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Toolkit

Ending Sexual Violence
and Harassment in Third-Level
Education



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There's really no such thing as the "voiceless". There are only the deliberately silenced, or the preferably unheard.

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Section Four

Policies, disclosures and investigations of sexual violence and harassment in higher education institutes

Creating cultural change: policies

The ESHTe project found that HEIs commonly lacked a comprehensive sexual misconduct policy addressing SVH. The issue was typically addressed through 'Dignity and Respect' policies which might only refer to 'sexual harassment'. As discussed in Section One, SVH is rooted in unequal power relationships and gender inequality. Given the complexity of the issue, it requires specific policies to address the particular challenges SVH poses.

► Guidelines for sexual violence and harassment policies

- Sexual misconduct policies should state their relationship to broader HEI frameworks that further gender equality and tackle discriminatory behaviours
- Sexual misconduct and relating policies should apply to anyone within the HEI who can experience or perpetrate SVH, regardless of whether the incident or behaviour occurred on or off campus
- Sexual misconduct policies should define the nature of SVH and contain a non-exhaustive list of examples: unwanted sexual conduct, unwanted touching, the sharing of sexually explicit material online or in text, posters etc.
- Policies should avoid language that trivialises the behaviour (e.g.: refers to it as an 'annoyance'), makes moral judgements (e.g.: refers to 'offensiveness') or engages in demeaning psychologising (e.g.: refers to 'humiliation')²⁰
- The standard of what constitutes SVH should be whether the behaviour was unwanted²¹
- Policies should address retaliations, threats, and reprisals in relation to a complaint being made
- Policies should be published widely, clearly and in a way that is accessible to all.²² They should use simple language, be disability friendly, be available in a variety of languages, and be suitable for those who have experienced trauma
- Non-disclosure agreements should not generally be used. If the perpetrators' behaviour is repeated, the HEI should not withhold information of previous incidences. The safety of the survivor and other members of the broader community must be a key consideration.

Disclosures

The terms 'disclosure' and 'reporting' of SVH can be used interchangeably; however, the intention and wishes of the survivor can distinguish them. A disclosure to a staff member within the HEI may be intended to seek support or further information only, whereas reporting may involve the intention to make a formal complaint.

Research indicates that reporting rates for sexual violence by third level students are generally lower than the broader population.²³ There are a number of reporting barriers for survivors of SVH, including fear of not being believed; feelings of shame, guilt or embarrassment; concerns regarding confidentiality; fears surrounding the criminal justice system; and a lack of knowledge of what action the institute will take if the institute would do anything.

In order to address some of these barriers HEIs should undertake particular measures to facilitate disclosure:

► Supporting disclosure through trauma-informed approaches

Providing a positive initial response to survivors who disclose SVH is pivotal in offering a sense of safety. This can enable survivors to engage further and work with the HEI to address any safety concerns and support needs. Conversely, responses such as disbelief or scepticism can have significant negative impacts, including self-blame, re-traumatisation, and disengagement.

Each person can react differently to trauma and their experiences; there is no right or wrong way for survivors to respond to SVH. Some may want to report to the police, others may want to attend counselling, while some may need time before they feel they are ready to make any decisions. After disclosing SVH, any further steps or referrals should be made only with the individual's full knowledge and consent, ensuring that they can disclose as little or as much as they feel comfortable with. Survivors must be made aware of the scope to which confidentiality can be provided.

► Anonymous reporting

Some HEIs, particularly in the UK, have introduced anonymous reporting procedures. These are generally online platforms which allow persons to make an anonymous report in relation to a range of behaviours, including SVH, to the HEI. Disciplinary action cannot be taken by the institute in the case of anonymous reporting, as the complainant must provide their name for this to proceed. The reporting technology can remove identifying information of an accused where a complaint remains anonymous. While this mechanism needs to be carefully managed, it has proved successful in a number of ways, as it:

- Gives a voice to those who have experienced SVH but do not feel they can and/or want to report
- Alerts HEIs to the range and prevalence of experiences of SVH within the institute
- Can identify reoccurring problematic behaviour so that the HEI can take policy, awareness-raising, or other actions to correct this
- Can provide a first step towards trust between survivors and the HEI, and may lead to official complaints being lodged
- Develops a 'culture of reporting' within the institute.

► Guidelines in relation to persons receiving disclosures

- Persons in this role should be clearly designated and appropriately trained members of staff, including student officers. The identified disclosure persons should come from a range of genders and backgrounds to ensure survivors have a choice of individuals who they would feel comfortable approaching
- Peer support has an important role in tackling SVH within institutes, but it should not replace dedicated and trained staff, including student office roles, within the HEI in a reporting and support structure
- Persons in this position should have a support framework in order to effectively carry out their role, including ongoing training and supervision
- Persons designated to receive disclosures should take the person seriously, listen, and provide practical information in relation to the person's options and, if desired, onward referral

- Information should include reporting options, both internally and to the police, as well as specialised support services, either within the institute and/or provided by external organisations
- The boundaries of confidentiality should be addressed and permission given by the survivor if any identifying information needs to be passed on to a third party
- Persons receiving disclosures should ensure not to minimise or trivialise the survivor's experience by, for example, categorising their experience of sexual harassment as 'an annoyance' or using phrases such as 'well at least you weren't hurt' or 'this is a common experience'
- Persons receiving disclosures should avoid victim-blaming remarks and attitudes, such as asking questions like "how much were you drinking" or intrusive questions as to the nature of their relationship with the perpetrator or any previous sexual contact
- Persons receiving disclosures should avoid making assumptions as to the gender identity of the individual or the perpetrator, how they think the survivor should present as a 'victim', or how the survivor categorises their experience. The language that the survivor uses should be mirrored back. It is possible that the individual will not label their experience as 'sexual harassment', 'sexual assault', 'rape' or 'stalking'.

► Guidelines for support services

- Support services should be specialised in dealing with SVH (e.g.: counselling services)
- If the institute does not have specialised ongoing support services or if they are under-resourced to adequately meet individuals' needs, it is recommended that referral pathways be developed with external providers to ensure a continuum of care
- There is a duty of care to provide support to persons within the HEI accused of SVH. However, where there are small counselling teams, it is appropriate to use external referrals to avoid any conflict of interest and reduce the possibility of the accused and the complainant having further unwanted contact.

Changing the culture: procedures

In order to build an environment of trust in the HEIs capacity to deal with SVH, disclosures, reporting, complaints and investigative procedures should be clear, fair, and transparent and take appropriate action to avoid any conflict of interest.

There should not be unreasonable time limitations in which a complaint in relation to SVH can be made.²⁴ Recognition should be given to particular reporting challenges regarding this issue and provision made for historical incidences where appropriate.

► **Balancing Rights between the Complainant and the Accused to make it "survivor's experience"**

When both the complainant and accused are part of the same institute, a variety of difficulties can arise in ensuring the confidentiality, safety, and fair treatment of both parties during all stages of the process. ESHTe focus groups indicated that staff were strongly in favour of receiving more robust legal guidance in relation to their obligations. However, it is important to ensure that those making a complaint do not experience distrust or disbelief, and that their safety needs and support are not contingent on the completion of an investigative process. There may also be safety considerations in relation to responses by the HEI community towards the person making the complaint and/or towards the person accused of the misconduct.

A definitive legal document is beyond the scope of the ESHTe project; however, it is recommended that a legal guidance, similar to the Pinsent Masons Guidelines, is developed in each national or regional legislative framework, laying out in clear terms what guiding principles HEIs should abide by and containing practical examples and case studies.²⁵ This work should be led by a national higher education coordinating or governmental body, as there should be a consistent approach and a mechanism to share best practice and experience across HEIs.

► **Guiding principles in relation to investigation procedures**

1. Proportionality

Sanctions, interim measures, and safety plans etc should be reasonable and proportionate to what is being investigated. There is a cultural tendency to minimize the harm of SVH and to give greater weight to the potential impact complaints or sanctions may have on the person accused, either personally, or on their career or studies. Persons involved in internal HEI SVH processes should receive training to be sensitive to addressing such issues and ensure fairness to all involved.

2. Parity

Policies and procedures in relation to investigations of SVH should be clear to the complainant and the accused. Adequate feedback should be provided to both throughout the investigative process. They should have equal access to representation and both should be able to appeal.

3. Timeliness

Once the complaint is made, the investigative process should be carried out within a reasonable time period once the complaint is made. Both parties should be informed as to how long the investigation is expected to take.

4. Confidentiality

Both parties have the right to protection, and information should only be shared with relevant persons on a need-to-know basis; this should be clearly communicated to the complainant and the accused.

5. Thoroughness

All investigations should be carried out thoroughly. The complainant is entitled to request that no action be pursued and not to participate in an investigation and disciplinary process.

Criminal cases and internal disciplinary processes

HEIs should be clear on the differences between internal disciplinary procedures and criminal proceedings. While sexual misconduct policies can encompass serious criminal behaviours, such as rape, sexual assault, and stalking, only a court can find a person guilty of a criminal offence. An internal HEI investigation is a separate type of process, with different types of sanctions. It should be the decision of the survivor whether they wish to avail of one or both of these routes. Therefore:

- Internal investigations are limited to conduct constituting sexual misconduct under HEI disciplinary processes. The language should remain distinct from the criminal justice system. A finding of sexual misconduct can be concluded by the HEI but not, for example, 'sexual assault'
- Internal investigative processes require the lesser burden of proof of the 'balance of probability', whereas criminal justice requires proof of 'beyond reasonable doubt'.
- The evidence that can be admitted in internal procedures does not have to follow criminal evidentiary rules.

If a complaint is made and the behaviour is also a criminal offence, the HEI may still take disciplinary action. However, once a report is made to the police and the matter is under criminal investigation, it is generally recommended that only interim measures should be taken by the HEI until the criminal process is concluded, so as not to prejudice the criminal investigation. Interim measures and sanctions should take into account any risk assessment, as well as the safety and well-being of the survivor and HEI community, on a case-by-case basis.

► Outcome of a criminal process

Where the accused has been convicted of a criminal offence, this can be relied upon to establish a disciplinary offence and sanctions by the HEI may be imposed as and if appropriate.

Where the accused is acquitted of a criminal offence, the institute can still take disciplinary action if there is sufficient evidence that the behaviour constituted a breach of discipline under the institute's disciplinary procedures. The accused's acquittal of a criminal offence, or a criminal case not proceeding, may be a relevant consideration; however, the weight that the HEI attaches to this will vary depending on the circumstances of each case.

► Sanctions

The institute body deciding over sanctions should be expressly named in the disciplinary procedures. This body should be gender-balanced and have an understanding in relation to the issue of SVH.

Examples of sanctions include:

- Expulsion
- Suspension
- Restriction/conditions
- Formal warning
- Compulsory attendance at a workshop, and
- Written apology.²⁴

Interviewing the complainant, accused and witnesses

► Provisions during the interview

- The complaints and disciplinary process should be explained fully to both the complainant and the accused
- Given the sensitivity of the nature of SVH, both the accused and the complainant should be allowed accompaniment by a support person and should be made aware of the internal and external support services available
- The accused does not have the right to confront the complainant, and the complainant should not have to attend the same meeting as the accused or does not have to engage in the process at all if they so wish
- Witnesses should be given the substance of the allegation, but do not need to be informed of more than what is necessary
- Both parties should be allowed to give evidence in their preferred language, and an interpreter should be present if required
- The investigator should be trained in trauma-informed approaches and SVH. They should explain sensitively to both parties the types of questions they will ask, for what purposes, and how this information will be dealt with
- The policy addressing retaliation should be outlined to the parties involved, explaining the mechanisms of how to make a report and what actions will be taken
- The person carrying out the investigation should keep factual and objective notes, and refrain from including perceptions or being subjective.

Summary of recommendations

- Develop clear, accessible policies in relation to SVH complaints procedures, using plain language
- Provide training for staff in both receiving disclosures and handling official complaints; it should be clear what the difference is between both
- Ensure a fair and impartial investigation procedure; this involves understanding the nature of sexual violence and sexual harassment, ensuring complaints officers understand trauma and have had training to explore SVH and its cultural context
- Ensure processes do not replicate the highly adversarial nature of the criminal justice system; the process should focus on avoiding any re-traumatising of survivors
- Keep the parties informed of the process at each stage, and carry the process out as speedily as possible
- Investigations take place without prejudice, including complaints against staff
- Consider external investigators, in particular if the accused is a staff member or in any situation where a potential conflict of interest may arise
- Train staff in relation to appropriate record-keeping on SVH disclosures, remaining particularly mindful that records could be subpoenaed for criminal investigations
- Publish data, such as on the types of incidents handled and sanctions involved etc, while maintaining the confidentiality of those involved
- Collate all sectoral data through a national higher education coordination or governmental body for comparative purposes.