in Europe.³ Their challenge was to create a robot that could solve a real-world problem.⁴ The girls created a robot that uses solar power to assist with fieldwork on farms.⁵ Thousands of spectators who attended the event chose the girls' team as the winner.⁶ Despite all the challenges, these Afghan girls rose and won. This is the story of Afghanistan and of Afghan women.

Afghanistan has endured nearly forty years of armed conflict, and yet in a 2018 Survey of the Afghan People by the Asia Foundation, 80.8 percent of Afghan female and male respondents reported that they were happy.⁷ As Afghan women and the Afghan people face challenge after challenge, both the prevalence of harassment of women exposed by the global phenomena of movements like #MeToo, and the day-to-day challenges of living in a warzone, the resilience and strength of Afghan women amid these realities cannot be understated.

The challenges and harsh realities are many. Violence against women is one of the biggest issues facing not only Afghan women but Afghanistan in general. The severe gender inequality in Afghanistan is directly related to lower health outcomes, lower educational outcome, and lower income inequality overall.⁸ We offer a sober assessment of these realities in the pages that

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³ Christine Hauser, *Afghan Girls' Robotics Team Overcomes Setbacks to Win Contest in Europe*, N.Y. TIMES, Nov. 29, 2017, <https://www.nytimes.com/2017/11/29/world/afghanistan-girls-robotics.html>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ THE ASIA FOUNDATION, A SURVEY OF THE AFGHAN PEOPLE: AFGHANISTAN IN 2018, 37 (2018); *Id.* at 37 (“This year, for the first time, women report being generally happy slightly more frequently than men (81.6% vs. 79.9%).”).

⁸ Afghanistan's Human Development Index value for 2017 is 0.498—which put the country in the low human development category—positioning it at 168 out of 189 countries and territories and a Gender Inequality Index (GII) value of 0.653, ranking it 153 out of 160 countries in the 2017 index. The GII reflects gender-based inequalities in three dimensions—reproductive health, empowerment, and economic activity and can be interpreted as the loss in human development due to inequality between female and male achievements in the three GII dimensions. Please see the 2018 Human Development Report for more information on Afghanistan's statistics with regards to Afghanistan's Human Development statistics and Gender Development Statistics. U.N. Dev. Programme, Human Development Indices and Indicators: 2018 Statistical Update, (2018), http://www.hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf. See also U.N. Development Programme, Human Developments Reports: Afghanistan, (2018), <http://www.hdr.undp.org/en/countries/profiles/AFG>.

follow, but every difficulty is counter-balanced by the sheer will of Afghan women and Afghan people to survive and flourish as independent, free people.

Real Life: Afghanistan

Women across the world are speaking up about their most painful experiences through the #MeToo movement in an effort to further social progress in women's daily lives. Afghan women, too, are part of this movement. Like their sisters across the world, Afghan women have suffered under historic and current-day gender-specific hostilities. Some issues are cross-cutting—abuse of female athletes, street and internet harassment, laws that provide insufficient protection or are not implemented properly. Others are specific to the history and context of Afghanistan—security in war, and patriarchy systems still evolving in the modern context.

Since the removal of the Taliban regime in 2001, women have made substantial legal gains—women's rights were enshrined in the national Constitution of 2004, and successive national governments have vowed to protect women's rights, eliminate violence against women, and support women's economic empowerment and political participation. In fact, one of the cornerstones of the international community's intervention in Afghanistan was the so-called liberation of Afghan women.⁹ The military occupation was coupled with billions of dollars in humanitarian and development aid, of which a substantial portion was explicitly conditioned on implementing projects containing a “gender equality” or “women's empowerment” component.¹⁰ Even with all of the rhetoric, reports by the United Nations, local civil society groups, and international human rights organizations have shown that violence against women remains largely unaddressed by the Afghan criminal justice system.¹¹ After nearly two decades of democratic governance after the fall of the Taliban, which kept Afghan women effectively out of Afghan society,¹² the Taliban legacy continues to loom over legal and social progress made by Afghans.¹³ In 2018, according to the Special Inspector General for Afghanistan Reconstruction, 56 percent of the country is under Afghan government (referred to as the National Unity Government (NUG)) control, 30 percent is contested, and 14 percent is under the control of insurgent groups.¹⁴ The latest reports of peace talks between the United States and the Taliban to potentially bring the Taliban into a power-sharing agreement with the current Afghan government have Afghan women in fear of the further erosion of their existing rights.¹⁵

⁹ Editorial, *Liberating the Women of Afghanistan*, N.Y. TIMES, Nov. 24, 2001,

<https://www.nytimes.com/2001/11/24/opinion/liberating-the-women-of-afghanistan.html>.

¹⁰ See, e.g., Afghanistan: Gender, USAID, (2019), <https://www.usaid.gov/afghanistan/gender-participant-training>.

¹¹ See, e.g., U.N. Assistance Mission in Afg., U.N. Office of the High Comm'r for Human Rights, Injustice and Impunity: Mediation of Criminal Offenses of Violence Against Women, (2018), https://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_EVAW_Report2018_InjusticeImpunity29May2018.pdf; Heather Barr, *Afghan Government Ignoring Violence Against Women*, HUMAN RIGHTS WATCH, May 30, 2018, <https://www.hrw.org/news/2018/05/30/afghan-government-ignoring-violence-against-women>; AFGHANISTAN INDEPENDENT HUMAN RIGHTS COMMISSION, SUMMARY OF THE REPORT ON VIOLENCE AGAINST WOMEN (2018), <https://www.aihrc.org.af/media/files/Research%20Reports/Summerry%20report-VAW-2017.pdf>.

¹² See SURVEY, *supra* note 7, at 165 (“Women's participation in the political process has been, on its face, a great success story since the fall of the Taliban, when women had no rights of participation or representation.”).

¹³ *Id.* at 77.

¹⁴ *Id.* at 128.

¹⁵ Rod Nordland, Fatima Faizi & Fahim Abed, *Afghan Women Fear Peace With Taliban May Mean War on Them*, N.Y. TIMES, Jan. 27, 2019, <https://www.nytimes.com/2019/01/27/world/asia/taliban-peace-deal-women-afghanistan.html>.

As Afghan women and girls take up the mantle of inclusion in the global community through academics, sports, working outside the home, and leading their families, the same ills that plague other countries also plague Afghanistan. Without a doubt, sexual harassment of women is widespread in Afghanistan. From public places to educational environments to the workplace, studies show that upwards of 90 percent of Afghan women report harassment.¹⁶ Underlying themes that contribute to extreme levels of harassment include the willingness of men to harass, the lack of public intervention when harassment occurs, victim-blaming, and distrust of police and institutions.¹⁷

Street harassment is a daily experience for Afghan women,¹⁸ including sexual comments and physical attacks, such as groping, pinching, and slapping. Anti-harassment advocates often end up being the subject of harassment themselves.¹⁹ For example, in 2015, an activist walked outside for eight minutes wearing steel armor to protest the groping and leering she endured daily. The activist received so many threats she was forced to leave Afghanistan.²⁰

Harassment of women in public institutions is also a problem area. Like the abuse of female gymnasts in the United States,²¹ explosive allegations of sexual and physical abuse of players on the Afghan women's national soccer team rocked Afghanistan in late 2018.²² A former player has alleged that the president of the Afghanistan Football Federation and some trainers "are raping and sexually harassing female players."²³ The response of the NUG was strong and unequivocal. President Ashraf Ghani ordered an investigation and noted that the allegations were "shocking to all Afghans."²⁴

The internet has also proven to be a source and space of harassment of Afghan women.²⁵ Facebook is widely used in Afghanistan and has become a source of harassment where women have received rape threats and extortion threats.²⁶

¹⁶ Patricia Gossman, *#MeToo in Afghanistan: Is Anyone Listening?*, HUMAN RIGHTS WATCH, Dec. 20, 2017, <https://www.hrw.org/news/2017/12/20/metoo-afghanistan-anyone-listening> ("A 2016 study found 90 percent of the 346 women and girls interviewed said they had experienced sexual harassment in public places, 91 percent in educational environments, and 87 percent at work.").

¹⁷ Danielle Moylan, *When It Comes to Sexual Assault, Afghanistan Is All Talk and No Action*, FOREIGN POLICY, Dec. 21, 2015, <https://foreignpolicy.com/2015/12/21/when-it-comes-to-sexual-assault-afghanistan-is-all-talk-and-no-action/>.

¹⁸ Sune Engal Rasmussen, *Outrage at Video of Afghan Colonel Sexually Exploiting Woman*, THE GUARDIAN, Nov. 2, 2017, <https://www.theguardian.com/world/2017/nov/02/outrage-at-video-of-afghan-colonel-sexually-exploiting-woman>.

¹⁹ Moylan, *supra* note 17.

²⁰ Rasmussen, *supra* note 18.

²¹ Christine Hauser & Karen Zraick, *Larry Nassar Sexual Abuse Scandal: Dozens of Officials Have Been Ousted or Charged*, N.Y. TIMES, Oct. 22, 2018, <https://www.nytimes.com/2018/10/22/sports/larry-nassar-case-scandal.html>.

²² Fahim Abed & Rod Nordland, *Afghan Women's Soccer Team Accuses Officials of Sexual Abuse*, N.Y. TIMES, Dec. 4, 2018, <https://www.nytimes.com/2018/12/04/world/asia/afghanistan-women-soccer-abuse.html>; "There was blood everywhere": the abuse case against the Afghan FA president," AFGHAN HERALD, Dec. 27, 2018, <https://afghanherald.com/?p=3260>.

²³ Abed & Nordland, *supra* note 22.

²⁴ *Id.*

²⁵ Gossman, *supra* note 16.

²⁶ *Id.*

Harassment in the workplace is also rampant, with studies suggesting that up to 90 percent of Afghan women have experienced such harassment.²⁷ In 2017, a video of an Afghan colonel having sexual intercourse with a woman he pressured after she had asked for a promotion went viral.²⁸ While the colonel was detained and placed under investigation, no formal charges appear to have been brought yet.²⁹ Other Afghan women have reported that to get grants from United Nations agencies and various Western embassies, they have been told by Afghan staff that their proposals would be approved in exchange for sexual favors.³⁰

Violence against women—including “murders, beatings, mutilation, and acid attacks”—remain prevalent, with the Ministry of Women’s Affairs reporting an increase in violence against women in areas under effectively-Taliban control.³¹ Afghan women continue to lag behind men in literacy, with literacy of young women being only 57 percent of young men.³² Further, child marriage continues as a widespread issue limiting the opportunities of women.³³

The #MeToo movement itself has taken a shape formed by the realities of Afghanistan. While a few Afghan women have spoken out, most Afghan women remain silent in the face of this speak-out movement.³⁴ One activist who has spoken out noted that “[i]n Afghanistan, women can’t say they faced sexual harassment. If a woman shares someone’s identity, he will kill her or her family. We can never accuse men, especially high-ranking men, without great risk.”³⁵ Threats come not only from the accused, but also from the victim’s families, and society at large.³⁶

Afghan activists blame impunity for perpetrators as a key reason that Afghan women do not report harassment or get relief.³⁷ Activists push back on the argument that misogyny derived from culture and sexual repression is what drives harassment of Afghan women and point out that harassment of women is prevalent in countries with differing cultural backgrounds and that harassment of women is a global problem.³⁸ That said, because Afghan laws and policies are not appropriately implemented and are rife with politicking, the reality is that Afghan women often remain unprotected in public and private spaces.³⁹

The current government is publicly committed to supporting women’s empowerment and addressing violence against Afghan women.⁴⁰ NUG’s adopted National Action Plan includes adoption of UN Security Council Resolution 1325, addressing the effects of war on women.⁴¹ The international donor and development community, which often drives the inclusion of

²⁷ Rasmussen, *supra* note 18.

²⁸ *Id.*

²⁹ Rod Nordland & Fatima Faizi, *Harassment All Around, Afghan Women Weigh Risks of Speaking Out*, N.Y. TIMES, Dec. 10, 2017, <https://www.nytimes.com/2017/12/10/world/asia/afghan-metoo-women-harassment.html>.

³⁰ *Id.*

³¹ SURVEY, *supra* note 7, at 32.

³² *Id.*

³³ *Id.* at 175.

³⁴ Nordland & Faizi, *supra* note 29.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ SURVEY, *supra* note 7, at 16.

⁴¹ *Id.* at 165.

women's rights issues, is highly involved in attempting to bring NUG's goals into effect and with "two-thirds of the population under the age of 24, Afghanistan's youth culture is thriving in major urban areas, and women are increasingly seen in the arts and media, including bold female street artists, painters and musicians."⁴² Strident advocacy of Afghan women's rights leaders has led to the passage of a number of laws directly addressing harassment and violence against women. All these efforts are part of a work very much in progress, and an important part of moving the rights of Afghan women forward.

Women's Rights and the Legal System of Afghanistan

Access to justice remains an enormous problem for Afghan women generally, and more particularly in the context of demanding their right to be free from violence, including harassment.⁴³ Illustrating the on-the-ground reality for Afghan women and the shortcomings of the Afghan legal system to adequately address violence against women is the excruciatingly tragic story of Farkhunda Malikzada, a 27-year-old woman beaten to death by a mob in the center of Kabul on March 19, 2015.⁴⁴

The murder happened in the center of a city near a religious site, among police checkpoints, embassies, ministries, even in the shadow of the presidential palace.⁴⁵ A religious leader falsely accused Farkhunda of burning a Quran.⁴⁶ In fact, Farkhunda, a teacher of the Quran herself, had told the man that his business of selling *tawiz*—small scraps of paper with religious verses that are supposed to be powerful spells—was against Islam.⁴⁷ After the religious leader began to yell that Farkhunda had desecrated the Quran, a crowd formed and beat her with sticks, stones, and even their feet.⁴⁸ They tied her to a car and dragged her through the streets, then threw her body on the riverbank and set it on fire.⁴⁹ The brutal murder of Farkhunda shocked Afghans and prompted massive demonstrations urging the authorities to protect women from violence.⁵⁰ After initial statements by the police in Kabul and prominent Afghan clerics that her killing was justified, there were mass demonstrations in the streets of Kabul which led to nearly 50 men being tried in connection with the attack, including police officers accused of failing to stop the assailants.⁵¹ Four men were sentenced to death, but those sentences were later commuted, and

⁴² *Id.* at 165.

⁴³ United Nations Assistance Mission in Afghanistan (UNAMA), *Access to Justice for Afghan Women Victims of Violence "Severely Inadequate,"* May 29, 2018, <https://unama.unmissions.org/access-justice-afghan-women-victims-violence-'severely-inadequate'---un-envoy>.

⁴⁴ Frozan Marofi, *Farkhunda Belongs to All the Women of Kabul, of Afghanistan*, THE GUARDIAN, Mar. 28, 2015, <https://www.theguardian.com/global-development/2015/mar/28/farkhunda-women-kabul-afghanistan-mob-killing>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Haroon Siddique, *Farkhunda Murder, Afghan Court Quashes Death Sentences*, THE GUARDIAN, July 2, 2015, <https://www.theguardian.com/world/2015/jul/02/farkhunda-murder-afghan-court-cancels-death-sentences>.

⁵¹ Hamid Shalizi & Jessica Donati, *Afghan cleric and others defend lynching of woman in Kabul*, REUTERS, Mar. 20, 2015, <https://uk.reuters.com/article/uk-afghanistan-woman/afghan-cleric-and-others-defend-lynching-of-woman-in-kabul-idUKKBN0MG1ZA20150320>; Pamela Constable, *It was a Brutal Killing that Shocked Afghanistan*, WASH. POST, Mar. 28, 2017, https://www.washingtonpost.com/world/asia_pacific/it-was-a-brutal-killing-that-shocked-afghanistan-now-the-outrage-has-faded/2017/03/27/e3301f5a-109c-11e7-aa57-2ca1b05c41b8_story.html?utm_term=.08ace350b946.

most of the lengthy prison terms given to eight others were reduced.⁵² Though the men were prosecuted, the proceedings were criticized for being conducted too hastily with the appeals process happening completely behind closed doors.⁵³

The Laws

Afghan women's legal rights are addressed expressly by the Afghan Constitution. Article 22 of the Afghan Constitution (2004) declares: "Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law."⁵⁴ Similarly, Articles 83 and 84 of the Constitution emphasize women's participation in the upper and lower houses, including placing a mandate on the President who should ensure that 50 percent of the one-third of appointees of the Mishrano Jirga, the Upper House of Parliament, are women.⁵⁵

The Constitution also requires all laws to be compatible with Sharia. Beyond the Constitution, the Afghan government has made various commitments to women's rights and gender equality in the Afghanistan Compact (AC 2006), the Afghanistan National Development Strategy in support of human development goals (ANDS 2008-2013), and most recently the Afghanistan's National Action Plan for the implementation of the United Nations Security Council Resolution 1325 (NAP 1325), which came into effect in June 2015. ANDS provided an analysis of the priority problems that affect Afghan men and women and set out policies, programs, and benchmarks to measure progress. As a result of such developments, the Afghan government drafted the National Action Plan for the Women of Afghanistan (NAPWA, 2008-2018) with the aim of improving women's lives in Afghanistan through a multi-sectorial plan in the areas of education, health, economic security, and political participation.

In addition to the Constitution and guiding policy documents, there are three sets of official laws that exist in Afghanistan regulating acts of violence against women, namely: the Law on the Elimination of Violence Against Women (EVAW), the Anti-Harassment of Women and Children Law (AHCW), and the revised Afghan Penal Code (PC).

In addition to the Constitution and the three sets of official laws that touch on women's rights, there is also an extensive informal justice system that many Afghans turn to for a variety of reasons including access, familiarity, tradition, convenience, and societal pressure. These informal mechanisms are based on cultural and traditional practices as well as interpretations of Sharia but are often in a tense relationship with both official laws and Sharia.

Overall, however, the official laws are hampered by poor enforcement, and as between EVAW, AHCW, and the PC, there is still unresolved confusion as to which law applies and controls in various contexts.

(1) Elimination of Violence Against Women Law

In an attempt to address the high incidence of violence against women through the law, women's rights advocates, civil society organizations, and their allies backed the drafting of EVAW. The

⁵² *Id.*

⁵³ Siddique, *supra* note 50.

⁵⁴ CONSTITUTION OF AFGHANISTAN, Jan. 26, 2004, art. 22, available at <http://www.afghanembassy.com/pl/afg/images/pliki/TheConstitution.pdf>.

⁵⁵ *Id.* at arts. 38, 84.

first law in Afghanistan specifically addressing violence against women, EVAW was adopted in August 2009 in a Presidential Decree.⁵⁶ Formulated in 44 Articles, Article 2 states its overall purpose is to: provide legal and Sharia-based protection to women; promote family integrity and fight against misogynist traditions and customs that are un-Islamic; provide support to women who have been harmed; prevent violence against women; raise awareness about violence against women and women's legal protection; and prosecute perpetrators of violence against women. In the face of great opposition, EVAW was passed by presidential decree while Parliament was in recess but has not been approved by Parliament since.⁵⁷ EVAW identifies five serious offenses set out in Articles 17 to 21 that the state must act on, irrespective of whether a complaint is filed or subsequently withdrawn.⁵⁸ These offenses include sexual assault, forced prostitution, publicizing rape victims' identity, setting fire to or attacking with a chemical substance, and forced self-immolation or forced suicide.⁵⁹

In addition to the five enumerated "serious crimes," EVAW covers a wide range of issues affecting women, from physical and verbal violence against women to legal, medical, and social protection, to provision of reparations to the harmed party, and protective and supportive measures. EVAW criminalizes twenty-two acts of violence against women such as forced and child marriage, beating, harassment, verbal abuse, and withholding of inheritance, among other offenses.⁶⁰ The law also specifies punishments for perpetrators and criminalizes the customs, traditions, and practices that lead to violence against women and that are against Sharia including *baad*,⁶¹ the customary practice of giving a woman or girl from the family of a man accused of a crime in compensation to the family of a victim of a crime.⁶²

The institutional responsibility for EVAW is with the Afghan Ministry of Women's Affairs (MoWA) and Afghanistan's judicial system including the Ministry of Justice (MoJ), which is

⁵⁶ Under Article 79 of the Constitution, a bill can be approved by Presidential decree if circumstances require the processing of a legislative document during the recess of the Wolesi Jirga, the lower house of Parliament, with the exception of legislation dealing with matters related to budget and financial affairs. A Presidential decree acquires the full force of law but must be presented to the National Assembly within thirty days of the convening of its first session after the decree has been endorsed. It is up to the National Assembly whether to act on the decree. If the decree is rejected by the National Assembly, it becomes void. If the decree is not rejected by the National Assembly or the National Assembly chooses not to act on the decree, it continues to be enforceable law and must be amended or voided by the same process as a law that has been approved by Parliament. See USAID, ISLAMIC REPUBLIC OF AFGHANISTAN LEGISLATIVE PROCESS MANUAL,

http://www.cid.suny.edu/publications1/arab/Legislative_Process_Manual.pdf.

⁵⁷ See Fawzia Koofi, *It's Time to Act for Afghan Women: Pass EVAW*, FOREIGN POLICY, Jan. 13, 2015, <https://foreignpolicy.com/2015/01/13/its-time-to-act-for-afghan-women-pass-the-evaw/> for a more completed discussion of the attempted process to get EVAW passed in Parliament.

⁵⁸ Article 39 states that for all crimes listed in Articles 22-39, "the victim may withdraw her case at any stage of prosecution (detection, investigation, trial or conviction) which results in the stoppage of proceeding and imposition of punishment," but a similar allowance is not stated for crimes listed in Articles 17-21, the "5 serious offenses." See Elimination of Violence Against Women (EVAW) Law, art. 39 (Afg.),

<https://www.refworld.org/pdfid/5486d1a34.pdf>.

⁵⁹ *Id.* at arts. 17-21.

⁶⁰ *Id.* at ch. 3, arts. 17-38.

⁶¹ *Baad* is a pre-Islamic practice of settlement and compensation whereby a woman or girl from the family of one who has committed an offence is given to the victim's family as a servant or a bride. *Afghanistan: Stop Women Being Given as Compensation*, HUMAN RIGHTS WATCH, Mar. 8, 2011, <https://www.hrw.org/news/2011/03/08/afghanistan-stop-women-being-given-compensation>.

⁶² EVAW, *supra* note 58, at art. 25.

responsible for prosecuting crimes, and Afghan courts. They are tasked with providing support to women who bring claims under EVAW, prioritizing cases of violence against women, and taking active preventive measures.⁶³

Looking specifically at the issue of harassment, harassment of women is defined in Article 3(7) of EVAW as “using words or committing acts by any means, which cause damage to the personality, body, and psyche of a woman.” But these “acts” and “words” remain undefined.⁶⁴ According to Article 30, a person convicted of this offense can be sentenced from three to twelve months in prison. In cases where the person who committed the harassment misused his authority, the sentence cannot be less than six months.⁶⁵ According to Article 7 of EVAW, the victims or their relatives can register complaints with the police, the Huquq (civil departments within the MoJ), at courts, or in other relevant offices. These institutions must pursue the complaints and inform MoWA.⁶⁶ Based on the same Article and Article 16, the High Commission on the Elimination of Violence (HCEV), chaired by MoWA and with participants from all relevant government institutions, is in charge of coordination between the different institutional actors and for developing policies and regulations for the implementation of EVAW.

Besides criminalizing acts of violence against women, EVAW includes provisions designed to ensure that government institutions work to address social and cultural patterns of harassment. For example, according to Article 11, the Ministry of Information and Culture is required to broadcast programs on television channels and radio stations and publish articles to raise public awareness about women’s rights, the root causes of violence against women, and to create awareness about crimes committed against women.

EVAW is the most robust law in Afghanistan combatting violence against women. The infrastructure built in order to implement EVAW—including the EVAW prosecuting offices—continues to be active and certain cases are still brought under EVAW. EVAW, however, is hampered by a number of realities. First, it was an extremely controversial law in its development and implementation and buy-in from the judicial system still appears to be an issue. Second, as explained further below, parts of EVAW are incorporated in the other two official laws addressing women’s rights, namely the AHWC and the revised PC. This has resulted in confusion as to which laws to use in addressing claims of assault and harassment, as well as the proper procedural mechanisms by which to bring those claims.

(2) Anti-Harassment of Women and Children Law

Despite the availability of EVAW, in 2016, Parliament passed a second law, the Anti-Harassment of Women and Children Law (AHWC) to specifically address harassment. This overlap has created conflict and confusion as to what law should govern and what law would be best for women. Though AHWC contains provisions negating and superseding the articles of the EVAW law that address harassment, it continues to be unclear for legal practitioners under which law to bring claims.

AHWC defines harassment as “body contact, illegitimate demand, verbal or non-verbal abuse and or any action resulting in psychological or physical harm and humiliating the human dignity

⁶³ *Id.* at art. 8.

⁶⁴ *Id.* at art. 3.

⁶⁵ *Id.* at art. 30.

⁶⁶ *Id.* at art. 7.

of woman and child.”⁶⁷ The Ministry of Interior (MoI) was tasked with providing a special contact number so that women can report violations, and the Ministry of Labor, Social Affairs, Martyrs and Disabled was made responsible for combatting violations of the law by setting up a High Commission for the Prohibition of Harassment Against Women and Children.⁶⁸ All government institutions are “obliged to establish a Committee on Combating Harassment Against Women and Children in their respective [institutions] within three months after the enforcement of this law.”⁶⁹ All complaints of harassment in government institutions are to be reported to the Anti-Harassment Committee of the relevant institution.⁷⁰ The Anti-Harassment Committees are then responsible for investigating the complaints, determining which ones are credible, and forwarding those to “relevant attorney[s]” for prosecution.⁷¹ It is not clear whether these “relevant attorney[s]” are government prosecutors from the MoJ or whether they are legal aid attorneys or private attorneys. The MoI is responsible for ensuring that police officers prevent harassment of women and children in public spaces.⁷² But as one Afghan woman subject to harassment stated to the Institute of War and Peace Reporting, “what would really be a big help is if the policemen themselves didn’t harass me.”⁷³

In addition to the overlap with EVAW and the resulting confusion as to which law applies, another major problem with AHCW is the relatively lenient penalty for violations. Penalties for those convicted of harassment in public places or vehicles include fines in Afghani equivalent to between \$80 to \$150 (U.S.), while similar behavior in the workplace or educational or healthcare centers can be punished with fines equivalent of between \$150 to \$300 (U.S.). Aggravated circumstances can lead to imprisonment for up to six months.⁷⁴ And even with these lax penalties, implementation under AHCW continues to be ad hoc.

Still other concerns relating to AHCW include that the law classifies women with children,⁷⁵ and harassment is narrowly defined as an offense that can be committed against women and children. It does not allow for the prosecution of cases in which men are sexually harassed verbally or physically. Not only does grouping women and children together and excluding men ignore victims of harassment that may be men, it further reinforces the idea that harassment is only a women’s issue, as well as stereotypical notions of women being weak and vulnerable and needing to be protected, like children, as opposed to recognizing that the act of harassment is wrong regardless of who is the target.

⁶⁷ Anti-Harassment of Women and Children Law, art 3(1).

⁶⁸ *Id.* at arts. 5, 10.

⁶⁹ *Id.* at art. 7.

⁷⁰ *Id.*

⁷¹ *Id.* at art. 8.

⁷² *Id.* at art. 10.

⁷³ Mina Habib, *New Afghan Law Targets Sexual Harassment*, INSTITUTE OF WAR AND PEACE REPORTING, Mar. 8, 2017, <https://iwpr.net/global-voices/new-afghan-law-targets-sexual-harassment>.

⁷⁴ AHCW Law, *supra* note 67, at arts. 25-27; Medica Afghanistan, Petition Not to Ratify the Anti-Sexual Harassment Law Dated 19 Akrib 1395 / 9 November 2016 Pursuant to The Afghanistan Constitution, (2016), <http://www.medicaafghanistan.org/medica/index.php/en/petition-not-to-ratify-the-anti-sexual-harassment-law-dated-19-akrab-1395-9-november-2016-pursuant-to-the-afghanistan-constitution/>.

⁷⁵ When speaking about this law with a number of Afghan women’s rights leaders and students, a point that was consistently made was that harassment is not just a problem impacting women. Many men face harassment both from other men as well as from some women; institutionalizing it as just a problem impacting women and children not only infantilizes women but fails to offer adequate protection for men. American University of Afghanistan (AUAF) discussions with Zulaikha Aziz, Nov. 28, 2018.

(3) Penal Code

The PC also addresses violence against women. Led by the MoJ in 2012, the Afghan government began revising the 1976 PC. Apart from incorporating new laws and provisions such as crimes against humanity and war crimes, the revised PC also incorporated all criminal laws and decrees of Afghanistan into one PC. The revision process was deemed necessary for meeting three key objectives: (1) codify all crimes and punishments in one document, (2) modernize the “Code-modern” definitions and concepts, and (3) ensure Afghanistan’s compliance with international commitments.⁷⁶ The PC was revised and presented in the Official Gazette in an extraordinary issue on May 15, 2017 by Presidential Decree No. 256, coming into force on February 14, 2018.

Though the original draft of the revised PC included a specific chapter on the elimination of violence against women, incorporating provisions to criminalize the majority of the twenty-two acts set out in EVAW, there was great opposition to the incorporation of EVAW into the PC. That draft of the PC also included new provisions prohibiting both the detention of women on charges of running away and the practice of *baad*. However, the final adopted version did not include any reference to criminal offences of violence against women, with the exception of rape. Ultimately, the opponents of incorporation were successful though a later amendment on March 3, 2018 incorporated the five “serious crimes” specified under EVAW Articles 17 to 21.⁷⁷

Proponents of incorporation argued that including a chapter on crimes related to violence against women in the PC would codify these crimes in Afghanistan’s official criminal code and strengthen compliance and implementation, since the PC is the definitive authority on Afghan criminal law. Opponents of incorporation argued that the PC would not incorporate all of the provisions of EVAW and that a stand-alone law is needed to highlight the particularly egregious nature of crimes of violence against women, and to ensure the current implementing structures of EVAW prosecutors and the MoWA Committee tasked with implementing EVAW would remain in effect. A further argument was that the EVAW provisions, if incorporated in the PC, would not have passed Parliament and would have been removed in order to ensure passage of the PC. In fact, the PC was never reviewed by Parliament, and it is impossible to say whether it would have been had it included the EVAW provisions.

Ultimately the opponents of incorporation were successful in their lobbying efforts, which resulted in EVAW remaining a stand-alone law and the majority of criminal acts of violence against women remaining out of the PC. Discussions with advisors in MoJ responsible for drafting the PC reveal that the original draft did in fact include all of the criminal offenses enumerated under EVAW.⁷⁸ Had the EVAW provisions been designated as violations of Afghanistan’s criminal code, they would have carried the same weight as all other criminal offenses in the PC rather than being bogged down by the politically complex history of bringing EVAW into effect.⁷⁹ Additionally, current efforts to draft a comprehensive commentary on the implementation of the PC would have included commentary on the crimes related to violence

⁷⁶MINISTRY OF JUSTICE, OFFICIAL GAZETTE 1260 (2007), https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=105003&p_count=12&p_classification=01.

⁷⁷ AFGHANISTAN PUBLIC POLICY RESEARCH ORGANIZATION, NEW PENAL CODE AND EVAW LAW: TO INCORPORATE OR NOT TO INCORPORATE? 12 (2018).

⁷⁸ Unnamed MoJ Advisor in discussion with authors, Jan. 21, 2019.

⁷⁹ The unnamed MoJ Advisor also confirmed that there were no threats to oppose passage of the Penal Code with the EVAW crimes incorporated and all indications pointed to passage.

against women, serving as an important opportunity for all legal practitioners, including judges, to understand the implementation of the law with respect to such crimes.⁸⁰

(4) Use of Informal Justice System

Most cases involving violence against women, including the five “serious” offenses in EVAW—rape, forced prostitution, publicizing the identity of a victim, burning or using chemical substances against a woman, and forced self-immolation or suicide—are not even prosecuted by or adjudicated in courts but are instead referred to traditional councils called shuras and jirgas, which have a long history of resolving disputes through the many provinces of Afghanistan.⁸¹ The Afghan Constitution, EVAW, AHCW, and the PC are the official legal mechanisms that should be used to address abuses of Afghan women. However, it is estimated that over 80 percent of all disputes in Afghanistan are resolved through these informal mechanisms.⁸²

Shuras and jirgas, the terminology differs depending on the region and structure of the councils, are based on local custom, tradition, and religious practices and have existed in Afghanistan for centuries. These informal institutions do not enforce the civil or criminal laws of Afghanistan, but rather the councils’ interpretation of Sharia, customary law, or the collective wisdom of elders. These mechanisms are not state-actors and are not legally mandated to resolve criminal cases. They largely operate in an unofficial and unregulated capacity, their decisions in criminal cases are unlawful, and as such, are not subjected to any government oversight or scrutiny. The reasons these informal systems are used to such a high degree are complex and varied. However, one reason may be the confusion around which official law prevails.

Afghan authorities can often exacerbate the situation for victims by turning to informal justice mechanisms to mediate serious offenses instead of carrying out their duty to investigate or prosecute offenses through the formal justice system.⁸³ Often, even EVAW institutions and legal aid organizations refer cases to shuras and jirgas instead of to prosecutors for investigation and initiation of criminal proceedings.⁸⁴ Referring such serious criminal cases, let alone lesser offenses of harassment, undermines efforts to promote women’s rights, erodes the rule of law, contributes to an expectation of impunity, discourages the reporting of these cases, and increases citizens’ perception of a corrupt and unreliable justice system. Further, the referral to informal dispute resolution mechanisms exposes the government’s abrogation of its primary responsibility as duty bearer under international law to ensure the effective prevention and protection of women from such crimes and to provide an effective response where they occur.⁸⁵

⁸⁰ The Asia Foundation facilitated the drafting of a comprehensive legal commentary on the revised Penal Code, completed in 2019. The Commentary includes substantial discussion on the provisions related to crimes involving violence against women which will be helpful in informing the application of those provisions in the Penal Code.

⁸¹ UNAMA, *supra* note 11, at 19.

⁸² The Center for Policy and Human Development (CPHD) at Kabul University estimated in 2017 that 80 percent of all disputes were being resolved in the informal sector. See CENTER FOR POLICY AND HUMAN DEVELOPMENT, AFGHANISTAN HUMAN DEVELOPMENT REPORT 2007: BRIDGING MODERNITY AND TRADITION—THE RULE OF LAW AND THE SEARCH FOR JUSTICE 9 (2017).

⁸³ UNAMA, *supra*, note 11, at 6.

⁸⁴ *Id.* “In many cases, EVAW Law institutions either coordinated or participated in the traditional mediation process.”

⁸⁵ Afghanistan is a state party to the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women (signed in 1980 and ratified in

The two different types of mediation carried out by traditional dispute resolution mechanisms related to violence against women—the mediation of criminal offences of violence against women and the mediation of wider disputes leading to decisions that result in violence against women—are both unlawful and constitute human rights abuses.⁸⁶ Traditional mediation mechanisms are prohibited legal tools in cases of violence against women in an increasing number of countries as they do not have an official mandate or agreement to abide by laws protecting women from violence and are therefore insufficient to prosecute serious offenses of violence against women. Mainly composed of men, their rulings are often extremely unjust and largely punitive towards women.⁸⁷ Still, in the absence of a legal system that is easily accessible to all Afghans, many women and men have no choice but to submit their complaints to shuras and jirgas if they seek resolution of a dispute. In fact, in many matters the shuras and jirgas are often more capable and more efficient in mediation and dispute resolution but in issues related to violence against women, there is a high risk of more damage to victims.

A Path Forward

Though the stories and statistics may seem bleak, much development has occurred in the past two decades and the resilience of Afghan women cannot be understated. They will carry their society forward to a new day of equal rights and protections for women and men, not just on paper but also in practice. To that end, there are a number of key areas where the Afghan government, civil society organizations, academia, and international allies can focus on to work with Afghan women on advancing their rights. Some recommendations are as follows:

A. Continued Commitment to Democratic Governance.

Democratic governance is a key component of advancing Afghan women's rights and must be upheld in Afghanistan. In the face of war and conflict, uncertainty and threats to their lives, the Afghan people have consistently taken the risk and showed up at the polling stations. They have bet on democracy and recognize it as the way forward. Talks of imposing an interim government comprised of the Taliban and acquiescing politicians runs in direct opposition to the notions of democracy for which Afghans have risked their lives. In addition to negotiations with the current official government of Afghanistan and a potential referendum of the people, the Taliban must explicitly recognize the rights of Afghan women and assert that they will uphold the rights of women to be free from violence as enshrined in the official laws of Afghanistan.

B. Overlapping Laws Should Be Clarified.

2003); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. The Committee on the Elimination of Discrimination against Women, General recommendation No. 35 states that the prohibition of gender-based violence against women has evolved into a norm of customary law and General Recommendation No. 33 on Access to Justice, CEDAW/C/GC/33, 23 July 2015 para. 58 (c), designed to: "Ensure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedures." Accessed respectively at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf; https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf.

⁸⁶ UNAMA, *supra*, note 11, at 10.

⁸⁷ There are very few cases of shuras and/or jirgas containing women. There have been incidents of all women shuras and/or jirgas in certain areas of the country but those are not regular and are not generally responsible for resolving disputes involving men and women including cases of violence against women.

The overlap between various laws addressing violence against Afghan women should be clarified and corrected through the Afghan legal process. Ideally, EVAW should be elevated entirely into the PC, and any overlapping pieces with the AHWC should be corrected in favor of EVAW. The AHWC and sections of PC should be updated to reflect harassment of men as well.

C. Public Awareness and Education.

An Afghan-led and culturally appropriate awareness and education campaign⁸⁸ around women's rights should be formulated and implemented. The basis to do so can be found in the EVAW law that instructs the Ministry of Information and Culture to broadcast programs on television channels and radio stations and publish articles to raise public awareness about women's rights, the root causes of violence against women, and to create awareness about crimes committed against women. Afghans working with Afghans to define and debate harassment is a key component of the legal system's ability to then implement those norms.⁸⁹

D. Afghan Women Leadership.

Afghan women must be given space to further their own agenda without the pressure of outside forces. Confusion and conflict occur due to competing donor aims and funding opportunities with different donors backing different strategies. Afghan women's rights advocates are left in the middle, attempting to access resources needed to further their work and siding with donors based on funding opportunities rather than shared vision. Any funding that is advanced should be in line with goals set by Afghan women, not by donors. Afghan women cannot be represented by only a handful of prominent leaders who have secured access to donors and high-level leaders. The work must be more transparent and in line with the needs of diverse Afghan women. To that end, there should be a focus on including women from rural and remote areas in the development of a comprehensive Afghan women's rights agenda. The voices of women from remote and rural areas, where the majority of informal dispute mechanisms operate, are often drowned out by those of women in cities and in the capital of Kabul.

E. Untangle the Confusion Between Religious and Cultural Issues.

Often cultural perceptions of women's rights are thought to be derived from Islam when the religion says the opposite.⁹⁰ There needs to be a greater focus on addressing religious and cultural perceptions that exist with laws related to ending violence against women. For instance, a woman or man who thinks EVAW conflicts with Islam may not attempt to access that law or may not attempt to use that law to advocate for his or her client or may not decide a case in accordance with that law. Actual implementation of the law requires belief in its purpose and legitimacy. This will require a multi-step approach from reforming legal education curriculum, particularly that of the law and Sharia faculties to include more information on women's rights in

⁸⁸ Danielle Moylan, *When It Comes to Sexual Assault, Afghanistan Is All Talk and No Action*, FOREIGN POLICY, Dec. 21, 2015, <https://foreignpolicy.com/2015/12/21/when-it-comes-to-sexual-assault-afghanistan-is-all-talk-and-no-action/>.

⁸⁹ *Id.*

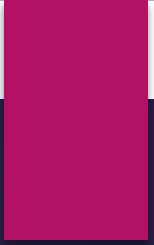
⁹⁰ One legal aid attorney relayed the case of a man who was being sued for not giving land that his cousin inherited to her, because she was a woman. His case was being heard by a panel of three female judges. When asked why he was not giving his cousin her land, he responded that "it wasn't in his religion" for women to own land. The judges informed him that in fact, both under Sharia and Afghan law, his cousin was entitled to the land. Ahmad Zia in discussion with Zulaikha Aziz, Dec. 10, 2018.

Islam and the importance of promoting human rights in general. Specific interventions can include:

(1) Legal education campaigns at every level, working with Imams in masjids and local shuras and jirgas—training shura and jirga members in women’s rights from an Islamic context but reflective of the official laws of Afghanistan. This must be done with local religious leaders who are seen as legitimate and authoritative, not external/international experts. Great care must be paid to how the information is conveyed and who conveys the information.

(2) More comparative work should be done on how other Muslim countries, which have lower incidence of violence against women, have addressed the issue. Best practices should be developed based on Muslim countries’ experiences rather than overreliance on Western models.

(3) Teaching women’s legal rights in law and Sharia faculties as part of the curriculum so all legal practitioners have a basic understanding when it comes to implementation and advocacy around relevant rights. Focusing on legal education not only imparts important knowledge on women’s legal rights to all legal practitioners, but it does so in the early stages of their legal development so that they inherently understand the importance of promoting women’s right to be free from violence as a foundational legal concept and implement that knowledge in their work as judges, prosecutors, and defense attorneys.



Challenges in the Disciplinary System: Sexual Offences on Campus.

BCCE 2021

PROCEDURAL GUIDELINES

- Training is mandated by DHET GBV Policy
 - Trained assessors of staff and students are needed please volunteer (anne.isaac@uct.ac.za)
- Evidence
 - Previously processes mirrored what happened in a criminal court and we argued for an administrative process
 - In the administrative process – the case uses a lower test of a balance of probability (50% vs 51%) instead of the test of reasonable doubt
 - Fair and follows natural justice
 - Manner of questions will not mirror cross examination in criminal court – to prevent harassment of the survivor.
 - Face to face or *in camera*
- Protective Measures
 - No contact order (student) pending outcome or interim measure
 - Suspension (staff) pending outcome as an interim measure (as per existing HR policy- managed by ED: HR)
 - Joint appointments (Split Sanctions on staff contract and student contract) – dual consideration
- Appeals
 - Staff matters still to CCMA once internal processes are exhausted
 - Students – DC process is followed



PROCEDURAL GUIDELINES

- One streamlined process for staff and students
- Staff governed by Labour Law legislation
- Students governed by UCT administrative rules
- Process
 - Reporting online to initiate UCT internal processes
 - Importance of reporting – the system tracks, assists in expediency between departments; offence hotspots and M&E
 - Line manager can certainly support survivor but OIC must be informed immediately to provide correct and empathic support
 - HR/Residence Warden is alerted to provide additional support to the living, work and learning environment.
- When case goes to the formal process
 - Evidence leader takes over from OIC and investigates
 - Reviews statements and further evidence that is necessary
 - Assesses whether matter goes to hearing
 - If it goes to hearing – then charges are drafted (GBV)
 - Charge sheet informs the respondent and the respondent receives the evidence file
 - Pre hearing with respondent is held to meet with them to raise issues in dispute and how they wish to go forward
 - Formal hearing date is set
 - Complainant is also met by the Evidence Leader
 - Tribunal preparation with the Complainant for the hearing
 - During the hearing – Staff (HR representative); Students (SRC rep); all proctors, students, staff must be trained or have expertise in GBV



South African context

- ▶ Sexual offences on campus is widespread.
- ▶ Sexual violence at universities has been an ongoing problem for decades.
- ▶ Historically patriarchal spaces for staff and students.
- ▶ Advocacy and public outcry has initiated policy revisions over the years.
- ▶ Recent violent crimes against women have incentivised institutions to escalate survivor centred policies.
- ▶ The reporting and support aspects of the process appear, on my reading, to have drawn most attention from scholars and activists

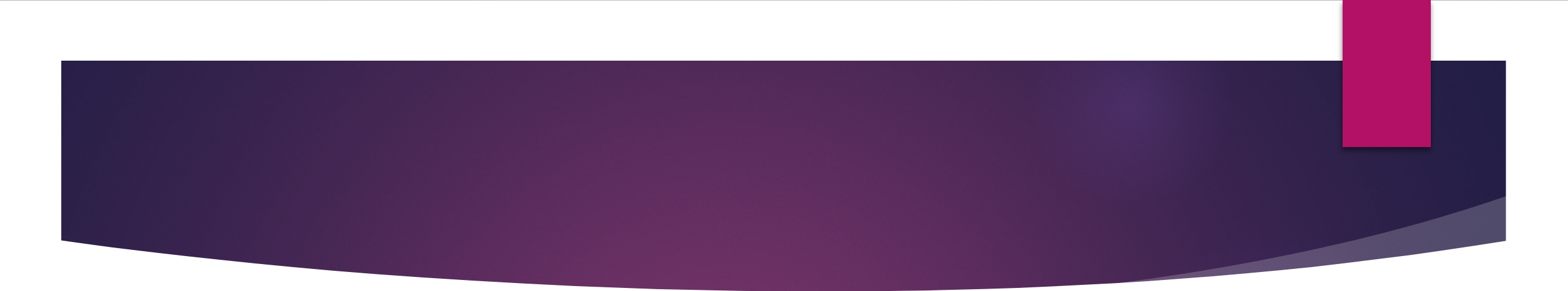
SA Universities

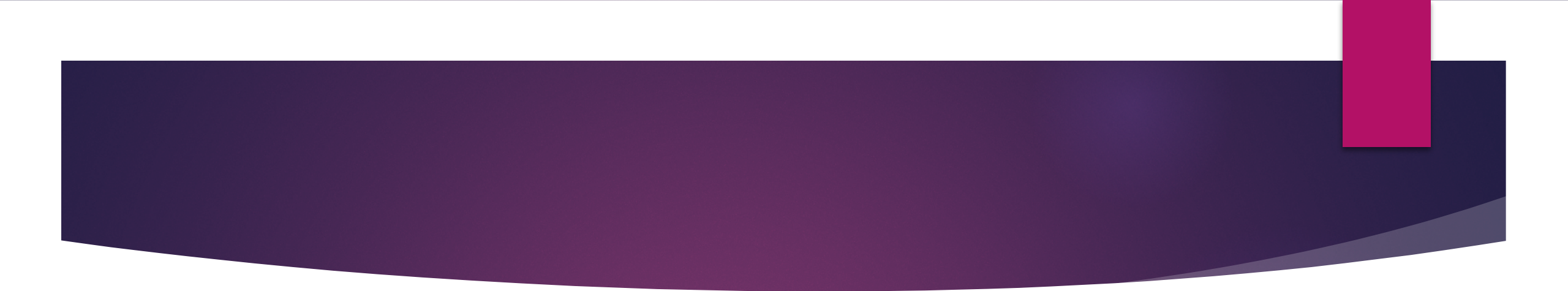
- ▶ As a result of a sexual harassment scandal the University of the Witwatersrand (Wits) engaged a commission of inquiry to evaluate their sexual harassment and other policies.
- ▶ the 2015 student protests at Rhodes University, which highlighted student outrage at the university's failure to adequately deal with disciplinary cases.
- ▶ In August 2019 a UCT female student, Uyinene Mrwetyana, was raped and murdered at a local post office.
- ▶ Her death inspired the #AmlNext movement against gender-based violence. South Africa together with national universities were motivated to accelerate campaigns against gender-based violence.

Cont...

- ▶ The literature on sexual violence on campuses shows how advocacy has consistently called for changes to policies and practices over time.
- ▶ University policies have been revised to address reporting and support services to the complainant, but there has been a lack of progressive changes to the disciplinary procedures that are necessary to meet the objectives of the policies
- ▶ The South African Department of Higher Education and Training (DHET) has developed a Policy and Strategy Framework that addresses GBV which could assist universities in tackling institutional GBV.

- 
- ▶ During 2005 and 2006 the African Gender Institute (AGI) conducted research in three Southern African universities in order to assess the success of university sexual harassment policies.
 - ▶ One was the University of the Western Cape (UWC) that had launched a sexual harassment policy in the 1990's.
 - ▶ The other two universities, both of which had new policies, were the University of Botswana and Stellenbosch University.
 - ▶ The AGI argued that there was little indication to show that these policies had been incorporated into university discussions around democracy and gender equality but were rather located in the realm of feminist activism.

- 
- ▶ Based on the AGI report, HEI's were operating under two types of positions on the administration of justice.
 - ▶ One was to deal with disciplinary cases in a more “criminal” way which led to expulsions and other disciplinary sanctions and the other was a more “restorative” approach that led to forgiveness and healing minus any punitive action against the perpetrator.
 - ▶ Anyone with insight into gender-based violence will identify problems with both types of processes.
 - ▶ Treating the harm as if it were a criminal offence does reinforce the seriousness of sexual harassment and sexual violence.

- 
- ▶ However, a criminal type of disciplinary process also contributes to trauma to a complainant as the perpetrator's focus is inevitably on the credibility of the survivor.
 - ▶ The research showed that complainants did not want to endure the traumatic effects of such a process
 - ▶ It may be concluded that a process that is in the best interests of the health and wellbeing of a survivor, together with humanising the perpetrator, is more useful to policy making than one which is criminalised

Current Gaps in our System - SGBV

- ▶ Different procedures for staff and students
- ▶ Different procedures for PASS and academic staff
- ▶ Lack of a gender sensitive approach
- ▶ Lack of unique/specialised experience:
 - ▶ Proctors/Chairs
 - ▶ Prosecutors/Initiators
 - ▶ Assessors
- ▶ The length of time to finalise cases

Disciplinary procedures

- ▶ Currently most institutions deal with all types of misconduct in one disciplinary system for staff and one for students.
- ▶ Panel members and Chairs may include academics with no knowledge or skill to deal with sexual harassment and sexual offences.
- ▶ The process mirrors a criminal process.
- ▶ External legal representation leads to cross-examination of the survivor.

A leap forward

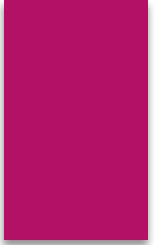
- ▶ Sexual offences and discrimination to be heard at a separate, specialised hearing tribunal.
- ▶ Chair must be legally qualified with a background in GBV knowledge.
- ▶ Panel members must have or be trained in understanding GBV-especially around how trauma affects the evidence of a survivor.
- ▶ Training on definitions and consent.
- ▶ Legal representation only for complex cases.
- ▶ Questions to be directed to the panel. No cross-examination.
- ▶ Reasonable, fair, natural justice.

Standard of proof...

- ▶ Criminal- beyond reasonable doubt
- ▶ Administrative- balance of probabilities.
- ▶ “*In Miller v Minister of Pensions* [1947] 2 All ER 372 (King's Bench) it was said at 373H by Denning J: Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice.”

Disciplinary Procedural Rules for Sexual Misconduct

- ▶ **Separate/Independent disciplinary process.**
- ▶ **Specialised Tribunal.**
- ▶ **Disciplinary panel members appropriately qualified and trained.**
- ▶ **Inquisitorial enquiry (deviation from the previous adversarial process).**
- ▶ **Survivor centred- includes legal representation and survivor support throughout the process.**
- ▶ **Alternate means of leading evidence.**



The purpose of a separate disciplinary procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment is to distinguish the process from the academic infringement cases in the student disciplinary system and the general misconduct cases in the Human Resources department. A separate procedure and Special Tribunal, dealing specifically with Sexual Misconduct, is consistent with the university's undertaking to effectively address gender-based violence and shows an intentional movement in meeting such objectives. This procedure supports the revised Sexual Misconduct: Sexual Harassment and Sexual Offences Policy which encourages and supports reporting and dealing with all sexual misconduct. This ensures a fair disciplinary enquiry to the respondent as well.

Objectives:

The objectives of the Special Tribunal are to:

- **Provide a disciplinary focus on GBV/Sexual misconduct.**
- **Ensure presiding officers and assessors are skilled and qualified to hear GBV/Sexual misconduct cases.**
- **Reduce/fast-track old and new reported cases on the system.**
- **Reduce the time taken to initiate contact with the survivor.**
- **Expedite preparation of witnesses for trial.**
- **Develop alternative methods of leading evidence: reduce secondary victimisation.**
- **Provide specialised legal skills for best prosecution outcomes.**
- **Build capacity and resources in respect of Tribunal members.**
- **Ensure that the procedural process is compliant with internal policies, external legislation and policy obligations in synergy with the rights of the accused and most importantly responding to the survivor's needs as envisioned with a survivor centred approach.**

Online tribunal performance surveys for survivors and other complainants.

LEGISLATION AND DIRECTIVES

Compliant with **DHET Policy Framework to address Gender Based Violence in the Post-School Education and Training System 2020**

The **Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (General Notice 1357)**, Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995

Higher Education Act 101 of 1997.

Promotion of Administrative Justice Act 3 of 2000.

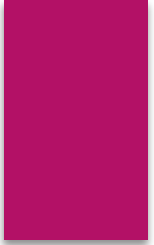
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. National directives.

INTERNATIONAL LEGISLATION

Employers to ensure that their policies are in line with the recently adopted International Labour Organization (**ILO**) Convention on Violence and Harassment. “Convention recognizes that violence and harassment in the world of work constitutes a human rights violation and a threat to equal opportunities; and is unacceptable and incompatible with decent work”.

department’s Employment Equity Director, Ntsoaki Mamashela, called on employers to “conduct risk assessment at your workplace and have your policies in line with the Convention and make sure that such policies protect employees against violence and harassment including third parties, that is, those who are not part of the incident but are affected.”

(<https://www.golegal.co.za/violence-harassment-ilo/>)



South Africa is a signatory to this Convention- obligation to ensure that policies and processes in dealing with violence and sexual harassment in the workplace are compliant with the requirements of the convention.

The Draft Code of Good Practice on the Elimination of Violence and Harassment in the World of Work was published in August 2020. Both the DHET Policy Framework together with the Code of Good of Good Practice encourages the revision and enactment of employer policies and processes that enable a work environment free of violence and harassment.

The formalising of the Special Tribunal is welcomed at a fortuitous time under the aegis of the various national and international guidelines and obligations in our collective response to gender-based violence.

EXPERT EVIDENCE: IMPERFECT EVIDENCE IS PERFECT

- ▶ Social workers
- ▶ Talk therapists
- ▶ Current trauma therapy practices
- ▶ GBV Expertise
- ▶ Explaining evidence from a trauma survivor-the impact on litigation and justice for the survivor.

JURISDICTION: OFF CAMPUS/WORKPLACE

- ▶ DUTY OF CARE
- ▶ REPUTATIONAL DAMAGE
- ▶ NEXUS BETWEEN OFFENCE AND WORK/INSTITUTION
- ▶ INTERNAL/EMPLOYER PROCESS

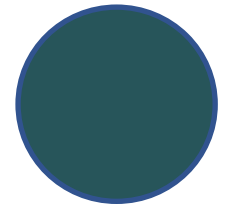
COURAGE TO ACT

Addressing & Preventing Gender-Based Violence
at Post-Secondary Institutions in Canada

Deborah Eerkes, University of Alberta
BCCE Conference, 29 October 2021

Courage to Act

- National Framework
- 3 Working Groups
- 10 Communities of Practice
- 25 Tools (and counting!)
- National skillshare
- Webinar Series
- Knowledge Centre
- Innovation Hub



A Truly National project



C2A toolkits

Key Principles of Gender- Based Violence Investigations at PSIs:

A Guide for Workplace Investigations

Supporting the Whole Campus Community:

A Roadmap Tool for Working with
People Who Have Caused Harm

Essential Elements for Non-Punitive Accountability:

A Workbook for Understanding
Alternative Responses to
Gender-Based Violence



A Comprehensive Guide to Campus Gender-Based Violence Complaints

**Strategies for Procedurally Fair, Trauma-Informed
Processes to Reduce Harm**

Coming November 2, 2021



**FOUNDATIONAL
STANDARDS**



Procedural
Fairness



Trauma-informe
d Practice



Harm
Reduction

Human Rights \ Equity

Comprehensive Guide



PART 1: Foundational Standards

- Procedural Fairness
- Trauma-informed care
- Harm reduction



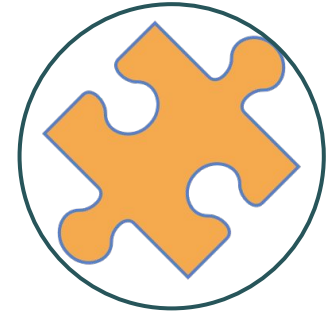
Part 2: Process, Policy & People

- Framework
- Policy
- Personnel



Part 3: Strategies for Practice

- Receiving complaints
- Interim measures
- Investigation
- Adjudication
- Non-adjudicative Options



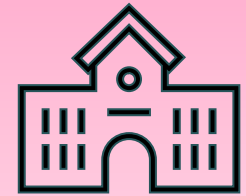
Part 4: Unsettled Questions

- Privacy & disclosure
- Criminal matters
- Historical complaints
- Future work



Starting point

1. PSIs are not the penal system
2. The regulatory environment is complex and sometimes contradictory
3. No matter how careful we are, the complaints process causes harm
4. We can never lose sight of the human experience
5. Procedural fairness + trauma-informed practice = risk mitigation



Key Messages

1. Investigation and adjudication should not be our default response
2. Need to recognize and mitigate harm inherent in complaints processes
3. Procedural fairness and trauma-informed practice do not exist in opposition to one another
4. Procedural fairness applies to both the complainant and the respondent
5. Trauma-informed practice applies to everyone involved in the process



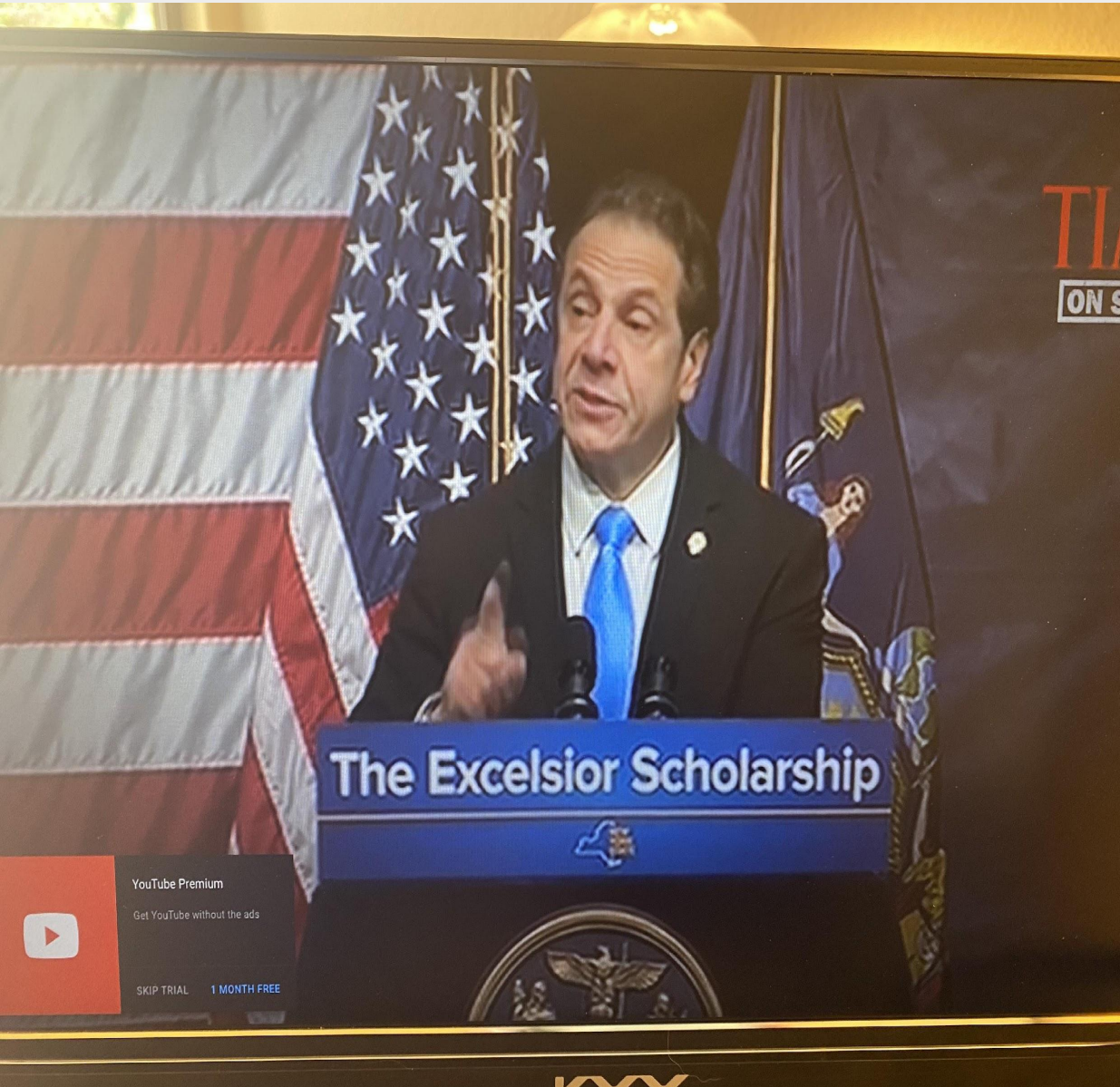
[www.couragetoact.ca/
knowledgecentre](http://www.couragetoact.ca/knowledgecentre)



Schools as Training Grounds for Harassment: An Intersectional Analysis

Ann C. McGinley
Boyd School of Law, UNLV
Berkeley Law
Friday, October 29, 2021

#MeToo





Title IX: Illegal to Discriminate Because of Gender/Sex

Schools are full of sex-based harassment, assault, and misconduct

Perpetrated often by groups on individuals

Vast majority of perpetrators are boys; sometimes groups of girls join in

- Boys and girls are victims
- Victims aged 5 through about 15
- Serious repercussions – from cutting to suicide
- Victims – good percent have disabilities

Enforcement of Title IX

Dept. of ED. OCR

Investigations/settlements with school districts – policies, training staff and students, reporting to OCR, monitors

Many claims – intersectional – Title II (ADA), Title VI (race) and Title IX (sex)

Legal standards (Title IX) – similar to Title VII co-worker suits – e.g. – negligence (knew or should have known)

Courts

- 20 years ago – COA – *Gebser v. Lago Vista Indep. Sch. Dist.*; *Davis v. Monroe County Bd. of Educ.* - teacher/peer harassment – damages and equitable relief
- Very severe restrictions on liability

20 Years of Proof Problems in COA with Title IX

Actual knowledge:
someone with power to
change

Deliberate indifference
(must be “clearly
unreasonable”)

Harassment must be **severe
and pervasive and
objectively offensive** (some
courts define pervasive
based on severity)

Must **deprive children of
access to education** (some
courts will infer from
severity and pervasiveness)

OCR/Courts = Total Disconnect (Pre-Trump)



Think disconnect.

OCR Standards—Before/After Trump Changes

Pre-Trump Administration

- OCR did investigations and when they found schools negligent, required training programs, etc. (no damages)
- Standards for finding responsibility – much easier to meet than in court

New (Trump/Betsy DeVos) Regulations Apply to OCR

- Adopt rules that courts require for damages liability in court. (Severe and pervasive and objectively offensive; deprive students of access; deliberate indifference of school authorities). But no damages.

Motivation = Masculinity: It's About Gender (not Biology)

Learned behaviors

Boys and men
pressured to
conform and prove
their masculinity

Boys taught not to
cry – be a “real
man”

Multidimensional Masculinities Theory

Different manifestations –
depends on age, race,
class, sexual orientation,
gender identity

Will also depend on the
context of the situation

The most accepted
masculinity – hegemonic –
highly competitive, need
to prove masculinity to
themselves and others

Hegemonic = white, upper
middle-class professional

Hegemonic Masculinity



Other Forms of Masculinity

React to hegemonic forms

Based on race, class

Multi-dimensional – intersectional identities

Importance of context

Examples – blue collar workplaces, boys growing up in poor, diverse neighborhoods

Oppositional Masculinities

Urban Black



White Blue Collar



Proving masculinity



Harassing behavior

Courts:

When Boys are
Victims: It's Not
Because of Sex

- "Roughhousing"
- "Hazing"
- "Boys will be boys"
- "Horsing around"
- (sometimes called "bullying")

When Girls are
Victims: It's Normal

Harassment of Girls

- Often intent is to prove one's masculinity

Teachers and Administrators

Teachers often side with popular harassers

Blame victims for reporting

Administrators inept at stopping behavior

Teachers are witnesses, but some courts say not sufficient for actual knowledge

Mean Girls

- Often reason is to get in with the “popular” boys
- Reinforces gender norms and masculinity



“Boys Will Be Boys” – White Middle-Class Masculinity

Considered normal behavior of boys

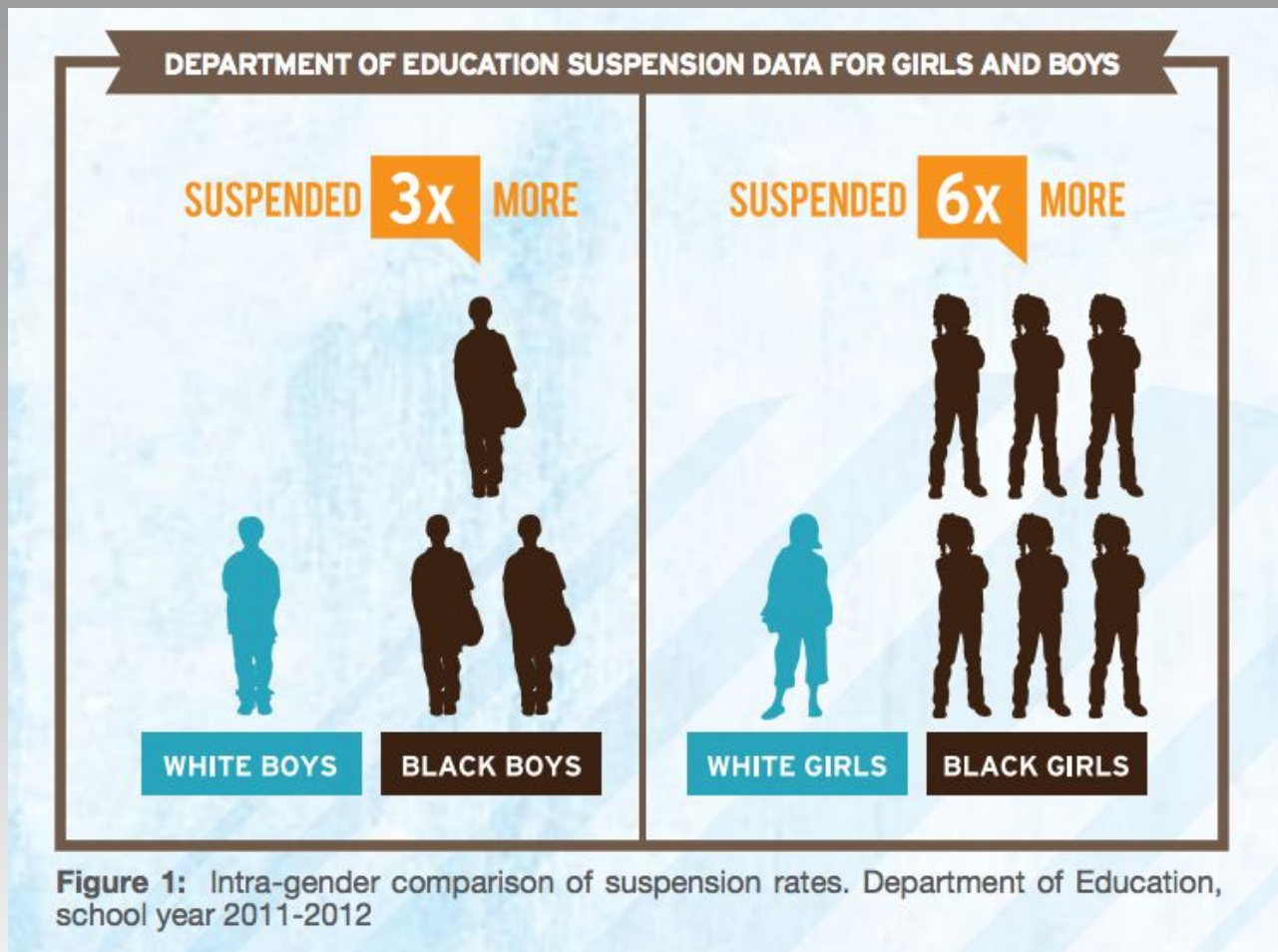
BUT Black and Latino boys – not excused

Teaches white boys they can “get away with it” as adults – in employment relations and other transactions

Race and Class – “Boys will be boys”?



Differential Discipline: Race and Gender



Intersections

Disability

Non-conforming gender expressions or identities – seen as weakness (not masculine)

Race – accusations treated differently?

Solutions?

Education re Masculinity – for educators, students, judges, employers

DON'T label behavior as merely "bullying"

Behavior occurring among men and boys happens "because of sex"
Vulnerabilities (aka disabilities) are not masculine

Gender non-conformity challenges masculinity of all boys

Boys police their own and their groups' masculinity

Change Title IX law?
Legislation?
Re-interpretation? Repeal new Regulations

Restorative Justice techniques in the schools?

BUT

How do we assure that schools and other authorities will treat all children equally?



Bibliography

- Ann C. McGinley, *Schools as Training Grounds for Harassment*, 2019 Univ. Chi. Leg. Forum 171 (2019) (contains citations to statutory provisions, regulations, opinions deciding Title IX cases available up until 2019).
- New regulations (promulgated 2020)-Title IX regulations (34 CFR Part 106) remain unchanged since 2020. They are available at this link:
<https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html#S1>

Case Striking Down a Portion of the New Regs

- *Victim Rights Law Center v. Cardona*, 2021 WL 3516475 (Aug. 8, 2021) (clarifying its earlier order and stating that the final rule with reference to prohibition of all statements not subject to cross-examination was vacated and remanded to the agency).
- *Victim Rights Law Center v. Cardona*, 2021 WL 3185743 (July 28, 2021) (holding that the portion of the final rule prohibiting statements not subject to cross examination is arbitrary and capricious).

Biden Administration Response

- 2020 regulations still in effect but see the following:
- **Public hearings on Title IX raise questions for coming guidance and regulatory changes**
<https://www.idsupra.com/legalnews/public-hearings-on-title-ix-raise-6294315/>
"The Unified Agenda for the U.S. Department of Education indicates that they expect to issue their NPRM for new Title IX regulations in May 2022. Therefore, the current regulations will remain in effect for the coming 2021–2022 school year, and perhaps longer."
- **Brooke LePage, *What's Next for Title IX?*, FutureEd, Sept. 26, 2021, <https://www.future-ed.org/whats-next-for-title-ix/>**
- "In April, the Department of Education began the process of unraveling the 2020 changes, announcing a comprehensive review, including a 5-day public hearing in early June in anticipation of beginning the formal rulemaking process that will culminate in May 2022."
- **Unified Agenda - RegInfo.gov**
- <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1870-AA16>
- ***Our Commitment to Education Environments Free from Sex-Based Harassment, Including Sexual Violence*, Office for Civil Rights Blog - October 8, 2021**
- <https://www2.ed.gov/about/offices/list/ocr/blog/20211008.html>

Biden Administration Response

- **Letter to Students, Educators, and other Stakeholders re Executive Order 14021**
<https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>
- **Letter to Educators on Title IX's 49th Anniversary - June 23, 2021**
<https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf>
- **Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)**
<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- **Letter to Students, Educators, and other Stakeholders re Victim Rights Law Center et al. v. Cardona**
<https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf>
- **Education Department Ceases Enforcement of "Arbitrary and Capricious" Exclusionary Rule - Holland & Knight Alert - August 25, 2021**
<https://www.hklaw.com/en/insights/publications/2021/08/edu-dept-ceases-enforcement-of-arbitrary-capricious-exclusionary-rule>

Biden Administration Response

- **OCR NEWSROOM PAGE:**
<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>
- **Announcement of Public Hearing; Title IX**
<https://www.govinfo.gov/content/pkg/FR-2021-05-20/pdf/2021-10629.pdf>
- "This hearing is also a step toward fulfilling the directives of Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, published in the Federal Register on January 25, 2021 (86 FR 7023)."
- That order is available at this link: <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>
-
- **April 6, 2021 - News Release re: Title IX Review**
<https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination>

For More Information

- The Department of Education, Office for Civil Rights (OCR) has a Policy Guidance Portal with the most recent guidance, frequently asked questions, etc. You can find this website at this link:

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>

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for everyone

Guidance

Conducting workplace investigations

June 2019



Conducting workplace investigations

About Acas – What we do

Acas provides information, advice, training, conciliation and other services for employers and employees to help prevent or resolve workplace problems. Go to www.acas.org.uk for more details.

'Must' and 'should'

Throughout the guide, a legal requirement is indicated by the word 'must' - for example, to carry out a fair disciplinary procedure, an employer must conduct a reasonable investigation.

The word 'should' indicates what Acas considers to be good employment practice.

June 2019

Information in this guide has been revised up to the date of publishing. For more information, go to the Acas website at www.acas.org.uk.

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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Conducting workplace investigations

About this guide

This guide outlines the essential decisions and actions that employers of all sizes must and should make when deciding to conduct an investigation. It also provides important information divided into manageable steps for anyone who has been appointed to conduct disciplinary or grievance investigations.

The order of steps 3 and 4 may change depending on the facts and information required, and how an investigator thinks the matter should be approached. However, considering the relevance of each step to the matter being investigated will help an investigator to complete a thorough and fair process.

The guide is both a reference tool for those with experience of investigations and an introduction for those new to investigations. However, it is highly recommended that anyone appointed as an investigator should be trained in this area whenever possible.

Employees and their representatives can also use the guide to gain an understanding of how and why investigations should be conducted.

What is an investigation?

An investigation is a fact-finding exercise to collect all the relevant information on a matter. A properly conducted investigation can enable an employer to fully consider the matter and then make an informed decision on it.

Making a decision without completing a reasonable investigation can make any subsequent decisions or actions unfair, and leave an employer vulnerable to legal action.

The role of an investigator

The role of an investigator is to be fair and objective so that they can establish the essential facts of the matter and reach a conclusion on what did or did not happen. An investigator should do this by looking for evidence that supports the allegation and evidence that contradicts it.

In potential disciplinary matters, it is not an investigator's role to prove the guilt of any party but to investigate if there is a case to answer.

At a glance chart

STEP 1: Organisational preparation

- Decide if an investigation is necessary
- Establish terms of reference – the rules that the investigation will follow, including precisely what needs to be investigated
- Choose an appropriate investigator



STEP 2: An investigator's preparation

- Draft an investigation plan
- Identify who might need to be called to an investigation meeting
- Identify what evidence might need to be gathered – and how to get it
- Contact parties involved in the matter



STEP 3: Handling an investigation meeting

- Establish who can accompany employees at the meeting
- Plan what questions need to be asked
- Interview the parties involved and any relevant witnesses
- Handle reluctant witnesses or refusals to meet appropriately



STEP 4: Gathering evidence

- Arrange and agree witness statements
- Collect any relevant written records and documents e.g. timesheets
- Collect any relevant and appropriate physical evidence e.g. CCTV



STEP 5: Report the investigation findings

- Write an investigation report – remember there is a free Acas template available to use or adapt
- Report what is likely to have happened – the balance of probabilities
- Make a recommendation where requested



STEP 6: After an investigation is completed

- Submit the report and conclude the investigator role
- Retain the report for an appropriate period of time
- Ensure any recommendations unrelated to the matter are considered

Step 1: Organisational preparation

Deciding if an investigation is necessary

Incidents and issues will arise in any workplace and ensuring that they are dealt with fairly and consistently may mean that they need to be investigated.

In the first instance, an employer should consider whether a quiet word or informal action may be all that is required to resolve a matter. Most problems that arise can be settled quickly and without undue process.

For example...

Antonella is informed by an employee, that they have been on the end of some unwanted office gossip, which they think is now getting out of hand. After initially discussing the matter with the employee, Antonella decides that because they simply want the comments to stop, the best way to resolve this is by informally talking to the other employees.

Where informal resolution is not practical or possible there are a number of considerations that an employer should bear in mind when deciding if an investigation is necessary.

Considerations before making a decision

Do any policies or procedures require an investigation? The policies and procedures of an organisation may obligate them to conduct a formal investigation on the matter under consideration.	For example: a company policy clearly states that all reported incidents of theft should be fully investigated.
Does the matter warrant further action? If an employer is not obligated to investigate the matter, whether one is necessary will often come down to the seriousness of the matter and what type of action may be warranted.	For example: if a company's policy isn't clear on how to approach an allegation of bullying, the incident is still likely to require some degree of investigation because it may warrant disciplinary action.
Will a preliminary investigation help? Where it is uncertain whether a full investigation is necessary or appropriate, an employer may benefit from trying to find this out first. Usually this would be limited to gathering appropriate evidence on the matter.	For example: a manager hears rumours that one employee in their team is purposely disconnecting calls from customers. A preliminary investigation could gather data on this and determine if there is a trend that may warrant a full investigation.

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If an investigation is necessary, then an employer **should act promptly**. Unnecessary delay may cause memories to fade or give the perception of an unfair process. Importantly, an informal resolution of the matter should still be considered as an option at any stage of the process.

What is to be investigated?

When instigating an investigation, an employer should decide what the precise purpose and scope of the investigation will be.

Terms of reference should be created that clearly explain what the investigator's role and responsibilities are for this investigation. The terms of reference should spell out:

- what the investigation is required to examine
- whether a recommendation is required
- how their findings should be presented. For example, an investigator will often be required to present their findings in some form of investigation report
- who the findings should be reported to and who to contact for further direction if unexpected issues arise or advice is needed. This might be HR or a similar experienced and informed source

Why have clear terms of reference?

Clear terms of reference can...

- help complete the investigation in a timely manner
- clarify exactly what the investigator's remit is
- clarify how they should present their findings
- ensure all key facts are responsibly investigated
- ensure an investigator only collects information and facts relevant to the matter
- minimise any negative impact on staff morale caused by investigation meetings
- minimise disruption to the organisation's daily business needs.

How long may an investigation take?

An employer should consult their policies and procedures to see if they contain suggested or required timescales for the investigation to follow. If no timescale is specified, an employer should provide a provisional timeframe within which the investigation should be completed. A complicated matter may take several weeks to conduct properly. A relatively simple matter may only require a small amount of investigation for it to be reasonable.

Providing a provisional time-frame is helpful but an investigator should not be restricted by a set completion date. An investigator may find that the time-frame needs to be modified to enable them to investigate the matter properly. While an investigation should be completed as quickly as

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is practical, it also needs to be sufficiently thorough to be fair and reasonable. This is particularly important if the matter could result in disciplinary action or legal proceedings. Any delay to the investigation's conclusion should be explained to those involved and included in the report.

If new issues come to light...

If a new matter comes to light during an investigation, the investigator and the person they report to may need to agree changes to the terms of reference, or to authorise a further investigation. It will usually be preferable to incorporate any new matters into the existing investigation unless it will make an investigation overly burdensome or unduly complicated.

Decide who will deal with the matter

In a potential disciplinary matter

Where possible, a different appropriate person should handle each required stage of the matter. Usually, roles needed for a disciplinary matter will be:

- 1.** An investigator to gather the facts of the matter.
- 2.** A decision maker, in case the facts warrant further action, such as a disciplinary hearing. Where the option is available, this should usually be a member of staff that is more senior than the investigator
- 3.** An appeal hearer, in case an appeal is raised against a disciplinary. Where the option is available, this should be a more senior member of staff to the decision maker. Sometimes, especially in smaller organisations, it may have to be someone at the same level as the decision maker or even the same person.

For example...

An employer has a disciplinary policy that states, where possible:

- formal investigations will be handled by a line manager
- disciplinary hearings will be handled by line managers or a senior manager
- any appeal hearings will be handled by a director.

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In response to a grievance

Where a grievance has been raised, the roles of investigator and decision maker may be combined. In many cases, matters raised in a grievance may be resolved more satisfactorily if the person investigating the issue also hears the grievance.

Choose an investigator

Who should be the investigator will often depend on the seriousness and/or complexity of the matter:

- In the majority of cases, where the matter to be investigated appears to be clear and the facts are not in dispute, the role of investigator may be carried out by an appropriate line manager or someone from HR for instance
- If the evidence to be investigated is more serious or complex (such as potential gross misconduct, discrimination or bullying) then, where possible, appointing someone more senior or experienced may be beneficial. However, an employer should be careful to ensure that there are still appropriate members of staff available if a disciplinary hearing (and appeal hearing) may be necessary
- In exceptional circumstances, it may be appropriate to appoint someone who is as detached from the matter as is practical, such as an external consultant. However, this needs to be carefully considered and any decision should balance the needs for fairness against a cost-effective and efficient investigation

Questions to consider when choosing an investigator:

- Are they personally involved in the matter being investigated?
- Would the appointment raise any conflict of interest concerns?
- Are they likely to be influenced by people involved in the matter?
- Might they be involved in any subsequent decision making on the matter?
- Do they have a good knowledge of the organisation and how it operates?
- What is their availability during the investigation's provisional time-frame?
- Are they trained and/or experienced in how to conduct investigations?
- How confident are they at communicating in writing and/or orally?
- What training or support may they require?

What is most important is that whoever is chosen to be the investigator **acts fairly and objectively.**

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Acas offers training courses for HR professionals and line managers on how to conduct an investigation. For further information, go to www.acas.org.uk/training

Keep the matter confidential

An investigation should usually be kept confidential. Even if it becomes known that one is being conducted, the details of the investigation should be kept confidential wherever possible. Keeping the matter confidential can:

- reduce any negative impact to a party involved in the matter
- help to ensure that staff morale is not unnecessarily affected
- reduce the risk of witnesses discussing or agreeing what their evidence should be

For example...

Kasia receives a grievance from one employee alleging they are being bullied by another employee. As director of the organisation she considers the grievance and authorises an investigation to look into the matter further.

Kasia is wary that if the rest of the workforce hear about the allegation, one or both of the employees involved in the matter may be shunned by the rest of the workforce and staff morale could be affected. She therefore decides that keeping the matter confidential is essential while an investigation is conducted.

In a confidential investigation it is important to explain the need to maintain confidentiality to all staff involved. However, an employee should be allowed to discuss the matter with an employee representative where they have one. It should be made clear that if an employee breaches confidentiality an employer could view this as a disciplinary matter.

Possible temporary measures

Many investigations may be conducted without removing an employee from their typical working environment. On occasions, an employer may need to consider taking a temporary measure while an investigation is conducted.

Temporary transfer

Sometimes, rather than the more extreme measure of suspension, it may be more practical and productive to transfer an employee to a different area of work on a temporary basis. If tensions between certain employees within the organisation are high then a temporary transfer can stop them having to work together while the investigation is carried out.

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In practical terms a temporary transfer will not always be possible. Where it is used, an employer should be reasonable and treat an employee fairly. An employer should only transfer an employee to a job of similar status in the organisation.

For example...

At lunchtime a manager intervened in a heated argument between Emma and Taz where both made several unsavoury allegations about the other. They are both extremely angry and both say that they won't work near the other.

The HR manager decides that while the incident is investigated it would be beneficial to temporarily transfer one of them to another part of the office. Emma has just started a new task whereas Taz is in the middle of an assignment that requires regular contact with his line manager. Therefore, it would be more appropriate to move Emma. This is explained to Emma and Taz but it is made clear that this is not a punishment and is just a temporary arrangement.

Suspension

In certain situations, an employer may decide that suspension with pay is necessary while the investigation is carried out. This may include where:

- working relationships have broken down
- the employee could tamper with evidence
- there is a risk to an employee's health or safety
- property or the business of an employee or the organisation may be damaged

Suspension with pay should only be used after careful consideration, as a last resort and should be reviewed to ensure it is not unnecessarily drawn out. It should be made clear that the suspension is temporary, not an assumption of guilt and not a disciplinary sanction.

For example...

Asha runs a construction company. One morning she is informed that two of her employees have been fighting on a work site. While Asha conducts an investigation to get the full facts she decides it is necessary to suspend both employees because:

- the actions of both employees may amount to gross misconduct
- it protects both employees from seeing the other until this is resolved
- no initial judgement is made on who may have been at fault.

Criminal proceedings

Some matters might also warrant a criminal investigation. Usually, an employer may need to decide whether or not to involve the police.

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However, some employers will be obligated to raise some matters to the relevant authorities. For example, an organisation that works with children may have safeguarding procedures that require the local authority to be informed in certain circumstances. An employer should therefore check their policies and procedures before deciding not to inform the police.

If criminal proceedings do commence, an employer may decide to put their investigation on hold until the criminal proceedings have concluded. However, if they believe it reasonable to do so, an employer may still carry out their own investigation.

If an employer does continue with its own investigation, the investigator should be careful not to prejudice the criminal proceedings. An employee may also be less likely to cooperate if they believe it could harm their defence to the criminal proceedings. While taking this into account, an investigator should investigate the matter as thoroughly as is reasonable and, if required, make a recommendation based on the facts available to them at that time.

For further information, go to www.police.uk/information-and-advice

Step 2: An investigator's preparation

Draft an investigation plan

Creating an investigation plan can provide an investigator with a structured approach to follow. This can help an investigator focus on:

- what facts need to be established
- what evidence needs to be collected
- completing the investigation within the provisional time-frame

An example of an investigation plan...	
Investigator	John Smith
Terms of reference	<ul style="list-style-type: none">• To investigate a grievance raised by Andrew A that Annie S has been harassing him in person and by email
Provisional time-frame	<ul style="list-style-type: none">• Started on 4 June 2015• Report to be completed by 19 June 2015
Policies and procedures to review and follow	<ul style="list-style-type: none">• Anti-bullying policy• Grievance policy• Disciplinary procedure
Issues that need to be explored/clarified	<ul style="list-style-type: none">• What actions does Andrew consider to amount to bullying and why?• What are Annie's responses to the allegations?

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Sources of evidence to be collected	<ul style="list-style-type: none">• Are there any witnesses to the matter?• Witness statements• CCTV?• All emails sent between the two which the organisation can still access
Persons to be interviewed (including planned order of interviews)	<ul style="list-style-type: none">• Andrew A 8 June 9am• Annie S 8 June 1pm• Further names may be added following initial interviews
Investigation meetings further arrangements (When/where/notes to be taken by)	<ul style="list-style-type: none">• Meeting room 1 booked 8th June• HR to be present as note taker• Meeting room 1 provisionally booked for the 11, 12 June also
Persons to supply own statement	<ul style="list-style-type: none">• Alison K (internal IT expert): to provide evidence on email interaction between Annie and Andrew
Investigation meetings to be completed by	<ul style="list-style-type: none">• 16 June 2015
Collection of evidence to have been completed by	<ul style="list-style-type: none">• 16 June 2015
Further considerations	<ul style="list-style-type: none">• Annie is on paid suspension while the matter is being investigated

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.

Acas has an investigation plan/checklist template that employers can use at www.acas.org.uk/templates

Check policies and procedures

An investigator should collect copies of any policies and procedures that may be relevant to the matter. Even if an investigator is already aware of the policies, they should re-read them to refresh their knowledge and ensure that correct procedures are followed wherever required.

For example...

Kareem is asked to conduct an investigation into a grievance that contains allegations of race discrimination. He re-reads the organisation's grievance and disciplinary procedure to refresh his knowledge and to ensure that he conducts the investigation as required.

He also collects the organisation's equality procedure because it may be important when considering if there is a case to answer regarding the allegations of race discrimination.

Identify possible sources of evidence

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There is no exhaustive list that an investigator can rely on to know what sources of evidence they should collect. Each investigation will be different and the facts and information that need to be collected will also differ. When initially identifying what may be relevant an investigator should consider:

- the terms of reference and what they need to establish
- what sources of evidence may be available to establish the facts of the matter
- how the evidence could be collected
- whether there are any time constraints for collecting the evidence, such as a witness going away on annual leave or CCTV records that are usually deleted after X days

As the investigation progresses, other possible sources of evidence may come to light or become relevant.

However, an investigator should remember that they only have to conduct a reasonable investigation. They do not have to investigate every detail of the matter, only what is reasonably likely to be important and relevant.

For example...

Mia is asked to investigate a matter. The terms of reference state the investigator is to look into whether fraudulent expenses claims have been made. It is clear that the forms where the alleged fraudulent expenses were made and the related receipts will need to be collected as evidence.

Mia knows she could collect the employee's telephone records and computer browsing history. However, she decides these are not needed to establish the facts of this matter.

Identify possible parties relevant to the investigation

When individuals might be able to provide information relevant to the investigation, an investigator may interview them and/or ask them to provide a witness statement.

Where a large number of people witnessed the same incident, it will usually not be necessary to interview everybody. An investigator should interview some of the witnesses. If their accounts are consistent then an investigator may not need to interview other witnesses unless there are good reasons to believe they might have further information on the matter.

For example...

Satnam is investigating a dispute between two employees that happened during lunch in the staff canteen. Around 20 people were in the canteen

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at the time but Satnam decides that initially she will only interview the two people involved in the dispute and four witnesses to see if a consistent version of events is found.

While the two employees involved in the dispute have a differing version of events, all four of the witnesses give a very similar account. Satnam decides that she does not need to interview any of the other employees who were also present.

Decide in what order evidence should be collected

The order in which evidence should be collected will change depending on the matter being investigated.

Where the matter is relatively straight forward, an investigator should hold some or all of the investigation meetings at an early stage of the investigation. In particular, if a person made a complaint or raised a grievance, an investigator should interview them first to ensure that they fully understand the matter.

In a potential disciplinary matter, an investigator should also consider interviewing the employee or employees under investigation at an early stage. Doing this can help to establish what facts are disputed and allow an investigator to focus the rest of the investigation on these areas. Also, if they admit the allegations against them are correct it might remove the need to investigate the matter as fully as planned. However, their explanation of why the incident occurred may still need to be investigated.

Where there is considerable physical or written evidence, or the matter is very complex, an investigator should consider whether or not to collect other evidence before interviewing the employee or employees under investigation. Doing so may help them to fully understand the matter and help them to ask the appropriate questions at the investigation meeting.

For example...

Felix is asked to investigate an allegation into a customer service employee intentionally 'cutting off' callers. As he is unsure of what evidence there may be he decides that before talking to the person under investigation he should gather the phone records that the organisation has and hold an investigation meeting with an IT expert who can advise him about what the data reveals.

Doing this helps Felix to understand the allegation and what the data that has been collected reveals. He is therefore able to ask the employee under investigation questions that enable him to establish the full facts of the matter.

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Consider the health and well-being of staff involved

An investigation can be stressful for everyone involved. Sometimes it can lead to significant distress, and negatively impact the mental health of an employee.

Where concerns about the mental health of an employee are raised, an investigator should treat the issue seriously and consider whether the process can be adjusted in some way. For example, by allowing the employee to be [accompanied at any investigation meetings](#) by a support worker, personal friend or family member who is aware of their mental health issues.

Sometimes it might be appropriate to seek (with the agreement and involvement of the employee) professional medical help or guidance as to how the investigation can proceed fairly in recognition of the impact the process may have on the employee's mental health.

To ensure the employee is able to receive help, an investigator should highlight where they can seek further support. This might include:

- The organisation's employee assistance programme
- Mental health first aiders or champions
- Local GP or doctor
- A mental health charity

An investigator should also liaise with the employee's line manager to ensure there are regular catch-ups to check on how the employee is doing and provide further support where necessary.

Arrange where meetings will take place

An investigation meeting should take place in a private room, where interruptions are unlikely to occur. Usually, meetings should be at the employee's normal place of work and during working hours. However, where a greater degree of confidentiality is required it may be better to hold the meeting outside of normal working hours or away from the organisation.

For example...

Abdul manages a team of 14 telesales staff who all work in the same open plan space as he does. The regular meeting spaces are all within sight of the staff and they are typically used for routine purposes staff are familiar with.

When Abdul raises a grievance alleging race discrimination, the investigator quickly establishes that any meetings held on site would be

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noticed and could quickly lead to gossip. In order to handle the investigation sensitively, the investigator arranges to meet Abdul on a different floor in the office outside of the main telesales working hours.

Contact relevant parties and their managers

Informing an employee they are under investigation

If an employee is under investigation, they should be informed in writing of the allegations against them and that an investigation will be carried out.

They should also be advised of who they can contact if they have any questions or concerns during the investigation. This is typically the investigator, their manager, or HR.

In most situations, an employee should be fully informed about the investigation into their actions from the outset. An investigation should only be concealed if there are very good reasons, such as, because an employee may be able to influence witnesses or tamper with evidence.

For example...

Alison is asked to investigate an allegation relating to computer misuse. The individual under investigation works from home and Alison needs an expert to find out what exactly is on the computer. She therefore decides that she cannot inform the employee of the full reasons for the investigation until she has access to their laptop because they may be able to conceal or delete evidence.

After collecting the laptop there is no reason not to inform the employee of the investigation. Alison therefore notifies the employee of the allegations against them before an investigation meeting takes place.

Inviting relevant parties to an investigation meeting

An investigator should give any employee that they intend to interview advance written notice of their investigation meeting.

The invitation should include...

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- the date, time and place of the meeting
- the name of the investigator and what their role is
- the reason for the meeting
- an explanation that the meeting is only to establish the facts of the matter and is not a disciplinary meeting
- a request to keep the reason for the meeting, and any discussions that take place, confidential
- whether there is a right to be accompanied to the meeting
- that it may be a disciplinary issue if they unreasonably refuse or fail to attend the investigation meeting.

Acas has developed a range of template letters that an investigator can use and adapt for their own needs at www.acas.org.uk/templates

Keep line managers informed

Throughout the investigation an investigator should also liaise with any line managers who are responsible for employees attending an investigation meeting. Keeping managers informed of arrangements is important. It will allow them to plan ahead and take steps to reduce any impact that the investigation may have on the organisation.

For example...

Kuljit is investigating an incident involving several members of a small helpline team. So that the matter has as little impact on customer service as possible she liaises with their line manager about when meetings will take place.

During discussions Kuljit finds out that the busiest time of the day is 12-2. She therefore arranges the meetings to take place outside of this time.

Being involved in an investigation can be a difficult time for the employees and even impact on their mental health. An investigator and line managers should consider the health and wellbeing of employees involved in an investigation and offer support where needed.

Step 3: Handling an investigation meeting

While investigation meetings will often be needed, some investigations will only require the collection of written and physical evidence. In these circumstances, an investigator will not need to follow this step.

What is an investigation meeting?

An investigation meeting is simply an opportunity for an investigator to interview someone who is involved in, or has information on, the matter under investigation.

An investigation meeting must never turn into a disciplinary meeting. Where disciplinary action may be necessary a separate meeting must be arranged.

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Can an interviewee be accompanied?

Workers have a statutory right to be accompanied at a disciplinary or grievance hearing by either a work colleague or a trade union representative.

Whether a worker has the right to be accompanied at an investigation meeting will depend on the circumstances.

Disciplinary investigations

There is no statutory right for a worker to be accompanied at a disciplinary investigation meeting (for example, a meeting held to gather facts). The right only applies to a disciplinary hearing which could result in a formal warning or some other action being taken or confirmed against a worker.

Grievance investigations

A worker who raises a grievance has a statutory right to be accompanied at any meeting held to hear, gather facts about, discuss, consider or resolve their grievance. This includes investigation meetings.

However, any other worker interviewed as part of an investigation into a grievance, (for example, to check facts or gather new evidence), does not have a statutory right to be accompanied at the investigation meeting.

Even where there is no statutory right to be accompanied at an investigation meeting, workers may still be allowed to be accompanied under:

- their own discipline and grievance procedures
- the Equality Act 2010 - as a reasonable adjustment for a disabled worker.

An employer might also consider allowing a personal friend or family member to accompany an interviewee if this is reasonable in the circumstances.

Benefits of allowing a companion

In many cases it will benefit an investigation to allow an interviewee to be accompanied by a workplace colleague or trade union representative, even where there is no statutory right or organisational policy to allow a companion.

It can be particularly helpful for the following reasons:

- English may not be their first language and a companion may be in a

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- position to help facilitate the discussion
- having a companion can make an interviewee feel more comfortable and more willing to talk openly about the matter
- a companion may be able to help an investigator manage the process more effectively by explaining steps being taken to an interviewee
- a procedure that allows a companion can increase the confidence staff have in a credible process
- it can help support the workers well-being as investigations can be stressful.

For further information on the statutory right to accompaniment and the role of the companion at disciplinary and grievance hearings, see the [Acas Code of Practice on Disciplinary and Grievance Procedures](#) and the [Acas Guide on Discipline and Grievances at Work](#).

Recording an investigation meeting

If investigation meetings are necessary, an investigator needs to plan how they will be recorded. Typically, an investigator may record the meeting themselves or have someone act as a note-taker.

Having a note-taker for the meeting can allow an investigator to focus on exactly what the interviewee says and consider what additional enquiries are necessary to establish the facts of the matter. A note-taker can also be used to read back answers given during the meeting and check that what has been recorded is agreed as being accurate.

What notes should be taken?

Notes taken at the meeting will usually become an interviewee's witness statement. The notes should therefore record:

- the date and place of the interview
- names of all people present
- an accurate record of the interview
- any refusal to answer a question
- the start and finish times, and details of any adjournments
- should be written without gaps, to avoid the accusation that gaps have been filled in after the meeting.

The notes taken **do not need to record every word that is said** but they should accurately capture the key points of any discussion.

[Further information on witness statements is provided in Step 4](#)

Recording the meeting using an audio device may be done if the organisation's policy allows it or with the agreement of the interviewee. However, this can unnecessarily complicate the matter. Knowing they are being taped may be intimidating to an interviewee, making them less able to talk openly about the matter. It can also be time consuming because a

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transcript of the recording will usually need to be typed up so that it can be used as a witness statement.

In some instances, an interviewee may ask to record the meeting. Whether or not a meeting may be recorded is for the employer to decide. To ensure a consistent and fair approach is taken an employer should make its position clear in its policies and procedures.

A covert recording of an investigation meeting may be viewed as a misconduct matter or as a breach of trust and confidence.

Investigation meetings – the process

Investigation meetings are often difficult and emotional, especially for someone who raised a complaint or is under investigation. A courteous investigator following a structured process, by pre-planning their initial questions, will reduce unnecessary stress and help keep the interview on the right track.

The interview process	
Before the meeting takes place an investigator should	<ul style="list-style-type: none">• establish how the interviewee may be able to help with the investigation and plan initial questions accordingly• book an appropriate time and place for the meeting• write to the employee inviting them to the meeting and detail any rights of accompaniment
At the start of the meeting an investigator should explain	<ul style="list-style-type: none">• who is present and why• the role of the investigator• the purpose of the meeting• the need for confidentiality during the investigation• that the interviewee's witness statement may be used in an investigation report• who will see the interviewee's witness statement
During the meeting an investigator should	<ul style="list-style-type: none">• ask questions to gather the facts of the matter• probe the interviewee without it being in an adversarial manner• record responses and any refusal to respond• seek evidence that may substantiate the information provided
At the end of the meeting an investigator should	<ul style="list-style-type: none">• check if there is anything else the interviewee thinks is important before ending the interview• ask if there are other witnesses that they think should be interviewed and why• explain that they may need to be interviewed again• explain that the interviewee will be provided

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	shortly with a copy of their witness statement for them to check and confirm that it is accurate
After the meeting an investigator should	<ul style="list-style-type: none">• provide the interviewee with a copy of their statement and seek agreement that it is accurate• consider what the important facts from the meeting were and whether evidence already collected supports or contradicts these• consider whether the meeting suggested any further evidence needs to be collected or interviews arranged

Although an investigator should plan to only interview each employee once, as further facts and information are collected, it may become necessary to interview some employees again to clarify certain points.

Investigation meetings – tips and techniques

Practicing interview techniques through training and experience is vital for an investigator. While there is no substitute for this, the following tips and techniques will help supplement and refresh an investigator's knowledge, skills and approaches.

Listening

This is the vital part of conducting an investigation meeting. Effective listening will help an investigator get a better understanding of the people they interview and their points of view. Typical actions that an investigator should follow include:

- have a list of pre-planned questions to follow and tick off
- remain focused on the witness and the reasons for the meeting
- concentrate on exactly what the witness says
- be open minded to anything the witness may say
- acknowledge the witness' viewpoint
- listen for points that the interviewee avoids covering or giving details on
- allow the witness to finish their point before moving the interview on or asking a further question
- use silence to encourage the interviewee to elaborate on points.

Body language

An investigator should think about their body language and consider how their actions may be perceived. Typical actions that can help to reassure an interviewee that the meeting will be conducted impartially, fairly and professionally include:

- facing the interviewee in a relaxed body posture
- being calm
- not folding arms, which can be intimidating

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- giving an appropriate amount of eye contact
- giving appropriate affirmative facial expressions and gestures, such as nodding.

An investigator should be careful to avoid making judgements based on an interviewee's body language. Where there is some discomfort or unease, an investigator could ask, in a sensitive way, why the interviewee is acting in a particular way, remembering that an interview of this sort can be stressful.

Questioning techniques

An investigator should be able to ask questions that challenge and test the credibility of the information being given in a manner that is professional and does not intimidate an interviewee.

There are a number of different types of questions an investigator may use during an investigation meeting to help them control the meeting and gather the full facts of the matter from the interviewee.

Questioning approaches to use	
Open questions: Encourage an interviewee to open up. They can provide a rich source of information that an investigator can then go on to explore in more detail.	For example: <ul style="list-style-type: none">• Explain to me exactly what you saw...• Describe exactly what happened...• Talk me through what you heard...
Closed / specific questions: Usually give a Yes, No or definite answer. They can be helpful to gather specific facts and can help focus an overly talkative interviewee.	For example: <ul style="list-style-type: none">• What time did you leave your workplace?• How many times did that happen?• Did you speak to your manager about that?• Who else was there?
Probing questions: Can test the strength of an interviewee's account and challenge any inconsistencies. However, it is important to phrase these questions so they are inquisitive rather than interrogative.	For example: <ul style="list-style-type: none">• When you say she was aggressive what exactly do you mean by aggressive?• You mentioned earlier that X... tell me more about that.
Feelings questions: Can help to focus an interviewee on what is important to them and reveal their beliefs. However, they	For example: <ul style="list-style-type: none">• What was important to you about that?• What is your main concern

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should be used sparingly as the meeting is mainly to establish the actual facts of a matter.	about what happened?
Asking "What else?": Helps an investigator to probe deeper beyond the initial information provided. However, care needs to be taken to ask this sensitively.	For example: <ul style="list-style-type: none"> • What else can you tell me about what happened? • What else do I need to know about the matter?
Summaries: Provide an opportunity to check that the correct information is recorded. They also allow the interviewee to reflect on what they have said, to correct any inaccuracies and to give further details where there are gaps.	For example: <ul style="list-style-type: none"> • So can I clarify that what you are telling me is that you left your workplace at 10am because there was a problem at home and you did not return to work. Have I got that right?

There are some types of questions that can hinder an investigation and should be avoided wherever possible.

Questioning approaches to avoid	
Interrogative questions: The aim of the investigation is to establish the facts rather than interrogate someone. Although sometimes necessary, "Why" questions can make people defensive and close up.	For example: <ul style="list-style-type: none"> • Instead of "Why did you do that?", use "What made you decide to do that?"
Leading questions: These can lead the interviewee to provide the answer the investigator hopes or expects to hear.	For example: <ul style="list-style-type: none"> • Instead of "Do you think he was perhaps over reacting?", use "What did you think of his reaction?"
Multiple questions: Lead to confusion and the interviewee will answer what they heard first, last or the part they are most comfortable answering.	For example: <ul style="list-style-type: none"> • Instead of "What is your role, do you like it and why?", ask each question individually.

Reluctant witnesses

Some employees may be reluctant to provide evidence for an investigation. An investigator should explore why an employee is reluctant to give evidence, provide reassurance and seek to resolve any concerns they have.

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An investigator should try to avoid anonymising witness statements whenever possible. This is because an employee under investigation is likely to be disadvantaged when evidence is anonymised as they will not be able to effectively challenge the evidence against them.

Only in exceptional circumstances where a witness has a genuine fear of reprisals should an investigator agree that a witness statement is anonymised. However, if the matter becomes subject to legal proceedings, and it is necessary in the interests of fairness, an employer may be required to disclose the names of any anonymous witnesses.

For example...

Three employees approach Tayo, their manager and explain they have seen another employee taking items from the warehouse. They make clear that they do not want to be used as witnesses because they fear reprisals if it is discovered they informed management.

Tayo is asked by the directors to investigate the matter. The investigation shows that the items the employees claim were taken are missing. To try to avoid using anonymous evidence, Tayo collects the CCTV records from the warehouse. It reveals the employee had spent a lot of time near where the items were but does not show them or anyone else taking the items.

Tayo decides to investigate the reasons why the three employees do not want to be named as witnesses and discovers there have been several reports of intimidation by the other employee and their family members who also work there. He decides that there is a genuine reason for offering anonymity in these circumstances. However, he does make enquiries into each of the three employees to see if there may be any reason for them to fabricate their evidence.

Where an investigator decides that the circumstances do warrant an agreement to anonymity, an interview should be conducted and notes taken without regard to the need for anonymity. An investigator should then consider what, if any, parts need to be omitted or redacted to prevent identification.

Handling a refusal or failure to attend an investigation meeting

If an employee refuses to attend an investigation meeting, an investigator should try to find out why and see if there is a way to resolve the issue. It may be that they are unable to attend for a legitimate reason, such as illness, and an investigator could rearrange the meeting or ask the employee to produce a witness statement instead.

Where an investigator does not believe a legitimate reason has been given they could remind the employee that failure to attend a meeting

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may be viewed as refusing to obey a reasonable request and result in disciplinary action.

Employee relationships and motives

When interviewing a witness an investigator should be alert to their possible motives. They should make tactful enquiries into the relationship between the witness and any employee involved in the matter because this may add or detract from the validity of the witness's statement.

Usually, this can be done when interviewing the witness themselves and, where relevant, the person under investigation. However, in some circumstances an investigator may also decide it is necessary to ask other witnesses for their views on the impact a particular relationship might have.

An investigator should be careful about the tone and phrasing of their enquiries and remember that a witness is not under investigation.

Step 4: Gathering evidence

When gathering evidence an investigator should remember that their role is to establish the facts of the matter. They should therefore not just consider evidence that supports the allegations but also consider evidence which undermines the allegations. Once collected an investigator should objectively analyse each piece of evidence and consider:

- what does the evidence reveal?
- are there any doubts over the credibility and reliability of the evidence?
- is the evidence supported or contradicted by evidence already collected?
- does it suggest any further evidence should be collected?

For example...

While conducting an investigation Dawinder is told by an employee under investigation that they were not working on the day of the alleged incident.

When trying to find evidence that supports or contradicts this claim, Dawinder remembers that the buildings security require employees to scan a pass to get in and out of the building. She makes enquiries into whether any data is stored. With the employee's card number she is able to collect records that show the employee's card had been used on the day of the incident. This may call into question the reliability of the information provided by the employee.

Witness statements

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A witness statement will usually be a signed copy of the notes from an investigation meeting. An interviewee should be given a copy of their statement taken at the investigation meeting to check that they agree it is accurate. This should be done as soon as possible after the meeting so that memories are still fresh. Once the interviewee has checked the document they should sign the statement confirming it is an accurate reflection of the conversation.

An investigator may want a witness statement to be typed up. However, when the original notes from the meeting are clear they could be given to the interviewee immediately after the meeting.

An interviewee should be allowed to amend their statement but should sign any amendments they make to the original document. Where changes to the statement are made that an investigator believes contradict what was said at the meeting, it may be necessary to note this and include both the original statement and the amended statement in the report.

If an interviewee refuses to sign their statement, an investigator should try to find out why and resolve the issue. If a resolution cannot be reached, an investigator should include the statement in their report while acknowledging that the interviewee refused to confirm that it was an accurate reflection of the meeting.

When might a statement be provided without a meeting?

An investigator may sometimes decide that a witness statement can be supplied without a meeting in circumstances such as:

- if a witness is not a worker
- when the facts required from a witness are very simple
- where a witness is ill and unable to attend an investigation meeting.

An investigator should provide a reasonable deadline for completion and ask the witness to answer specific questions or to include in their statement:

- their name and, where applicable, job title
- the date, place and time of any relevant issues
- what they saw, heard or know
- the reason why they were able to see, hear or know about the issues
- the date and time of statement
- their signature.

A witness statement supplied in writing will be of limited use where there are doubts about the witness's account or the witness needs to be probed for further details.

Written records and documents

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An investigator should collect any documentation that may be useful to establish the facts of the matter, such as attendance sheets/records or paper copies of electronic material. These types of documentation can help an investigator corroborate or contradict other evidence collected and can highlight areas that an investigator needs to explore further at an investigation meeting.

For example...

Nico is investigating a grievance that alleges a manager has been bullying an employee. He held an investigation meeting with the employee who claimed the manager had called him several derogatory names in private but had also been aggressive to him in emails.

Nico collects all emails between the two for the last three months and analyses the discussions.

At an investigation meeting with the manager, Nico is able to explore the content of several emails and probe the manager about the tone and language used.

Physical evidence

There may be physical evidence, such as CCTV or computer and phone records relevant to the investigation, which can be obtained lawfully and without breaching the employee's employment contract.

If physical evidence is collected, an investigator should document what it is, how it was collected and what it reveals. This can make it easier for an investigator to refer to the evidence at the conclusion of the investigation. Any physical evidence gathered should also be retained in case it needs to be viewed again at a later date.

Using CCTV and other personal data as evidence...

Policies and employee contracts should clarify whether or not an employer may use CCTV recordings and/or personal employee data as evidence in disciplinary and grievance matters.

Where this is not the case, an employer should only use such evidence where it is not practicable to establish the facts of the matter through the collection of other evidence only.

Some physical evidence that could be collected may be difficult or expensive to collect. An investigator should seriously consider how any relevant evidence could be collected and then decide whether the associated costs mean that it would be reasonable to collect or not.

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For example...

Adil is investigating an allegation of theft. He speaks to five witnesses, and four claim to have seen Jill putting the item in her bag. Upset, Jill claims at an investigation meeting that she has never been in the room where the item was taken from and demands the organisation get fingerprint analysis to prove she was in there.

Adil discusses this with the director. They decide the cost of paying for an expert to do this would be unreasonable.

Considerations if searching personal possessions

A search should only be conducted in exceptional circumstances where there is a clear, legitimate justification to search an employee or their possessions. Even if an employee's contract allows an employer to conduct a search, they will usually need an employee's consent for it to be lawful.

Where an investigator needs to search a desk or cupboard that an employee uses, the employee should be invited to be present. Where they are unable to be present, a manager should be present to witness the search.

If an employee refuses to be searched when their contract allows this, it might amount to unreasonable behaviour and/or jeopardise evidence that could potentially be used to exonerate them.

However, an employee may have a legitimate reason to refuse and an investigator should be sensitive to other factors that may explain a refusal. An investigator should therefore explore why an employee has refused to be searched and seek to resolve this rather than assume that a refusal implies guilt.

Where it is believed that a criminal offence may have been committed, an employer may call the police as they have wider powers to search individuals.

All requests and refusals should be recorded.

Step 5: Reporting the investigation findings

Once an investigator believes they have established the facts of the matter as far as is reasonably possible and appropriate, they will usually need to produce an investigation report that explains their findings. While a written report is not always necessary, many investigations will benefit if its findings are recorded in writing.

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An investigation report should cover all the facts that were and were not established, and whether there were any mitigating circumstances that also require consideration. To exclude any information may leave an investigation open to accusations of bias and filtering evidence to suit their findings.

The report should reflect the investigator's own conclusions. While an investigator may seek advice from a third party such as HR, the conclusions should be their own.

Writing an investigation report

A consistent structure to the investigation report should ensure that all issues raised in the terms of reference are covered and all of the investigation's findings are included.

An investigation report should include...	
Introduction	<ul style="list-style-type: none">• name and job title of the person who authorised the investigation• name and job title of the person who conducted the investigation• a brief overview of the circumstances that led to the investigation• the terms of reference of the investigation and if they were amended
Process of the investigation	<ul style="list-style-type: none">• how the investigation was conducted• what evidence was collected• whether any pieces of evidence could not be collected and why• names and job titles of all witnesses and why each witness was relevant to the matter• whether any witnesses could not be interviewed and why• where a witness statement has been anonymised explain why and provide any details of enquiry into their character and background
The investigation findings	<ul style="list-style-type: none">• summarise the findings from all relevant documents• summarise the key evidence from each witness statement• what facts have been established• what facts have not been established• whether there are any mitigating factors to consider• whether there is any other relevant information to consider

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Conclusion of report (if required)	<ul style="list-style-type: none">• recommendation based on all evidence collected• any other recommendations related to the matter
Supporting documents	<ul style="list-style-type: none">• copies of all documents and witness statements collected and referred to in the report should be included and clearly referenced

Acas has developed an investigation report template that an investigator can adapt for their own needs at www.acas.org.uk/templates

Tips and techniques for writing a report

When writing an investigation report an investigator should remember who will read the report once it is completed and that this will often include an employee who raised a grievance or an employee under investigation. The report should therefore:

-
- be written in an objective style
- avoid nicknames and jargon
- use same form of address for all people referenced
- use appropriate language and keep simple wherever possible
- stick to the facts of the matter
- keep it concise
- explain any acronyms used
- include all evidence that was collected.

Reporting what is likely to have happened

While reporting with absolute certainty on a matter is desirable it will often not be possible. An investigator should arrange their evidence into:

- **Uncontested facts:** Where the facts are not in dispute, they can simply be reported as factual.
- **Contested facts:** Where the facts are contested or contradictory they should determine what, on the balance of probabilities, took place (see below).
- **Unsubstantiated claims:** Where an investigator is unable to substantiate an allegation they should consider if further investigation is reasonable or report that they are unable to draw a conclusion.

The balance of probabilities

An investigator should endeavour to reach conclusions about what did or did not happen, even when evidence is contested or contradictory. In these circumstances an investigator will need to decide whether, on the

balance of probabilities, they could justifiably prefer one version of the matter over another and explain why.

Unlike criminal law, an investigator conducting an employment investigation does not have to find proof beyond all reasonable doubt that the matter took place. An investigator only needs to decide that on **the balance of probabilities** an incident is **more likely to have occurred than not**.

Malicious complaints

A further issue that an investigator may sometimes need to consider is whether an employee raised a malicious complaint. An investigator should consider what the evidence collected suggests but the employee should usually be given the benefit of any doubt. If an investigator decides the complaint was clearly malicious they could recommend formal or informal action, as set out below.

Requests to make a recommendation

It is common for an investigator to be asked to make a recommendation. However, an investigator should restrict their recommendations to only suggesting whether any further action may be necessary or beneficial. In most circumstances an investigator should recommend **formal action, informal action** or **no further action**.

An investigator **should not** suggest a possible sanction or prejudge what the outcome to a grievance or disciplinary hearing will be.

Formal action recommendation: The formal action an investigator could recommend will usually be:

- to initiate a disciplinary hearing
- changes to an organisation's policy or procedure
- further investigation into other matters uncovered.

Informal action recommendation: The informal action an investigator could recommend will usually be:

- training or coaching for parties involved
- counselling for parties involved
- mediation for parties involved
- notification that further similar action may result in disciplinary action.

No further action recommendation: Although an investigator may find there is no further action necessary they could recommend that counselling, mediation or another form of support may be beneficial to the parties involved and the organisation.

Step 6: After an investigation is completed

Concluding the role of an investigator

Once an investigator completes their investigation and hands in their report they will usually not be involved in any further action other than the following possible matters:

- **Discussing the report in person:** sometimes an investigator may need to discuss their findings with the individual or panel they report to. In disciplinary matters, the focus of discussion should only be to decide whether any further steps are necessary. The investigator should not discuss what sanction might be imposed if a disciplinary charge is established.
- **Attending the disciplinary hearing:** an investigator may be required to attend a subsequent hearing. However, they should only be there in a fact giving capacity. They should not be there to give their opinion or present the case against the employee.
- **Input into policy or procedure review:** depending on the needs of the organisation it may be appropriate to use the expertise the investigator has accumulated to advise on amending or updating policies and procedures.

If an investigator does continue to be involved in the process for any other reason there may be a perception that the investigation was biased and this should be avoided wherever possible.

It should be the **decision maker** and not the investigator who makes the final decision as to whether or not a disciplinary hearing will be held. This is usually the person or group who would be conducting the disciplinary process. If their decision differs from the investigator's recommendation, the reasons for this should be written down and included as an addendum to the report.

Recommendations unrelated to the investigation matter

During an investigation an investigator may identify other issues that, while outside the scope of the terms of reference, may still require action. An investigator should note what other matters may require further action and report these to the employer in a separate document for them to consider.

For example...

While investigating a grievance about a request to work part-time, Ibrahim realises the company's flexible-working policy needs to be updated to bring it in line with the law. He also discovers that recently promoted managers have not been trained in handling flexible working requests as the organisation's policy requires.

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Ibrahim does not include these issues in his report as they are not relevant to the actual matter being investigated. However, in a separate document, he does recommend that the policy urgently needs reviewing and that several managers should be given training.

Clarifications and further enquiries

On some occasions an issue may be raised during a formal hearing which may not appear to have been considered during the investigation. The hearing may therefore need to be adjourned while the decision maker chairing the hearing discusses and clarifies the matter with the investigator.

Only in exceptional circumstances will there be a need to reinvestigate the whole matter. However, a decision maker may ask an investigator to investigate any new issues put forward or investigate it further themselves.

Approaching the matter in this way means that a deficiency in an investigation may be rectified or a new argument can be fully considered before the hearing is reconvened and a final decision is made.

Keeping investigation reports

There will usually be a need to retain investigation reports for a period of time. Where the report includes details about individuals, (including witnesses) it is important to keep the report securely stored and restrict access only to those individuals who need it and to be aware of data protection or other legal requirements.

If an individual wishes to see a report they believe they have been named in, they have a right to see any parts of the report that contains information about them, or that is reliant on information that they have provided. However, they should not be allowed to see private information belonging to other individuals.

The report should be securely disposed of once it becomes irrelevant or out of date.

For more information on data protection, go to www.ico.org.uk

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Further information

Acas learning online

Acas offers free E-Learning on a wide range of topics including, Discipline & Grievance and Conflict Resolution. For more information go to www.acas.org.uk/elearning

Acas training

Acas offers a conducting investigations course that is carried out by experienced Acas staff who work with businesses every day.

Go to www.acas.org.uk/training for up-to-date information about our training and booking places on face-to-face courses.

Acas business solutions

Acas specialists can visit an organisation, diagnose issues in its workplace, and tailor training and support to address the challenges it faces. To find out more, see the Acas website page Business solutions www.acas.org.uk/businesssolutions

Related Acas guidance

- Acas Code of Practice on disciplinary and grievance procedures
- Discipline and grievances at work: The Acas guide
- Bullying and harassment at work: a guide for managers and employers
- Bullying and harassment at work: a guide for employees
- Guidance on discrimination is available at www.acas.org.uk/equality

Additional help

Employers may be able to seek assistance from groups where they are members. For example, if an employer is a member of the Confederation of British Industry or the Federation of Small Businesses, it could seek its help and guidance.

If an employee is a trade union member, they can seek help and guidance from their trade union representative or equality representative.

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Keep up-to-date and stay informed

Visit www.acas.org.uk for:

- Employment relations and employment law guidance – free to view, download or share
- Tools and resources including free-to-download templates, forms and checklists
- An introduction to other Acas services including mediation, conciliation, training, arbitration and the Acas Early Conciliation service
- Research and discussion papers on the UK workplace and employment practices
- Details of Acas training courses, conferences and events.

Sign up for the free Acas e-newsletter. The Acas email newsletter is a great way of keeping up to date with changes to employment law and to hear about events in your area. Find out more at:

www.acas.org.uk/subscribe

The Acas Model Workplace. This engaging and interactive tool can help an employer diagnose employment relations issues in its workplace. The tool will work with you to identify areas of improvement you can consider, and will point toward the latest guidance and best practice:

www.acas.org.uk/modelworkplace

Acas Helpline Online. Have a question? We have a database of frequently asked employment queries that has been developed to help both employees and employers. It is an automated system, designed to give you a straightforward answer to your employment questions, and also gives links to further advice and guidance on our website:

www.acas.org.uk/helplineonline

Acas Helpline. Call the Acas Helpline for free and impartial advice. We can provide employers and employees with clear and confidential guidance about any kind of dispute or relationship issue in the workplace. You may want to know about employment rights and rules, best practice or may need advice about a dispute. Whatever it is, our team are on hand. Find out more: www.acas.org.uk/helpline

Look for us on:

Facebook <https://www.facebook.com/acasorguk>

LinkedIn <http://linkd.in/cYJbuU>

Twitter <http://twitter.com/acasorguk>

YouTube <https://www.youtube.com/user/acasorguk>

Sexual harassment and harassment at work

Technical
guidance

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Foreword

The Equality and Human Rights Commission is issuing this guidance on sexual harassment and other forms of harassment at work to help employers, workers and their representatives understand the extent and impact of harassment in the workplace, the law in this area and best practice for effective prevention and response.

The #MeToo movement has highlighted the fact that sexual harassment is pervasive in contexts as diverse as Hollywood and Westminster, and reveals the barriers that many women and men experience in reporting it. Meanwhile research shows that lesbian, gay, bisexual and transgender (LGBT) people and ethnic minorities and also continue to face unacceptable levels of harassment at work. No workplace is immune to harassment, and a lack of reported cases does not mean that people have not experienced it.

Employers are responsible for ensuring that workers do not face harassment in their workplace. They should take reasonable steps to protect their workers and will be liable for harassment committed by their workers if they fail to do so. Our 2018 report, 'Turning the Tables', highlighted some of the most prevalent issues, and made a range of recommendations to the UK Government aimed at tackling the issue. This guidance is just one of the outcomes of this process.

We have a set of powerful tools to enforce the law. We can, for example, take organisations to court and intervene in individual cases. We also provide information, support and advice so that employers can help prevent workplace harassment and respond effectively when it does occur.

This guidance is the authoritative and comprehensive guide to the law and best practice in tackling harassment. It provides real and relevant examples for both workers and employers in a user-friendly and accessible way so employers of all sizes and types can take practical steps to eliminate harassment in the workplace.

We have prepared and issued this guidance using our powers to provide information and advice under section 13 of the Equality Act 2006. It is **not** a statutory code issued under section 14 of the Equality Act 2006. This means that while an employment tribunal is not obliged to take this guidance into account in cases where it thinks it is relevant, it may still be used as evidence in legal proceedings.

In developing this guidance we have consulted representatives from a range of groups, including government departments, public sector bodies, trade unions, representative bodies, lawyers, regulators and third sector organisations. These contributors have enriched and improved the content and we are grateful for their help.

Further detail about the terms used in this guidance can be found at the end of this document.

The scale and effect of harassment in the workplace

The evidence of the need for tougher action on harassment in the workplace is overwhelming. Harassment at work in all its different forms has a significant negative effect on both workers and employers. It damages the mental and physical health of individuals, which affects both their personal and working life, and has a negative impact on workplace culture and productivity. Moreover, ineffective responses to harassment complaints compound the impact of the harassment on the individual.

In the following sections we discuss the prevalence and effects of some of the different forms of harassment in the workplace.

Sexual harassment and harassment related to sex

In early 2018 we called for evidence from women and men who had experienced sexual harassment at work, the findings from which we published in our report, 'Turning the tables'.¹ The aim was not to describe the scale of the problem but to draw on a wide range of experience to find practical solutions.

Three-quarters of people who responded had experienced sexual harassment at work. Nearly all of the people who had been sexually harassed were women. While sexual harassment can be perpetrated or experienced by both men and women, we know that women are most often the targets and men the perpetrators. Harassment in the workplace largely reflects power imbalances based on gender and is part of a spectrum of disrespect and inequality that women face in the workplace and everyday life.

¹ [Equality and Human Rights Commission \(2018\), 'Turning the tables: ending sexual harassment at work'](#) [accessed: 6 January 2020].

The most common perpetrator of harassment was a senior colleague. However, just under a quarter of respondents reported being harassed by customers, clients or service users – known as third party harassment.

Around half of respondents hadn't reported their experience of harassment to anyone in the workplace. Barriers to reporting included:

- the view that the employer would not take the issue seriously
- a belief that alleged harassers, particularly senior staff, would be protected
- fear of victimisation
- a lack of appropriate reporting procedures.

Our findings reflect other research that has been undertaken in this area. For example, Trades Union Congress (TUC) research in 2016² found that 52 per cent of women had experienced unwanted behaviour at work, including groping, sexual advances and inappropriate jokes, which rose to 63 per cent for young women aged 16–24. Similarly, research undertaken by the Young Women's Trust³ found that 1 in 5 young women said they either didn't know how to report sexual harassment, or were too scared to, because of concerns that this might mean losing their job or being given fewer hours. Their findings also indicated that 1 in 14 young women reported being treated less well in their job, or while looking for work, because they had rejected sexual advances.

The professional, financial, and emotional impact on those who have been harassed can be profound. Some respondents to our survey described receiving threats that their career could be damaged if they pursued their complaint, or said they had been disciplined or lost their job because they complained. Others said they were blamed for the harassment taking place or felt punished by being moved to another department or role and described how their reputation and health were damaged.

² [Trades Union Congress \(2016\), 'Still just a bit of banter? Sexual harassment in the workplace in 2016'](#) [accessed: 6 January 2020]. The results of the research came from a sample of 1,537 adult women who were asked about sexual harassment.

³ [Young Women's Trust \(2018\), 'It's \(still\) a rich man's world: inequality 100 years after votes for women'](#) [accessed: 6 January 2020]. The findings are from a survey of 4,010 young women aged 18–30.

While recent research largely concentrates on sexual harassment, it is clear that harassment related to sex such as unwanted sexist comments is a problem too.⁴ For example, our pregnancy and maternity discrimination research found that one in five mothers said they had experienced harassment or negative comments related to pregnancy or flexible working at work. While pregnancy and maternity is not a protected characteristic under the harassment provisions, such behaviour would amount to harassment related to sex.

The economic costs of sexual harassment and harassment related to sex are harder to estimate. However, it is clear that such harassment can have serious economic consequences for employers as a result of the negative impact on staff engagement and productivity, which in turn can undermine organisational effectiveness and cause damage to an employer's public reputation.

Reducing the barriers that stop women participating fully in the workplace is also central to the future success of the UK economy. Harassment is a significant contributing factor to the gender pay gap which, along with other workplace equality issues, has a serious economic impact. McKinsey⁵ found that ensuring gender equality in UK workplaces has the potential to add an extra £150 billion to business-as-usual gross domestic product (GDP) forecasts in 2025, and could translate into 840,000 additional female workers.

Harassment of LGBT people

In 2019, the TUC conducted a survey of more than 1,000 lesbian, gay, bisexual and transgender (LGBT) people on their experience of sexual harassment at work. Its report, 'Sexual harassment of LGBT people in the workplace',⁶ revealed that nearly 7 out of 10 (68 per cent) of LGBT people who responded had been sexually harassed at work.

⁴ See Chapter 2 for an explanation of the difference between sexual harassment and harassment related to sex.

⁵ [McKinsey & Company \(2016\), 'Women Matter 2016: reinventing the workplace to unlock the potential of gender diversity'](#) [accessed: 6 January 2020].

⁶ [Trades Union Congress \(2019\), 'Sexual harassment of LGBT people in the workplace'](#) [accessed: 6 January 2020].

Around two-thirds of those surveyed had not reported their experience of sexual harassment in the workplace. One in four people identified that doing so would have meant revealing their sexual orientation and/or gender identity and that they were afraid of being 'outed' at work.

Many of the incidents of sexual harassment that were highlighted appeared to be linked to the sexualisation of LGBT identities. Harassment ranged from verbal abuse, to unwanted touching, and serious sexual assault.

Evidence from a number of studies⁷ echoes these findings and shows that LGBT people suffer much higher levels of bullying and harassment (more broadly than just sexual harassment) at work than heterosexual people: twice as high for gay and bisexual men or four times as high for LGBT people as a whole, according to different studies.

A Unison guide⁸ on harassment at work states that persistent harassment commonly leads to poor work performance and attendance, which in turn may lead to dismissal and the root cause – homophobia or biphobia – never being acknowledged.

LGB workers who do complain of harassment are frequently accused of being over-sensitive, having no sense of humour or of 'bringing it on themselves' by not hiding their sexual orientation.⁹

⁷ [National Institute of Economic and Social Research \(2016\), 'Inequality among lesbian, gay bisexual and transgender groups in the UK: a review of evidence'](#) [accessed: 6 January 2020].

⁸ [Unison \(2016\), 'Harassment at work: a UNISON guide'](#) [accessed: 6 January 2020].

⁹ As above.

Evidence presented in a review commissioned by the Government Equalities Office and published by the National Institute of Economic and Social Research (2016),¹⁰ suggests that trans people may be even more likely to experience discrimination and harassment at work than LGB people, with one study finding up to 50 per cent of trans people in work had experienced this. Respondents reported extremely poor service from human resources departments, a lack of understanding among managers of trans issues and little support when they faced discrimination and harassment. Consequences of this included restricted job choice, reduced progression and inability to be 'out' at work.

Harassment related to race

The TUC's report on racism at work, 'Racism Ruins Lives',¹¹ which sets out the findings of its 2016/17 survey, shows that racism in the workplace still plays a major role in the experience of ethnic minority workers.

Over 70 per cent of Asian and Black workers reported that they had experienced racial harassment at work in the last five years.

The most common form of racial harassment encountered at work was racist remarks. Of those who responded, 46 per cent of people from Black, Asian and Mixed Heritage background, and 32 per cent of non-White other participants reported that they had been subjected to 'verbal abuse and racist jokes'.

More than 40 per cent of workers who reported a racist incident to their employer said that their complaint was either ignored or that they themselves had subsequently been identified as 'troublemakers'. Of respondents who raised a complaint, 1 in 10 said that they were subsequently disciplined and/or forced out of their job as a result of doing so.

Nearly half of all respondents said that racism had negatively affected their ability to do their job.

¹⁰ [National Institute of Economic and Social Research \(2016\), 'Inequality among lesbian, gay bisexual and transgender groups in the UK: a review of evidence' \[accessed: 6 January 2020\].](#)

¹¹ [Centre on Dynamics of Ethnicity, University of Manchester \(2019\), 'Racism Ruins Lives: an analysis of the 2016-2017 Trade Union Congress Racism at Work Survey' \[accessed 6 January 2020\].](#)

Harassment related to religion or belief

'Racism Ruins Lives',¹² while focused on race, also draws attention to Islamophobia and antisemitism in the workplace and the way in which different religious groups are represented as constituting a distinct racial group. The report highlights the many encounters of Islamophobia and antisemitism reported through the TUC's racism at work survey.

A report by the Social Mobility Commission, 'The Social Mobility Challenges Faced by Young Muslims', found that the 'othering' of Muslims by employers and colleagues through Islamophobia, racism, discrimination and harassment in the labour market can increase the disadvantage experienced by young Muslims. They found that racism and discrimination in the workplace is limiting aspirations and preventing young Muslims from 'aiming high' and fulfilling their potential.

Harassment related to age

Both young and older workers have experienced harassment and discrimination at work. Research from the Department for Work and Pensions' (DWP), 'Attitudes to Age in Britain 2010/11',¹³ found that one-third of respondents had experienced age discrimination in the past year, and younger respondents aged under 25 were at least twice as likely as all other age groups to have experienced age prejudice. Experiences of age discrimination were also affected by factors such as gender. For example, the chances of a man experiencing age discrimination are about eight per cent lower compared to a woman.

¹² [Centre on Dynamics of Ethnicity, University of Manchester \(2019\), 'Racism Ruins Lives: an analysis of the 2016-2017 Trade Union Congress Racism at Work Survey' \[accessed: 6 January 2020\].](#)

¹³ [Department for Work and Pensions \(2011\), 'Attitudes to age in Britain 2010/11' \[accessed 6 January 2020\].](#)

Harassment related to disability

A Wales TUC report, 'Disability and "hidden" impairments in the workplace',¹⁴ stated that 24 per cent of disabled respondents said that they felt that disability was treated negatively in their workplace. In contrast, just six per cent of non-disabled respondents said they felt that disability was treated negatively in their workplace, highlighting a lack of awareness of the issues disabled people face. Respondents described negative and often discriminatory attitudes and behaviour towards disabled people. This included harassment such as insulting or inappropriate questions and comments and excluding or isolating disabled workers due to their disability.

Taking action

The scale of harassment that we and others have found is disturbing – and has been largely hidden due to under-reporting. Low reporting rates have often been taken by employers to mean that harassment is uncommon in their workplace. In fact, a lack of reported incidents could reflect an absence of confidence in reporting and resolution procedures, indicating an even greater problem.

The effects of harassment on individuals are damaging, long-lasting and profound, and they harm employers. All harassment is unacceptable and it is not inevitable. Employers can and must take action to change culture and behaviours and eradicate harassment in the workplace. By taking the practical steps outlined in this guidance, employers can protect their workers against harassment and transform workplace cultures.

¹⁴ [Wales TUC Cymru \(2018\), 'Disability and "hidden" impairments in the workplace'](#) [accessed: 6 January 2020].

1. Introduction

Scope of the guidance

What this guidance covers

- 1.1.** This guidance applies in England, Scotland and Wales and covers sexual harassment, harassment and victimisation in employment under the work provisions in the Act. The work provisions are based on the principle that people with the protected characteristics set out in the Act should not be harassed or discriminated against at work (**Part 5 of the Act**).

Who this guidance is for

This guidance will:

- help **employers** to understand their legal responsibilities in relation to harassment and victimisation; the steps they should take to prevent harassment and victimisation at work; and what they should do if harassment or victimisation occurs
 - help **workers** to understand the law and what their employer should do to prevent harassment and victimisation, or to respond to their complaint of harassment or victimisation
 - help **lawyers and other advisers** to advise workers and employers about these issues, and
 - give **employment tribunals and courts** clear guidance on the law and best practice on the steps that employers could take to prevent and deal with harassment and victimisation.
- 1.2.** While all employers must take reasonable steps to prevent harassment, what is reasonable will vary from employer to employer. Small employers may have more informal practices, have fewer written policies and may be constrained by a smaller budget. This guidance should be read with awareness that large and small employers may carry out their duty to prevent harassment in different ways but that no employer is exempt from this duty because of size.

Our role

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. We operate independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. We enforce equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. We also encourage compliance with the Human Rights Act 1998.

- 1.3.** We exist to protect and promote equality and human rights in Britain. We stand up for freedom, compassion and justice in changing times. Our work is driven by a simple belief: if everyone gets a fair chance in life, we all thrive.
- 1.4.** We use a wide range of different methods to tackle discrimination, disadvantage and human rights abuses, work with other organisations and individuals to advance fairness, dignity and respect, and we are ready to take action against those who abuse the rights of others. Our statutory powers give us a range of tools with which to do this.
- 1.5.** We are recognised as an expert and an authority on equality and human rights law, evidence and analysis. Policymakers, businesses and public bodies turn to us for guidance and advice.
- 1.6.** We are also Britain's national equality body and have been awarded an 'A' status as a national human rights institution (NHRI) by the United Nations. We work with equivalent bodies in Scotland and Northern Ireland, across Europe and internationally to protect and promote equality and human rights around the world.
- 1.7.** Participation in work is an important aspect of personal fulfilment as well as an economic necessity, and the right to work and to fair working conditions are fundamental human rights.

Please note that throughout this guide we use the terms:

- **'must'**: where the person or organisation referred to has a legal duty
- **'can'**: where the person or organisation has a power (not a duty) under statutory or common law
- **'should' or 'could'**: for guidance on good practice.

2. What is harassment?

Introduction

- 2.1.** In any workforce there will be a range of attitudes about what conduct is considered to be offensive, humiliating, intimidating, hostile, or degrading. What one worker – or even a majority of workers – might see as harmless fun or ‘banter’, another may find unacceptable. A worker complaining about conduct may be considered by others to be overly sensitive or prudish. However, it is important to understand that conduct can amount to harassment or sexual harassment even if that is not how it was intended. This chapter explains what types of behaviour amount to harassment under the Act. These include harassment related to a relevant protected characteristic, sexual harassment, and less favourable treatment for rejecting or submitting to harassment. No form of harassment can ever be justified.
- 2.2.** Unlike direct discrimination, harassment does not take a comparative approach. That is, it is not necessary for the worker to show that another person without the protected characteristic was, or would have been, treated more favourably. For an explanation of direct discrimination, please see Chapter 4 of the [Employment Statutory Code of Practice](#).

What the Act says

- 2.3.** The Act makes three types of harassment unlawful. These are:
- harassment related to a ‘relevant protected characteristic’ (**s.26(1)**)
 - sexual harassment (**s.26(2)**), and
 - less favourable treatment of a worker because they submit to, or reject, sexual harassment or harassment related to sex or gender reassignment (**s.26(3)**).
- 2.4.** ‘Relevant protected characteristics’ are:
- age
 - disability

- gender reassignment
- race
- religion or belief
- sex, and
- sexual orientation (**s.26(5)**).

2.5. Unlike other forms of discrimination, pregnancy and maternity and marriage and civil partnership are not protected under the harassment provisions. However, harassing somebody because of pregnancy or maternity would be harassment related to sex.

Harassment related to a protected characteristic

- 2.6.** This type of harassment arises when a worker is subject to unwanted conduct that is related to a protected characteristic and has the purpose or the effect of:
- violating the worker's dignity, or
 - creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker (**s.26 (1)**).
- 2.7.** Conduct that has one of these effects can be harassment even if the effect was not intended.

Meaning of 'unwanted conduct'

- 2.8.** Unwanted conduct covers a wide range of behaviour. It can include:
- spoken words
 - banter
 - written words
 - posts or contact on social media
 - imagery
 - graffiti
 - physical gestures
 - facial expressions
 - mimicry
 - jokes or pranks
 - acts affecting a person's surroundings
 - aggression, and
 - physical behaviour towards a person or their property.

- 2.9.** The word ‘unwanted’ means essentially the same as ‘unwelcome’ or ‘uninvited’.
- 2.10.** Unwanted means ‘unwanted by the worker’ and should be considered from the worker’s subjective point of view. However, external factors may be considered by a tribunal or court in deciding whether it accepts that, subjectively, the conduct was unwanted as explained further at 2.11 to 2.14.
- 2.11.** It is not necessary for the worker to say that they object to the conduct for it to be unwanted. However, in deciding whether a claimant has established that the conduct was unwanted, a tribunal or court may take into account whether or not the worker objected to the conduct (among other things).
- 2.12.** In some cases, it will be obvious that conduct is unwanted because it would plainly violate a person’s dignity.

Example

A male manager is to interview a female worker, whom he line manages, for a promotion opportunity. The manager says that she’s the favourite for the job because she’s the best-looking candidate. The manager’s statement is self-evidently unwanted and the worker need not object to it for a tribunal or court to find it is unwanted.

- 2.13.** At the opposite end of the spectrum are cases in which many people would not like the behaviour, but the actions of the particular worker concerned make it clear that in their case, the conduct was not unwanted.

Example

A male worker is called a number of homophobic names by his colleagues who know that he is actually heterosexual. Many workers would not welcome this sort of behaviour. However, an employment tribunal finds that this worker did not object to the conduct, which continued for several years. He willingly joined in, making equally offensive comments to his colleagues. There is also evidence of genuine friendships with the colleagues, such as going on holiday with one of them. The tribunal finds that in the circumstances, the worker's actions do not indicate that the conduct was unwanted.

- 2.14.** There may be circumstances in which a course of conduct is not unwanted in the earlier stages, but at some point 'oversteps the mark' and becomes unwanted.

Example

In the previous example, the colleagues use very offensive homophobic terms about the worker in an in-house magazine, which is read by a much wider group than the immediate group of colleagues. In the circumstances, the tribunal accepts that this article oversteps what the worker has previously deemed acceptable and was therefore unwanted.

Meaning of 'related to'

- 2.15.** Unwanted conduct 'related to' a protected characteristic has a broad meaning. The conduct does not have to be because of the protected characteristic. It includes the following situations:

- a) Where conduct is related to the worker's own protected characteristic**

Example

If a worker with a hearing impairment is verbally abused because he wears a hearing aid, this could amount to harassment related to disability.

- 2.16.** Protection from harassment also applies where a person is generally offensive to other workers but, in relation to a particular worker, the conduct is unwanted because of that worker's protected characteristic.

Example

During a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexist nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment related to sex, even though the remarks were not specifically directed at her.

b) When there is any connection with a protected characteristic

Workers are also protected where the unwanted conduct is connected to a protected characteristic, even if the worker does not have the relevant protected characteristic. This includes where the employer knows that the worker does not have the relevant characteristic. Connection with a protected characteristic may arise in several situations:

- The worker may be associated with someone who has a protected characteristic.

Example

A worker has a son who is a trans man. His work colleagues make jokes about his son's transition. The worker could have a claim for harassment related to gender reassignment.

- The harasser may wrongly believe the worker to have a particular protected characteristic.

Example

A Sikh worker wears a turban to work. His manager wrongly assumes he is Muslim and subjects him to Islamophobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager's perception of his religion.

- The worker is known not to have the protected characteristic but nevertheless is subjected to harassment related to that characteristic.

Example

A worker is subjected to homophobic banter and name calling, even though her colleagues know she is not gay. Because the form of the abuse relates to sexual orientation, this could amount to harassment related to sexual orientation.

- The unwanted conduct related to a protected characteristic is not directed at the particular worker but at another person or no one in particular.

Example

A manager racially abuses a Black worker in front of a White colleague. The Black worker has a clear claim for harassment related to race. In addition, the Black worker's White colleague is offended and could also bring a claim of harassment related to race.

- The unwanted conduct is because of something related to the protected characteristic, but does not take place because of the protected characteristic itself.

Example

A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.

- 2.17.** In all of the circumstances listed, there is a connection between the unwanted conduct and the protected characteristic, and so the worker could succeed in a claim of harassment if the unwanted conduct has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- 2.18.** However, in deciding whether conduct was related to the protected characteristic, an employment tribunal may take account of the context in which the conduct takes place.

Example

A Muslim worker, has a conversation with a colleague about so-called 'Islamic State' fighters. The worker relays to the colleague some comments made by a journalist about Islamic State fighters which are of a positive nature. Later that month the colleague approaches the worker and asks, 'Are you still promoting Islamic State?' The worker is upset at the allegation that he promotes Islamic State and brings a claim of harassment related to religion or belief. The tribunal finds that the colleague asked that question because of the worker's previous comments, not because the worker is a Muslim or because of anything related to the worker's religion. The question was therefore not harassment.

Sexual harassment

- 2.19.** Sexual harassment occurs when a worker is subjected to unwanted conduct as defined in paragraphs 2.8 to 2.14 and which is of a sexual nature. The conduct need not be sexually motivated, only sexual in nature (**s.26(2)**).

Example

A male worker alters a pornographic image by pasting an image of his female colleague's face on to it. He then sends it to their other colleagues, causing them to ridicule her. There was no sexual motivation behind this act, but the use of the image is sexual in nature.

- 2.20.** Conduct 'of a sexual nature' includes a wide range of behaviour, such as:
- sexual comments or jokes
 - displaying sexually graphic pictures, posters or photos
 - suggestive looks, staring or leering
 - propositions and sexual advances
 - making promises in return for sexual favours
 - sexual gestures
 - intrusive questions about a person's private or sex life or a person discussing their own sex life
 - sexual posts or contact on social media
 - spreading sexual rumours about a person
 - sending sexually explicit emails or text messages, and
 - unwelcome touching, hugging, massaging or kissing.
- 2.21.** An individual can experience unwanted conduct from someone of the same or a different sex.
- 2.22.** Sexual interaction that is invited, mutual or consensual is not sexual harassment because it is not unwanted. However, sexual conduct that has been welcomed in the past can become unwanted.

Example

A female worker has a brief sexual relationship with her supervisor. The worker tells her supervisor that she thinks it was a mistake and doesn't want the relationship to continue. The next day, the supervisor grabs the worker's bottom, saying 'Come on, stop playing hard to get'. Although the original sexual relationship was consensual, the supervisor's conduct after the relationship ended is unwanted conduct of a sexual nature.

Less favourable treatment for rejecting or submitting to unwanted conduct

- 2.23.** The third type of harassment occurs when:
- a worker is subjected to unwanted conduct
 - of a sexual nature
 - related to sex, or
 - related to gender reassignment
 - the unwanted conduct has the purpose or effect of
 - violating the worker's dignity, or
 - creating an intimidating, hostile degrading, humiliating or offensive environment for the worker, and
 - the worker is treated less favourably because they submitted to, or rejected the unwanted conduct (**s.26(3)**).

Example

In the previous example, the worker responds to the supervisor's behaviour saying, 'Get off me, I'm not playing hard to get!' After that, the supervisor starts to make things more difficult for the worker, giving her more work to do than others and being more critical of her work. The supervisor is treating the worker less favourably because she rejected his unwanted conduct.

- 2.24.** Under this type of harassment, it may be the same person who is responsible for the initial unwanted conduct and the subsequent less favourable treatment, or it may be two (or more) different people (**s.26(3)(a)**).

Example

Continuing with the previous example, the supervisor informs his line manager, who he is friendly with, about his rejection by the worker. The line manager feels sorry for the supervisor, thinking that the worker ‘led him on’. When the worker applies for a promotion, the line manager rejects her application saying that ‘she can’t be trusted’, an opinion based on her rejection of the supervisor. The line manager’s actions also amount to less favourable treatment because of the worker’s rejection of the supervisor’s unwanted conduct.

Meaning of ‘purpose or effect’

- 2.25.** For all three types of harassment, if the harasser’s **purpose** is to violate the worker’s dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for them, this will be sufficient to establish harassment. It will not be necessary to look at the effect that conduct has had on the worker.
- 2.26.** Unwanted conduct will also amount to harassment if it has the **effect** of violating the worker’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them, even if that was not the intended purpose.

Example

Male workers download pornographic images on to their computers in an office where a woman works. She may make a claim for harassment if she is aware that the images are being downloaded and the effect of this is to create a hostile and humiliating environment for her. In this situation, it is irrelevant that the male workers did not intend to upset the woman, and that they merely considered the downloading of images as ‘having a laugh’.

- 2.27.** In deciding whether conduct had that effect, each of the following must be taken into account:

- a) **The perception of the worker**; that is, whether they feel that it violated their dignity or created an offensive environment for them **(s.26(4)(a))**. This part of the test is a subjective question and depends on how the worker regards the treatment.
- b) **The other circumstances of the case**. Circumstances that may be relevant may include:
- the personal circumstances of the worker experiencing the conduct (for example, the worker's health, including mental health; mental capacity; or previous experience of harassment)
 - whether the harasser is in a position of trust or seniority to the worker, or holds any other form of power over them
 - the race or cultural background of those involved. For example, a particular term may be offensive to people of one race because historically it has been used as a derogatory term in relation to that race, whereas people of other races may not generally understand it to be offensive, and
 - the environment in which the conduct takes place **(s.26(4)(b))**.
- c) **While the worker's perception of the conduct is key to whether something amounts to sexual harassment, consideration must also be given to whether it is reasonable for the conduct to have that effect**. This is an objective test. A tribunal or court is unlikely to find unwanted conduct has the effect, for example, of offending a worker, if it considers the worker to be hypersensitive and that any other reasonable person subjected to the same conduct would not have been offended **(s.26(4)(c))**.

2.28. Sometimes the harasser may put forward evidence to suggest that their conduct could not have had the relevant effect on the worker. Where they do so, an employer must not rely on irrelevant information about the conduct of the individual.

Example

A worker's manager makes comments to her about her breasts. The worker brings a claim of sexual harassment against her employer. The manager informs the employer that the worker previously posed topless on page 3 of a national newspaper. The employer tries to produce this information to the tribunal as evidence that the worker could not have been offended by her boss's comments. The tribunal would be right to find that the information is irrelevant. The worker could be offended by her boss's comments regardless of the fact that she had posed topless for a newspaper.

Meaning of violation of dignity or creation of an intimidating, hostile, degrading, humiliating or offensive environment

- 2.29.** To amount to harassment, the unwanted conduct must have had the purpose or effect of violating the worker's dignity, **or** creating a hostile, degrading, humiliating or offensive environment for them. It is not necessary to show both.
- 2.30.** Many acts of unwanted conduct will have the effect of both violating the worker's dignity and creating the relevant environment for them. However, it is possible that an act may do one but not the other.
- 2.31.** 'Environment' in this context means a state of affairs. An environment may be created by a single act of unwanted conduct, but the effects of that single act must be longer in duration to do so. Whereas a single act of unwanted conduct which does not have an enduring effect could well violate a person's dignity in the moment.

2.32. Example

A Black worker's colleague says that he is a member of a far-right activist group and joined because he thinks there are too many 'coloured' people in the UK taking jobs away from 'indigenous' people. He only makes the comment once but it creates an intimidating environment for the worker every time she sees him in the office.

3. What is victimisation?

Introduction

- 3.1.** Our 'Turning the Tables' report revealed that fear of victimisation is one of the biggest barriers to people reporting harassment at work. It is important that employers recognise the role that fear of victimisation plays in relation to how they approach and deal with harassment and sexual harassment at work. This will be a key factor in their ability to fulfil their duty to prevent and protect employees from harassment. This chapter explains what the Act says about victimisation in the context of harassment at work. For consideration of victimisation in the wider context please see Chapter 9 of the [Employment Statutory Code of Practice](#).

What the Act says

- 3.2.** Victimisation means treating a worker badly (subjecting them to a detriment) because they have done a protected act – for example, making a complaint of harassment (see paragraphs 3.6 to 3.16 for the full definition). Victimisation also means subjecting a worker to a detriment because it is believed they have done or are going to do a protected act; the worker does not actually need to have done the protected act (**s.27(1)**).

Example

A bar owner hears a rumour that one of his workers may make a grievance about harassment related to race by a colleague. As the worker has only been in his employment for a few weeks, the owner dismisses the worker to avoid dealing with the grievance. The worker, in fact, had no intention of raising a grievance. Nevertheless, the bar owner has subjected her to a detriment because he believed that she would, and as such her dismissal is an act of victimisation.

- 3.3.** The worker does not need to compare their treatment with the treatment of another worker who has not done a protected act, and show that this comparable worker would not have been subjected to the same detrimental treatment. The worker only has to show that they have experienced detrimental treatment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act (**s.27(2)(c) and (d)**).
- 3.4.** The detrimental treatment does not need to be connected to a protected characteristic. However, there does need to be a protected act (see paragraphs 3.6 to 3.16 for the definition of a protected act).

Example

A worker gives evidence to the employment tribunal which supports his colleague's claim of sexual orientation discrimination. As a result, the worker is denied a promotion. The worker has been subjected to a detriment because he did a protected act – giving evidence in connection with a claim under the Equality Act. This is victimisation. The worker's sexual orientation is irrelevant to whether he has been victimised or not.

- 3.5.** Former workers are also protected against victimisation.

Example

A grocery shop worker resigns after making a sexual harassment complaint against the owner. Several weeks later, she tries to make a purchase at the shop but is refused service by the owner because of her complaint. This could amount to victimisation.

What is a 'protected act'?

- 3.6.** Former workers are also protected against victimisation.
- making a claim or complaint under the Act (for example, for discrimination or harassment)
 - helping someone else to make a claim by giving evidence or information
 - making an allegation that someone has breached the Act, or
 - doing anything else in connection with the Act **(s.27(2)(a)-(d))**.
- 3.7.** This protection will apply to anyone making a claim or allegation that the Act has been breached or assisting someone (like a colleague) in doing so. It is irrelevant whether the Act was breached or not, as long as the person doing the protected act genuinely believes that the information or evidence they are giving is true.
- 3.8.** Protected acts include claims or allegations of discrimination and harassment under both the Act and any of the legislation that the Act replaced.

Example

In 2009, a worker brought an employment tribunal claim under the Sex Discrimination Act 1975 against her employer. In 2019, she applies for a job with another company. Upon checking her employment history, the company feels that her reason for leaving her previous employment is vague and calls the previous employer to find out more. The previous employer says a number of bad things about the worker. Although the worker brought proceedings under the Sex Discrimination Act 1975 and not the Act, she has still done a protected act and her previous employer's comments may still therefore amount to victimisation.

- 3.9.** As this example suggests, there is no limit on how much time may elapse between the protected act and the detriment, provided that the worker is subjected to the detriment because of the protected act and not because of some other reason.
- 3.10.** The protected act may relate to any part of the Act, not just the employment provisions. The act of victimisation may relate to the provision of services, goods or education or the exercise of a public function, for example.

Example

A nurse is employed by an NHS Trust. She is being treated at the hospital where she works. She brings a claim under the services provisions of the Act against the Trust, relating to sexual harassment that she was subjected to while undergoing treatment. She is subsequently denied a promotion by her manager who says that she is not a 'team player', a view based on her bringing a claim against her employer. Although her claim is brought under the services provisions of the Act, she is still protected against being subjected to a detriment in her employment and can accordingly bring a claim for victimisation.

- 3.11.** While a claim of victimisation will often be brought against the person or employer who carried out the discrimination or harassment, this will not always be the case. The behaviour which is the subject of the protected act can be committed by any person.

3.12. Example

A worker leaves her employment at her local village shop and brings a claim against the owner for harassment related to age. The worker applies for a job at another local shop. The owner of the second shop knows about the claim and turns down the worker's application, saying that he can't afford it if she were to bring a claim against him. Although the protected act relates to her employment with the first shop, she still has the right not to be subjected to a detriment by the second shop, because of that protected act.

- 3.13.** An act will not be a protected act where the worker gives false evidence or information or makes a false allegation in bad faith. This is a two-stage test.
- 3.14.** First, a tribunal or court must decide whether the evidence, information, or allegation is false. This is an objective exercise that involves weighing up the evidence for and against. If a tribunal or court decides that on balance the evidence, information or allegation is more likely to be true than false, then the act is protected.
- 3.15.** If a tribunal or court decides that the evidence, information or allegation is more likely to be false, then it must decide whether it was given or made in bad faith. The focus here is on whether the individual acted honestly or not.
- 3.16.** If a worker has an ulterior motive for providing the evidence or information, or making the allegation, this does not necessarily mean that the worker doesn't honestly believe it is true. So an ulterior motive will not of itself mean the worker acted in bad faith. However, it may be a relevant piece of information for a tribunal or court to consider in deciding whether the worker acted honestly. Other factors such as the length of time it took the worker to raise the matter may also be relevant.

Example

A worker is going through a performance management process. During the process, the worker raises an allegation that the manager conducting it racially harassed him three years ago. The worker is subsequently dismissed for poor performance. He brings a claim for victimisation, alleging that he was in truth dismissed because he made an allegation of racial harassment, not because of his poor performance. The tribunal finds that the worker's allegation is not true and then considers whether it was made in bad faith. The tribunal finds that the worker primarily made the allegation to disrupt the poor performance proceedings, but had an honest belief in it. The allegation was therefore not made in bad faith and is a protected act. The tribunal must then go on to consider whether the worker has been subjected to a detriment.

What is a 'detriment'?

- 3.17.** 'Detriment' is not defined by the Act and could take many forms. Generally, a detriment is being treated badly. This could include, for example, being rejected for promotion, denied an opportunity to represent the employer at external events, excluded from opportunities to undertake training, or not being given a discretionary bonus or performance-related award.

Example

A senior manager hears a worker's grievance about harassment. He finds that the worker has been harassed, offers a formal apology and directs that the harassers be disciplined and required to undertake diversity training. The senior manager's director thinks that the harassment did take place, but that the manager should have rejected the worker's grievance to protect the company's reputation. As a result, he doesn't put the senior manager forward to attend an important conference. This is a detriment.

- 3.18.** A detriment might also include a threat made to the complainant that they take seriously and which is reasonable for them to take seriously. There is no need to demonstrate physical or financial consequences. However, an unjustified grievance alone would not be enough.

Example

An employer threatens to dismiss a worker because he thinks she intends to support a colleague's sexual harassment claim. This threat could amount to victimisation, even though the employer has not actually taken any action to dismiss the worker and may not really intend to do so.

- 3.19.** Detrimental treatment amounts to victimisation if a 'protected act' is one of the reasons for the treatment, but it need not be the only reason.

4. Obligations and liabilities under the Act

Introduction

- 4.1.** The Act makes discrimination, harassment and victimisation in the work relationship unlawful (**Part 5**).
- 4.2.** This chapter explains:
- who is protected against harassment and victimisation
 - whose conduct an employer may be liable for, and
 - what preventative steps employers must take to establish the statutory defence.

Who is protected against harassment and victimisation?

- 4.3.** Employers must take reasonable steps to prevent harassment and victimisation of a range of individuals who work for them (**s.83**). (See 4.20 to 4.27 and Chapter 5 for what is meant by 'reasonable steps'.)

What 'employment' means

- 4.4.** The Act protects all those who are in 'employment'. This has a wide meaning and covers:
- **employees:** those who have a contract of employment
 - **workers:** those who contract to do the work personally and cannot send someone to do the work in their place (see paragraph 4.5 as to how we use this term throughout the rest of the guidance)
 - **apprentices:** those who have a contract of apprenticeship
 - **crown employees:** those employed by a government department or other officers or bodies carrying out the functions of the crown, and
 - **House of Commons staff and House of Lords staff.**

Other work relationships covered by the Act

4.5. In addition to those listed in paragraph 4.4, protection from harassment under the Act also applies to a wide range of relationships that constitute work. Employers are also responsible for preventing harassment against:

- job applicants
- contract workers (including agency workers and those who contract to provide work personally such as consultants)
- police officers
- partners in a firm
- members in a limited liability partnership
- personal and public office holders, and
- those who undertake vocational training.

4.6. Work relationships that are given other names not specifically mentioned in the Act may nevertheless be covered by the Act if, in practice, the reality of the situation is that the individual falls into one of the categories that is covered. For example, an employer takes an individual on as an unpaid 'intern', but the circumstances suggest that in fact the individual has a contract of employment with the employer, and is therefore an employee. Volunteers are not protected under the work provisions of the Act, but may be protected under the services provisions of the Act if the organisation providing the volunteering opportunity is providing a service to the volunteer. This has not yet been tested in the courts.

4.7. We only differentiate between the terms employee, worker and other relationships covered by the Act at 4.4 to 4.14. For simplicity, throughout the rest of this guidance, we use the term 'worker' to refer to all employment relationships that are protected by the work provisions of the Act unless indicated otherwise. We do, however, provide guidance as to who falls into the categories listed in paragraph 4.4 at 4.8 to 4.14.

Who is an employee and who is a worker?

- 4.8.** In UK employment legislation, there is an overlap between who is an employee and who is a worker. All employees contract to do work for their employer personally, and so do workers. But not all workers have a contract of employment, so they are not all employees.
- 4.9.** Employees and workers are both protected against harassment and victimisation by the Act. Therefore the difference between an employee and a worker is not covered at length in this guidance.
- 4.10.** However, it might be necessary to clarify whether a person is an employee or a worker if that person wants to bring other claims under legislation outside the Act, which can only be made by employees. For example, the right not to be unfairly dismissed under the Employment Rights Act 1996 applies to employees, but not to workers. A more detailed overview of the different types of employment status and the employment rights that each category have beyond the Act can be found on the [gov.uk](https://www.gov.uk) website.

Who is self-employed?

- 4.11.** Sometimes, an employer may say that an individual is a self-employed contractor who is not protected by the Act, but the individual may believe they are an employee or worker who is protected.
- 4.12.** In resolving such a dispute, a tribunal or court must look at what the employer and the individual intended and what any contract between them says. However, what the contract says does not dictate whether a person is genuinely self-employed or not. A tribunal must look carefully at what actually happens between the employer and individual in practice. If in practice, the relationship is one which is protected by the Act, then the individual will be protected despite having a contract that says they are self-employed. Case law sets out a number of factors that a tribunal or court must weigh up when deciding whether an individual is self-employed and not protected by the Act, or an employee or worker who is protected by the Act. The following are indicators that the individual is an employee or worker:
- The employer is required to provide work to the individual.
 - The individual is required to do work offered to them by the employer.
 - The employer has a lot of control over the way the individual does the work.

- The individual is required to do the work personally (see 4.13).
- The individual is well integrated into the employer's workplace. They look like an employee or worker of the employer to the outside world rather than a self-employed person running their own business.
- The individual is not free to do work for others as well as the employer.
- The employer deducts tax from their pay.
- The individual is not required to have their own insurance in place; they are covered by the employer's liability insurance.
- The individual receives a wage. They do not take a share of profits and losses made by the employer.
- The contract between the individual and the employer says that they are an employee or worker.

The meaning of 'personal service'

4.13. A key issue in deciding whether someone is self-employed is often whether they provide personal service or not. That is, do they always do the work themselves and have no right to ask another person to do the work for them (a substitute). If they are required to do the work personally, they are likely to be an employee or worker. Conversely, if they have an unlimited right to use a substitute, then they are not required to provide personal service to the employer and are likely to be self-employed.

4.14. In between these two extremes, there will be cases where someone has a right to appoint a substitute but on certain conditions. For example, requirements that the substitute used is from a limited group of people; that the individual gets consent from the employer before using a substitute; or that the substitute has certain qualifications. The courts have not yet provided clear guidance as to how free an individual must be in order for the individual to be self-employed. They have taken a case-by-case approach to whether the particular circumstances of each case indicate that personal service is required.

Example

An electrician has a right under his contract to ask other electricians to do a job for him. However, the wording of the contract suggests that he will perform the work personally, and the right to use a substitute is significantly restricted to using other electricians who already have a similar contract with the company. The electrician's contract with the company suggests he has an obligation to provide personal service and therefore, he is protected by the Act.

The effect of illegal contracts on harassment claims

- 4.15.** The fact that a contract of employment is illegal will not normally prevent a worker pursuing their harassment claim. It will only prevent them doing so if there is an inextricable link between the conduct and the harassment (that is, the harassment is so tangled up with the illegal conduct that the two are impossible to separate). If the two things are impossible to separate, a tribunal or court may not be able to hear the claim because making an award of compensation in these circumstances would give the appearance that the tribunal or court condones the illegal conduct.

Example

A migrant worker without a valid work permit is sexually harassed by her colleague while working for a company. The contract of employment is illegal because the worker does not have a work permit. However, the tribunal can hear the worker's claim for sexual harassment. While her employment with the company may have created an opportunity for the colleague to sexually harass the worker, the harassment was not dependent on her employment. She could have been subjected to the harassment even if she had not been in employment with the company.

This can be contrasted with a case where the harassment is dependent on there being a contract of employment. For example:

A migrant worker obtains a job with a school without a valid work permit, by lying about his entitlement to work in the UK. He complains that he was repeatedly subjected to unwanted conduct related to his race including being passed over for promotion and being denied access to various benefits and facilities. The alleged acts of harassment were all dependent on there being a contract of employment. The migrant worker is therefore unable to pursue his claim.

When are employers liable for harassment?

4.16. Employers are liable for acts of harassment:

- committed by one worker against another of their workers
- committed by one of their workers against a job applicant or former worker
- committed by an agent acting on their behalf against one of their workers, and
- where a failure to deal with harassment of one of their workers by a third party, or by another worker outside of employment, amounts to direct or indirect discrimination (or breach of other legal obligations) (s.40).

Liability for harassment from workers

4.17. Employers will be liable for harassment committed by their workers in the course of their employment unless they can rely on the 'reasonable steps' defence (see 4.20). It does not matter whether or not the employer knows about the harassment (s.109(1) and s.109(3)).

Example

A bar worker's supervisor creates opportunities to be alone with her. While they are alone, the supervisor makes sexual comments about the bar worker's appearance and his feelings towards her. There are no witnesses and, as the harasser is the bar worker's supervisor, she feels unable to make a complaint to her employer. The bar worker leaves and makes a sexual harassment claim. The employment tribunal could find the employer liable for the actions of the supervisor if it failed to take all reasonable steps to prevent the harassment.

- 4.18.** The phrase 'in the course of employment' has a wide meaning. It includes acts committed in the workplace or in any other place where the worker is working. For example, when the worker is working offsite or attending a training course, conference or external meeting.
- 4.19.** It also includes other circumstances in which the worker is not actually working but that are connected with work. Whether or not acts committed outside of work are committed 'in the course of employment' will depend on the strength of the connection with work in each particular case. An employment tribunal will decide in each case whether the circumstances in which the harassment took place were an extension of the employment, or whether the connection with work is too weak.

Example

A worker is harassed by her colleague on two occasions. The first time, during drinks in the pub with colleagues immediately after work. On the second occasion, at a leaving party for another worker, which also takes place in the pub. Although the workers are not working at the time, the tribunal decides that these social gatherings with work colleagues immediately after work or at an organised leaving party are closely connected with employment. Therefore they fall within the definition of 'in the course of employment'.

Example

A worker receives an unexpected visit to her home from a colleague late at night, who subjects her to unwanted sexual advances. The tribunal finds that the incident is too remote from work to be 'in the course of employment'. Although the two colleagues met through work, they are essentially in the same position that they would have been had they merely been social acquaintances. (The employer should nevertheless take appropriate steps to deal with any complaint about this incident for the reasons set out at 4.52 to 4.53.)

Taking all reasonable steps to prevent harassment

- 4.20.** An employer will not be liable for harassment committed by a worker in the course of employment if they can show that they took all reasonable steps to prevent the harassment (the 'reasonable steps' defence) **(s.109(4))**.
- 4.21.** An employer will have taken all reasonable steps if there are no further steps that they could reasonably have been expected to take.
- 4.22.** In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective.
- 4.23.** A tribunal or court may find that it would have been reasonable for an employer to take a certain step, even if that step might not have prevented the act of harassment.

Example

A worker is gay and has not told his work colleagues this. One of his colleagues finds out through a mutual friend. The colleague reveals the worker's sexuality to other colleagues and makes offensive jokes about it. The employer has a harassment policy but has not taken steps such as using the induction process or training to make sure that workers follow it. The employment tribunal believes that such steps probably would have made no difference to the outcome: The worker's colleague probably would have broken the rules anyway. Nevertheless, the employment tribunal finds that it would have been reasonable for the employer to take those steps and they are therefore liable for the harassment.

- 4.24.** However, an employer is entitled to weigh how effective a step might be against other factors such as the time, cost and potential disruption that may be caused in taking the step. A step that is expensive, time consuming and troublesome to implement will not be a reasonable step to take if it will achieve nothing. Conversely, if a step would be effective, then this may outweigh any other negative factors.

Example

A Jewish worker at a large company is offended by comments made by her colleague, which are antisemitic. The worker raises the matter with her line manager, but the line manager does not think the comments are antisemitic. The line manager tells the worker she is being overly sensitive. The worker brings an employment tribunal claim against the company and her colleague. The company has an anti-harassment policy, refers to it on induction and includes reminders about the policy in internal newsletters. The company says that it would not have been reasonable to train managers, because it would have been expensive and time consuming. However, the employment tribunal finds that training would have been an effective means of preventing this type of harassment. It would have cost money and resulted in the loss of a working day for the company's managers, but it would have been reasonable for the company to incur the cost and disruption bearing in mind its size and resources.

- 4.25.** The requirement is to take preventative steps. The fact that an employer has taken steps such as an investigation and disciplinary action to deal with the harassment after it has occurred, will not be sufficient on its own to avoid liability. However:
- if an employer has taken effective steps to deal with harassment, this may help to prove that the anti-harassment policy in place to prevent harassment is taken seriously by the employer and used effectively when breached by a worker, and
 - any remedial action taken may be referred to in relation to future acts of harassment. For example, if an employer improved its reporting and investigation processes after a previous incident, this will help an employer to establish that it has taken preventative steps in relation to the current act of harassment.
- 4.26.** What steps were reasonable for an employer to take will depend on the circumstances of each individual case. For example, an employer who knows that a worker has previously committed an act of harassment may be required to take specific steps to ensure that they do not do so in future.

Example

A worker's colleague uses a term which he finds racially offensive. The colleague says he didn't intend to cause any offence and didn't realise it was a racially offensive term. Nevertheless, he has committed an act of harassment because the effect of his language was to cause offence. He accepts he shouldn't have used the term and apologises. The worker tells the employer that he accepts his colleague didn't intend any harm, he is satisfied with the apology and doesn't want it taken any further. The employer, however, reiterates to the worker's colleague that harassment will not be tolerated, ensures that he reads its anti-harassment policy again, and requires him to undertake training on harassment and racial awareness.

- 4.27.** Chapter 5 provides detailed explanations of the types of action employers can take to prevent harassment.

Liability for harassment by agents

- 4.28.** Employers are liable for harassment committed by their agents. Agents are those who act on the employer's behalf. Examples of agent relationships might be an external occupational health adviser engaged by an employer to provide an occupational health report on a worker, or a firm of management consultants appointed by an NHS Trust to deliver a project in a hospital (**s.109(2) and s.109(3)**).
- 4.29.** The employer does not need to know about or approve of the acts of its agent to be liable for them. The employer will be liable if it consents to the agent acting on their behalf. The employer does not need to expressly consent to the acts of harassment. Consent could be implied from the employer's actions.

Example

A firm of solicitors uses a recruitment agency to recruit a paralegal. The agency conducts interviews on behalf of the firm. The firm does not oversee the interview process, giving the agency free rein to conduct the interviews as they see fit. During one interview, the agency asks the applicant a series of questions concerning his ability to do the job on the basis of stereotypical assumptions about his disability, which amount to harassment. The firm has not expressly consented to the agency asking the questions. However, it will be liable for the harassment, because it gave the agency free rein to ask whatever questions it wanted and therefore impliedly consented to the agency's actions.

- 4.30.** An employer will not be liable for harassment carried out by its agents where the agent has acted without the employer's authority. For example, where the employer provides instructions for the agent to follow and the agent acts contrary to those instructions.

Example

A housebuilding company (the employer) uses a recruitment agency to recruit a site-supervisor. The employer asks the agency to sift CVs, undertake right to work in the UK checks and do an initial telephone interview. The employer asks the agency to follow its equality and diversity and anti-harassment policies. It also agrees a set of criteria against which candidates are to be judged during the interview. An agency employee checks identity documents and sees that one of the candidates is a trans male. During the interview, the agency asks this candidate a series of questions about his gender identity and questions his ability to 'command the respect of the men' on site. This is contrary to the criteria provided by the employer and the employer's policies. The agency has acted without the employer's authority and the employer would not be liable for the harassment. The agency would, however, be liable.

Harassment of former workers

- 4.31.** Employers must not harass former workers. An employer will be liable for harassment of former workers if the harassment is closely connected to the work relationship (**s.108**).
- 4.32.** The expression 'closely connected to' is not defined in the Act. This has to be judged on a case-by-case basis.

Example

A worker was employed by a sole trader (the employer). The employer found out that the worker was bisexual shortly before she left her job with the employer. The employer answers reference requests untruthfully. The worker finds out and asks the employer why she has been providing her with poor references. The employer says that she believes same-sex relationships are immoral and never would have given the worker a job in the first place if she had known about her sexuality. As the worker was employed by the employer and the harassment is closely connected with the work relationship, the employer will be liable for these acts of harassment.

- 4.33.** If a former worker is treated badly by the employer because they made a complaint about harassment, this will be covered by the victimisation provisions which are detailed in Chapter 3.

Harassment by third parties

Third party harassment and the Act

- 4.34.** Originally, the Act required employers to prevent third parties such as clients, customers or suppliers harassing their workers. An employer would have been liable if:
- a worker had been harassed by a third party on at least two previous occasions
 - the employer was aware of the harassment, and
 - the employer failed to take 'reasonably practical steps' to prevent harassment happening again.

- 4.35.** This provision was repealed. Subsequent case law stated that employers could be liable where their inaction itself violated the worker's dignity or led to the creation of an intimidating, hostile, degrading, humiliating or offensive environment for them.
- 4.36.** However, this changed following *Unite the Union v Nailard*. In that case, the Court of Appeal stated that the Act does not make employers liable for failing to protect workers against third party harassment. They will only be liable if they fail to take action because of a protected characteristic (*Unite the Union v Nailard* [2018] EWCA Civ 1203).

Example

A restaurant worker is sexually harassed by a customer. The worker complains to her manager. The manager sympathises with the worker and decides to serve the customer himself. The manager takes no further action, thinking that he has resolved the problem. However, the customer touches the worker inappropriately on his way out of the restaurant. The employer would have dealt with the complaint in the same way, regardless of whether the worker was a man or a woman. Therefore, as the law currently stands following *Nailard*, the employer will not be liable for harassment, despite not taking sufficient action to prevent the second act of harassment.

Example

A Black shop worker is subjected to a racially offensive term by a customer. When the worker complains to the shop owner, the owner says, 'Sorry mate, but your lot have got to expect a bit of that around here now and again'. The customer returns and continues to use the same term towards the worker. The shop owner may be liable for harassment related to race as his comments to the worker suggest that he thinks Black people should put up with racial abuse. Therefore, his lack of action, which has created an offensive environment for the worker, is motivated by the worker's race.

- 4.37.** While there is no specific protection against third party harassment under the Act, employers should still take reasonable steps to prevent third party harassment. Harassment by a third party can be just as devastating for a worker as harassment by a fellow worker. Employers who do not take reasonable steps to prevent or respond to third party harassment may be liable under other sections of the Act or other legislation in certain circumstances as set out in the following sections of this guidance.

Third party harassment: indirect discrimination

- 4.38.** It is possible that inaction or a particular way of dealing with complaints of third party harassment could amount to indirect discrimination. This occurs when a provision, criterion or practice (PCP) is applied in the same way, for all workers or a group of workers, but has the effect of putting workers sharing a protected characteristic at a particular disadvantage. It does not matter that the employer did not intend to disadvantage the workers.
- 4.39.** If a PCP is applied and puts workers sharing a characteristic at a disadvantage, then it will be unlawful unless the employer can justify it. That is, prove that they have a legitimate aim in applying the PCP, and that the PCP was a proportionate way to achieve that aim.
- 4.40.** 'Provision', 'criterion' or 'practice' can include:
- workplace policies
 - the way in which access to any benefit, service or facility is offered or provided
 - one-off decisions, and

- directions to do something in a particular way.

- 4.41.** 'Disadvantage' is a very broad term and can take many different forms. For example, the disadvantage could be not having a complaint of harassment investigated.
- 4.42.** Indirect discrimination is covered in more detail in Chapter 4 of the [Employment Statutory Code of Practice](#).

Example

A hotel worker complains that she has been sexually harassed by a customer. Her employer says she does not take action in response to complaints about sexual harassment by third parties, as she feels that she is not responsible for what third parties do and 'the customer comes first'. The employer would take no action regardless of whether the person harassed is a man or a woman. This practice places women at a particular disadvantage in comparison to men as statistics show that women are more likely to be sexually harassed at work than men. It is unlikely that the employer will be able to justify her practice of taking no action as she does not have a legitimate aim. It is not a legitimate aim to prioritise her customers over the safety of her workers.

Third party harassment: direct discrimination

- 4.43.** An employer may also be liable for direct discrimination if it treats complaints of harassment by a worker with a protected characteristic in a less favourable way than it treats complaints by others. Direct discrimination is covered in more detail in Chapter 3 of the [Employment Statutory Code of Practice](#).

Example

A male worker is sexually harassed by a customer. He makes a complaint about the harassment to his employer. The employer says that the worker should be flattered by the attention and doesn't do anything about it. Had the worker been a woman who had complained of sexual harassment by a customer, the employer would have taken the matter more seriously and taken action to address it. The employer has directly discriminated against the worker because of sex.

Third party harassment: health and safety at work

- 4.44.** The Health and Safety at Work etc. Act 1974 (HSWA) may apply where workers are subject to third party violence while carrying out their work.
- 4.45.** Third party violence means violence caused by any person who is external to the employer such as customers, clients, patients, service users, students and members of the public. Third party violence may take the form of physical or verbal abuse with the effect of causing physical or psychological harm to the worker.
- 4.46.** In general, for HSWA to apply, third party violence should arise out of the work activity of the employer. It occurs, for example, when the employer is providing a service (often to the public). Factors which increase the risk of third party violence may include, for example, services not meeting expectations, acting in a position of authority such as an enforcement officer, or dealing with people who have consumed alcohol or drugs.
- 4.47.** Under the Management of Health and Safety at Work Regulations 1999, employers are required to assess risks to their workers including reasonably foreseeable risks of third party violence. Employers should identify reasonably practicable organisational measures to prevent or control risks from third party violence as appropriate. Common measures include the provision of equipment, design of the workplace, instruction or training on personal safety which may involve conflict resolution techniques as well as support arrangements. Further information on violence at work can be found in the HSE leaflet ['Violence at work: A guide for employers'](#) (INDG69).

- 4.48.** Violence by a third party against a worker is likely to amount to a criminal offence. The actions of perpetrators should therefore be dealt with in accordance with 5.53 to 5.57.

Third party harassment: constructive unfair dismissal

- 4.49.** A contract of employment between an employer and employee always includes certain implied terms. One of these implied terms is that an employer will not act in a way which destroys the trust and confidence between the employer and the worker. If an employer breaches this implied term, then the worker will be entitled to resign and claim that they have been constructively dismissed. A failure to take action by an employer may amount to a breach of this term. If so, such a dismissal would likely be an unfair dismissal contrary to section 94 of the [Employment Rights Act 1996](#). For further information on constructive dismissal, see the [Acas website](#).

Third party harassment: Public Sector Equality Duty (PSED)

- 4.50.** Public sector employers must comply with the PSED. This means that when carrying out their functions, they must pay due regard to the need to:
- eliminate discrimination, harassment and victimisation
 - advance equality of opportunity between people who have a protected characteristic and people who do not, and
 - foster good relations between people who share a protected characteristic and people who do not.
- 4.51.** To comply with the PSED, public sector employers must give due regard to how taking steps to prevent third party harassment may help to eliminate discrimination, harassment and victimisation, advance equality of opportunity and foster good relations. For further information on the PSED, see the [PSED guidance on our website](#).

Harassment by a colleague outside of work

- 4.52.** As explained in 4.17 to 4.19, an employer will be liable for harassment by one worker against another if it took place during the course of employment. An employer will not be directly liable under the Act for harassment by one worker against another if it took place outside of employment.

- 4.53.** However, an employer must still take reasonable steps to deal with a complaint of harassment by one worker against another committed outside of employment, because the legal principles set out in 4.38 to 4.43 and 4.49 to 4.51 in relation to third party harassment, could be applied equally to any failure by an employer to deal with such a complaint. That is, the employer could potentially be liable for direct or indirect discrimination, constructive dismissal or breach of the PSED.

Who else can be liable for harassment?

- 4.54.** Workers may be personally liable for acts of harassment they carry out during their employment. They will only be liable under the Act if their employer is also liable for the harassment, or if their employer would have been liable but is able to rely successfully on the ‘reasonable steps’ defence (**s.110(1) and s.110(2)**) (see 4.20 to 4.27).

Example

A supermarket worker is subjected to comments about her race by a colleague. The worker subsequently brings a claim for harassment related to race against her employer and her colleague. The employer argues that it provided workers with equality and diversity training, implemented an anti-harassment policy, and investigated the complaint and dismissed the colleague for gross misconduct. The employment tribunal finds that the worker was subject to harassment related to race by her colleague. The supermarket will be liable unless the tribunal accepts that it took all reasonable steps to prevent harassment. The colleague will be liable regardless of whether the supermarket establishes the defence or not.

- 4.55.** Agents (as defined at 4.28 – 4.30) may also be personally liable for acts of harassment committed with the employer’s authority where the employer is also liable.

Example

A company uses a self-employed consultant to implement an IT project. The company puts the consultant in charge of its workers in the IT team assigned to the project. The company does not alert the consultant to its anti-harassment policy. The consultant constantly refers to a member of the IT team as 'old boy' and 'old-timer' and makes jokes about how technology has moved on since his day. Both the company and the consultant will be liable for the acts of harassment related to age as the consultant is acting as the company's agent.

- 4.56.** A worker can make an employment tribunal claim against the worker or agent who personally harassed them, without also making a claim against their employer. However, in order to succeed in their claim against the worker or agent, they must be able to show that the employer could have been liable under the Act had they made such a claim.

4.57. Example

A worker is sexually harassed by his colleague. The worker brings a claim against both his employer and his colleague, but subsequently withdraws his claim against his employer. The worker decides to pursue his claim against his colleague to a tribunal hearing. The colleague is also employed by the employer and therefore had the worker pursued his claim against the employer, it would have been liable (unless it could establish the 'reasonable steps' defence). The colleague may therefore also be liable under the Act.

- 4.58.** If a worker or agent reasonably relies on a statement by the employer that an act is not unlawful, then the worker or agent will not be liable even if the employer is liable **(s.110(3))**.

4.59. Example

The chief executive of a company tells a manager to ask a worker, who is 67, a series of unjustified questions regarding his intention to retire and his performance, all based on stereotypical assumptions about people of the worker's age. The chief executive tells the manager that he is entitled to do so because the worker is over 65 and only people below 65 are protected. The chief executive is wrong as the Act protects employees of all age groups against harassment related to age. If the manager reasonably relies on that statement and follows the chief executive's instructions, he will not be personally liable. The employer would still be liable.

5. Taking steps to prevent and respond to harassment

Introduction

- 5.1.** An employer will be liable for harassment or victimisation committed by its workers unless they can show that they took all reasonable steps to prevent such behaviour. The relevant factors as to whether an employer has taken all reasonable steps are considered in paragraphs 4.20 to 4.27. This chapter sets out what steps can be taken to prevent harassment and protect workers, to help employers understand how best to meet their responsibilities under the Act (**s.109(4)**).
- 5.2.** As explained in Chapter 4, there is no prescribed minimum about what an employer can do to prevent harassment and protect its workers. It is an objective test about what it is reasonable for the employer to do in the circumstances. This will vary from employer to employer depending on the size and nature of the employer, the resources available to it and the risk factors which need to be addressed within the particular employer or sector. Therefore, not every step set out in this chapter will be reasonable for every employer to take, nor should they be considered exhaustive. Employers should consider what steps they have taken to date and what further steps it is practicable for them to take.
- 5.3.** This should not be a one-off exercise. Employers should continue to review whether there are any further steps it is practicable for them to take, considering issues such as whether there have been any changes in the workplace or the workforce and the availability of new technology such as new reporting systems.

Preventing harassment

Effective policies and procedures

- 5.4.** All employers will be expected to have in place effective and well communicated policies and practices which aim to prevent harassment and victimisation. The policies should be monitored and their success regularly reviewed (see 5.16 to 5.18). Employers should not conflate different forms of harassment. They should have different policies to deal with sexual harassment and harassment related to protected characteristics or have one policy which clearly distinguishes between the different forms of harassment. Employers should also consider preparing separate strategy documents to accompany their anti-harassment policy or policies, setting out what measures they will take to tackle the different forms of harassment. These documents should take into account issues such as the different causes of different forms of harassment and the risk of different forms of harassment occurring in the employer's particular workforce.
- 5.5.** To ensure that workers' views are taken into account, anti-harassment policies and other measures to prevent and respond to harassment should be developed in consultation with recognised trade unions, or where there isn't one, other worker representatives.
- 5.6.** A good anti-harassment policy (or policies where, for example, an employer has separate policies to deal with sexual harassment and other forms of harassment) will:
- confirm who the policy covers
 - state that sexual harassment, harassment and victimisation will not be tolerated
 - state that sexual harassment, harassment and victimisation are unlawful
 - state that harassment or victimisation may lead to disciplinary action up to and including dismissal if it is committed:
 - in a work situation
 - during any situation related to work such as at a social event with colleagues
 - against a colleague or other person connected to the employer outside of a work situation, including on social media or
 - against anyone outside of a work situation where the incident is relevant to their suitability to carry out the role.

- state that aggravating factors such as abuse of power over a more junior colleague will be taken into account in deciding what disciplinary action to take
- define the protected characteristics that harassment may be related to
- define harassment related to protected characteristics, sexual harassment, less favourable treatment for rejecting or submitting to sexual harassment and victimisation separately. Different forms of harassment should not be conflated
- (if bullying is included within the same policy) distinguish between bullying and harassment
- provide clear examples to illustrate each definition of the different forms of harassment, which are relevant to the employer's working environment and which reflect the diverse range of people whom harassment may affect
- include an effective procedure for receiving and responding to complaints of harassment (see 5.34)
- address third party harassment. This section should outline:
 - that third party harassment can result in legal liability (see 4.34 to 4.51)
 - that it will not be tolerated
 - that workers are encouraged to report it
 - what steps will be taken to prevent it. For example, warning notices to customers or recorded messages at the beginning of telephone calls
 - what steps will be taken to remedy a complaint or prevent it happening again. For example, warning a customer about their behaviour, banning a customer, reporting any criminal acts to the police, or sharing information with other branches of the business
- include a commitment to review the policy at regular intervals and to monitor its effectiveness
- cover all areas of the employer's organisation, including any overseas sites, subject to any applicable local laws which impose any additional requirements on the employer.

Malicious complaints

5.7. In our work on sexual harassment, we have found that policies often overemphasise malicious complaints, which does not reflect the fact that the vast majority of complaints are made in good faith. We have also found policies on malicious complaints that, if put into practice, would result in workers who make good faith complaints that are not upheld being victimised contrary to the Act. While employers can lawfully state within their policy that malicious complaints may lead to disciplinary action, if not worded carefully, statements to this effect may discourage complainants coming forward. People may be worried that they will be disciplined if their allegation is not upheld. Where such a statement is included, it should be made clear that:

- workers will not be subjected to disciplinary action or to any other detriment simply because their complaint is not upheld, and
- workers will only face disciplinary action if it is found both that the allegation is false and made in bad faith (that is, without an honest truth in its belief).

Interaction with other policies

5.8. Other policies and procedures should be reviewed to ensure that they interact well with the anti-harassment policy and that they create a culture in which the risk of harassment is reduced. An employer should consider, for example:

- Do the examples of misconduct and gross misconduct in the disciplinary policy match or cross reference the anti-harassment policy?
- Do the policies on use of IT, communications systems and social media include appropriate warnings against online harassment and encourage workers to report it, even where such harassment takes place on personal devices?
- Does the dress code potentially foster a culture that could contribute to the likelihood of sexual harassment or harassment related to race or religion occurring? See the UK Government's [guidance on dress codes and sex discrimination](#) for further information.
- Is it clear from performance objectives that managers will be expected to deal appropriately with complaints of harassment?

Awareness of policies

- 5.9.** Employers should ensure that all workers are aware of their anti-harassment policies. Employers should consider publishing their policies on an easily accessible part of their external-facing website. This will enable a worker to access a copy of the policy if, for example, they are off work with a stress condition related to their harassment and cannot access the internal system. It will also mean it is available to other workers, such as contract workers, who similarly may not have access to internal systems. Doing so also demonstrates the employer's commitment to transparency and tackling the issue.
- 5.10.** Where policies are not publicised externally, they should nevertheless be as freely available as possible to all workers, including those who do not have access to the internal IT systems. This may mean, for example, providing copies to each worker or publishing them on the intranet. It is not appropriate to tell workers that they can get copies from a manager as the worker may be reluctant to ask the manager and alert them to the fact that they have a complaint. Likewise, leaving copies in an area that is accessible to all workers, such as a staffroom, would not be appropriate, as a worker may not wish other workers to see them reading the policy.
- 5.11.** The policies, and the staff handbook in general, should also be referenced in (though not necessarily incorporated into) the contract of employment, written statement of particulars or other terms and conditions of work.
- 5.12.** The policies should be verbally communicated to workers during the induction process, at which point they should also receive a copy of it or otherwise know where they can access a copy.
- 5.13.** If employers amend their policies or introduce one for the first time, they should raise awareness of it among workers. They should also take opportunities to remind workers of the existence of the policy and what it contains, highlighting the policy's key messages – such as the employer's zero tolerance approach to harassment and how to report harassment. Employers can communicate the policies and their contents using, for example:
- internal newsletters
 - physical or digital noticeboards
 - staff meetings
 - reminders to staff ahead of key events where the risk of harassment increases, such as an office party, and
 - an annual reminder to staff.

- 5.14.** If necessary, the policies should be translated for a linguistically diverse workforce or provided in an accessible format for those with disabilities.
- 5.15.** The policies should be shared with other organisations that supply workers and services. This is to ensure that all workers supplied to the employer are aware of the standards expected of them under the policies and how to report instances of harassment.

Evaluation of policies

- 5.16.** The effectiveness of the policies should be evaluated through the use of, for example:
- centralised records that record complaints in a level of detail that allows trends to be analysed. For example, date of events, areas of business, roles of complainant and harasser, protected characteristic, legal category (harassment, sexual harassment etc.), outcome and brief reason for outcome. Employers should ensure that any such register is compliant with the General Data Protection Regulation (GDPR). They should, for example, review contracts, policies, procedures and privacy notices to ensure that they inform workers that such data will be stored and ensure that appropriate safeguards are in place to protect the data and ensure that any processing of data is proportionate. For example, ensuring that access to the data is restricted to a limited number of people. Further guidance on compliance with the GDPR can be found on the website of the [Information Commissioner's Office](#).
 - staff surveys which ask all workers questions on an anonymised basis to obtain as accurate a picture of harassment that is happening in the workplace as possible, including:
 - whether they have been subjected to or witnessed harassment. The questions should describe behaviours which constitute harassment and ask the worker whether they have experienced such behaviours rather than asking the worker directly whether or not they have experienced harassment
 - what type of harassment they have experienced
 - whether they reported the harassment;
 - if they did not report the harassment, why not
 - if they did report the harassment, what the outcome was
 - were they satisfied with the outcome and if not, why not

- if they were to experience harassment in the future (whether they have experienced it in the past or not), whether they would feel able to speak up and if not, why not, and
- whether they believe there are any steps the employer should be taking to address harassment at work.
- lessons-learned sessions once complaints have been resolved, and
- feedback provided through conversations with employees. For example, during exit interviews (see 5.19).

5.17. Employers should not assume that the number of complaints of harassment made is an accurate reflection of the level of harassment happening in the workplace. Employers should compare data they have regarding reported cases of harassment against data received through the other means listed above, to identify the extent to which harassment is reported. The gap between the actual level of harassment and harassment that is reported can then be monitored, to determine whether the policy and other steps put in place to encourage reporting are working.

5.18. Policies should be reviewed annually. As part of this review, any themes arising from evaluation and monitoring and feedback received through means such as staff surveys and lessons-learned sessions should be considered. This should include evaluating whether the policy is leading to appropriate and consistent outcomes to complaints or whether further steps need to be taken to improve this.

Detecting harassment

5.19. Employers should proactively seek to be aware of what is happening in the workplace. There may be warning signs that harassment is taking place, beyond informal and formal complaints. For example, sickness absence, a change in behaviour, comments in exit interviews, a dip in performance or avoidance of a certain colleague. Employers should give workers every opportunity to raise issues with them, even where there are no warning signs of harassment, for example, through:

- informal one-to-ones
- sickness absence or return-to-work meetings
- meetings about performance
- open door meetings with senior management or 'town hall' meetings
- exit interviews
- a post-employment survey, and

- mentoring programmes and staff networks.

5.20. Employers should consider introducing an online or externally run telephone reporting system which allows workers to make complaints on either a named or anonymous basis and makes clear to the worker what the employer may do with the information provided. While it is preferable for workers to raise issues without anonymising their details, some workers will not feel able to raise their complaints and issues will therefore go undetected. The introduction of a reporting system which allows anonymous reports to be made:

- will ensure that those complaints that would otherwise go unreported are captured
- provides the employer with an opportunity to give complainants information about the support and safeguards that can be put into place if they were to report the matter on a non-anonymous basis
- enables the employer to take action to address the matter, even in cases where there may not be sufficient evidence to start an investigation due to the anonymity of the complainant. For example, by issuing a reminder of the policy to workers and monitoring the area of the business affected.

Training

5.21. Workers should be provided with training which addresses each of the three types of harassment along with training on victimisation. Training should ensure that workers know what each of the three types of harassment involves and what victimisation is, what to do if they experience it and how to handle complaints of harassment. Training should be tailored towards the nature of the employer, the target audience (in terms of, for example, the seniority and job roles of the audience and the best method to deliver the training to them) and the employer's policy to maximise its impact. For example:

- In industries where third party harassment from customers is more likely, training should be provided on how to address such issues. This will vary from employer to employer. For example, in a call centre, a manager may require guidance on what to do in the event of a worker receiving an abusive phone call. In a pub, the manager may need guidance on what to do in the event of physical or verbal abuse of staff.

- All workers, including those without supervisory or management responsibilities, will require guidance on issues such as acceptable behaviour, recognising harassment and what to do should they experience or witness it. Supervisors and managers may need additional guidance on what to do upon receiving a report or complaint of harassment, investigating complaints, taking disciplinary action and supporting workers.

5.22. Employers should keep records of who has received the training and ensure that it is refreshed at regular intervals.

5.23. Employers should make sure that there are workers who are trained in providing support to individuals who have experienced harassment through the process of making a complaint. This may be, for example, members of the human resources department or other nominated workers who may be identified by a title such as harassment 'champions' or 'guardians'. Such training should include the particular sensitive issues involved in different forms of harassment related to different protected characteristics.

Assessing risks relating to harassment

5.24. Employers should make an assessment of risks relating to harassment and victimisation. Existing risk management frameworks, traditionally used in the workplace health and safety context could be used for this process. Assessments should identify the risks and the control measures identified to minimise the risks. Factors may include, for example:

- power imbalances
- job insecurity
- lone working
- the presence of alcohol
- customer-facing duties
- particular events that raise tensions locally or nationally
- lack of diversity in the workforce, and
- workers being placed on secondment.

Arrangements for agency workers

5.25. Before supplying agency workers to a hirer, the agency should check that the hirer has appropriate arrangements in place for the prevention of and to deal with complaints of harassment and victimisation.

- 5.26.** Where agency workers are engaged, the agency and hirer should clearly divide responsibilities in relation to handling complaints of harassment and victimisation between them and confirm these arrangements in writing.
- 5.27.** Normally, it will be most appropriate for the hirer to investigate any complaint relating to harassment or victimisation of agency workers that has occurred during the course of the agency providing their services to the hirer. However, there may be exceptions to this. For example, the parties may wish to make different arrangements in circumstances where the complaint is made by an agency worker against another worker from the same agency. The hirer should not simply end its engagement of the agency in order to avoid investigating the issue properly.
- 5.28.** The arrangements between the agency and hirer should include agreement as to when and how one party will update the other on progress and take input where appropriate.
- 5.29.** The agency should make sure that the agency worker is provided with clear guidance as to who to make a complaint to, whose policy applies in which circumstances and that the agency worker receives an induction into both the agency's and hirer's policies and procedures.
- 5.30.** An agency should hold regular catch-ups with its workers and give them the opportunity to raise any issues that have come up in the workplace.

Confidentiality agreements

5.31. Employers should promote a culture of transparency, where workers feel empowered to speak up about discrimination and the root causes of issues can be tackled. Employers must only use confidentiality agreements (also known as confidentiality clauses, non-disclosure agreements, NDAs, or gagging clauses) where it is lawful. It will not be lawful to use confidentiality agreements to prevent workers from whistleblowing, reporting a criminal offence or doing anything required by law such as complying with a regulatory duty. Confidentiality agreements should only be used where necessary and appropriate and the employer should follow best practice where they are used. See [our guidance on confidentiality agreements](#) for further details.

Addressing power imbalances

5.32. Harassment often takes place and goes unreported where there is a power imbalance in the workplace. For example, there may be a power imbalance between a senior manager and someone junior to them, where a worker with a particular protected characteristic is in a minority in the workplace or where a worker is in insecure employment. Employers should consider what action they can take to reduce power imbalances by, for example, taking steps to reduce feelings of isolation, addressing under-representation of workers, ensuring that decision making at senior levels is more representative of different groups, and providing sufficient support for workers at all levels. The employer could, for example:

- take positive action measures to improve representation of an under-represented group, such as introducing a development programme or mentoring network for the under-represented group(see Chapter 12 of the [Employment Statutory Code of Practice](#) for further information on positive action)
- tackle bias in recruitment, development and promotion decisions by taking a transparent and structured approach to such processes, including assessing all candidates against a set of objective criteria and ensuring diversity of representation on assessment panels
- introduce training on topics such as diversity and inclusion, particularly for those who have responsibility for the overall strategy of the organisation and such as the board and for those who make decisions on recruitment, development and promotion

- introduce or extend flexible working to all roles and encourage the take up of shared parental leave to help improve representation of women in the workforce, especially at senior levels
- recognise a trade union or introduce another means of collective bargaining to ensure that workers are represented in decisions such as those regarding policies and procedures
- include a worker representative such as a trade union official on panels that hear complaints of harassment and disciplinary panels, and
- ensure that harassment champions or guardians are representative of those who are, for example, in insecure employment and more junior positions (**ss.158 and 159, Equality Act 2010**).

Responding to harassment

Anti-harassment procedure

- 5.33.** When an employer becomes aware that harassment is taking or has taken place, it is important that they deal with it promptly, efficiently and sensitively.
- 5.34.** To deal effectively with complaints of harassment, a good anti-harassment procedure should:
- tell workers how to make a complaint. This should not be too restrictive. For example, they should not be required to make a complaint on a specific form
 - define multiple reporting channels for workers who wish to report harassment, to ensure that a worker is not required to report an incident to the perpetrator or someone who they may feel will not be objective
 - set out a range of approaches for dealing with harassment – from informal solutions to formal disciplinary processes
 - set out a range of appropriate consequences and sanctions if harassment or victimisation occurs
 - state that victimisation or retaliation against a complainant will not be tolerated
 - provide contact details for and information about support and advice services available to the complainant or alleged harasser, provided by the employer or within the workplace, such as:

- an employee assistance programme
- a list of contact points within the employer
- recognised trade unions, and
- provide contact details for and information about external sources of support and advice both locally and nationally such as:
 - the Equality Advisory and Support Service
 - Protect (the whistleblowing charity)
 - local advice centres
 - helplines which have been set up to deal with specific forms of harassment (such as the helplines provided to deal with sexual harassment by the Scottish Women's Rights Centre in Scotland and Rights of Women in England and Wales).

Informal resolution

- 5.35.** The procedure should tell the worker how they can raise an issue informally. However, the policy should not place the onus on the complainant to resolve an issue personally.
- 5.36.** It should provide the worker with guidance on how to raise the issue directly with the harasser if that is their preferred method, they feel able to and it is appropriate to do so. This may involve the complainant speaking to the harasser directly to explain how their conduct has made them feel and why they would like it to stop. The procedure should not place any pressure on a worker to take this approach.
- 5.37.** Often a complainant may not feel able to resolve an issue directly and may need support from a third party to resolve their complaint. The procedure should ensure that where a complaint is raised informally, those who it is raised with fully engage in resolving the issue and provide them with guidance on how to do so. The procedure should direct the complainant towards someone (preferably a choice of people) who is equipped to help them resolve their complaint such as a manager, trade union representative, a harassment 'champion' or 'guardian' (see 5.23) or a member of human resources. This person should listen to the complainant and work out how best they can help them to resolve the issue informally and in a way with which the complainant is most comfortable having considered the different options. They may, for example:
- provide the complainant with advice on how to approach the issue directly with the alleged harasser

- support the complainant in raising the issue with the alleged harasser by accompanying them in any discussion or helping them to set out their thoughts in writing
- raise the matter informally with the harasser on the complainant's behalf
- arrange mediation by a trained mediator between the complainant and the alleged harasser
- help to obtain advice on how best to resolve the issue and/or assistance in doing so from other sources either internally such as from human resources or externally from sources such as Acas.
- help to obtain advice on or assistance in dealing with issues relating to particular protected characteristics. For example, from a charity with expertise relating to a particular disability, or
- help to obtain counselling or support for the individual.

5.38. The procedure should recognise that an informal solution may not be appropriate or may not work in many cases. For example, any informal solution is unlikely to be appropriate in more serious cases or to work in cases where the alleged harasser is unlikely to accept that they have done anything wrong. It should be clear that the worker can make the matter formal at any stage if they wish to.

Formal resolution

5.39. This section highlights some particular issues that employers should be aware of when dealing with formal complaints of harassment. However, a detailed explanation of the steps that should be taken in conducting an investigation or a grievance or disciplinary hearing process is beyond the scope of this guidance. Employers should familiarise themselves with Acas guidance on [conducting workplace investigations](#) and [discipline and grievances at work](#).

5.40. The formal reporting channels set out in the anti-harassment policy should ensure, wherever possible, that a worker is able to raise an act of harassment or victimisation with someone other than the alleged harasser. Where possible, this should be someone more senior than the alleged harasser.

- 5.41.** Employers should not set a time limit within which complaints must be made. A worker may not be able to raise a complaint within any such time limit due to, for example, illness or fear of victimisation. If complaints are raised about historical matters, these should be investigated in line with normal processes. Employers should not make assumptions that because an alleged event took place a long time ago, it will not be able to find any evidence relating to it.
- 5.42.** Roles and responsibilities during the process should be clearly defined. Employers should ensure independence and objectivity at each stage of the process. For example, wherever possible, different people at escalating levels of seniority should conduct the investigation, formal hearing and appeal hearing phases. Employers should avoid appointing people to carry out these roles who have been involved in the issue. They should, where possible, appoint people from different parts of their organisations who have no or less knowledge of the people involved and consider appointing an external investigator where necessary to ensure objectivity. They should also take into account the particular sensitivities of the case. For example, a woman who has been sexually assaulted may be more comfortable talking to a female investigator.
- 5.43.** If a worker feels that an investigation is taking a long time, this can cause them to feel that their complaint has not been taken seriously or aggravate the stress and worry that they may experience while waiting for the outcome. Target timescales for each stage of the process should be set and communicated to the complainant. These timescales should provide for a prompt but thorough process. They should be realistically achievable and kept to, other than in exceptional circumstances. The employer should provide the complainant with regular updates on progress and, when expected timescales are not met, the employer should give the worker a clear explanation as to why.

5.44. Employers must inform the complainant and alleged harasser of their statutory right to be accompanied to formal grievance hearings by a trade union representative or colleague. Employers should consider extending this right to be accompanied by a colleague or trade union representative to other meetings such as investigation meetings where reasonable. Employers should also consider extending the right to be accompanied, to allow persons others than colleagues or trade union representatives where appropriate bearing in mind the need to maintain confidentiality in the investigation. In certain circumstances, employers must extend the right to be accompanied in order to comply with certain legal obligations. For example, an employer must allow a worker to be accompanied by another person if that would be necessary:

- to comply with the duty to make reasonable adjustments for a disabled worker
- if not extending the right in order to help a worker overcome a language barrier would amount to discrimination, or
- to maintain trust and confidence between the employer and employee. For example, if a vulnerable employee needs emotional support and this cannot be provided by a trade union representative or colleague.

Example

A worker has made a complaint of sexual harassment. She isn't in a trade union and it would be unreasonable to expect her to recount explicit details of the harassment in front of a colleague. She finds it very stressful and upsetting to talk about the matter and requires emotional support in order to do so. It would be reasonable in these circumstances to allow the worker to be accompanied by someone who can offer emotional support, such as a friend.

- 5.45.** Employers should ensure that investigators have appropriate expertise to conduct an investigation and that they have access to appropriate advice, taking into account the nature of the particular complaint to be handled. For example, an investigator appointed to deal with a complaint of antisemitism should have a good understanding of what antisemitism means. An investigator appointed to deal with a complaint where the complainant has suffered trauma as a result of their experience, should understand how to question the complainant in a way that avoids compounding the trauma.
- 5.46.** Investigators should clearly identify the facts that they need to establish, the questions they will need to ask and the evidence they will need to obtain. Investigators should avoid inappropriate lines of questioning. For example, it would not be appropriate to ask a person who complains of sexual harassment about their sexual history.

Confidentiality during an investigation

- 5.47.** During an investigation of a complaint, and whether the process is informal or formal, the employer should ensure that the complaint is kept confidential (subject to any legal obligations or rights such as a requirement to report to a regulator). This will protect the complainant from any further disadvantage, such as gossip among colleagues about the harassment. Confidentiality should not, however, necessarily continue once the complaints process has been concluded (see 5.31 and 5.66 to 5.69).
- 5.48.** As confidentiality means that workers cannot speak to other witnesses about the issue, employers must ensure that they follow up with all witnesses suggested by the complainant and the alleged harasser and actively seek evidence for and against the allegations to ensure that no evidence is missed. The employer should ensure that any witnesses they speak to about the complaint are made aware that:

- the matter is confidential (subject to any personal legal or regulatory obligations or rights), and
- breach of confidentiality will be a disciplinary offence.

Requests by workers not to take action

5.49. If a worker raises a complaint with the employer but asks them not to take the matter any further, an employer should still take steps to ensure that the matter is resolved. The employer should, for example:

- keep a record of the complaint and the worker's request to keep the matter confidential
- encourage the worker to address the issue informally either directly themselves or with support
- provide the worker with any necessary support and guidance on how to address the issue informally
- keep the situation under review by checking in with the worker to find out if the situation has improved, and
- where the situation has not improved, explain to the worker that it is necessary to address the issue both for their well-being and that of their colleagues.

5.50. Where possible, the employer should respect the wishes of the complainant. Not doing so could compound any harm caused by the original conduct. However, there may be circumstances in which the employer should take action because the risk of not taking action outweighs the risk arising from overriding the complainant's wishes. In assessing the relative risk of the options, the employer should ask:

- Have they considered and exhausted all other possible options such as those already referred to in this guidance?
- What will the impact be of overriding the complainant's wishes on them?
- What are the potential risks to the complainant, the complainant's colleagues and to other third parties if the employer does not take further action?
- Have other complaints been made against the same person?
- What is the likelihood of the matter being resolved by the complainant without intervention by the employer?

- 5.51.** For example, it may be appropriate to take further action where the harassment is so serious that there is an immediate risk to the safety of the complainant, their colleagues or anyone else that the harasser may come into contact with. The risks may be higher in cases where criminal behaviour has taken place (see 5.53 to 5.57).
- 5.52.** If the employer decides that it must take formal action then it should explain its decision to the complainant and ensure that it has put in place appropriate safeguards to prevent further harassment or victimisation of the complainant (see paragraphs 5.58 to 5.63) as well as support and counselling for the complainant to deal with any impact the decision may have.

Criminal behaviour

- 5.53.** Some acts of harassment may also amount to a criminal offence.
- 5.54.** If an individual makes a complaint of harassment that may amount to a criminal offence, the employer should raise the possibility of reporting the matter to the police with the complainant and provide them with the necessary support if they choose to do so.
- 5.55.** The employer should give the complainant's wishes a significant amount of weight: if they do not wish to report the matter to the police then in most cases the employer should respect that wish.
- 5.56.** In certain circumstances, however, an incident should be reported to the police. The employer should weigh up the risk of reporting the matter to the police contrary to the complainant's wishes, against any risk to the safety of the complainant, the complainant's colleagues and third parties if the matter is not reported to the police.

5.57. In cases where the police are involved, an employer should discuss the disciplinary process with the police. The employer should not assume that it cannot take any action to investigate the matter until police enquiries or any subsequent prosecution have concluded. The employer should check with the police that it can carry out its own investigation without prejudicing any criminal process. If it is safe to do so, then the employer should consider whether it would be reasonable in all the circumstances to continue with an investigation immediately rather than to await the outcome of the criminal process. Likewise, if the investigation does not result in a conviction, the employer should not assume that it cannot take further action. Criminal offences have to be proved beyond reasonable doubt, meaning that there must be clear evidence supporting the allegation against the accused. An employer, on the other hand, need only have reasonable grounds to conclude that a disciplinary offence has been committed. This could involve, for example, the employer weighing up the evidence of the witnesses and deciding which witness or witnesses have provided the most cogent version of events.

Preventing further harassment or victimisation during an investigation

5.58. When a formal complaint of harassment or victimisation is made, an employer should consider what steps need to be taken while the matter is investigated to ensure that:

- the complainant is not subjected to further acts of harassment
- the complainant is not victimised for having made a complaint
- any potential adverse impact on the complainant is minimised
- other workers are safeguarded against similar behaviour, and
- there will be no interference with the investigation.

5.59. In some cases, no action may be necessary because, for example, the employer is satisfied that the complainant is prepared to continue working with the alleged harasser and that the alleged harasser is unlikely to repeat the alleged behaviour while under investigation.

- 5.60.** In other cases, it may be necessary to limit the contact between the complainant and the alleged harasser and ensure this is maintained to minimise the risk of the alleged harassment being repeated. For example, by redeploying the alleged harasser to another part of the employer or a different site pending conclusion of the matter, arranging working from home, or removing duties from the harasser that bring the complainant and harasser into contact. Any measures to limit contact should normally be applied to the alleged harasser unless, for example, the complainant's preference is to be moved. It is important to assess the risks of moving a worker elsewhere before doing so. For example, whether the alleged harasser might pose a risk to other workers other than the complainant.
- 5.61.** In cases where there is a continuing risk to the complainant or their colleagues, or to the integrity of the investigation, then the employer should consider suspending the alleged harasser on full pay. The employer should consider carefully the necessity of suspension and any viable alternatives before pursuing this route. Employers should ensure that alleged harassers are able to access appropriate support and this will be particularly important where they are suspended from work.
- 5.62.** The employer should make clear to the alleged harasser that any steps taken are a precaution only and do not imply that the employer has formed any conclusions about the complaint. Likewise, if the alleged harasser makes counter allegations against the complainant, then the employer should be clear with both parties about how it formed its view as to which party to suspend, redeploy or remove duties from, so as to avoid any suggestion that it has favoured one account over the other.
- 5.63.** The need to take preventative steps to protect the complainant will be particularly important in cases where the complainant did not want to make their complaint formal but the employer has concluded that they have to deal with it formally due to the risks of not doing so (see 5.49 to 5.52).

Witnesses to harassment

- 5.64.** The anti-harassment policy should encourage witnesses to harassment or victimisation to take steps to address it. This may include:
- the witness intervening where the witness feels able to do so
 - the witness asking the person subjected to the harassment if they would like the witness to report it or support them in reporting it
 - the witness reporting the incident where the witness feels that there may be a continuing risk if they do not report it, and
 - requiring witnesses to cooperate in an investigation.
- 5.65.** The employer should assure witnesses that it will not subject them to a detriment for providing information and that it will also take steps to prevent them being subjected to a detriment by any other worker.

Reporting outcomes and data protection

- 5.66.** To be effective in encouraging those with complaints to come forward, the outcome to a formal complaint of harassment should be as transparent as possible. This means that wherever appropriate and possible, if a complaint is upheld then the complainant should be told what action has been taken to address this including action taken to address the specific complaint and any measures taken to prevent a similar event happening again in the future. If the complainant is not told what action has been taken, this may leave them feeling that their complaint has not been taken seriously or addressed adequately.
- 5.67.** Employers may have concerns that reporting outcomes such as disciplinary action taken against the harasser, may be a breach of obligations that it owes to the harasser. In particular, they may be concerned about breaching the General Data Protection Regulation (GDPR). However, while employers must comply with the data protection principles under Article 5 GDPR, they should not assume that disclosure of the harasser's personal data will amount to a breach of the GDPR. It often will not if the employer has been clear that outcomes may be disclosed, considered what grounds it has for disclosure and acts proportionately in disclosing personal data.

- 5.68.** Employers should take steps to enable disclosure of the outcomes to complainants where it is appropriate to do so. This includes reviewing contracts, policies, procedures and privacy notices to ensure that they inform workers when the outcome of complaints and disciplinary proceedings may be disclosed.
- 5.69.** The employer should consider on a case-by-case basis each of the grounds on which data can be processed lawfully under Article 6 of the GDPR (and Article 9, where special category data is involved) and what measures it can put in place to ensure that disclosure is proportionate. The employer should record its decision as to whether the outcome can be disclosed or not and its reasons for that decision. Further guidance on compliance with the GDPR can be found on the website of the [Information Commissioner's Office](#).

Further steps after the process has ended

- 5.70.** Where a complaint is not upheld, or it is upheld but this results in action short of dismissing the harasser, the employer should consider carefully the continuing relationship between the complainant and the (alleged) harasser. The employer should nominate someone to manage the reintegration of all those affected by the allegation and investigation including:
- arranging the appropriate support and counselling for the parties
 - arranging mediation, and
 - making an offer of redeployment where any relationship breakdown cannot be resolved through other means.
- 5.71.** If the complaint is upheld and the harasser is not dismissed, the employer may need to consider, as part of any disciplinary process involving the harasser, issues such as:
- further training for the harasser
 - permanent redeployment of the harasser to another role (or permanent redeployment of the complainant if that is their preference) or other measures needed to keep the two parties separate, and
 - asking the harasser to apologise to the complainant

5.72. If a complaint is upheld and the harasser is dismissed, the employer should assess whether any post-employment issues might arise and ensure that it has appropriate processes in place to deal with them. For example:

- How will it answer requests to provide a reference for the harasser, ensuring compliance with its duty not to provide a misleading or inaccurate reference to a potential employer? The employer should consider the risk that harassment may be repeated with a new employer in the future and should not assume that it cannot disclose details of the harassment to the potential employer for data protection reasons. It should instead consider whether the reasons for dismissal can be lawfully disclosed under Article 6 of the GDPR and what measures it can put in place to ensure that disclosure is proportionate, and
- If the workplace is open to the public, how will the employer ensure that the harasser does not target the complainant at work?

Sources of further guidance

Acas: For information and advice on all aspects of workplace relations and employment law.

Citizens Advice: A network of charities offering confidential advice online, over the phone, and in person, for free.

Code of Practice on Employment: Definitive guidance about what the Equality Act means.

Equality Advisory & Support Service: The EASS Helpline advises and assists individuals on issues relating to equality and human rights, across England, Scotland and Wales. EASS can also accept referrals from organisations which, due to capacity or funding issues, are unable to provide face to face advice to local users of their services.

Information Commissioner's Office: For information and advice on data protection

Law Society's find a solicitor service: To find a solicitor in England and Wales.

Law Society of Scotland's find a solicitor service: to find a solicitor in Scotland

Law Works: to find free advice, representation and online resources

Protect: For information and advice on whistleblowing.

Recruitment & Employment Confederation: for information on recruitment practices and standards, including agency workers' rights

TUC: Represents affiliated trade unions. The TUC website provides guidance on workplace issues for workers and union representatives, and has a trade union finder tool for those considering joining a trade union.

Glossary of terms

Acas: Advisory, Conciliation and Arbitration Service

The Act: Equality Act 2010

Agent: Agents are those who act on the employer's behalf. An employer may be liable for acts of discrimination committed by an agent against one of its employees. (See paragraph 4.28.)

Detriment: Subjecting a worker to a detriment means treating them badly. (See paragraphs 3.17 to 3.19.)

Confidentiality agreement: Any clause or separate agreement that prevents a worker (or their employer) from discussing or passing on information. Sometimes referred to as confidentiality clauses, non-disclosure agreements, NDAs or gagging clauses. See [our guidance on confidentiality agreements](#).

Employee: An individual who has a contract of employment with their employer. Employees are protected against discrimination, harassment and victimisation under the Equality Act 2010. (See paragraphs 4.4 to 4.14.)

Gender reassignment: A person has the protected characteristic of gender reassignment if they are proposing to undergo, are undergoing or have undergone a process for the purpose of reassigning their sex by changing physiological or other attributes of sex. No legal or medical process is required.

Harassment: Unwanted conduct related to a protected characteristic that has the purpose or effect of violating a worker's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (see Chapter 2).

Protected act: A worker does a protected act if they: make a claim or complaint under the Act (for example, for discrimination or harassment); help someone else to make a claim by giving evidence or information; make an allegation that someone has breached the Act; or they do anything else in connection with the Act. (See paragraphs 3.6 to 3.16.)

Protected characteristic: A term used in the Act to describe the characteristics that people have in relation to which they are protected against discrimination and harassment. Under the Act, there are nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Marriage and civil partnership and pregnancy and maternity are not protected under the harassment provisions. (See paragraphs 2.3 to 2.5.)

The ‘reasonable steps’ defence: A defence available to employers in claims of harassment. The employer will not be liable for any action of harassment by one of its workers if it can show that it took all reasonable steps to prevent it. (See paragraphs 4.20 to 4.27.)

Sexual harassment: Unwanted conduct of a sexual nature that has the purpose or effect of violating a worker’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (see Chapter 2).

Third party harassment: Harassment of a worker by someone who does not work for and who is not an agent of the same employer. For example, a client, customer or service user.

Trans: A term used to describe a person whose gender identity is not the same as the sex assigned to them at birth. It can also include someone who does not identify as male or female (non-binary) or someone who is outside any gender definition (non-gender). In this guidance we use the term ‘trans’ to refer to a person with the protected characteristic of gender reassignment. For example: a trans man – a person whose sex was recorded as female at birth but who identifies and lives as a man.

Unlawful: Contrary to the law and specifically in the context of this guidance, contrary to the Act.

Victimisation: Subjecting someone to a detriment because they have done, or because it is believed they have done or may do a protected act. (See paragraphs 3.2 to 3.5.)

Worker: As defined under the Equality Act 2010, this is an individual who does work for an employer and is required to do the work personally – that is, they cannot send someone (a substitute) to do the work in their place and are therefore not self-employed. Workers are protected against discrimination, harassment and victimisation under the Equality act 2010. **Note that we use the word ‘worker’ in this guidance to include both workers and employees.** (See paragraphs 4.4 to 4.14.)

Contacts

This publication and related equality and human rights resources are available from [our website](#).

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

Introduction

1. This statement of expectations provides a set of consistent recommendations to support higher education providers in England develop and implement effective systems, policies and processes to prevent and respond to incidents of harassment and sexual misconduct.
2. 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.
3. The OfS cannot intervene in individual student cases to provide resolution or redress. These should be dealt with through a provider's internal complaints processes. If a student feels that an issue is not resolved, they can refer their concerns to the Office of the Independent Adjudicator for Higher Education (OIA).¹
4. While this statement focuses on the interests of students, we anticipate that providers would seek to take a similar approach to protecting staff and visitors from harassment and sexual misconduct.
5. The OfS statement of expectations refers throughout to 'harassment and sexual misconduct'. Our definitions for the purposes of this framework are as follows:
 - a. **Harassment** (as defined by Section 26 of the Equality Act 2010) includes unwanted behaviour or conduct which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment because of, or connected to, one or more of the following protected characteristics:
 - i. age
 - ii. disability
 - iii. gender reassignment
 - iv. race
 - v. religion or belief

¹ See www.oiahe.org.uk/

- vi. sex
 - vii. sexual orientation
- b. Under our definition, we understand harassment to include domestic violence and abuse (which can also involve control, coercion, threats), and stalking.
 - c. We would also consider harassment to include any incidents of physical violence towards another person(s) on the basis of a protected characteristic, and hate crimes, such as those criminal offences which are perceived by the victim or any other person, to be motivated by hostility or prejudice, based on a person's disability or perceived disability; race or perceived race; or religion or perceived religion; or sexual orientation or perceived sexual orientation or transgender identity or perceived transgender identity.
 - d. **Sexual misconduct** relates to all unwanted conduct of a sexual nature. This includes, but is not limited to:
 - i. Sexual harassment (as defined by Section 26 (2) of the Equality Act 2010)
 - ii. Unwanted conduct which creates an intimidating, hostile, degrading, humiliating or offensive environment (as defined by the Equality Act 2010)
 - iii. Assault (as defined by the Sexual Offences Act 2003)
 - iv. Rape (as defined by the Sexual Offences Act 2003)
 - v. Physical unwanted sexual advances (as set out by the Equality and Human Rights Commission: Sexual harassment and the law, 2017)²
 - vi. Intimidation, or promising resources or benefits in return for sexual favours (as set out by the Equality and Human Rights Commission: Sexual harassment and the law, 2017)³
 - vii. Distributing private and personal explicit images or video footage of an individual without their consent (as defined by the Criminal Justice and Courts Act 2015).
6. Our definitions include harassment and sexual misconduct through any medium, including, for example, online.
 7. In considering this statement of expectations, providers will also need take into account their statutory duties, and the OfS's regulatory requirements, relating to academic freedom and free speech.

² Sexual harassment and the law: Guidance for employers, Equality and Human Rights Commission, 2017

³ See www.equalityhumanrights.com/en/publication-download/sexual-harassment-and-harassment-work-technical-guidance

8. As outlined in EHRC guidance on freedom of expression⁴, published in February 2019, exposure to course materials that students might find offensive or unacceptable is unlikely to constitute harassment.

⁴ See www.equalityhumanrights.com/en/publication-download/freedom-expression-guide-higher-education-providers-and-students-unions-england

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

1. Higher education providers should clearly communicate, and embed across the whole organisation, their approach to preventing and responding to all forms of harassment and sexual misconduct affecting students. They should set out clearly the expectations that they have of students, staff and visitors.

We consider this to include:

- a. Visible and ongoing commitment from senior leaders and the governing body to preventing and responding to all forms of harassment and sexual misconduct. There should be clear governance accountability lines to ensure that the provider's approach is embedded, upheld in practice, and remains fit-for-purpose across all of the provider's higher education activities.
- b. Collaboration with students' unions, or other relevant student bodies, and student representatives to deliver a clear and consistent message to students, staff and visitors that harassment and sexual misconduct will not be tolerated. This should involve making clear the possible consequences and action the provider may take in response to such instances.
- c. A clear statement of behavioural expectations for all students, staff and visitors, and the possible sanctions that can be imposed where these are not followed. These expectations should be visible and easy to understand for all students, staff and visitors, with communications adapted to the needs of different groups. It should be made clear to new and continuing students and staff as part of induction and relevant ongoing activities.

2. Governing bodies should ensure that the provider's approach to harassment and sexual misconduct is adequate and effective. They should ensure that risks relating to these issues are identified and effectively mitigated.

We consider this to include:

- a. A systematic approach to tackle harassment and sexual misconduct embedded within existing governance structures. For example, committees and working groups set up to tackle these issues should form part of the provider's governance structure to allow effective oversight across the provider's remit.
- b. The governing body routinely being given information on the provider's approach to harassment and sexual misconduct for consideration and action (as necessary). This may include the provision of information on any prevalence data collected, as well as reported incidents and cases and outcomes of cases. It could include the review and evaluation of the provider's approach to harassment and sexual misconduct and its impact on students.

- c. Steps taken to ensure that those with a governance role have a clear understanding of the issues that are relevant to their responsibilities and, where appropriate, their obligations under the Public Sector Equality Duty. This could be achieved for example through appropriate training and briefing of relevant staff or members of the provider's governing body and committees.

3. Higher education providers should appropriately engage with students to develop and evaluate systems, policies and processes to address harassment and sexual misconduct.

We consider this to include:

- a. Proactive and meaningful engagement with students and student representatives in the development, implementation and evaluation of systems, policies and processes for preventing and responding to harassment and sexual misconduct, and in how to support students who have experienced it.
- b. Engagement with a diverse range of students, as well as learning from the experience of students who have been involved in reports or investigations, to ensure that the development, implementation and evaluation of systems, policies and processes are adequate and effective. This may include consideration of protected characteristics and mode and level of study.
- c. Engagement conducted in a sensitive manner to support student wellbeing. This means that engagement should be accompanied by appropriate support and safeguards, which have been informed by specialist expertise, where appropriate.

4. Higher education providers should implement adequate and effective staff and student training with the purpose of raising awareness of, and preventing, harassment and sexual misconduct.

We consider this to include:

- a. A clear training strategy which supports staff to respond effectively to different types of harassment and sexual misconduct incidents. This should involve an assessment of the training needs of all staff. This strategy should be reviewed and evaluated on a regular basis to ensure it is fit for purpose.
- b. Training made available on an ongoing basis for all staff and students to raise awareness of harassment and sexual misconduct with the purpose of preventing incidents and encouraging reporting where they do occur. For example, this may include covering areas such as bystander initiatives, consent and receiving and handling disclosures.

5. Higher education providers should have adequate and effective policies and processes in place for all students to report and disclose incidents of harassment and sexual misconduct.

We consider this to include:

- a. Provision of easy to understand information for all students and staff on how they can report, disclose or seek support and advice if they experience or witness any incident of harassment and sexual misconduct. This should include clearly communicating how the provider may receive and respond to anonymous reports or reports made by student representatives or third parties, for example third party reporting centres.
- b. Provision of support for students regardless of whether a formal report or complaint is made.
- c. Policies and processes for reporting communicated to all students in an accessible way: for example, inclusion in student handbooks, via the provider's website and social media and as part of early communication with prospective students.
- d. If required and requested, signposting or referring students to the police, NHS, sexual assault referral centres or hate crime reporting centres, or to local specialist services such as Rape Crisis, if specialist support is needed.
- e. An understanding of and minimising any barriers to reporting and disclosing incidents that may exist for particular groups of students.

6. Higher education providers should have a fair, clear and accessible approach to taking action in response to reports and disclosures.

We consider this to include:

- a. A visible and easy to understand policy which sets out the circumstances in which a provider would initiate disciplinary proceedings against a student, staff member or visitor (including member of the governing body) where relevant, and how the process addresses disciplinary issues that may also constitute a criminal offence.⁵ We would anticipate providers investigating (for example, as a disciplinary matter) complaints made in relation to any of its registered students.
- b. Visible and easy to understand information for all staff and students about the provider's investigatory process, decision-making process, associated timescales and factors which may impact on timescales. This should be explicit about the range of actions that may result from the provider's investigation and should include information about any appeal process and how this can be accessed.
- c. An investigatory process that is demonstrably fair, independent, and free from any reasonable perception of bias. This may include consideration of and consultation with appropriate expertise.
- d. Disciplinary hearings that consider student complaints and appeals conducted by a panel that is free from any reasonable perception of bias, is diverse and includes student representatives where appropriate. All panel members should be appropriately trained in handling complaints of this nature and be independent from the investigatory process and specific case being considered. For example, this may include consideration of and consultation with appropriate expertise.

- e. An approach which ensures that staff are able to respond appropriately and consistently to a disclosure about harassment and sexual misconduct.
- f. A clear explanation of how confidential information will be used and shared as well as the protections in place for individuals, within investigatory and disciplinary processes.

7. Higher education providers should ensure that students involved in an investigatory process have access to appropriate and effective support.

We consider this to include:

- a. In the event of a disclosure about an incident of harassment and/or sexual misconduct, both the reporting and responding parties having equitable access to appropriate support prior to the decision to launch a formal investigation, for the duration of any investigation, and following its outcome.
- b. An appropriate protocol for timely communications with reporting and responding parties.
- c. Procedures that ensure that all reports of incidents of harassment and sexual misconduct are dealt with within a clearly communicated and reasonable timeframe.
- d. Reporting and responding parties being provided with an outcome of the investigatory process where the provider is able to share this information, or an explanation of any actions the provider has taken, or not taken, as a result of the complaint. Should the outcome of a process change, the reporting and responding parties should be informed of this.

⁵ UUK/Pinsent Masons LLP's '[Guidance for Higher Education Institutions: How to Handle Alleged Student Misconduct Which May Also Constitute A Criminal Offence](#)' may help providers develop appropriate practice in this area.

Facilitation Skills & Mindsets for Facilitating Restorative Practices

Compiled by Carrie Landrum, March 2019 (updated 2021)

Skills to Begin With

Build Rapport – Get to know the person first and foremost. Ask about their interests, etc.

Build Trust – Clarify confidentiality, be as transparent as possible, be sincere and non-judgmental.

Practice Multipartiality¹ – Be equitably partial to all participants. Respect and care for each person.

Hold Space – Be present with the person’s experience. Use silence. Be an affirming presence.

The “OARS” of Motivational Interviewing²

Open-Ended Questions – Ask questions that cannot be answered by a yes or no.

Affirmations – Express appreciation and respect, validate as helpful.

Reflections – Instead of asking a question, reflect back what you heard in a statement.

Summaries – Summarize what you heard, ask if you understood accurately what was shared.

The LARA Method³

Listen – Actively listen to what is said and unsaid. Notice terminology and body language.

Affirm or Acknowledge – Verbally acknowledge what was shared, affirm where possible.

Respond – Respond in an honest, respectful, and thorough manner to what was surfaced.

Add – Add additional information as helpful in a respectful and empathic way.

Additional Skills

Use Silence – Practice the use of silence to honor what’s shared, and to offer space for reflection.

Offer Choice – Pose options and honor agency whenever possible; ask before adding thoughts.

Convey Empathy – Understand, empathize with, and be sensitive to others’ experiences, thoughts.

Practice Mirroring – Use the terms they use, match their energy, mirror their body posture.

Breathe Mindfully – Breathing deeply and mindfully can calm a facilitator as well as participants.

Non-Violent Communication⁴

Observations – Use objective observations, not subjective statements, evaluations, or judgments.

Feelings – Explore underlying emotions behind statements, requests, or needs.

Needs – Identify and explore unmet universal human needs behind stated positions.

Requests – Establish requests (and not demands) that could satisfy unmet needs.

Facilitator Mindsets⁵

Offer Hope and Vision – Express optimism, possibilities, and hope for a future ideal state.

Accompaniment – A facilitator accompanies and guides participants through the process.

Presence – “It may be that the facilitator’s presence is more fundamental than any specific skills.”⁶

Maintain presence through being grounded, empathetic, open-minded, attentive, and caring.

¹ www.mediate.com/articles/assegued-multi-partiality.cfm

² www.myacpa.org/sites/default/files/Intervention%20Handout.pdf, pachiefprobationofficers.org/docs/MI_Workbook_Final.pdf

³ <https://sparqtools.org/lara/>

⁴ www.nonviolentcommunication.com/aboutnvc/4partprocess.htm

www.schooltransformation.com/wp-content/uploads/2012/06/Expressing_Empathy.pdf

⁵ *Serving Crime Victims through Restorative Justice: A Resource Guide for Learners and Practitioners*

Alberta Restorative Justice Association, 2018 docs.wixstatic.com/ugd/adb2db_0aa56dae8ae149808afac83b6869546d.pdf

⁶ Ibid. 79.

Working With Respondents Restoratively

5 tips for working with students accused of sexual misconduct in a restorative process

By Carrie Landrum, University of Michigan, 2019 (revised 2021)

1. Remember: “Restorative Justice is Respect”

“Ultimately [restorative justice] comes down to one basic value: respect. If I had to put restorative justice into one word, that would be it: respect for all, even those who are different than us, even for those who seem to be our enemies. Respect reminds us of our interconnectedness but also our differences. Respect reminds us that we must balance concern for all parties.

If we pursue justice as respect, we will do justice restoratively. If we are aware of the rights of self and others, [we] will respect these rights. [If] we will extend respect, [we will] get respect. If we do not respect others and their rights and needs, we will not do justice restoratively, no matter how earnestly we adopt the principles. The value *respect* underlies restorative justice principles and must guide and shape their application.” - Howard Zehr

Tip: Approach respondents as fallible, growing humans who need guidance and support to make things right.

2. Consider: If you had just been accused of sexual misconduct, how would you respond?

The stages of grief are commonly known as: denial, anger, bargaining, depression, and acceptance.² Respondents frequently show up with denial, anger, and/or defensiveness first, often accompanied by confusion. This response can be an unconscious protection against feeling shame. Respondents may employ defense tactics in order to avoid feeling shame, to avoid confronting the possibility that they actually hurt another person, and in order to feel safe.

According to Nathanson’s *Compass of Shame*, shame generally shows up in people in four different ways.³ Two of these are avoidance (denial) and attacking others, which includes blaming the victim, turning the tables, and lashing out. Respondents may engage in attacking others, whether that’s attacking the claimant/survivor, or the institution itself (and/or others). Allow respondents space to go through their stages of grief and loss, knowing that this can ultimately culminate in acceptance.

Tip: Be patient while respondents act reactively; give them time to accept responsibility.

3. Create space for learning by building trust and rapport and by listening

When working with students, we serve as educators. In order to maximize learning, it is essential to ensure the learner feels safe, respected, and supported in their learning. For a respondent to be willing to go on a journey with us, they must trust us, feel safe with us, and feel respected and heard by us. To establish trust we can build rapport, practice empathy, listen actively, honor silence, seek understanding, find commonality, and offer respect for a respondent’s humanity. It is also really important to understand and acknowledge respondents’ perspectives, needs, and fears, and to assuage their fears where possible. Through the demonstration of respect, listening, and care we can build the foundation of trust necessary to support learning, growth, and change.

Tip: Spend time getting to know a respondent first and take time to listen to what they want to share.

¹ Howard Zehr with Ali Gohar, *The Little Book of Restorative Justice*, Good Books, 2003 www.unicef.org/tdad/littlebookrjpakaf.pdf

² Elisabeth Kubler Ross & David Kessler, *Five Stages of Grief* <https://grief.com/the-five-stages-of-grief>

³ Ted Wachtel, *Defining Restorative*, IIRP Graduate School, International Institute of Restorative Practices, 2016 www.iirp.edu/restorative-practices/defining-restorative

“I did then what I knew how to do. Now that I know better, I do better.”

~ Maya Angelou

4. Meet students where they're at, come alongside them, and work with (not to) them

Professionals in higher education work to *meet students where they're at*; in the counseling method of motivational interviewing professionals *come alongside* a person to effectively support change behavior. The fundamental principle of restorative practices rests on the belief that human beings are more cooperative and more likely to make positive changes in their behavior when those in positions of authority do things *with* them, rather than *to* them or *for* them.⁴ By harnessing the principles and skills associated with restorative practice, effective teaching and learning, and motivational interviewing, we encourage respondents to be more self-reflective and give them space to grow and change.

More than just techniques, these approaches include a *way of being*. Restorative practices and motivational interviewing are both relational in their approach. The spirit of motivational interviewing is a relational methodology grounded in four primary approaches by the facilitator that are also inherent in restorative practices:

1. **Partnership and Collaboration:** Engagement of the respondent's point of view and experiences.
2. **Autonomy with Responsibility:** The exploration of various pathways to change by upholding absolute worth, accurate empathy, affirmation, and the autonomy of others to engage in change.
3. **Evocation:** The drawing out of a respondent's inherent motivations for change and repair.
4. **Compassion:** The commitment to seek to understand others' experiences, values, and motivations without engaging in explicit or implicit judgment.⁵

Tip: Practice rolling with resistance and balancing equitable amounts of support and accountability.

5. Support growth by planting seeds

We won't usually be able to help a respondent move from denial and defense to empathy and repair in a single meeting. However, we can invite them on the journey. Once we've established trust and mutual respect and we've met them where they're at, we are better able to help students understand other perspectives and experiences. Respondents may likely need to feel heard and affirmed first, before they can begin to perspective-shift or have empathy for others.

To support this building of empathy we can lean into multipartiality: being partial to individuals who were harmed as well as being equitably partial to the respondent. We can plant seeds of understanding and empathy even if the respondent isn't quite ready to see or hold such things. If we nurture these seeds by coming alongside a respondent and supporting their dignity, autonomy, and intrinsic motivation, while appealing to their highest or best self, we may be surprised at the change we witness. Remember that to cultivate growth, seeds need to be planted as well as nourished.

Tip: Practice multipartiality, plant seeds of empathy and perspective-shifting, and water those seeds!

⁴ Ibid.

⁵ Spirit of Motivational Interviewing https://pachiefprobationofficers.org/docs/MI_Workbook_Final.pdf and <https://ytp.uoregon.edu/content/spirit-motivational-interviewing>



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How sexual harassment creates inequality in academia

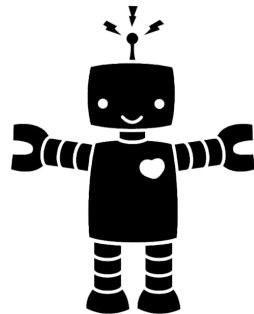
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2021 Conference on Sexual Harassment in Education

Berkeley Center on Comparative Equality and Anti-Discrimination Law
UC Berkeley School of Law, 29 October 2021



Kidd Lab

© University of California, Berkeley

promising professional rewards in return for sexual favors

threatening professional consequences unless sexual demands are met

UNWANTED SEXUAL ATTENTION

rape

sexual assault

unwanted groping or stroking

PUBLIC CONSCIOUSNESS

GENDER HARASSMENT

relentless pressure
for sex

unwanted sexual
discussions

nude images posted
at work

relentless pressure
for dates

sexually humiliating acts

offensive sexual teasing

sexual insults
e.g. *"for a good time call..."*,
calling someone a whore

sexist insults
e.g. *women don't belong
in science*

offensive remarks
about bodies

obscene gestures

sabotage of women's
equipment

vulgar name calling
e.g. *"slut," "bitch," "c**t"*

gender slurs
e.g. *"pu**y"*

insults to working mothers
e.g. *"you can't do this job with
small kids at home"*

***Sexual harassment** prevents equal access to training and professional opportunities.*



University of Rochester, Rochester, NY , United States

A University of Rochester investigation confirmed that Florian Jaeger:

- (1) objectified women
- (2) used sexualized language in academic settings
- (3) sent an unwanted picture of his penis to one student, and a unwanted “racy” picture to another woman
- (4) had four sexual relationships with students (including one *undergraduate* student), characterized as “problematic” and an inherent “asymmetry of power”
- (5) had sexual relationships with at least four other women he helped bring to UR to give academic talks

A University of Rochester investigation confirmed that Florian Jaeger:

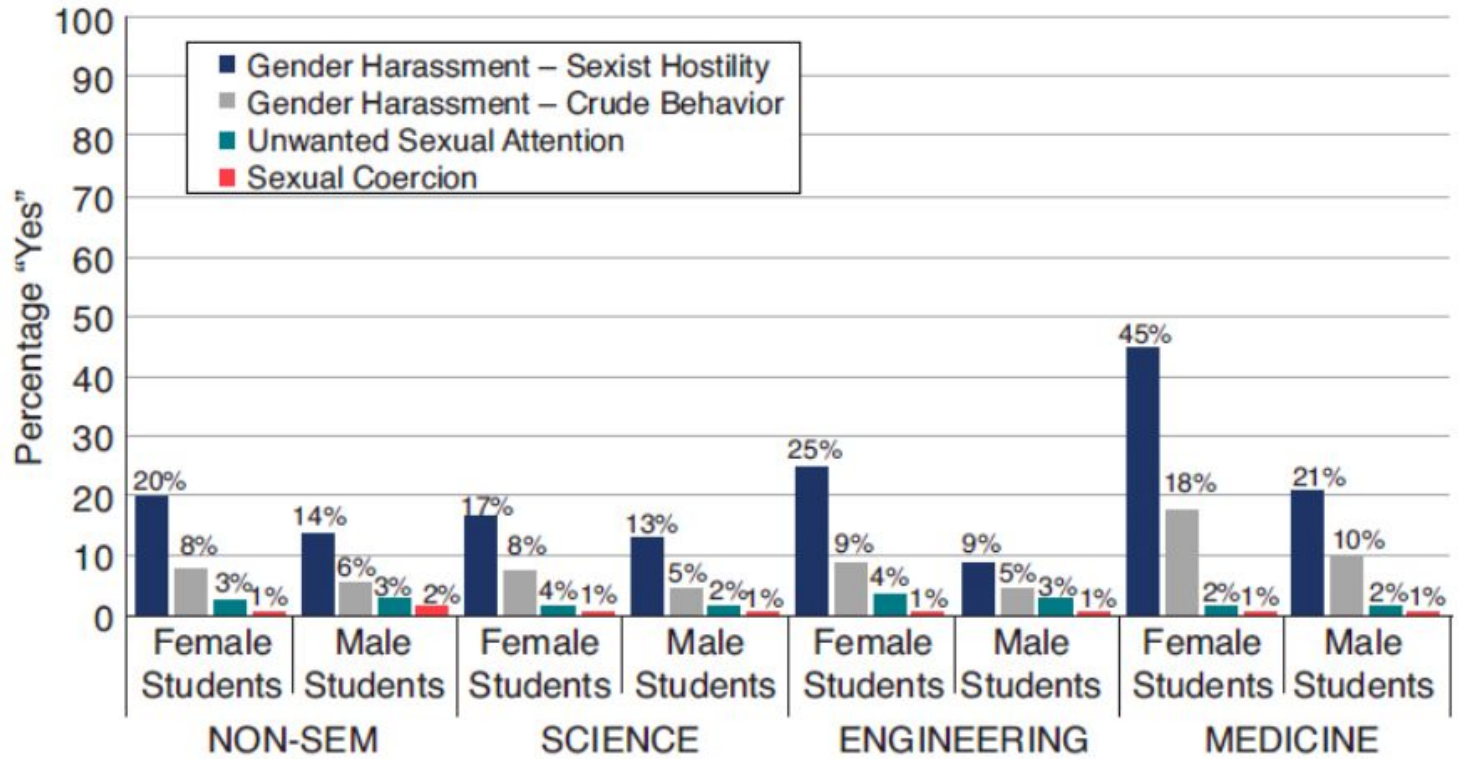
- (6) had “loud sex” that students did not want to hear but could
- (7) used drugs at retreats leading to a hospital visit
- (8) served on a thesis committee for a student he had sex with
- (9) mentored and wrote a recommendation for a student while in a sexual relationship with her
- (10) caused students to miss out on educational opportunities because they *specifically* avoided him

***Harassment targets people who
lack the power to stop it.***

In a fieldwork study, 90% of women and 70% of men were trainees or employees at the time they were targeted.

Experienced	Gender	All % (N)	Respondent's Status at Time of Experience*		
			Trainee % (N)	Employee % (N)	Faculty % (N)
Harassment	Women	71% (361/512)	84% (305)	12% (42)	2% (8)
	Men	41% (56/138)	68% (38)	20% (11)	13% (7)
Assault	Women	26% (131/504)	86% (113)	11% (14)	2% (3)
	Men	6% (8/133)	75% (6)	0% (0)	25% (2)

*Not all respondents provided an answer to these questions.
doi:10.1371/journal.pone.0102172.t002



Faculty/staff-on-student sexual harassment incidence rates, by gender and type of sexual harassment (University of Texas System).

***Reporting sexual harassment
triggers retaliation for 75%
harassment victims.***

Table 2

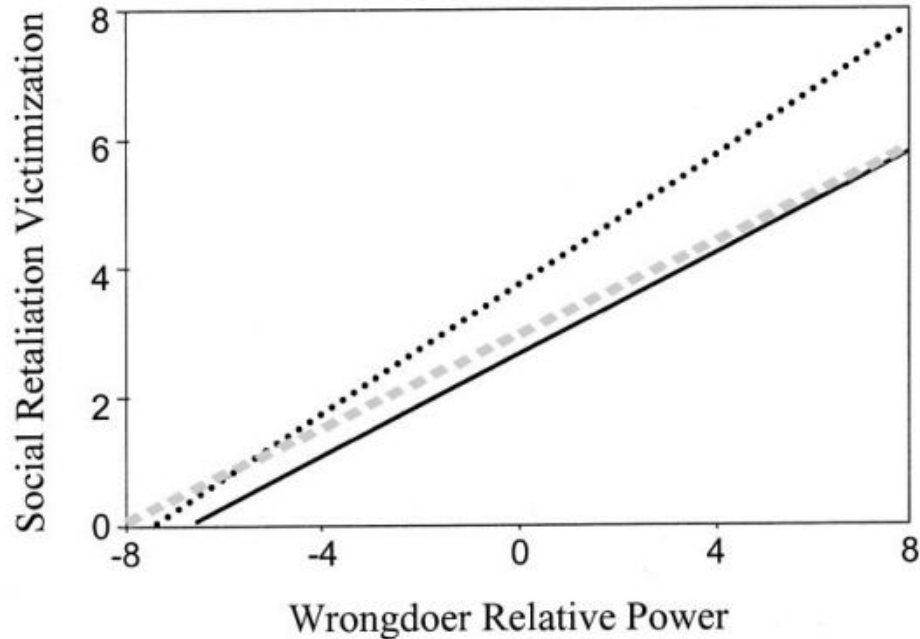
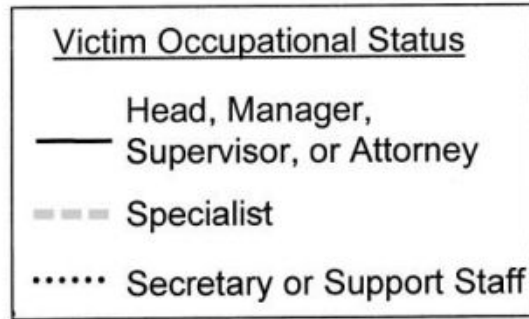
Social Retaliation Victimization (SRV) and Work Retaliation Victimization (WRV) Items and Factor Loadings

Item	Factor loading	
	SRV	WRV
I was shunned or excluded by others at work.	.92	
I was slighted or ignored by others at work.	.88	
I was gossiped about in an unkind way.	.83	
I was threatened.	.83	
I was criticized for complaining about the situation.	.82	
I was blamed for the situation.	.81	
I was considered a "troublemaker."	.80	
I was given less favorable job duties.		.91
I was unfairly demoted.		.87
I was denied a promotion I deserved.		.85
I was denied an opportunity for training I deserved.		.85
I was given unfair poor job performance appraisals.		.84
I was transferred to a less desirable job.		.82
I was unfairly disciplined.		.77



The less powerful the victim, the more extreme the retaliation.

a. Victim Occupational Status X Wrongdoer Power



Power differentials between peers may be based on a target's:

- (1) Gender minority status*
- (2) Racial minority status*
- (3) Ethnic minority status*
- (4) LGTBQ+ status*
- (5) Citizenship status*
- (6) First-generation student status*

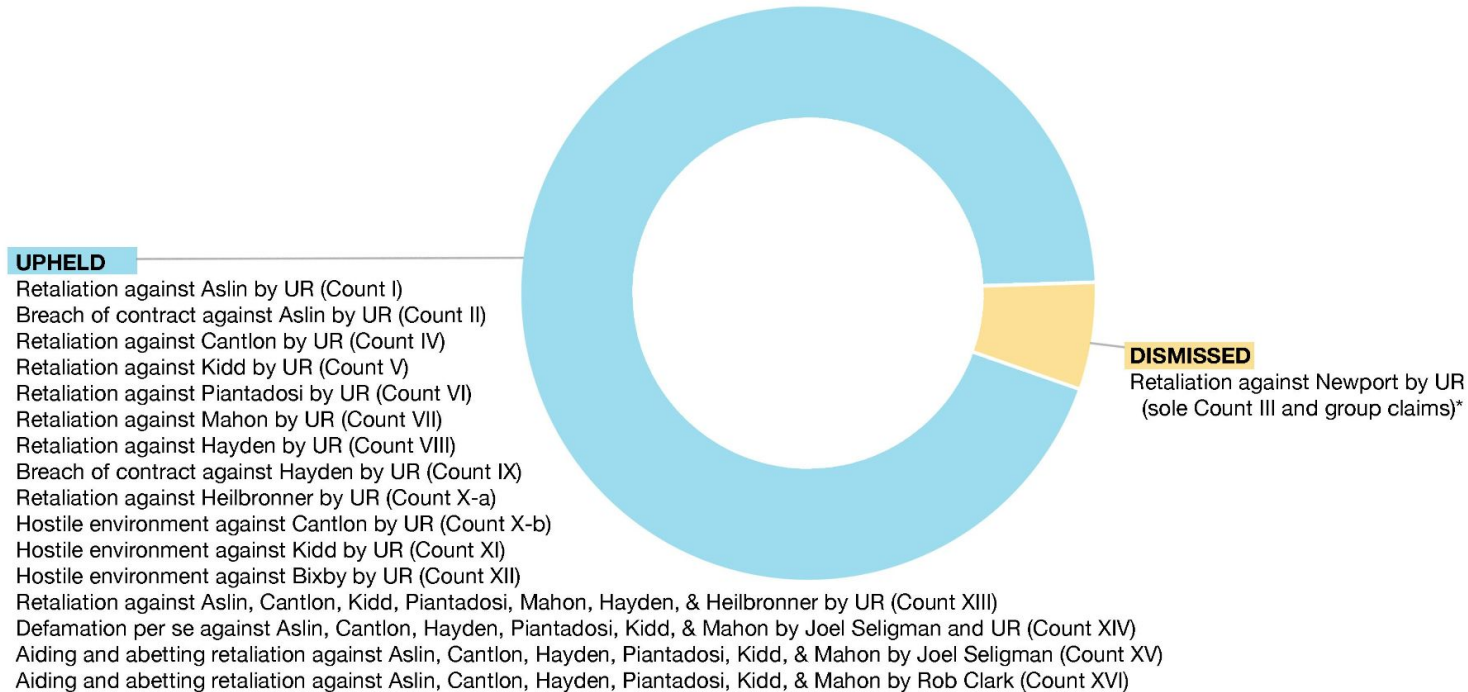


Zimbardo, Stanford Prison Experiment, 1971; Zimbardo, *The Lucifer Effect*, 2007

Institutional biases

“A combination of Jaeger’s harsh and demeaning language, flirtatious behavior, use of sexual innuendo, promiscuous reputation, open relationships with students and blurring of social and professional lines all contributed to some extent [to students avoiding him], but we cannot unravel the degree to which women avoided Jaeger because of the sexual elements in his conduct, as opposed to other simply offensive or unappealing aspects of his personality.”

Ruling upheld **16 of 17** claims, in full or part, against UR's motion to dismiss.



*Dismissed due to the timing of Newport's employment, not because the actions failed to meet the legal threshold
Aslin et al. v. University of Rochester, Seligman, & Clark, U.S. District Court Western District of New York case 6:17-cv-06847-LJV



University of Rochester and plaintiffs settle sexual harassment lawsuit for \$9.4 million

Accusers alleged retaliation by university in case of linguist Florian Jaeger

27 MAR 2020 · BY [MEREDITH WADMAN](#)



Penn Professor to Stand Trial on Rape and Drug Charges

By *SCOTT SMALLWOOD* | AUGUST 01, 2003 [PREMIUM CONTENT FOR SUBSCRIBERS](#) [SUBSCRIBE TODAY](#)

A University of Pennsylvania professor accused of drugging and then raping a woman in his office last September has been ordered to stand trial after attempts to negotiate a plea bargain failed.

'21-CENTURY ANIMAL HOUSE'

Dartmouth Professors Sexually Assaulted Students, Turned Research Department Into '21st-Century Animal House': Lawsuit

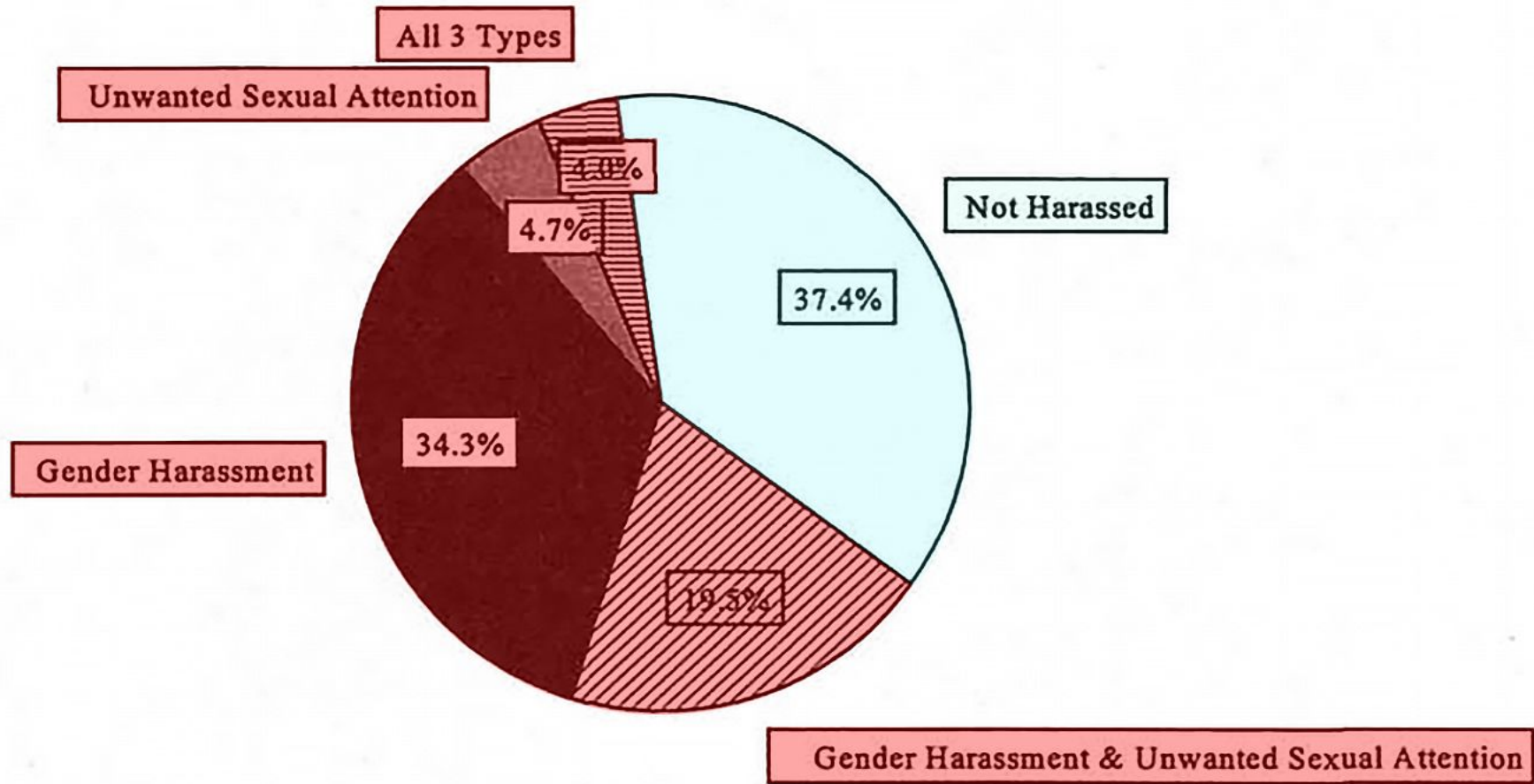
In a class-action suit, 7 current and former students claim 3 professors hosted drinking parties with students and sexually assaulted women in exchange for academic support.

USC medical school dean out amid revelations of sexual harassment claim, \$135,000 settlement with researcher

[Education](#) | [Local News](#) | [Science](#)

Sex harassment, porn, personal use of state money among litany of complaints against UW prof

Originally published June 30, 2016 at 12:52 pm | Updated July 1, 2016 at 9:59 am



SCIENCE

How Women Are Harassed Out of Science

The discrimination young researchers endure makes America's need for STEM workers even greater.

JOAN C. WILLIAMS AND KATE MASSINGER JUL 25, 2016



Graduate students at University of California, Berkeley, after they filed complaints of sexual harassment against a professor (JEFF CHIU / AP)

When Joan was an undergraduate, in the 1970s, she asked her boyfriend why one of his roommates was finishing up a Ph.D. while another, in the same

Gender Inequity & Harassment

Women are 1.68 times more likely to encounter gender harassment in male-dominated environments

Male-dominant environments are environments where:

- (1) men outnumber women
- (2) leadership is male-dominated
- (3) fields are considered atypical for women

Sexual harassment causes women and minorities to drop out of disciplines in which they are already underrepresented.

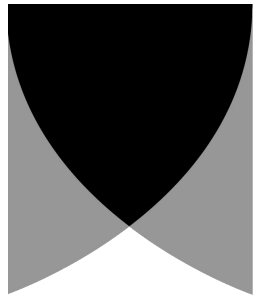
What do we do?

**1. People who
report need
support**

**2. People who
report need
options for *how*
and *when***

**3. Power abusers
need to lose that
power**

**4. Institutions
can't police
themselves**



STUDENT

EQUITY

C O A L I T I O N

www.studentequitycoalition.org

National Academies Consensus

Predictors of Sexual Harassment:

- 1) Gender ratios in the environment
- 2) Institutional climate

Institution Climate & Harassment

Perceptions of organizational tolerance for sexual harassment are:

- (1) the perceived risk to targets for complaining,
- (2) a perceived lack of sanctions against offenders, and
- (3) the perception that one's complaints will not be taken seriously

**5. We need to
keep talking**



JUSTIN TROMBLY | CAMPUS TIMES

Student protesters called for resignations and accountability in response to mishandling of sexual harassment complaints on campus at the University of Rochester on Sept. 17, 2017.



JUSTIN TROMBLY | CAMPUS TIMES

Student protesters called for resignations and accountability in response to mishandling of sexual harassment complaints on campus at the University of Rochester on Sept. 17, 2017.

A student is holding a hand-drawn protest sign. The sign is white with black and red text. The text reads: "POLICY SHOULD PROTECT PEOPLE NOT REPUTATION". The word "NOT" is written in red and underlined with a thick black stroke. The sign is held in front of a blurred background of other students and trees.

POLICY SHOULD
PROTECT
PEOPLE NOT
REPUTATION

JUSTIN TROMBLY | CAMPUS TIMES

Student protesters called for resignations and accountability in response to mishandling of sexual harassment complaints on campus at the University of Rochester on Dec. 10, 2017.



JUSTIN TROMBLY | CAMPUS TIMES

Student protesters called for resignations and accountability in response to mishandling of sexual harassment complaints on campus at the University of Rochester on Dec. 10, 2017.

**\$ 10 Million
And ZERO
Accountability**

HENRY LITSKY | CAMPUS TIMES

Student protest flyers referencing the settlement on campus in October of 2021.

White credits
that Jaeger
said he came
to UR beca-
use of "legend-
ary nude hot tub
parties w.
students."
(p. 9-155)

TAKE
STORY,
FIRE
MORIAN!

8 35°
WROC 6:07



LUMI SCHILDKRAUT | CAMPUS TIMES

Student protestors calling for Jaeger's firing near "Meliora Village" on Oct. 4, 2019.

THANK YOU

McALLISTER
OLIVARIUS



BERKELEY CENTER ON
COMPARATIVE EQUALITY
& ANTI-DISCRIMINATION
LAW



 **STUDENT
EQUITY**
C O A L I T I O N

Special thanks to Suzy
Wilson for seed funding.

Email: celestekidd@gmail.com

Web: www.celestekidd.com

Lab: www.kiddlab.com

Twitter: [@celestekidd](https://twitter.com/celestekidd)

Senate Bill No. 331

CHAPTER 638

An act to amend Section 1001 of the Code of Civil Procedure, and to amend Section 12964.5 of the Government Code, relating to civil actions.

[Approved by Governor October 7, 2021. Filed with Secretary of State October 7, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 331, Leyva. Settlement and nondisparagement agreements.

Existing law prohibits a settlement agreement from preventing the disclosure of factual information regarding specified acts related to a claim filed in a civil action or a complaint filed in an administrative action. These acts include sexual assault, as defined; sexual harassment, as defined; an act of workplace harassment or discrimination based on sex, failure to prevent such an act, or retaliation against a person for reporting such an act; and an act of harassment or discrimination based on sex by the owner of a housing accommodation, as defined, or retaliation against a person for reporting such an act.

This bill would clarify that this prohibition includes provisions which restrict the disclosure of the information described above. For purposes of agreements entered into on or after January 1, 2022, the bill would also expand the prohibition to include acts of workplace harassment or discrimination not based on sex and acts of harassment or discrimination not based on sex by the owner of a housing accommodation.

The California Fair Employment and Housing Act (FEHA) prohibits various actions as unlawful employment practices unless the employer acts based upon a bona fide occupational qualification or applicable security regulations established by the United States or the State of California. In this regard, FEHA makes it an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to require an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment or discrimination.

This bill would provide that unlawful acts in the workplace for these purposes include any harassment or discrimination and would instead prohibit an employer from requiring an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about those acts. The bill would make it an unlawful employment practice for an employer or former employer to include in any agreement related to an employee's separation from employment any provision that prohibits the disclosure of

information about unlawful acts in the workplace. The bill would provide that any provision in violation of that prohibition would be against public policy and unenforceable. The bill would require a nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace to include specified language relating to the employee's right to disclose information about unlawful acts in the workplace.

The people of the State of California do enact as follows:

SECTION 1. Section 1001 of the Code of Civil Procedure is amended to read:

1001. (a) Notwithstanding any other law, a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited:

(1) An act of sexual assault that is not governed by subdivision (a) of Section 1002.

(2) An act of sexual harassment, as defined in Section 51.9 of the Civil Code.

(3) An act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination, as described in subdivisions (a), (h), (i), (j), and (k) of Section 12940 of the Government Code.

(4) An act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination by the owner of a housing accommodation, as described in Section 12955 of the Government Code.

(b) Notwithstanding any other law, in a civil matter described in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts with subdivision (a).

(c) Notwithstanding subdivisions (a) and (b), a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant. This subdivision does not apply if a government agency or public official is a party to the settlement agreement.

(d) Except as authorized by subdivision (c), a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to the claim described in subdivision (a) that is entered into on or after January 1, 2019, is void as a matter of law and against public policy.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.

(f) In determining the factual foundation of a cause of action for civil damages under subdivision (a), a court may consider the pleadings and other papers in the record, or any other findings of the court.

(g) The amendments made to subparagraphs (3) and (4) of subdivision (a) by Senate Bill 331 of the 2021–22 Regular Session apply only to agreements entered into on or after January 1, 2022. All other amendments made to this section by Senate Bill 331 of the 2021–22 Regular Session shall not be construed as substantive changes, but instead as merely clarifying existing law.

SEC. 2. Section 12964.5 of the Government Code is amended to read:

12964.5. (a) (1) It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either of the following:

(A) (i) For an employer to require an employee to sign a release of a claim or right under this part.

(ii) As used in this subparagraph, “release of a claim or right” includes requiring an individual to execute a statement that the individual does not possess any claim or injury against the employer or other covered entity, and includes the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.

(B) (i) For an employer to require an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace.

(ii) A nondisparagement or other contractual provision that restricts an employee’s ability to disclose information related to conditions in the workplace shall include, in substantial form, the following language: “Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”

(2) Any agreement or document in violation of this subdivision is contrary to public policy and shall be unenforceable.

(b) (1) (A) It is an unlawful employment practice for an employer or former employer to include in any agreement related to an employee’s separation from employment any provision that prohibits the disclosure of information about unlawful acts in the workplace.

(B) A nondisparagement or other contractual provision that restricts an employee’s ability to disclose information related to conditions in the workplace shall include, in substantial form, the following language: “Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or

discrimination or any other conduct that you have reason to believe is unlawful.”

(2) Any provision in violation of paragraph (1) is against public policy and shall be unenforceable.

(3) This subdivision does not prohibit the inclusion of a general release or waiver of all claims in an agreement related to an employee’s separation from employment, provided that the release or waiver is otherwise lawful and valid.

(4) An employer offering an employee or former employee an agreement related to that employee’s separation from employment as provided in this subdivision shall notify the employee that the employee has a right to consult an attorney regarding the agreement and shall provide the employee with a reasonable time period of not less than five business days in which to do so. An employee may sign such an agreement prior to the end of the reasonable time period as long as the employee’s decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, or a threat to withdraw or alter the offer prior to the expiration of the reasonable time period, or by providing different terms to employees who sign such an agreement prior to the expiration of such time period.

(c) As used in this section, “information about unlawful acts in the workplace” includes, but is not limited to, information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful.

(d) (1) This section does not apply to a negotiated settlement agreement to resolve an underlying claim under this part that has been filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer’s internal complaint process.

(2) As used in this section, “negotiated” means that the agreement is voluntary, deliberate, and informed, the agreement provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in a severance agreement.

(f) This section does not prohibit an employer from protecting the employer’s trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.

Crafting Meaningful Sexual Harassment Settlements Workshop – October 29, 2021

Notes and Links from Sunu Chandy, Legal Director, National Women's Law Center

- Activision - [Article](#) and [EEOC Proposed Consent Decree](#), see pages 39-40
Provision from an EEOC Proposed Decree (note – still pending court approval)

Mental Health Support

Within sixty (60) days of the Effective Date, Defendants shall work with the EEO Consultant to make available expanded counseling for employees in need of mental health or counseling services, reconfirming that they are available for persons who may have experienced sexual harassment, pregnancy discrimination and/or related retaliation, regardless of whether any experience occurred while the person was employed by any Defendants. The counseling will be with qualified providers with experience in providing mental health services related to sexual harassment. Notice will be disseminated to the workforce of the availability of this service, a copy of which will be provided to the EEOC in the first semi-annual report and annually thereafter. All other records associated with this service will be kept confidential and will not be disclosed as part of the record keeping and reporting required under this Decree.

- Public Justice - [resource that compiles jury verdicts and settlements in K-12 harassment and bullying cases](#) (including resolutions that require increased mental health services)
- [What Works at Work: Promising Practices to Prevent and Respond to Sexual Harassment in Low-Paid Jobs](#)
- [Resources for Transforming Anti-Harassment Policies in Your State and Community](#)
- [2020 Progress Update: MeToo Workplace Reforms in the States](#)
- [Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools](#)
- [Dress Coded II: Protest, Progress and Power in D.C. Schools](#)
- NWLC Title IX Settlements
 - [Pennridge](#)
 - [Miami](#)
- [DOJ SJSU Press Release](#) and [SJSU Agreement Summary](#)
- [DOE Title IX Settlement](#)
- [Doe v. Brunswick School Department](#)

REGIONAL APPROACHES TO SEXUAL HARASSMENT IN EDUCATION: UGANDA, NIGERIA, KENYA.

BERKELEY CONFERENCE



The development of sexual harassment laws in Africa is reflective of cultural/societal attitudes towards sexual harassment; it is indicative of the political priorities and political interests of a nation and demonstrates the power dynamics of decision-making structures. This context also has a direct bearing on responses to sexual harassment in universities.



Uganda

Following a series of sexual harassment incidences at Makerere University, the oldest and most prestigious institution of higher learning in Uganda, a committee was appointed by the Vice Chancellor to undertake three key issues;

- Investigating the causes of increasing cases of sexual harassment at the university.
- Reviewing the Makerere University Policy and Regulations Against Sexual Harassment and make recommendations for its improvement.
- Receive submissions on sexual harassment at Makerere University.



A total of 234 interviews were conducted and women comprised 59 per cent of the total respondents.

There was a broad consensus among respondents that power relations lay at the heart of sexual harassment. They argued that abuse stemmed from inequalities in power and from the exploitation of such power in gender relations, lecturer-student relationships, boss-employee relationships, and socio-economic status. The Committee also noted that the university environment is generally attuned to a patriarchal culture which stereotypes females as sexual objects and there is a campus “fraternity” culture, all of which shape attitudes that contribute to inappropriate sexual behavior.

Other factors were noted as follows.

- Physical structure of the university building, eg poor street lighting and most buildings do not have 24-hour security or surveillance cameras.
- Lack of awareness of University Policy and Regulations Against Sexual Harassment.
- Alcohol and drug abuse.
- Poor academic monitoring and mentoring systems which results in ‘missing marks.’ The Committee acknowledged that sometimes results are omitted due to genuine errors and honest oversight, it noted that oftentimes some examiners deliberately omit students’ results from the class list to get them into their offices and exploit them.
- Culture of silence.

Review of Sexual Harassment Policy

The Sexual Harassment Policy was revised and recognizes that although sexual harassment policy occurs between equals it occurs more often where one person has power over the other.

1. Wide scope of applicability

Former and current Students/academic staff/contractors/partners

2. Confidentiality

It seeks to protect all persons involved in the matter.

NB/

- It is a top-down approach where the requirement of confidentiality is imposed on all parties but essentially its effect is to protect the perpetrator.
- The definition of sexual harassment centres around consent however does this resolve the controversial issue of whether the policy against sexual harassment should totally prohibit intimate relationships between staff and students.



3. Enforcement principles

Anonymous complaints are generally not admissible; 1st investigate to establish authenticity. Both complainant and respondent are to be advised promptly of the outcome. If the investigation reveals evidence of sexual harassment, then the investigative committee refers the matter to the internal disciplinary body.

4. Procedural matters

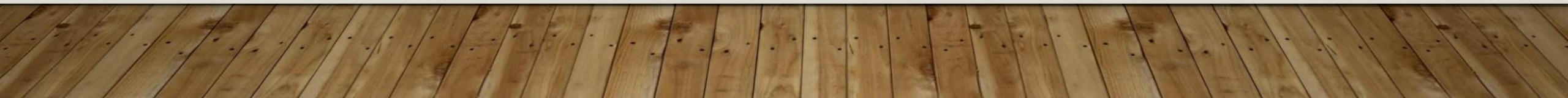
Retaliation is an offence

NB/No mention of what constitutes retaliation and its various forms.

Alternate methods of presenting evidence.

5. Reporting

Failure to act in a complaint submitted to a 'person in authority' is an offence.



6. Complaint Procedures

Informal complaints: These are made to any member of the implementing body which includes academic/administrative staff/student leader, and it can be forwarded to the Gender Mainstreaming Directorate for recording.

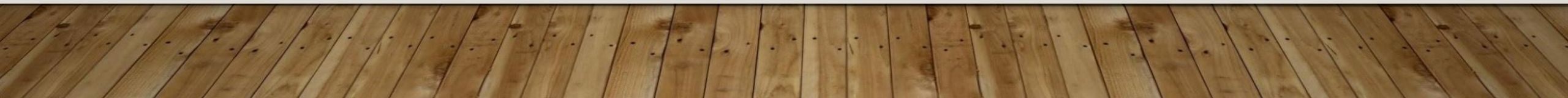
Formal complaints: Written format lodged with the Gender Mainstreaming Directorate/or other person trusted by the victim.

The University can also initiate a complaint.

7. Guidelines on how to document sexual harassment

An individual being sexually harassed is required to communicate clearly to the harasser; it must be direct and consistent, and the individual must provide evidence of this communication.

- This is a provision which fails to consider power disparities which make it difficult to give such a response to a harasser.



GENERAL COMMENTS

All complaints go through the Gender Mainstreaming Directorate

A roster of 100 persons form ad hoc committees to investigate sexual harassment allegations

Members who participated in an investigation cannot be members of the disciplinary committee hearing the matter.

SH complaint lodged within 3 years after its occurrence and the complaint must be investigated within 3 months of the complaint being lodged.

The penalty depends on the gravity of the offence



The penalty depends on the gravity of the offence

Written warning/Dismissal/Counseling/Restraining order/Fines of up to 2 years' salary/Suspension/demotion/Criminal investigation/prosecution

Both parties have right to appeal

The VC can suspend any member of the university with a sexual harassment case

But this cannot stretch beyond three months.

NB/ the three months elapse before investigations are completed which interferes with the investigations.



NIGERIA

A BILL FOR AN ACT TO PREVENT, PROHIBIT AND REDRESS SEXUAL HARASSMENT OF STUDENTS IN TERTIARY EDUCATIONAL INSTITUTIONS AND FOR MATTERS CONNECTED THEREWITH, 2019

In November 2019, Nigeria's Anti-Sexual Harassment bill was introduced, two days after the release of the Sex For Grades BBC documentary done by Kiki Mordi, which exposed lecturers at the University of Lagos and the University of Ghana for sexually harassing their students. The documentary led to an outcry among Nigerians; a spotlight was being shone on a problem that has been going on for so long and had, unfortunately, been normalized and accepted.

It seeks to promote and protect ethical stance in tertiary institutions, as well as protect students against and prevent sexual harassment by educators. The bill also proposes up to 5 years in jail for offenders and up to 14 years in jail for having sex with students.



Objective

1. Enacted to promote and protect ethical standards in tertiary education, the sanctity of the student-educator fiduciary relationship of authority, dependency and trust and respect for human dignity in tertiary educational institutions, by providing for:

(1) protection of students against sexual harassment by educators in tertiary educational institutions.

(2) prevention of sexual harassment of students by educators in tertiary educational institutions; and

(3) redressal of complaints of sexual harassment of students by educators in tertiary educational institutions.

- **Relationship of Authority, Dependency and Trust.**
- **Consent is not a defence**



CRITICISMS

The Anti-Sexual Harassment Bill addresses only universities and gives the impression that that is where the problem is, even though it is pervasive in all sectors – police, prison, civil service, private sector, etc. This brings to the fore several questions: Why doesn't Nigeria have a law that addresses sexual harassment directly? Are we going to be creating new bills to address each sector? Why not amend existing sexual assault laws to include harassment in all sectors?

NB/ There is no provision in Labour Act that prohibits sexual harassment or any other kind of harassment during employment. If an employee considers that the employer is harassing him/her, the employee can terminate the employment contract by providing the giving an appropriate notice. However, if an employer terminates the employment contract, it is not considered as harassment because the Nigerian law clearly states that the employer can terminate the employment contract for any reason or may be for no reason at all.

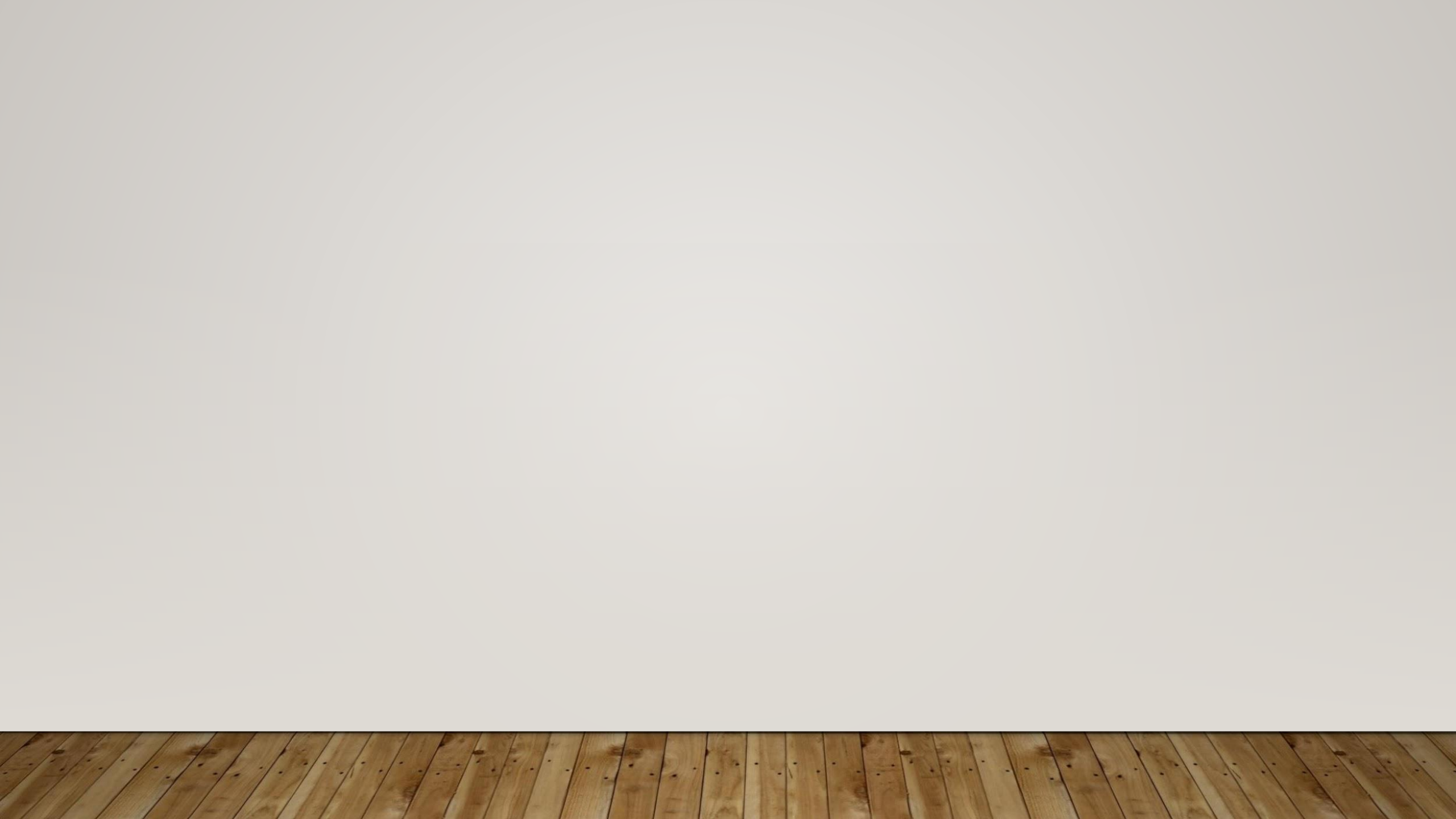
NB/ Members of the Academic Staff Union of Universities (ASUU) have criticized the bill, stating that the bill is biased against lecturers.

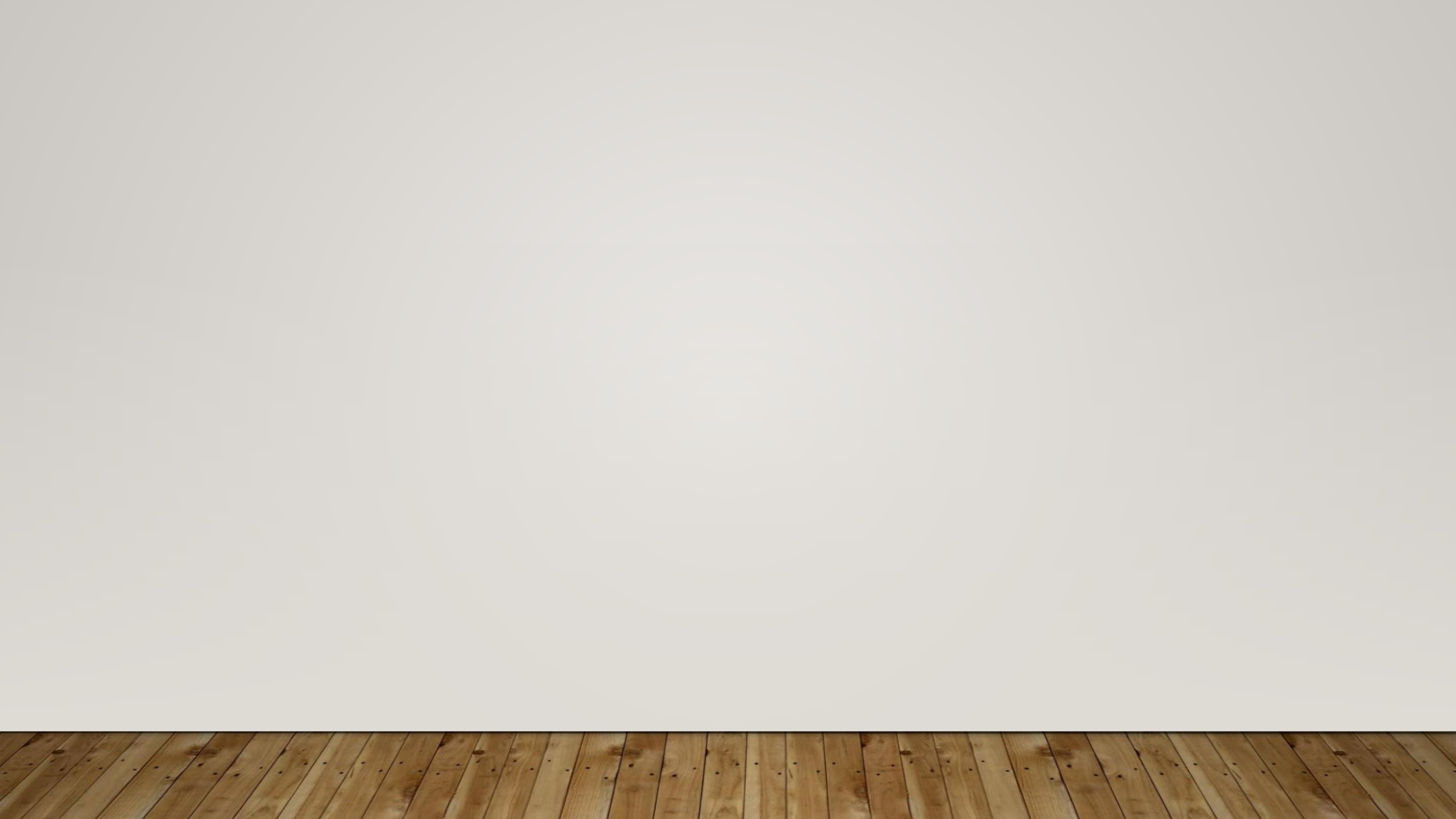


The closest provision which can be construed as prohibiting SH is the Employees Compensation Act 2010, which states that compensation is provided in the case of mental stress to a worker if the mental stress is the result of a sudden and unexpected traumatic event arising out of or during the employee's employment. (Section 8 of the Employees Compensation Act, 2010).

The Criminal Law of Lagos State prohibiting harassment that implicitly or explicitly affects a person's employment or education. "Any person who sexually harasses another in Lagos State is guilty of a crime and is liable to imprisonment for three years." (S-262 of the Criminal Law of Lagos State 2011).







SEXUAL HARRASMENT IN
EDUCATION - A
PREVENTION LENS

FROM BOYS INTO MEN

Presentation by: Leila Milani,
Sr. International Policy Advocate

FUTURES
WITHOUT VIOLENCE



STATE OF PLAY

STATUS QUO

- 55 women enrolled for every 44 men on campus
- The National Institute of Justice documents that “about 1 in 5 women are victims of completed or attempted sexual assault while in college.”
- The last decade has seen an increase in student activism and engagement on this subject. Students are standing up, speaking out, and calling for change.
- This activism and engagement must be inclusive where men are also invited and included.



**COLLEGE CAMPUSES ARE NOT
MERE SITES FOR TITLE IX
ADJUDICATION -**

**THEY CAN BE PLACES FOR
ATTITUDINAL AND
BEHAVIORAL CHANGE!**

1. Sexual assault is **prevalent** on college campuses.
2. College students are considered “**emerging adults,**” meaning that developmentally, this is a critical time where life-long behavioral patterns can become cemented.
3. Many college students are open to new ideas and may not be as tied to public opinions and perspectives.

This is a chance to cultivate better ideas and attitudes as they transition to adulthood.

By incorporating evidence-based violence prevention programs and working with many of the most visible and influential leaders in the campus community, we have an opportunity to change campus norms,
promote healthy relationships, redefine ideals of masculinity, and prevent sexual assault



Model Man Fraternity Leadership Project Objectives



Identify the barriers of engaging fraternity men and fraternities in sexual violence prevention and discuss strategies to effectively overcome these barriers.



Identify what is needed to help fraternity men become engaged in prevention work.



Explore strategies for empowering fraternities and fraternity men to become leaders and role models on campus in preventing and responding to violence against women on campus.

In their own words

IS IT INEVITABLE

“Why are we here right now? Why do we teach all these people? Because we feel we can make a change and if we say that’s inevitable it is as if we’re giving up on this whole thing. We need to tell ourselves that we can make a difference now.”

CAN YOU SPEAK TO THE PROBLEM

“Sometimes, people take it to such extremes, talking about demonizing all men, and then suddenly, if you disagree with any part of their opinion, they’re like, ‘oh, you’re a rapist.’ You know, if you disagree with the most extreme opinion anyway, you’re kind of immediately told that you’re wrong and you’re a terrible person. So that kind of makes it hard to engage in these discussions with them.”



REFLECTIONS

- The need to dispel the myths and misperceptions about fraternities and fraternity men as the primary perpetrators of sexual violence against women on campus.
- Fraternities' exposure to trainings and their existing infrastructure makes them well poised to take on campus leadership roles in preventing violence against women.
- **There are barriers to holding space for meaningful conversations between men and women on the topic of sexual assault and such barriers must be removed.**
- Trainings cannot be “one-offs” (i.e., isolated events) and should focus on risk-mitigation.
- Meaningful university leadership in addressing and preventing sexual assault on campuses is missing and must be cultivated.

RECOMMENDATIONS

- START EARLY - CONVERSATIONS IN MIDDLE SCHOOL AND HIGH SCHOOL YEARS ARE CRITICAL
- CULTIVATE SAFE SPACES FOR MEANINGFUL CONVERSATIONS
- HOLD MEANINGFUL CONVERSATIONS
- DEVELOP TRAINING GUIDELINES
- CULTIVATE UNIVERSITY LEADERSHIP
- CONDUCT RESEARCH AND COLLECT DATA THAT BETTER INFORMS ABOUT THE PERPETRATORS
- DEVELOP AND CULTIVATE FRATERNITY LEADERSHIP



Embracing a whole of community approach to the elimination of sexual violence ✧

Respect. Now. Always. at the University of Technology Sydney

THE JOURNEY SO FAR

October 2021

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PhD Candidate



*Respect.
Now.
Always.*




**RESPECT.
NOW.
ALWAYS.**



**UNIVERSITIES
AUSTRALIA**

AHRC - Change the Course Report, August 2017

At a glance...


30,000+ students responded to the national survey


39 Australian universities represented

Who experiences sexual assault and sexual harassment at university?

Women were **three times** as likely as men to have been **sexually assaulted** in a university setting in 2015 or 2016.



Women were **almost twice** as likely as men to have been **sexually harassed** in a university setting in 2016.



Prevalence and location of sexual assault and sexual harassment at university.



One in five (21%) students were **sexually harassed** in a university setting, excluding travel to and from university, in 2016.

Recent incidents most commonly occurred:



Who perpetrates sexual assault and sexual harassment at university?

51% of students who were **sexually assaulted** and

45% of students who were **sexually harassed**

...knew some or all of the perpetrators.



1.6% of students were **sexually assaulted** in a university setting, including travel to and from university, on at least one occasion in 2015 or 2016.

Recent incidents most commonly occurred:



Complaints or reports of sexual assault and sexual harassment at university



94% of students who were **sexually harassed** and

87% of students who were **sexually assaulted**

...did **not** make a formal report or complaint to their university.

Discovering and understanding the Student Voice was imperative ...

We spent time collaborating with more than 3000 students through co-design workshops to understand their perspectives on sexual violence

Key insights from Student Voice immersion

Many students feel sexual harassment is part of everyday experience

Lack of understanding of sexual harassment

Students more likely to disclose to people they trust

Students have different motivations for action, including seeking justice or healing

Students experience complex internal processing about whether to seek support

Students desire a more open conversation about sexual assault and sexual harassment in the UTS community

Response and actions needed

Requires **role models to challenge 'normalised' behaviour**

Definitions needed on UTS website

Student-facing staff and student leaders need to be prepared to respond

Be ready to advise students on their options and what you need to do as a member of staff

Targeted initiatives to normalise help seeking

Foster interactive open dialogues that encourage social interactions



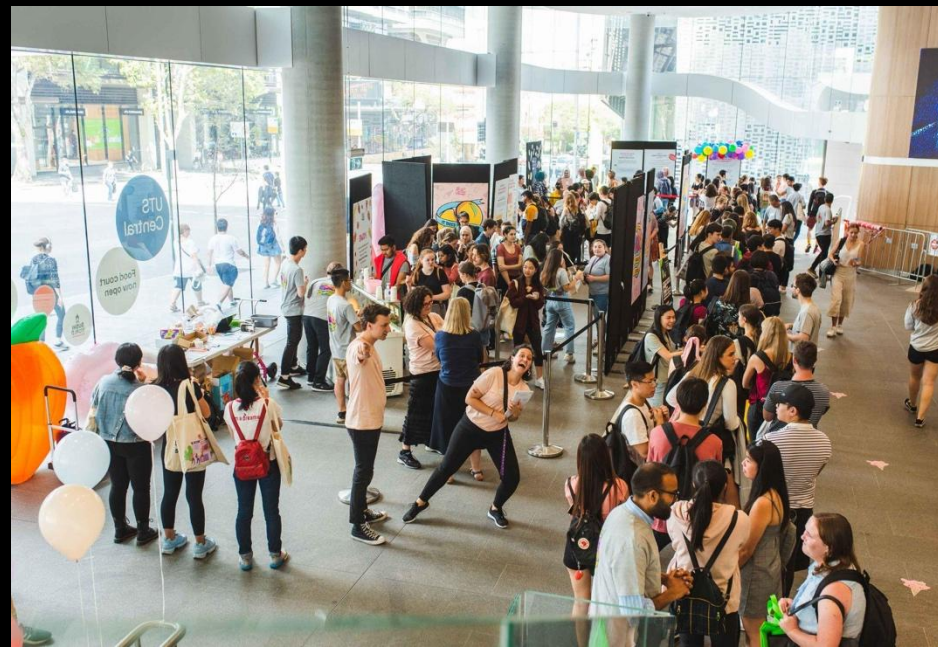
Activations, connection and accountability

The RNA Program has engaged with more than 10,000 students through Orientation activations and workshops with almost 400 student and staff volunteers to help run the activities and discussions.

As of October 2021, almost 80,000 UTS students and staff have successfully completed our mandatory online Consent Matters module.

Our student community are held accountable by rules and policies that guide behavioural standards and expectations, e.g. student misconduct rules explicitly prohibit acts of sexual harassment and assault, and outline relevant penalties within a system of procedural fairness.





THE RNA STRATEGIC FRAMEWORK

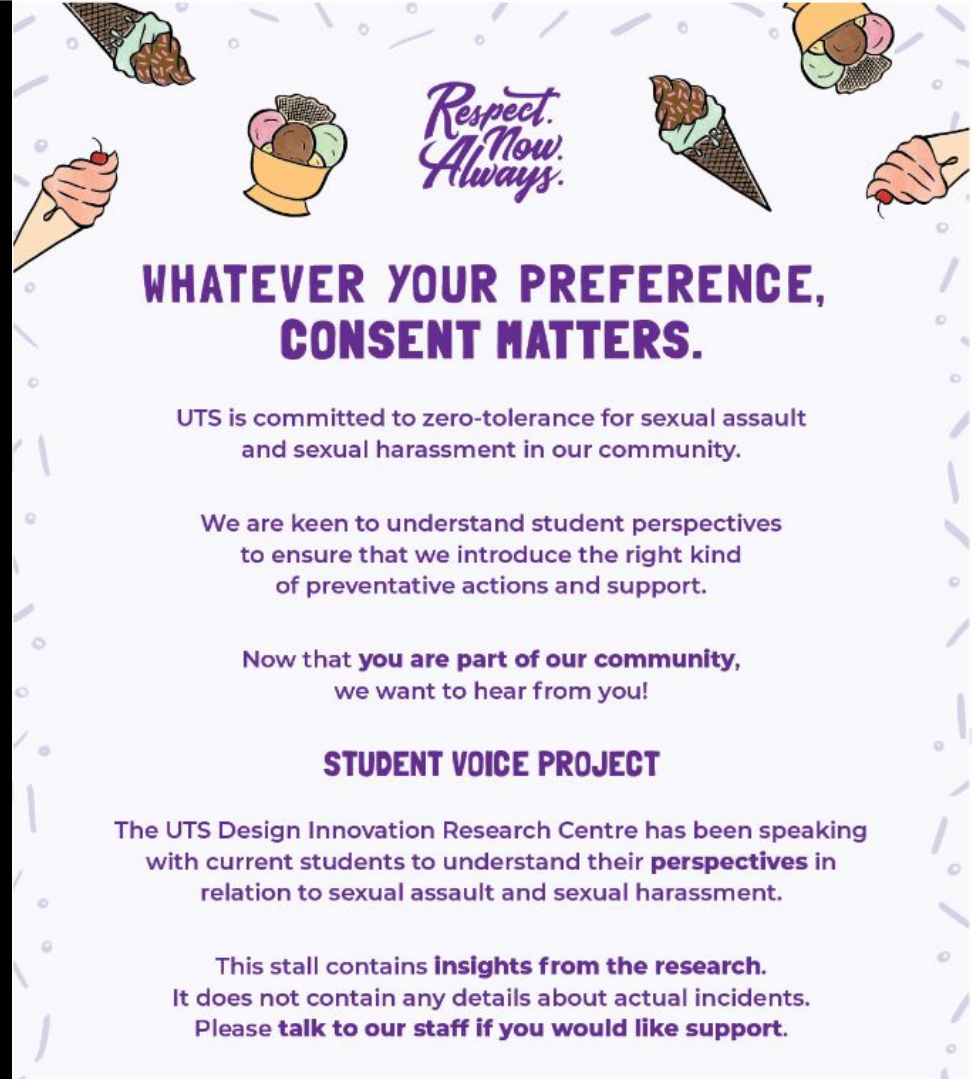


Our framework underscores the need to adopt a **whole of community approach** to effect the **culture change** needed to eliminate sexual violence

In 2020 our human centred design approach was recognised with a Good Design Award, achieving Best in Class in the Social Impact category



**GOOD
DESIGN
AWARD[®]
BEST IN CLASS**



*Respect.
Now.
Always.*

WHATEVER YOUR PREFERENCE, CONSENT MATTERS.

UTS is committed to zero-tolerance for sexual assault and sexual harassment in our community.

We are keen to understand student perspectives to ensure that we introduce the right kind of preventative actions and support.

Now that **you are part of our community**, we want to hear from you!

STUDENT VOICE PROJECT

The UTS Design Innovation Research Centre has been speaking with current students to understand their **perspectives** in relation to sexual assault and sexual harassment.

This stall contains **insights from the research**. It does not contain any details about actual incidents. Please **talk to our staff if you would like support**.

Respect.
Now.
Always.

'ADVANCED CONSENT: LEARNING FROM' the SEXPERTS

17 FEB
2021

SOMETIMES OUR
INSTINCTS
ARE AT ODDS
WITH THE WORLD

OR AS PROF. ALAN MCKEE PUTS IT:
HOW TO HAVE
Great Filthy Sex!

We're ALL
GIVEN
MODELS
OF CONSENT



KIM
CUMS

WHAT IS CONSENT?

“YES”
DOESN'T MEAN
FREE REIGN

IT MEANS SAYING YES
WITH OUR



IT SHOULD
NOT BE
POLITICISED

WE
NEED TO
COME
BACK
TO OUR
BODIES

MISTRESS
Tokyo



@benbrothers

DON'T JUST ASSUME YOUR
PARTNER KNOWS WHAT YOU WANT



**SILENCE
HIDES
VIOLENCE**

