

## **Response to February 2019 consultation on Student Disciplinary Procedures**

The Review Committee on Discipline undertook a University-wide consultation on recommendations for reforms of the Student Disciplinary Procedures in February 2019. It received 229 responses from students, staff, Colleges, Faculties and Schools. The Review Committee is grateful to those who took the time to respond; responses have resulted in a number of amendments and clarifications to the student disciplinary framework.

Around 88% of student responses (200 individual responses and the outcome of a student survey) agreed with all of the proposed changes, specifically the change in the standard of proof from beyond reasonable doubt to the balance of probabilities for all Rules of Behaviour, the inclusion of a full-time specialist officer role, the inclusion of 'intimate partner violence' within the definition of 'abusive behaviour', and the required training for decision-makers. The other 12% of students opposed changing the standard of proof.

29 other responses were received, primarily from Colleges, Faculties and Departments, Senior Members of the University and CUSU representatives. These responses tended to be more detailed and requested clarification of specific aspects of the framework. Several responses focused particularly on the risks of investigating serious sexual misconduct (a type of investigation that already takes place under the current discipline procedure) regardless of the standard of proof used.

This document clarifies the reasons for the need to investigate serious sexual misconduct, the reasons for a change to the standard of proof and provides some clarification and confirmation of amendments made to the student disciplinary framework following the consultation.

### **Investigating serious sexual misconduct**

As this type of investigation was already being carried out by the University, the consultation did not include reasons as to why this should continue. However, following the concerns raised by a number of parties, in addition to the external legal advice that had already been sought, counsels' advice was requested to ensure that investigations of this nature were required by the University and that the University's processes are legally appropriate. The conclusions of counsels' advice was as follows:

- a) It is lawful for the University to have a discretion to initiate investigations into complaints about matters which would constitute serious offences under the criminal law.
- b) It is not appropriate for the University to maintain an approach under which it refuses to exercise the discretion to conduct even the preliminary investigation of complaints about matters which would constitute serious offences under the criminal law by reason only that it did not have the forensic capabilities or investigatory powers that would be deployed in a criminal investigation. This may give rise to successful claims that the University is discriminating unlawfully against Reporting Persons.
- c) Article 6 is highly unlikely to apply to student disciplinary procedures, though students may bring challenges to unfair treatment in the context of student discipline by reference to other public law or contractual rights.
- d) The adoption of the standard of proof upon a balance of probabilities is lawful.

- e) There is no requirement for the University to fund as well as permit legal representation. We agree that there may be exceptional cases when it would be advisable for a student to obtain legal representation.
- f) There is nothing in the Draft Procedure which renders it inherently unlawful or unfair.

There is concern from some consultation responses that changing the standard of proof would lead to unrealistic expectations from complainants who make complaints about sexual misconduct. However, all students involved in the process will receive clear explanations by trained staff regarding what to expect from the process and outcome. Continued personal interaction between the students and the Investigator will enable realistic expectations to be maintained during and following the process.

### **Standard of proof**

The 2019 consultation included some information regarding the reasons for the recommendation to change the standard of proof from the criminal standard, beyond reasonable doubt, to the civil standard, the balance of probabilities. The Office of the Independent Adjudicator's Good Practice Framework, published in Autumn 2018, concludes that 'normally' the balance of probabilities standard should be used, and that this should always be used for student where fitness to practise proceedings may follow. Some further information regarding the standard of proof and its impact include:

- a) In recent years the University has been moving away from a criminal approach to student disciplinary matters and towards a civil approach and therefore, it is natural that the standard of proof reflects this shift. The University is not equipped to handle criminal processes and it should not be attempting to do so. By lowering the standard of proof, there is a clear attempt to distinguish any disciplinary outcome from that given by a criminal court; any University finding of misconduct would be irrelevant to a criminal court as it would have been reached using a different standard of proof.
- b) The 'balance of probabilities' standard of proof is not a test of which party is more believable. It requires evidence to confirm whether the allegation was more likely to have happened than not. The more serious the allegation, the more unlikely it is to have happened; therefore the more serious the allegation, the more evidence that is required. The investigating officer will ensure that complainants have a clear understanding of this.
- c) Students want a system that they perceive to be fair. By having a different standard of proof to other higher education institutions, students consider that the University is preferring to protect perpetrators rather than victims. This is a particular challenge when perpetrators are considered more likely to be in a position of relative power to the victim.
- d) Currently, The University cannot impose any measures on a student unless an allegation has been proven beyond reasonable doubt, including measures such as preventing the respondent from contacting the complainant. Where an allegation cannot be proven beyond reasonable doubt, the only current option for someone who has been subject to sexual violence is to request that the perpetrator agrees not to contact or interact with them but this cannot be compelled.
- e) The student disciplinary framework has checks and balances in place to avoid the risk of wrong or unfair decisions – this includes separating investigation from decision-making, having an appeal mechanism for the Discipline Committee's

decision, required training for all decision-makers and external oversight via the OIA and the judicial review process.

In the light of these considerations the Review Committee on Discipline has confirmed its recommendation that the standard of proof in the Student Disciplinary Procedure should be changed.

### **Response to other matters raised within the consultation**

The following points are made in response to other matters which were raised by the responses received to the consultation:

- i. The 'Rules of Behaviour' purposefully do not use criminal language; the University will never consider whether a student's behaviour amounted to a criminal offence.
- ii. Complainants currently choose between College or University disciplinary procedures based on the circumstances of the case/standard of proof. The changes to the student disciplinary framework should enable all Complainants to choose the University procedure if they wish. As is currently the case, there are some matters that could be investigated under either the College or the University student disciplinary procedure. It may fall to the Complainant to choose to initiate the procedure either with the College or University. However, since 2016 it has been agreed in principle that sexual misconduct should be investigated by the University and that low-level physical misconduct should be investigated by a College, unless there are multiple respondents from multiple Colleges. In practice, the College and University would be able to refer matters to each other's procedures, as allowed for by 3.6(c) in the procedure, and OSCCA already liaises with senior College members where these discussions are relevant. Additional wording has been added to the guidance on sanctions to clarify the types of cases that should be investigated by the University or by Colleges. It is not possible to definitively provide guidance for what may happen in all circumstances.
- iii. The student disciplinary framework has been amended so that any ambiguity between the right to freedom of speech and causing offence is removed, following consideration of the Parliamentary Freedom of Speech in Universities Inquiry.
- iv. Prior to the first investigative meeting, the Respondent will only be given a brief summary of the complaint, including the identity of the complainant and the time and date of the alleged Concern. Following this investigative meeting, all evidence will be shared with the Respondent. This process enables the Respondent to provide an account of their actions without being accused of creating an account to fit with the complainant's full version of events.
- v. Any concerns that the Complainant has in relation to the investigation can be addressed either at the time of the investigation or subsequently raised through the Student Complaint Procedure.
- vi. It will not be possible for this procedure to be used retrospectively. Only Concerns that are alleged to have occurred from 1 October 2019 onwards will be investigated using this framework.
- vii. Both the Respondent and the Reporting Person are entitled to engage a legal representative. The Reporting Person is able to have a supporter during all

interactions and may engage a legal representative as their supporter. However, this would be at the Respondent and Reporting Person's own cost. The responsibility for proving that an allegation took place remains with the University.

- viii. The procedure has been amended to prevent the Respondent from contacting Witnesses or other Respondents during the investigation. It will be possible for decision-makers to continue any non-contact arrangements following the proceedings where a breach of the Rules of Behaviour is found.
- ix. The procedure has been amended to clarify that once the student disciplinary procedure has been completed those involved may discuss their own personal experience but may not identify any individual involved in the investigation or decision-making process. To permit a Reporting Person or Witness to identify a Respondent would put them at considerable risk of being accused of engaging in abusive behaviour.
- x. The person who would hold the role of Investigating Officer has already been appointed and currently investigates reports of harassment and sexual misconduct under the Procedure for Student Harassment and Sexual Misconduct. This was a cost neutral appointment; previously the Collegiate University had agreed that only specialist investigators could be used to investigate these matters and external investigation had been used for the first 18 months, to better understand the resource implications. The appointed person meets the criteria outlined in the Investigating Officer role specification.
- xi. All formal student procedures which have been implemented since 2016 have been subject to a year's review process and it is envisaged that this procedure would also be subject to a review after one year.
- xii. The primary purpose of using the phrase 'Registered Student' is to capture a group of students beyond those who are 'members' of the University. The OIA expects a provider to have a consistent disciplinary procedure for all its students and therefore it was necessary to define that group of students, without amending the regulations regarding those students who would be considered 'members' of the University
- xiii. When visiting students attend the University, they are subject to their own terms and conditions, this would require them to adhere to the Rules of Behaviour. However, if concerns were raised about an alleged breach, then this would be investigated and sanctions would apply as described under the terms and condition of the visiting student agreement.
- xiv. The Respondent will be given the opportunity to question and test the evidence, both during the investigation process and, where a concern is referred to a Discipline Committee, both in writing and orally to the Committee.
- xv. If the revised procedure is implemented, the Procedure for Student Harassment and Sexual Misconduct will be amended to ensure that language and definitions will be consistent across all procedures. This will include replacing the word 'harassment' with 'physical misconduct' and 'abusive behaviour'. Anecdotally, students are unclear whether this Procedure is only to be used for cases of sexual misconduct, so it is likely that this change of terminology will have a wider benefit.

- xvi. Providing there is no conflict of interest, the Investigating Officer is seen to be appropriately neutral to conduct an investigation where the offence is technically 'against the University', in a similar way that employees of the state investigate cases on behalf of and against the state.
- xvii. If the Reporting Person or Witness is a student, they shall have the opportunity to raise a complaint about the handling of their Concerns under the Student Complaint Procedure. Where a Reporting Person or Witness is a staff member then a grievance policy will be made available to them. These additional options are available for only students and staff as it is these groups that have to remain within a University setting to study or work following the investigation and therefore, the University needs to be able to consider any additional impact.
- xviii. The procedure defines what a 'relevant' criminal conviction is at paragraph 4.6.
- xix. If a student has a complaint about anyone, student or staff member, then there is a form on the OSCCA website that can be completed, which will initiate a process to meet with the student to understand what action they are requesting and then facilitate the complaint being transferred into the most appropriate procedure. For students, the Student Complaint Procedure is normally used as a framework to ensure that they receive the necessary support and remedies, with the investigation being undertaken in accordance with staff disciplinary procedures by HR.
- xx. An 'expert', as identified in paragraph 4.5, who would conduct an assessment regarding the level of risk a respondent may pose, would be a professional whose expertise is to assess such a risk. For example, the University works with Glebe House, a specialist organisation which conducts assessments via clinical psychiatrists to assess the risk of young people who display sexually harmful behaviour.
- xxi. The Rules of Behaviour do not include bringing the University into disrepute because it is only where the University could actually prove a material loss that this would be legally permissible. Where a student's misconduct was so significant that it caused a material loss to the University, then it would have also have interfered with the activities of the University and therefore be covered under the Rule of Behaviour 2.a).

There have been other additional substantive changes made in the guidance following the consultation including:

- Explicit confirmation that all Respondents are entitled to legal representation
- Clarification for some of the definitions within the Rules of Behaviour
- Confirmation that where formerly registered students are employees, the relevant staff disciplinary framework shall be used
- Inclusion of an additional minor sanction or measure; not permitting the Respondent to contact a Reporting Person or a Witness
- A more detailed description of how fitness to practise procedures fit into the framework
- Clarification of the warning that respondents will be given about the possibility of future disclosure of evidence to the police