Innocent until proven guilty: how universities must handle sexual allegations

Julie Norris says university investigations into allegations of sexual misconduct must be fair to the alleged perpetrator as well as the complainant

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Although some institutions have been in the spotlight more than others, UK universities across the board have reported a sharp upturn in the number of complaints made about sexual violence in recent years; indeed, some statistics put the figure as high as an 82% increase between 2014 and 2018.

The focus of debate is usually the failure by universities to protect adequately the rights and freedoms of the complainant. Too few reports have shone any light on the impact the investigation process has on the alleged

perpetratorsof sexual offences, be they a student or member of teaching staff.

Universities need to consider fairness to all parties during investigations into allegations of sexual misconduct and not fall into a post #metootrap of focusing solely on those bringing complaints.

The need for robust procedures

There is no standard or universally applicable procedure mandating the approach to the resolution of complaints of a sexual nature within universities. Despite the publication in 2016 of the Office of the Independent Adjudicator for Higher Education (OIA) guidance and the excellent work of Universities UK (UUK) in establishing some helpful guidance in this area, the processes for the investigation and adjudication of complaints of sexual misconduct still vary widely from institution to institution.

> “Too few reports have shone any light on the impact the investigation process has on the alleged perpetrators of sexual offences – *Julie Norris, Kingsley Napley LLP*

Schemes are not subject to direct external regulation, meaning they are immune from effective oversight (the OIA and, if necessary, the High Court can remedy serious procedural irregularities – but, by then, the damage has usually been done).

I have seen many examples of critically important legal concepts being misunderstood and misapplied by investigators and panels alike – with serious implications for both sides. A recurrent mistake is the failure of institutions to understand and properly apply the correct legal test of consent. In one recent case, the panel described it in terms of the victim’s ‘internal willingness to comply’, instead of the well-established criminal test, which considers whether the alleged perpetrator has a ‘reasonable belief in consent’.

The use of this highly unusual definition of consent means that no person accused of a sexual offence where consent is in issue could possibly defend themselves against such an allegation. The implications for the impugned student were

catastrophic – a finding of rape, even if not by a court of law, is a serious reputational impediment.

Universities need to ensure best practice

I have also seen disciplinary procedures that do not allow for legal representation at the first hearing meaning that those charged with (what are effectively) criminal offences are left to look after their own interests. How an unrepresented student is supposed to go about questioning the alleged victim is beyond me (leaving aside the unacceptability of such a course from the complainant's perspective).

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A scheme that claims to counterbalance this prohibition through allowing representation at any appeal stage falls far short of protecting the interests of the accused – by then, the evidence has been heard and the opportunity to test the account given by the complainant is lost.

By way of best practice, a fit for purpose investigation and adjudication scheme would, as a minimum, include the following:

1. All those involved in the process must be independent, suitably qualified and properly trained – that includes the investigating officer, the panel and the presenting officer. Schemes that currently require a student to sit on the panel to hear serious sexual allegations are in need of a rethink. Consideration should be given to the appointment of an independent legal assessor at the hearing to advise the panel on law and procedure and ensure that the process is lawful and fair.
2. The relevant legal concepts need to be properly defined in law and correctly applied. Definitions invented by the university are unwise. Procedural and evidential issues, such as the burden and standard of proof, must also be accurately defined and carefully applied so that only cases in which the evidence crosses the appropriate threshold are found proved.

3. The process must allow for the proper 'testing' of the evidence. It is hard to see how a scheme that allows a finding of rape to be made against a student without the panel ever having heard live evidence from the complainant can ever be described as fair. Steps can be taken if necessary to assist a vulnerable witness (screens, the giving of evidence over FaceTime etc), but the ability for an accused student to test the evidence raised against them sits at the front and the centre of a fair adjudication process.
4. Fairness needs to be the guiding principle throughout the process. Arbitrary deadlines, refusing the admission of relevant evidence, declining to hear from a party on a relevant issue and similar such conduct have no place in proceedings of this nature. If one party prepares a statement, consideration needs to be given to whether the other side should see it.
5. Universities must have a clear process for approaching cases where the allegation amounts, or may amount, to a criminal offence. The complainant needs to be made aware of their options and the circumstances in which the university may have to report the matter to the police, regardless of the complainant's wishes, due to its other competing legal duties. Best practice would usually see any criminal investigation conclude before the university disciplinary process commences. The need for contemporaneous and accurate note-keeping is enhanced in cases of potential criminal misconduct.
6. Legal representation should be permitted. Lawyers should be allowed to support the accused; the preoccupation with keeping the process 'low key' or somehow informal by not allowing legal representation is misplaced and misses the crucial point that all parties have an interest in ensuring that the hearing is conducted fairly and according to the applicable rules and best practice.

In this post #metoo era, it is undoubtedly right that we strive to achieve fairness and justice for complainants. Sexual misconduct and violence should have no place in our workplaces, universities, government offices, sports clubs – anywhere. However, we must not be myopic and let this obscure the important task of securing and upholding the rights of the alleged perpetrator; after all, not all those accused of sexual misconduct are guilty and a university's reputation may just as equally depend on this.