

Guidance For Higher Education Institutions

How To Handle Alleged Student Misconduct
Which May Also Constitute A Criminal Offence



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1. Introduction

In 1994, the Council of Vice-Chancellors and Principals (CVCP), now Universities UK (UUK), published the *Final Report of the Task Force on Student Disciplinary Procedures* commonly referred to as the Zellick Report. These non-statutory guidelines provided advice to universities on handling circumstances where a student's alleged misconduct may also constitute a criminal offence. That guidance has been of significant value to the higher education sector and some universities continue to use the Zellick Report as the basis for their internal procedures.

Earlier this year (2016), a Taskforce which was established by UUK to examine violence against women, harassment and hate crime received evidence from the National Union of Students, individual universities and other organisations highlighting concerns about the Zellick guidelines. In particular, it was noted that, since the guidelines were published, there had been substantial and important developments and changes in the sector and in the law (for example, the coming into force of the Human Rights Act 1998 and the Equality Act 2010). As a consequence, there were concerns that the guidelines did not adequately reflect the various duties and obligations that universities have in relation to their students or assist universities in handling the most complex and sensitive incidents, particularly those involving sexual violence.

The Taskforce therefore initiated a review of the Zellick Report. Pinsent Masons LLP has worked closely with members of a steering group to produce the following new guidance for the sector on how to handle student disciplinary issues where the alleged misconduct may also constitute a criminal offence. The guidance relates to all types of student misconduct which may constitute a criminal offence and provides some specific recommendations in relation to sexual misconduct.

2. Basis For Disciplinary Action

The relationship between universities and students is primarily governed by contract and students are recognised as consumers under consumer legislation. The handling of incidents of student misconduct and the imposition of disciplinary sanctions must therefore be seen in the context of the contractual relationship between the university and the student.

The rules and regulations of universities which require students to conduct themselves appropriately and enable institutions to discipline students in the event of misconduct ("Disciplinary Regulations") form part of the terms of the contract between the parties. In order to ensure that any disciplinary response by an institution reflects that contractual relationship, we recommend that universities:

- publish a code of conduct which (i) sets out the types of behaviours that are unacceptable; (ii) makes it clear that any such behaviour will amount to a breach of discipline; and (iii) provides an indication of the sanctions which may be imposed on students in relation to any such breaches (the sanction imposed must be reasonable and proportionate to the misconduct which is found to have occurred)
- publish a disciplinary procedure which includes a list of the sanctions which could be imposed on students
- ensure that the Disciplinary Regulations are properly incorporated into the contract by being brought to the student's attention before the contract is concluded
- ensure that the Disciplinary Regulations comply with consumer law by being easy to locate on the university's web site, accessible, clear, accurate and fair.

A simple example of a code of conduct ("Code") is set out at Appendix 1. The example Code seeks to break unacceptable behaviours into two general categories – those which are serious and those which are less serious – and indicate the types of

sanctions that may be imposed if such behaviour is found to have occurred. This simple example will have to be developed by universities so that their Codes include more detailed explanations of the types of behaviour that are unacceptable and indicate how seriously different acts will be treated. This is particularly important in relation to sexual misconduct as different acts arising from the same type of behaviour will need to be treated very differently. For example, in relation to the unacceptable behaviour of kissing without consent, the act of forcefully kissing another on the lips is likely to be regarded as a serious disciplinary offence whereas the act of lightly kissing another on the back of a hand is likely to be regarded as a less serious disciplinary offence – to emphasise the work required in the area of sexual misconduct, the examples of unacceptable behaviour and examples of sanctions have not been separated into serious and less serious disciplinary offences in the example Code at Appendix 1. A Code can never cover all incidents of unacceptable behaviour and so it should be made clear in the Code itself that the unacceptable behaviours listed are not exhaustive and that the indication of the sanctions which may be applied if certain behaviour is found to have occurred is illustrative only (there will be instances when certain behaviours which would usually be considered to be minor are in fact very serious and will require a more serious sanction and there will be instances when certain behaviours which would usually be considered to be serious are in fact minor and will require a less serious sanction). The Code should also include a description of any terms that may require interpretation to prevent any misunderstanding or argument when seeking to take disciplinary action against a student and to avoid the need to look at any external sources.

The scope of the Disciplinary Regulations (including the extent to which students can be disciplined for behaviour which happens outside of the University) should be specified within the Disciplinary Regulations. We recommend that the Disciplinary Regulations provide that they extend to alleged misconduct by a student occurring on or off university premises (including via social media) where the alleged victim is the university itself, a student or employee of the university or others visiting, working or studying at the university and to alleged misconduct occurring during university activities (including on placements and field trips).

Where an allegation of misconduct has been made, the Disciplinary Regulations should be followed when determining what action should be taken. That procedure can and should provide an opportunity at various stages for the university to take no further action if appropriate, for example, if there is insufficient evidence to support an allegation of misconduct.



3. Alleged Misconduct Which May Constitute A Criminal Offence

There are many instances where an alleged act of misconduct may also constitute a criminal offence and this guidance focusses on providing recommendations about how universities should deal with these cases.

Importantly, when dealing with allegations that have been made about the conduct of one of its students, universities must have regard to the various duties and obligations that they owe to all of their students including performing contractual obligations, exercising a duty of care, applying the principles of natural justice (i.e. the right to a fair hearing before an impartial decision-maker), complying with equality law duties and upholding human rights.

Cases involving allegations made by one student against another student are very difficult to manage because universities owe the same duties and obligations to **both** students and will wish to take steps to protect **both** students from harm and to provide education to **both** students. This results in universities having to balance the conflicting rights and interests of two students when considering what action to take.

The management of cases where an alleged act of student misconduct may also constitute a criminal offence is therefore a complex exercise and the outcome will be entirely dependent upon the circumstances of the case. As a consequence, it is not possible to produce guidance about what the outcome will be but this guidance does make recommendations about the process that can be followed and the factors that should be taken into account.

4. General Principles

The welfare of students is paramount. Universities must recognise that any allegation of misconduct which may constitute a criminal offence is likely to have an adverse impact on all students involved (whether the incident is dealt with through a disciplinary process or a criminal process). We therefore recommend that, as a priority, universities should ensure that all students involved in any such incidents, particularly the reporting student and the accused student, have access to support, advice and assistance throughout the process.

The nature and scope of an internal disciplinary process and the nature and scope of a criminal process are fundamentally different. It is therefore important to maintain a clear distinction between them. The internal disciplinary process is a civil matter, is based upon an allegation that a student has breached the university's rules and regulations, the allegation has to be proven on the balance of probabilities and the most serious sanction that can be applied is permanent expulsion from the university. In contrast, the criminal process is an external procedure, deals with allegations that a student has committed a criminal act, the allegation has to be proven beyond reasonable doubt and the most serious sanction that can be applied is imprisonment (although any adverse finding could result in the student having a criminal record and that could have a serious detrimental effect on the future of the individual concerned).

Taking the above differences into account, we recommend that universities follow two key principles when dealing with disciplinary matters which may constitute criminal offences.

- First, the criminal process must take priority. There should be no duplication of that process and no other process should operate at the same time. Consequently, if the matter is being dealt with under the criminal process, then save for taking any necessary precautionary action (see section 8), the internal disciplinary process should be suspended until the criminal process is at an end.
- Second, if the matter is not being dealt with under the criminal process or where the criminal process has concluded, then the university **should** consider whether a breach of discipline appears to have occurred and, if so, refer the matter for consideration under its internal Disciplinary Regulations. By way of example, taking a library book without permission and drawing graffiti on a university building may constitute the **criminal offences** of theft and criminal damage and **disciplinary offences** of taking property belonging to the university without permission and causing damage to university property (see Appendix 1).

These key principles are expanded upon in sections 9 and 10.





5. Record Keeping

All involved in dealing with alleged student misconduct which may also constitute a criminal offence should be aware that any notes that are made or documents that are created could be requested by the police as part of a criminal investigation and individuals could be called to give evidence. Consequently every effort should be made to ensure that written records are clear, accurate and appropriate.

We strongly recommend that universities ensure that clear processes are in place for recording and documenting all actions and decision-making that are taken by the university from the day when the report of the incident is received up until any criminal and/or disciplinary proceedings have been concluded. This will mean that there will be a record about which process is underway, what issues/matters have arisen and been considered and the basis for the decisions that have been made. Such records will enable new decisions to be made effectively and allow for previous decisions to be reconsidered and reviewed when appropriate.

6. Provision Of Information And Support

It is absolutely essential that universities provide appropriate and relevant information and support to students who are involved in disciplinary matters which may constitute criminal offences from the time when the incident is first reported to the university up until the time when the relevant criminal and/or disciplinary process has been concluded (and often beyond that).

Note that where one student has made an allegation against another student, universities should treat the reporting student and the accused student fairly and not make any presumptions about either of them.

In order to ensure that students are provided with all appropriate information and support, relevant members of staff should be properly trained and should be able to co-ordinate the provision of internal and external support. There should be a clear, simple and accessible method of reporting incidents to ensure that students are referred to these specially trained members of staff as quickly as possible (identification of a different single point of contact for each student will assist so that they do not have to repeatedly recount the details of the incident). All staff should be trained about when and how to refer a student to these specialists (even with clear reporting processes in place, many students will make disclosures to the academic staff that they come into contact with on a daily basis - it is important that all staff have a basic understanding of what to do in these circumstances).

In providing information and support, universities should consider academic, housing, finance, health and well-being issues and, where appropriate, assist students to access specialist sexual violence support services provided by external agencies. For example, a university could assist the reporting student and the accused student to submit mitigating circumstances (although any such adjustments will be subject to the academic requirements of the course). Importantly, care should be taken to ensure that students who have disabilities or other health issues (particularly relating to their mental health) are provided with reasonable adjustments in relation to the disciplinary process.

As part of the support role, universities should assist the reporting student to understand the various options available to him/her and provide the student with support in making a decision about the way forward. The key options for the reporting student will usually be as follows:

- make a report to the police
- take some time to consider the options (in this situation, where appropriate, universities should provide advice about how attendance at the nearest sexual assault referral centre can enable forensic evidence to be collected whilst a decision is being made about whether or not to make a report to the police)
- not report the matter to the police but request that the university consider the case under its Disciplinary Regulations (or other internal process)
- take no further action.

When outlining the options available, universities should ensure that the reporting student understands the process related to each option and, in particular, understands the difference between criminal investigations/proceedings and university disciplinary investigations/proceedings. A number of the key differences are set out below.

- Under the criminal process, the allegations will be treated as a potential criminal offence. Under the disciplinary process, the allegations will be treated as a potential breach of discipline. For example, a judge/jury will deal with allegations of rape and a university will deal with allegations of and make findings about sexual misconduct – see Appendix 1.
- A disciplinary investigation will be more limited than a criminal investigation because forensic analysis and medical examinations are not available to universities and universities have no power to compel witnesses to give evidence.
- Under the criminal process, a judge can impose a wide range of sanctions on an individual who is found to have committed a criminal offence (including imprisonment) and can put conditions/restrictions on that individual which apply nationwide for significant periods of time. Under the disciplinary process, the worst sanction that can be imposed on a student who is found to have committed a breach of discipline by a university is expulsion from the institution and, once the individual has left, any restrictions/conditions placed on him/her by the university will no longer be applicable. In addition, the reporting student should understand that following a disciplinary process, there will be very limited circumstances in which the university can disclose any information about the misconduct to any third parties¹.

No pressure should be put on the reporting student to take any particular course of action.

¹ Universities will have a general obligation to keep the information confidential and, subject to certain exemptions, specific obligations not to disclose the information to third parties under the Data Protection Act 1998.

7. Referral To The Police

There are three basic principles to consider in relation to the reporting of a matter to the police. They are, in summary:

- anyone can make a report to the police
- no-one may prevent anyone else from reporting or referring a matter to the police
- there is generally no legal requirement to report alleged or suspected crimes to the police².

Usually the reporting of a crime is made by the reporting student and often the evidence of the reporting student is crucial in securing a conviction.

Where a potential criminal offence is committed **against the university**, for example, a student taking a microscope belonging to the university without permission, the decision about whether to report the incident to the police will be dependent upon the facts of the matter and is therefore a matter for universities to determine on a case-by-case basis (for example, there should not be a general rule that "serious" offences should be reported and "non-serious" offences should not be reported). There will be a number of factors that will have to be taken into account by universities when assessing whether to report a matter to the police. These will include the nature and seriousness of the case and whether there is any risk to the health, safety and well-being of the reporting student or others. In our experience, universities are generally slow to report matters to the police which may constitute a criminal offence against the institution due to the potential effect that such a report would have on the accused student. Universities recognise that being involved in a criminal process would result in the accused student suffering a significant amount of distress, involve the investment of a considerable amount of time and effort by the accused student and may result in the accused student obtaining a criminal record. In such circumstances, if a university (as the victim) decides that dealing with the allegation as a breach of discipline under its Disciplinary

Regulations is more appropriate then our view is that this is a reasonable and proportionate approach to take.

Where the victim is not the university, then the university should usually allow the **victim** to decide whether or not to report the matter to the police. Where the victim is a member of the university community i.e. a student or employee of the university (or another person visiting, working or studying at the university) and they wish to make a report to the police then the university should support them to do that. If they do not wish to make a report to the police then, subject to the points made in the paragraph below, the university should comply with that decision.

Universities should only in exceptional circumstances report an alleged crime to the police contrary to the wishes of the victim. The circumstance in which a report by a university may be justified is if disclosure of the information is necessary to protect the reporting student (or others) from harm or to prevent a further crime taking place³ but, in deciding whether to make such a disclosure and in deciding what information to disclose (in order to prevent a further crime taking place, it may be sufficient to disclose details of the incident without disclosing the name of the reporting student), universities must take into account any potential harm that the unauthorised disclosure may cause to the reporting student. This assessment will have to be undertaken on a case-by-case basis as much will depend on the circumstances of the matter. However, it should be noted that disclosing information to the police without the reporting student's consent could cause significant harm as it is likely to undermine the relationship of trust and confidence between the university and the reporting student and potentially result in the individual declining any further support or assistance from the university or those associated with the university (which could make the reporting student more vulnerable). Further, preventing a reporting student from controlling the reporting process could cause them further distress (we understand that it is particularly important for those who are victims of violence (including sexual violence) to feel that they are in control of the process). If universities decide that it is necessary for them to report the alleged crime to the police then the reasons for taking that action should be explained to the reporting student so that he/she understands what is happening and is prepared if/when the police contacts him/her.

² There are some exceptions. For example, in relation to suspected money laundering and suspected terrorist activity.

³ Under the Data Protection Act 1998, universities will need to be able to justify the disclosure of information about a victim that is made to the police without their consent.

8. Precautionary Action

We strongly recommend that Disciplinary Regulations expressly provide for the university to impose precautionary measures on a student who is alleged to have committed a criminal offence or a breach of discipline at an early stage pending the outcome of criminal/disciplinary proceedings.

It should be made clear that any such action is a **precautionary measure only**, it is not a penalty or sanction and does not indicate that the university has concluded that the accused student has committed a breach of discipline or a criminal offence.

Precautionary action must be reasonable and proportionate and may include:

- imposing conditions on the accused student (for example, requiring the accused student not to contact the reporting student and/or certain witnesses and/or requiring the accused student to move accommodation)
- suspending the accused student from his/her studies⁴
- excluding the accused student⁵ (for example, prohibiting the accused student from going to certain accommodation blocks or using the sports facilities or from attending a placement).

The grounds for taking any such action should be clearly set out in the Disciplinary Regulations. For example, the Disciplinary Regulations may provide that precautionary measures may be put in place if they are **necessary**:

- to ensure that a full and proper investigation can be carried out (either by the police or a university investigator); and/or
- to protect the reporting student or others whilst the allegation is being dealt with as part of a criminal process or disciplinary process.

In order to ascertain the type and extent of any precautionary measures, we recommend that universities undertake a risk assessment on a case-by-case basis. Any bail conditions that have been imposed on the accused student should be taken into account as part of this analysis as any such conditions will need to be accommodated by the university and may affect the decision about whether or not precautionary action is required. The precautionary measures that are put in place should be those which will best protect the investigation and/or the reporting student /others from harm whilst having the minimum possible impact on the accused student. Note that in cases where one student has made an allegation against another student, universities will have to take into account the interests and welfare of both students and endeavour to treat them fairly and equally

when undertaking the risk assessment and ascertaining the potential effectiveness and impact of precautionary measures.

An example risk assessment is set out at Appendix 3. The type of misconduct, the circumstances of the incident, the circumstances of the individuals involved and the views of the police/prosecutor will all be relevant in assessing risk and in determining what precautionary action is required. We recommend that a risk assessment should include consideration of the support arrangements that need to be put in place for the students involved (for example, counselling sessions and academic adjustments) and consideration of any measures that need to be put in place to protect the investigation and/or the reporting student (for example, a university may prohibit an accused student from entering the hall of residence where the reporting student lives and from entering the academic building where the reporting student studies in relation to a case where it is alleged that the accused student has engaged in a sexual act with the reporting student without his/her consent and where the students live in different halls and are studying on different courses). As circumstances are likely to change during the life of the matter, the risk assessment and any precautionary measures that are put in place should be reviewed at regular intervals and reconsidered as the case develops (see the case studies at Appendix 2). A failure to comply with a precautionary measure should trigger a review and is likely to result in more serious measures being put in place (for example, a failure to comply with a requirement not to contact the reporting student, could result in the accused student being suspended).

Any decision to suspend a student can have serious consequences as it is highly likely to disrupt and/or interrupt the student's course of study. Consequently, such a step should only be taken where the risk level is high and where there are no alternative measures that could be put in place to mitigate that risk. Further, any suspension should be fixed for a specified period of time and subject to review at regular intervals.

The decision to suspend a student as a precautionary measure should be made at a senior level and the student should have an opportunity to:

- make representations to the decision-maker before the decision is made (or if that is not possible or appropriate due to the urgent or sensitive nature of the matter, as soon as possible thereafter)
- appeal the decision
- request a review at any stage if there is a material change in the circumstances of the case.

Note that it may be appropriate for the Disciplinary Regulations to provide that a decision to suspend a student may be made by a senior member of staff at a level which enables any appeal to be reserved to the Vice-Chancellor.

⁴ Suspension means that the student is prohibited from participating in the academic activity of the university and the student's registration on his/her course is put on hold. A qualified or partial suspension may be put in place where appropriate.

⁵ Exclusion means that the student is prohibited from taking part in university activities, using university facilities and/or entering university grounds or premises. A qualified or partial exclusion may be put in place where appropriate.

9. Criminal Investigation/ Prosecution

As set out above, we recommend that if a report is made to the police (either by the reporting student or, in rare circumstances, by the university on behalf of the reporting student) and the matter is considered under the criminal process then **save for taking any necessary precautionary action**, universities should not undertake any disciplinary action against the accused until the criminal process is at an end (i.e. when a decision is made not to charge the accused or not to pursue the prosecution or when a court reaches a determination).

The reasons for this are:

- any immediate threats or dangers can be dealt with by way of precautionary action
- there is a substantial risk that an internal investigation could interfere with/prejudice a criminal investigation (for example, in relation to witness evidence, an internal investigation may involve an element of “rehearsal” of evidence prior to a criminal trial with the potential for memories to be tainted or, in some cases, the alteration of accounts because of what has been said, heard or disclosed during the process). This should be avoided as it could result in a situation where, at best, there is negative judicial comment, and at worst, may mean that the criminal proceedings have to be halted or abandoned entirely
- the prosecutor has to prove its case and defence lawyers will insist on seeing the evidence before advising the accused student on how to proceed. If the accused student engages with an internal disciplinary process, that could impact upon his/her defence in the criminal proceedings. As a consequence, the accused student will generally be advised by lawyers representing him/her in a police inquiry not to co-operate with an internal disciplinary process until the criminal process is at an end. In these circumstances, it could well be argued that if the university goes ahead with an internal investigation in any event then, due to the constraints on the accused student by virtue of the criminal process, that student will be denied a right to a fair hearing and that would provide a ground for challenge
- usually neither the reporting student nor the accused student want the university to undertake an internal investigation before the criminal process has reached a conclusion because the accused student will be concerned that such an investigation may prejudice his/her defence and the reporting student will wish to ensure that the prosecution can proceed.



10. Internal Disciplinary Procedure

As set out above, we recommend that if the reporting student decides not to make a report to the police (or the police decide not to investigate or the prosecutor decides not to prosecute), where the accused is a student of the university, the reporting student should have the option of requesting that the university deal with the matter under its internal disciplinary process and, in such circumstances, the university should follow its Disciplinary Regulations when determining what action should be taken (note that a university should also ensure that its Disciplinary Regulations provide that it has the ability to take disciplinary action against the accused student of its own volition if the reporting student does not wish to make a formal complaint).

If a university refused to take disciplinary action simply because an alleged act of misconduct could constitute a serious criminal offence (including a serious sexual offence) that could lead to a perverse situation where a reporting student receives greater protection from their university if he/she makes an allegation about a less serious act than if he/she makes an allegation about a very serious act. Note that we are not advocating that all matters should be progressed through the disciplinary process as that may not be appropriate (for example, due to lack of evidence), but the matters should not be excluded from consideration simply because the alleged act could constitute a serious criminal offence.

The question arises as to how universities can deal with alleged acts of student misconduct which could constitute a serious criminal offence under their internal processes. As set out above, we strongly recommend that any such cases are dealt with as a potential breach of discipline and not as a criminal offence, and as such, no criminal offences should be referred to when seeking to define unacceptable behaviour in the Code (see Appendix 1). It is unreasonable and dangerous for all involved to ask a university to make any findings about an alleged criminal offence. To do so would undoubtedly open universities up to legal challenge (particularly by an accused student as a finding of "rape" or "fraud" or "theft" by a disciplinary panel could have very serious ramifications for his/her future career). Institutions have neither the standing nor the expertise to make such findings about criminal offences. Only a criminal court can make such findings when the prosecution has proven the offence

beyond reasonable doubt (in contrast to disciplinary cases where universities must establish facts and matters on the balance of probabilities i.e. more likely than not / 51% or more).

In our view, alleged student misconduct which may also constitute a criminal offence can and should be dealt with in the same way as other potential breaches of discipline. The Code will set out examples of the types of behaviour which are unacceptable and which will constitute a disciplinary offence (see Appendix 1). The university should determine (i) whether the alleged facts and matters occurred on the balance of probabilities; (ii) whether those facts and matters amount to a breach of discipline and, if so, the level of seriousness of the breach of discipline; and (iii) what sanction (if any) should be imposed.

By way of example, a university cannot make a finding about whether or not an accused student has raped a reporting student because that is a criminal offence and is a decision that only a criminal court can take. However, a university can decide if there has been a breach of discipline. The facts and matters leading to an allegation of rape should be dealt with as potential sexual misconduct so that the university will have to decide whether the alleged facts and matters occurred (on the balance of probabilities) and, if so, determine whether the admitted/proven behaviour amounted to sexual misconduct and, if so, determine what sanction should be imposed for that breach of discipline.

As noted in section 6 above, reporting students should be informed at the beginning of the process (as it will be an important factor for them to consider when deciding whether or not to make a report to the police) and reminded at appropriate times during the process, that universities will deal with allegations of misconduct as potential breaches of discipline and not as criminal offences. The reporting students should therefore be prepared for the types of findings that can be made by universities at the end of a disciplinary process and the scope of the potential outcomes that can be imposed.

Due to the limitations of internal investigations, universities may be faced with some cases where there is insufficient evidence to establish, on the balance of probabilities, that the alleged unacceptable behaviour occurred. However, in such cases, there may be sufficient evidence to establish that another type of unacceptable behaviour has occurred and then the university can impose a sanction for **that** breach of discipline. For example, there may be insufficient evidence to establish that there has been sexual intercourse without consent but there may be sufficient evidence to establish that the accused student had published private sexual photographs of the reporting student without consent and the university can impose a sanction for **that** breach of discipline.



Further key points that need to be considered by universities when dealing with cases involving serious allegations of student misconduct which may constitute a criminal offence through an internal disciplinary process are set out below:

- Universities should ensure that the investigation is carried out by appropriately trained individuals. For example, the investigator should understand the health and welfare issues involved, the potential inter-action between the disciplinary process and the criminal process and the procedure that should be followed.
- Universities should consider whether any adjustments need to be made to the disciplinary procedure to address any actual and/or perceived imbalances between the reporting student and the accused student. In considering what adjustments may be required, universities should take into account the trauma that the reporting student may suffer when giving evidence and the need to uphold fundamental principles relating to a fair hearing for the accused student such as the right for the accused to hear the evidence against him/her and the right to "test" that evidence. For example, a university could allow the reporting student to provide evidence from a different room through video link and questioning could be through the Chair so that the accused student and the reporting student do not have to communicate directly with each other and to ensure that no inappropriate questions can be put to either student.
- Once the internal disciplinary process has been exhausted, students may make a complaint to the Office of the Independent Adjudicator ("OIA"). The OIA will consider whether or not the university properly applied its regulations and followed its procedures and whether or not a decision made by the university was reasonable in all the circumstances. Where the complaint is justified (or partly justified) the OIA may recommend that the university do something or refrain from doing something⁶.

⁶ See *Rules of the Student Complaints Scheme* at www.oiahe.org.uk

11. Different Facts And Matters

A university can take action under its disciplinary process at the same time as a criminal process is underway if the disciplinary case is based upon facts and matters which are different to those being dealt with under the criminal process.

For example, in a case where a student acted abusively to another student after taking drugs, the police may be prosecuting the student for the supply of drugs but not the abusive behaviour. In that situation, a university could undertake disciplinary proceedings in relation to the abusive behaviour but any action in relation to the drug use would have to be suspended until the outcome of the criminal process was known.

12. Outcome Of A Criminal Process

If a student is convicted of a criminal offence then the conduct or behaviour that he/she has been found to have committed can be relied upon to establish a disciplinary offence and the focus of any disciplinary process by the university should be to consider the impact and effect of the criminal offence in order to determine the sanction/s (if any) to be applied by the university.

If a student is acquitted of a criminal offence then the university can still take disciplinary action against the accused student if there is sufficient evidence that unacceptable behaviour which constitutes a breach of discipline under the university's Disciplinary Regulations occurred. This is because in a disciplinary process, the alleged "offence" will be different, the evidence that can be taken into account may be different, the burden of proof will be different and the sanctions available will be different. The fact that the student has been acquitted of a criminal offence after a full trial is a relevant consideration and the weight attached to it will depend upon the circumstances of the case.

Where a student is acquitted of a criminal offence and no disciplinary action is taken against the accused student, universities should be aware that the accused student and the reporting student are likely to continue to require assistance and support. The measures that are necessary will have to be assessed on a case-by-case basis but should include changes being made to academic, living or pastoral arrangements and consideration of steps that could be put in place to seek to ensure that the reporting student and accused student do not come into contact with each other (for example, ensuring that the students are put into different tutorial groups if they are studying on the same course). Universities should note that any such action would be taken in order to protect the welfare and well-being of both students and not as part of a disciplinary process. The rights and interests of both students would therefore have to be balanced fairly and equally.

Appendix 1

Code of Conduct (for illustration purposes only)

The Code of Conduct below is produced in order to illustrate how such a Code could be drafted. However, it is not comprehensive as more detail will need to be included to:

- define the types of unacceptable behaviour which will amount to a breach of discipline and indicate how seriously different acts will be treated - this is particularly important in relation to sexual misconduct as different acts arising from the same type of behaviour will be treated very differently, for example, in relation to the unacceptable behaviour of kissing without consent, the act of forcefully kissing another on the lips is likely to be regarded as a serious disciplinary offence whereas the act of lightly kissing another on the back of a hand is likely to be regarded as a less serious disciplinary offence – to emphasise the work required in this area, the examples of unacceptable behaviour and examples of sanctions have not been separated into serious and less serious disciplinary offences in the Code.
- explain that the examples of unacceptable behaviour that are listed are not exhaustive and that the university can bring action in relation to other unacceptable behaviour
- explain that the indication of the sanctions which may be applied if certain behaviour is found to have taken place is illustrative only and that a full list of the sanctions which may be imposed by the university are set out in the disciplinary procedure - there will be instances when certain behaviours which would usually be considered to be minor are in fact very serious and will require a more serious sanction and there will be instances when certain behaviours which would usually be considered to be serious are in fact minor and will require a less serious sanction
- provide that multiple or repeated incidents of misconduct may be more serious than a single act of misconduct and previous findings may be taken into account when determining what sanction should be imposed
- provide definitions of any terms which may need to be interpreted to prevent any misunderstanding or argument when seeking to take disciplinary action against a student and to avoid the need to look at any external sources e.g. "consent" could be defined as "a person consents if he/she agrees by choice and has the freedom and capacity to make that choice"⁷.



⁷ This is the same definition as the statutory definition in s.74 Sexual Offences Act 2003. By setting out the definition in the Code, there will be no need to look at external resources.

People

Disciplinary Offence	Examples Of Unacceptable Behaviour	Examples Of Sanctions
Physical Misconduct	<ul style="list-style-type: none"> • Punching • Kicking • Slapping • Pulling hair • Biting <ul style="list-style-type: none"> • Pushing • Shoving 	<ul style="list-style-type: none"> • Expulsion • Suspension/Exclusion • Restrictions/Conditions <ul style="list-style-type: none"> • Formal Warning • Compulsory attendance at a workshop/ coaching session • Written Apology
Sexual Misconduct	<ul style="list-style-type: none"> • Sexual intercourse or engaging in a sexual act without consent • Attempting to engage in sexual intercourse or engaging in a sexual act without consent • Sharing private sexual materials of another person without consent • Kissing without consent • Touching inappropriately through clothes without consent • Inappropriately showing sexual organs to another person • Repeatedly following another person without good reason • Making unwanted remarks of a sexual nature 	<ul style="list-style-type: none"> • Expulsion • Suspension/Exclusion • Restrictions/Conditions • Formal Warning • Compulsory attendance at a workshop/ coaching session • Written Apology
Abusive Behaviour	<ul style="list-style-type: none"> • Threats to hurt another person • Abusive comments relating to an individual's sex, sexual orientation, religion or belief, race, pregnancy/maternity, marriage/civil partnership, gender reassignment, disability or age • Acting in an intimidating and hostile manner <ul style="list-style-type: none"> • Use of inappropriate language • Repeatedly contacting another person (by phone, email, text or on social networking sites) against the wishes of the other person 	<ul style="list-style-type: none"> • Expulsion • Suspension/Exclusion • Restrictions/Conditions <ul style="list-style-type: none"> • Formal Warning • Compulsory attendance at a workshop/ coaching session • Written Apology

Property

Disciplinary offence	Examples Of Unacceptable Behaviour	Examples Of Sanctions
Damage To Property	<ul style="list-style-type: none"> • Causing significant damage to University property or the property of students or employees of the University or visitors to the University • Causing minor damage to University property or the property of students or employees of the University or visitors to the University 	<ul style="list-style-type: none"> • Expulsion • Suspension/Exclusion • Restrictions/Conditions • Requirement to make good the damage caused at his/her expense • Formal Warning • Compulsory attendance at a workshop/ coaching session • Written Apology
Unauthorised Taking Or Use Of Property	<ul style="list-style-type: none"> • Unauthorised entry onto or unauthorised use of University premises • Taking property belonging to another without permission • Misuse of University property (for example computers and laboratory equipment) 	<ul style="list-style-type: none"> • Expulsion • Suspension/Exclusion • Restrictions/Conditions • Formal Warning • Compulsory attendance at a workshop/ coaching session • Written Apology
Causing A Health Or Safety Concern	<ul style="list-style-type: none"> • Act/omission that did cause or could have caused serious harm on University premises or during University activities (for example, disabling fire extinguishes or possessing/supplying controlled drugs) • Act/omission that did cause or could have caused a health and safety concern on University premises (for example, smoking cigarettes in non-designated areas) 	<ul style="list-style-type: none"> • Expulsion • Suspension/Exclusion • Restrictions/Conditions • Formal Warning • Compulsory attendance at a workshop/ coaching session • Written Apology

University

Disciplinary Offence	Examples Of Unacceptable Behaviour	Examples Of Sanctions
Operational Obstruction	<ul style="list-style-type: none"> • Acts/omissions/statements intended to deceive the University • Disruption of the activities of the University (including academic, administrative, sporting and social) on University premises or elsewhere • Disruption of the functions, duties or activities of any student or employee of the University or any authorised visitor to the University 	<ul style="list-style-type: none"> • Expulsion • Suspension/Exclusion • Restrictions/Conditions
	<ul style="list-style-type: none"> • Improper interference with the activities of the University (including academic, administrative, sporting and social) on University premises or elsewhere • Improper interference with the functions, duties or activities of any student or employee of the University or any authorised visitor to the University 	<ul style="list-style-type: none"> • Formal Warning • Compulsory attendance at a workshop/ coaching session • Written Apology
Reputational Damage	<ul style="list-style-type: none"> • Behaviour which has caused serious damage or could have caused serious damage to the reputation of the University 	<ul style="list-style-type: none"> • Expulsion • Suspension/Exclusion • Restrictions/Conditions
	<p>Behaviour which has damaged or could have damaged the reputation of the University</p>	<ul style="list-style-type: none"> • Formal Warning • Compulsory attendance at a workshop/ coaching session • Written Apology

Appendix 2

Case Studies

We have set out below, a number of different scenarios which may arise where one student has informed the university that another student at the university has sexually assaulted them. We have explained how the recommendations set out above would apply to those scenarios.

Case Study 1:

The reporting student states that he/she does not want to report the incident to the police.

- The university should ensure that the reporting student is provided with reassurance, support and assistance (this should include support from external specialist agencies, such as sexual violence counsellors, where appropriate).
- The university should provide the reporting student with information about the options available to him/her (including a description of the relevant processes and procedures and the types of sanctions available), for example:
 - make a report to the police
 - take some time to consider the options (in this situation, where appropriate, the university should provide advice about how attendance at the nearest sexual assault referral centre can enable forensic evidence to be collected whilst a decision is being made about whether or not to make a report to the police)
 - not report the matter to the police but request that the university consider the case under its Disciplinary Regulations
 - take no further action.
- Once the reporting student has made a decision about the next step then, save in exceptional circumstances, for example, where a report to the police is necessary to protect the reporting student (or others) from harm or to prevent a further crime taking place, the university should seek to act in accordance with his/her wishes.
- The university should undertake a risk assessment and consider whether any precautionary action needs to be taken (for example, measures to seek to prevent the accused student from coming into contact with the reporting student).

Case Study 2:

The reporting student reports the incident to the police and a criminal investigation is commenced.

- The university should undertake a risk assessment and ensure that (i) support and assistance is provided to both students (as far as possible, the support measures for each student should be provided separately, for example, the students should not be provided with the same counsellor); and (ii) any necessary precautionary measures are put in place.
- The university should endeavour to keep updated about the progress of the criminal investigation and review the position at regular intervals (or any time that there is a material change or development). The review should include consideration of whether any changes need to be made to the risk assessment and, consequently, whether any changes need to be made to the support/assistance given to both students and/or to any precautionary measures that have been put in place (this could include new measures being put in place or current measures being amended or removed). For example, if the accused student is failing to comply with the precautionary measures that have been put in place then more restrictions may have to be placed on that student (this may lead to temporary suspension).
- Save for taking precautionary action, the university should not take any internal disciplinary action against the accused student in relation to the matter which is the subject of the criminal investigation. However, the university could commence disciplinary action in relation to any matter which was not part of the criminal investigation e.g. drug use.

Case Study 3:

The reporting student reports the incident to the police and the accused is charged. The trial date is set for many months away.

- The university should review the risk assessment and, where appropriate, amend the risk analysis. For example, in some circumstances, as a decision by the prosecutor to charge a student with a criminal offence indicates that there is some evidence to support the charge, a charging decision may constitute an increase in risk. Similarly, in some circumstances, a decision by the prosecutor to reject a serious charge and proceed with a more minor charge may constitute a decrease in risk.
- As part of the review of the risk assessment, the university should consider whether there is a need to make any changes to support arrangements and/or precautionary measures. For example, the university may wish to partially lift a restriction on the accused student speaking to other students on his/her course if the criminal proceedings are to continue for the duration of the academic year. The precautionary measures may be changed so that the accused student is only restricted from speaking to the reporting student and other individuals who the police have indicated will be called as prosecution witnesses in the criminal proceedings.
- The university should ensure that periodic reviews of the risk assessment, support arrangements and precautionary measures are undertaken until the date of trial.

Case Study 4:

The reporting student reports the incident to the police who have investigated. The prosecutor has decided not to press charges.

- The criminal proceedings are at an end and the university should consider whether there is sufficient evidence to take internal disciplinary action against the accused student. Any disciplinary action must be based upon an allegation that the accused student's behaviour was unacceptable and constituted a breach of discipline.
- If the university takes disciplinary action against the accused student, it should review the risk assessment and consider whether there is a need to make any changes to support arrangements and whether additional precautionary measures need to be put in place during the course of the disciplinary process or whether any measures that have been put in place should be amended or removed. For example, the accused student may have been subject to bail conditions which have now been removed and so the university should consider whether it is necessary to impose similar restrictions and conditions during the disciplinary process.

- If the university does not take disciplinary action against the accused student, it should consider whether the accused student and the reporting student continue to require support (and seek to provide that support) and consider whether any action needs to be taken to protect the well-being of the students and take appropriate action. Note that in taking these steps, the rights and interests of both students will have to be balanced fairly and equally.

Case Study 5:

The reporting student reports the incident to the police who have investigated. The prosecutor subsequently charges the accused and the case goes to trial. The student is acquitted and wishes to return to the university.

- The criminal proceedings are at an end and the university should consider whether there is sufficient evidence to take internal disciplinary action against the accused student. Any disciplinary action must be based upon an allegation that the accused student's behaviour was unacceptable and constituted a breach of discipline. The fact that the accused student has been acquitted of a criminal offence after a full trial is a relevant consideration and the weight attached to it will depend upon the circumstances of the case.
- If the university takes disciplinary action against the accused student, it should review the risk assessment and consider whether there is a need to make any changes to support arrangements and whether additional precautionary measures need to be put in place during the course of the disciplinary process or whether any measures that have been put in place should be amended or removed. For example, the accused student may have been subject to bail conditions which have now been removed and so the university should consider whether it is necessary to impose similar restrictions and conditions during the disciplinary process.
- If the university decides not to take any disciplinary action against the accused student, it should consider whether the accused student and the reporting student continue to require support (and seek to provide that support) and consider whether any action needs to be taken to protect the well-being of the students and take appropriate action. Note that in taking these steps, the rights and interests of both students will have to be balanced fairly and equally.

Appendix 3

Risk Assessment

Risk assessment for student A

What are the risks to the well-being and safety of student A /others	What measures are required to manage the risk/concerns?	Action by whom and by when?	Completed
Academic progress – student A failed to submit two pieces of coursework within the prescribed deadline			
Personal health and well-being – student A has a history of mental health difficulties			
Safety – student A is concerned that student B will approach her and be abusive towards her			
[Others]			

Review date



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