

## Guidance for Universities

# How to Respond to Alleged Staff or Student or University Related Sexual Misconduct

### 1. Introduction

- 1.1 In April 2019 the Minister of State for Higher Education published a Framework policy document for Higher Education Institutions entitled *Safe, Respectful, Supportive and Positive - Ending Sexual Violence and Harassment in Irish Higher Education Institutions. ("the Framework")*
- 1.2 The focus of this Guidance is on ensuring that appropriate policy and procedural arrangements are in place in each university to ensure effective response to reports/complaints of Sexual Misconduct. Universities are advised that, consistent with the Framework, these arrangements should be situated within a broader institutional context that focuses on prevention, support and an institutional culture that promotes the values of respect, dignity and integrity.
- 1.3 While universities have a strong policy base in relation to Discipline and Dignity and Respect issues, there is a general acceptance that further guidance is required to adequately reflect the various duties and obligations that universities have in relation to their students, and staff and others (including visitors, suppliers, employees of suppliers, club members etc.) and to assist universities in handling the most complex and sensitive incidents, particularly those involving sexual misconduct.
- 1.4 Sexual Misconduct is defined<sup>1</sup> as *"any form of unwelcome behaviour of a sexual nature that may be subject to disciplinary proceedings. This includes but is not limited to crimes of sexual violence, sexual cyberbullying of any kind including non-consensual taking and/or sharing of intimate images, creating, accessing, viewing or distributing child pornography material online or offline, stalking behaviours whether online or offline in a sexual context, and any verbal or physical harassment in a sexual context."*

Sexual misconduct can be committed by a person of any gender and it can occur between people of the same or different genders. It is often gender targeted and perpetrated to demean, diminish and intimidate. Sexual misconduct may occur between strangers or acquaintances, including people involved in an intimate or sexual relationship. This definition embraces Sexual Harassment,<sup>2</sup> which traditionally

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<sup>1</sup> Source: *Safe, Respectful, Supportive and Positive: Ending Sexual Violence and Harassment in Irish Higher Education Institutions*

<sup>2</sup> Equal Status Act 2000, s11(5)(a): references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of

has been well covered in Dignity and Respect policies, and to which the procedural guidance set out here is also applicable.

As may be noted from the above, some instances of sexual misconduct may also constitute a criminal offence.

- 1.5 Universities have been very active in the provision of Sexual Consent training, as a key initiative in ensuring a safe and respectful institutional environment. In this context, Sexual Consent is described as the freely given verbal or non-verbal communication of a feeling of willingness to engage in sexual activity. This description entails an ongoing, mutual and preferably verbal communication, and is consistent with the definition of consent in the [Criminal Law \(Sexual Offences\) Act 2017](#), as where the individual “freely and voluntarily agrees to engage in that act”.
- 1.6 Any difficulty in defining what constitutes Sexual Misconduct should not deter students or staff from complaining of behaviour which is unwelcome.
- 1.7 A particularly complex issue for universities is how to handle cases where the alleged sexual misconduct may also constitute a criminal offence. This Guidance provides the basis for universities to amend their existing policies and procedures (including those relating to Sexual Harassment) or to introduce new aspects of policy where none currently exists. It is recommended that each university has clear, dedicated policies and procedures on Sexual Misconduct in line with this Guidance.
- 1.8 This Guidance is addressed to the universities that are members of the Irish Universities Association and it is intended as general guidance on how to respond to alleged staff or student sexual misconduct. The application and impact of the law can vary widely based on the jurisdiction in which the events occur, based on the specific facts involved and by reason of changes in the law and in judicial interpretation of the law. Given those variables there may be omissions or inaccuracies in information contained in the Guidance. Accordingly this Guidance is published on the understanding that the Irish Universities Association are not thereby engaging in the provision of legal or other professional advice or services. As such the Guidance should not be used as a substitute for consultation with professional legal or other advisers.
- 1.9 In any case where a complaint relates to a matter which is also a criminal offence in Ireland or in another jurisdiction, specific legal advice should be sought by the university concerned.
- 1.10 As this Guidance is addressed to member universities only, a person who wishes to make a complaint about sexual misconduct or who is a person against whom such a complaint has been made, should refer to the university’s relevant policies and procedures.
- 1.11 Incidents of sexual misconduct are a societal wide issue. Universities have been very proactive to date in putting positive measures in place to deal with alleged incidents of sexual misconduct and in the provision of appropriate supports from the time any incidents are first reported. Universities will continue to play their role and ensure enhanced systems and supports are in place.

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violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

## 2. **Framework for Consent in Higher Education Institutions 2019**

2.1 All universities strive to place the student experience at the heart of the university mission, ensuring that the context exists for every student to thrive, flourish, and develop to their full potential. A safe and respectful academic, extracurricular, and social environment is an essential prerequisite to achieving this objective. In this regard, the universities strongly support the Framework design, which sets out a 'Whole of System' approach, ensuring that positive support and prevention are embedded in institutional culture.

Outcomes such as, (a) whether students have good understanding of consent and knowledge of positive actions, etc. and (b) workable knowledge and preparedness to engage with supports / reporting, are key criteria in assessing the effectiveness of universities in achieving these objectives.

This is described in the Framework Vision, which is summarised as:

2.1.1 A campus or institutional culture which is safe, respectful and supportive; clear in its condemnation of unwanted and unacceptable behaviours.

2.1.2 The higher education student experience empowers individuals to foster a culture of respect, dignity and integrity.

2.2 The national Framework is based on the premise that initiatives in relation to sexual harassment and gender-based violence are of limited value, unless systemic and institutional issues are also addressed, through attention to institutional culture, and supporting structures and processes. Within this broader context the Framework sets specific expectations of universities in relation to their policies, as follows:

2.2.1 Dedicated policies are in place consistent with the Framework aims.

2.2.2 Policies are explicitly linked to clear lines of responsibility, active responses, institutional reporting, and regular review.

2.2.3 Policies include guidelines for addressing student complaints, including transparency for all involved.

2.2.4 Policy implementation is supported by institutional leadership, and an annual report to the Governing Authority.

2.2.5 Accessible, trauma-informed services; for supporting student disclosure, reporting and complaints, and for counselling and advocacy.

2.3 The Framework also states that HEIs must aim to (pg. 17):

2.3.1 Provide a transparent and consistent system for addressing student complaints of sexual harassment, sexual assault, and rape.

2.3.2 Provide a transparent and accountable protocol for those against whom complaints have been made who are part of the student or staff body of the HEI.

This Guidance has been developed to support universities in achieving that objective, while complementing the cultural change being advanced through initiatives such as universities' Gender Action Plans, as envisaged in Principle 12 of the SAGE Charter – 'Eradicating bullying, sexual and moral harassment from our institutions'.

### 3. Basis for University Intervention

- 3.1 In the context of the institutional and sectoral objectives set out in section 2 above, it is important that university intervention in the management of complaints/reports<sup>3</sup>, is not confined solely to the matters of procedure and process. While these are undoubtedly important, and are the focus of these guidelines, these must be conjoined with a wider ethos and policy of the institution to promote and support positive sexual, consensual behaviour through education programmes, and a preventative ethos of mutual support and respect. In addition, it will be very important for universities to be able to clarify for those reporting an incident, that there is a difference between disclosing (which is followed by support) and making a complaint, and the subsequent options that are available to them.
- 3.2 The rules and regulations of universities which require staff and students to conduct themselves appropriately and enable universities to respond to reports/complaints of misconduct, are generally covered by a set of policies in relation to standards of behaviour and appropriate disciplinary procedures and codes of practice. Setting out the required standards and the need for individual accountability for one's own behaviour should be a key pillar in ensuring a proactive preventative approach. Universities should ensure that the relevant rules and regulations include behaviour perpetrated by or against non staff or student members of the university community, e.g. visitors, on site contractors etc.
- 3.3 In order to ensure that any complaints of sexual misconduct are responded to appropriately, universities should:
  - 3.3.1 publish an appropriate policy or code of conduct which
    - 3.3.1.1 states that any form of sexual harassment or sexual violence or sexual misconduct is unacceptable and that the university has responsibility (with staff and students) for ensuring an environment free from any form of sexual misconduct;
    - 3.3.1.2 sets out the types of behaviours that are unacceptable;
    - 3.3.1.3 makes it clear that any such behaviour will amount to a breach of discipline; and
    - 3.3.1.4 provides a clear indication of the sanctions which may be imposed on staff or students in relation to any such breaches (the sanction imposed must be reasonable and proportionate to the misconduct which is found to have occurred)
  - 3.3.2 publish disciplinary procedures/regulation which include a list of the sanctions which could be imposed on students and staff
  - 3.3.3 ensure that the Policies are easy to locate on the university's website, and conform to the National Framework principles of:

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<sup>3</sup> Universities are also implementing various 'Report and Support' tools. These typically are not formal complaint mechanisms, but their function is for the purposes of monitoring self-reports of harassment and misconduct and to raise awareness of existing university supports and disclosure channels.

- 3.3.3.1 Transparency - Transparent, easily accessible and easily understood policies.
  - 3.3.3.2 Consistency - Consistent and timely application of university policies and procedures.
  - 3.3.3.3 Integrity - strong ethical principles and values at the heart of processes and procedures.
- 3.4 Each university must have a clear process for reporting sexual misconduct with designated channels and clear reporting processes for staff and students. Typically, university policies should specify examples of unacceptable behaviours relating to sexual misconduct and indicate the types of sanctions that may be imposed if such behaviour is found to have occurred. Policies should also set out how reports/complaints will be handled, from initial informal (if applicable) and formal reporting, through investigatory and disciplinary stages.

Examples of sexual misconduct are set out in Appendix I

- 3.5 Policies can never cover all incidents of unacceptable behaviour. Universities may decide to develop detailed supporting policies or guidelines on specific issues that clarify expected behavioural standards, such as personal relationships between staff and students, senior and junior staff etc. However, the scope of the Policies should clearly include examples which happen inside and outside of the university, as well as conduct on social media, and in digital communications. It should also be made clear in the policies 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). The policies 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.
- 3.6 It is essential that universities provide appropriate and relevant information and support to students or staff members who report sexual misconduct 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). This should include facilitating attendance at a Sexual Assault Treatment Unit if that is what the person wishes.
- 3.7 In situations where one student has made an allegation against another student, in order to ensure due process and to avoid re-traumatisation, universities should treat the reporting student and the accused student fairly and not make any presumptions about either of them.
- 3.8 In order to ensure that students are provided with all appropriate information and support, appropriate training and guidance will need to be provided to all relevant staff who may have an involvement in responding to student reports/complaints. Staff coming within the scope of this type of training and guidance will range from those who may only need to be aware of general policies and support options, as well as those relevant members of staff who will be expected to have a deeper level of knowledge and expertise in order to be able to co-ordinate the provision of internal

and external support. There should be clear reporting pathways and an understanding that engagement with same will not require the person concerned to make a report to the Gardaí. Universities will work with local Rape Crisis Centres, and other relevant partners in making services available to people who report sexual misconduct.

In accordance with the Framework there should be a clear, simple and accessible method of reporting incidents of sexual misconduct to ensure that complainants are referred to these specially designated /trained members of staff as quickly as possible. Identification of a single point of contact for each class of complainant (e.g. student, staff etc.) 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 or staff member to these designated contacts. Even with clear reporting processes in place, many students will make disclosures to the academic or professional staff that they come into contact with on a daily basis, so it is important that all staff have a basic understanding of what to do, how to listen actively, and what to say by way of response in these circumstances.

- 3.9 The scope of the policy or code of conduct (including the extent to which staff or students can be disciplined for behaviour which happens outside of and/or is unconnected with the University) should be specified within the policy or code of conduct. The policy or code of conduct should provide that they extend to sexual misconduct by a staff member or student occurring on or off university premises (including via social media) or digital communications where the complainant is a student or employee of the university or others visiting, working or studying at the University and to sexual misconduct occurring during university (or university-related) activities (including on placements and field trips).
- 3.10 There may be cases where reported sexual misconduct by a student or staff member is considered to be insufficiently connected to the university, for the university to be able to investigate it under the university's disciplinary procedures. Similarly, there may also be situations where the university may not be the appropriate agency to investigate a particular complaint, e.g. alleged misconduct by students/student teachers on placements governed by Child Protection legislation and procedures; staff on secondment to other organisations, etc. There should be clear provisions as to how any such cases should be managed.
- 3.11 When dealing with complaints that have been made about the conduct of one of its students or staff members, universities must have regard to the various duties and obligations that they owe to all of their staff and students including 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 Employment Equality Acts and Equal Status Acts duties and upholding human rights. Cases involving allegations made by one student against another student or, indeed, by a student against a staff member or vice versa, require careful and sensitive management because universities owe a duty of care to both parties and are obliged to take steps to protect both parties from unintended harm. This results in universities having to balance the conflicting rights and interests of two parties when considering what action to take.
- 3.12 Universities should also include provisions in their internal procedures for the university to instigate formal investigation and disciplinary procedures in

circumstances where a complainant does not wish to pursue a formal complaint, but where a sufficient concern arises for the university, having regard to their broader obligations in relation to the safety and welfare of others. Similarly, the authority for universities to act on third party complaints and anonymous complaints should also be set out clearly in the relevant university procedures. It is recognised that there will be inherent limitations in responding to these types of complaints, particularly with regard to the rights of respondents pursuant to the rules of natural justice and Article 6 of the European Convention on Human Rights. These limitations may be exacerbated, or mitigated, by issues such as the level of detail provided, the number of such complaints etc. The approach to be adopted by a university in such instances will be determined on a case by case basis, however it is important that provision is made for these exceptional cases within university procedures.

- 3.13 Universities should ensure that any 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.
- 3.14 Universities should consider whether any adjustments need to be made to the disciplinary procedure to address any actual and/ or perceived imbalances between the complainant and the person against whom the complaint is made, referred to as “the Respondent” hereafter. In considering what adjustments may be required, universities should take into account the trauma that the complainant may suffer when giving evidence and the need to uphold fundamental principles relating to a fair hearing for the respondent such as the right for the accused to hear the evidence against them and the right to “test” that evidence. For example, a university could allow the complainant to provide evidence from a different room through video link and questioning could be through the Chair so that the respondent and the complainant do not have to communicate directly with each other and to ensure that no inappropriate questions can be put.
- 3.15 Where a complaint against a student or a member of staff is not upheld, and no disciplinary action is taken against them, universities should be aware that the respondent and the complainant 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, consideration of steps that could be put in place to seek to ensure that both parties do not come into contact with each other, as well as access to the relevant support services such as Health, Counselling, Employee Assistance Programme, etc..
- 3.16 Building on the progress made across the sector in relation to provision of Consent workshops it is recommended that the opportunity to participate in such workshops is made available to all students and staff given that these consent framework guidelines are to be situated within a broader institutional context that focuses on prevention, support and a positive institutional culture.



#### 4. Precautionary Action

- 4.1 University procedures should expressly provide for the university to impose at an early stage precautionary measures on a student or staff member who is alleged to have engaged in sexual misconduct pending the outcome of criminal/disciplinary proceedings.
- 4.2 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 person concerned has committed a breach of discipline or a criminal offence.
- 4.3 Precautionary action must be reasonable and proportionate and may include:
  - 4.3.1 imposing conditions on the respondent (for example, requiring the respondent not to contact the complainant and/or certain witnesses and/or requiring the respondent to remain out of certain libraries, restaurants, bars, clubs and societies, social spaces etc.)
  - 4.3.2 suspending a student respondent from their studies or makes alternative tuition arrangements (in the case of alleged sexual misconduct by a student). 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.
  - 4.3.3 making appropriate accommodation arrangements to ensure separation between the respondent and complainant in student residential settings.
  - 4.3.4 making appropriate arrangements to ensure separation of the respondent and complainant in delivery of teaching and supervision (for example, moving the respondent into another tutorial group or laboratory group).
  - 4.3.5 placing a staff member concerned off duty (in the case of alleged sexual misconduct by a staff member).
  - 4.3.6 excluding/restricting the person concerned (for example, prohibiting the person concerned from going to certain accommodation blocks or using the sports facilities or from attending a placement). Exclusion means that the student is prohibited from taking part in certain university activities, using certain university facilities and/or entering certain university grounds or premises. A qualified or partial exclusion may be put in place where appropriate.
- 4.4 The grounds for taking any such action should be clearly set out in the university procedures. For example, the university procedures may provide that precautionary measures may be put in place provided they are proportionate and **necessary**:
  - 4.4.1 to ensure that a full and proper investigation can be carried out (either by the Garda Síochána or a University investigator); and/or
  - 4.4.2 to protect the complainant or others whilst the allegation is being dealt with as part of a criminal process or disciplinary process.

- 4.5 In order to ascertain the type and extent of any precautionary measures, universities should undertake a risk assessment on a case-by-case basis. Importantly, precautionary measures are not contingent on the making of a criminal complaint and can be instituted to facilitate an investigation or pending the outcome of a university's disciplinary process. If a criminal complaint has been made, any bail conditions that have been imposed on the respondent as part of the criminal process 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.
- 4.6 The precautionary measures that are put in place should be those which will best protect the investigation and/or the complainant /others from harm whilst having the minimum possible impact on the respondent. Note that in cases where one party has made an allegation against another(s), universities will have to take into account the interests and welfare of both and endeavour to treat them fairly and equally when undertaking the risk assessment and ascertaining the potential effectiveness and impact of precautionary measures.
- 4.7 The type of misconduct, the circumstances of the incident, the circumstances of the individuals involved, and the views of the Gardaí/prosecutor, if applicable, will all be relevant in assessing risk and in determining if, and what precautionary action is required. The risk assessment should include consideration of the support arrangements that need to be put in place, to protect and support the parties involved, and to protect any investigation that may be undertaken. As circumstances may 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
- 4.8 Any decision to impose a precautionary suspension on a student or to place a staff member off duty can have serious consequences. Therefore, 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 or off duty decision should be fixed for a specified period of time and subject to review at regular intervals.
- 4.9 The decision to suspend a student or place a staff member off duty as a precautionary measure should be made at a senior level and the respondent should have an opportunity to:
- 4.9.1 consider the reasons why such a decision might be made
  - 4.9.2 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)
  - 4.9.3 request a review at any stage if there is a material change in the circumstances of the case.
- 4.10 Note that it may be appropriate for the disciplinary procedures to provide that a decision to suspend may be made by a senior member of staff at a level which enables any appeal to be reserved to the President.

## 5. Alleged Sexual Misconduct which may Constitute a Criminal Offence

### General Principles

- 5.1 There are many instances where an alleged act of sexual misconduct may also constitute a criminal offence and this guidance focusses on providing recommendations about how universities should respond to these cases. As set out in section 1.4 earlier, not all sexual misconduct will constitute a criminal offence, and these issues will continue to be dealt with through university disciplinary procedures as appropriate.
- 5.2 The intervention by universities in cases where an alleged act of sexual misconduct may also constitute a criminal offence is a complex exercise. This Guidance makes recommendations about the process that can be followed and the factors that should be taken into account.
- 5.3 Universities receiving complaints of sexual misconduct, must recognise that any allegation of sexual misconduct which may constitute a criminal offence is likely to have an adverse impact on all parties involved (whether the incident is dealt with through a disciplinary process or a criminal process). As a priority, universities should ensure that all parties involved in any such incidents, particularly the reporting party and the accused party, have access to appropriate supports.
- 5.4 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.
- 5.5 The internal disciplinary process is a civil matter, is based upon an allegation that a student or staff member has by engaging in sexual misconduct breached the university's rules and regulations; the allegation has to be proven on the balance of probabilities (the event is more likely to have occurred than not) and the most serious sanction that can be applied is permanent expulsion from the university or termination of employment.
- 5.6 In contrast, the criminal process is an external process, deals with allegations that an accused person 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.
- 5.7 Taking the above differences into account, universities should follow three key principles when dealing with disciplinary matters which may constitute criminal offences.
  - 5.7.1 A person who reports to a university sexual misconduct which also constitutes a criminal offence should be given clear guidance as to the options open to them. This should include internal support and reporting options, as well as attending at the nearest HSE Sexual Assault Treatment Unit (SATU)<sup>4</sup>, and/or referral to the Gardai (noting that these two are both separate and discrete services). See section 6.1 for more details.

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<sup>4</sup> <https://www2.hse.ie/services/sexual-assault-treatment-units/sexual-assault-treatment-units.htm> SATUs provide both healthcare and forensic services to victims of sexual assault.

- 5.7.2 The criminal process must take priority. Consequently, if the matter is being dealt with under the criminal process, then save for taking any necessary precautionary action (see section 4), or unless the circumstances require otherwise (such as cases where the complainant may wish for a university investigation process to proceed and where same is possible) the internal disciplinary process should be postponed until the criminal process is at an end.
- 5.7.3 If the matter is not being dealt with under the criminal process (perhaps because the complainant chooses not to make a criminal complaint) 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 procedures. The Framework notes that “not all of those who experience sexual violence or harassment wish to engage with the criminal justice system”.

5.8 These key principles are expanded upon below.

### **Referral to the Garda Síochána**

- 5.9 Usually the reporting of a crime is made by the complainant and the evidence of the complainant is crucial in securing a conviction.
- 5.10 Where the complainant 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 Gardaí the university should facilitate that. If they do not wish to make a report to the Gardaí then, subject to the points made in the paragraph below, the university should comply with that decision. It is of course open to a complainant to make a report to the university and the Gardaí.
- 5.11 Universities should only in the most exceptional circumstances and with the benefit of specific legal advice report a complaint or a disclosure of sexual misconduct to the Gardaí contrary to the wishes of the complainant. The circumstance in which a report by a university may be justified is if the complainant is a minor<sup>5</sup> or where there is clear evidence of wrongdoing available to the university separate from the complainant itself or where there is considered to be a clear and imminent risk to the safety of the complainant or of third parties.
- 5.12 Under the Data Protection Acts 1988 to 2018 and GDPR, universities will need to be able to justify the disclosure of information about a complainant that is made to the Gardai without their consent or where there is considered to be a clear and imminent threat to the safety of the complainant or of third parties<sup>6</sup>.
- 5.13 In deciding whether to make such a disclosure, and what information to disclose, universities must take into account any potential harm that the unauthorised disclosure may cause to the complainant. This assessment will have to be undertaken on a case-by-case basis as much will depend on the circumstances of the matter.

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<sup>5</sup> Where a complaint concerns a minor, the university should in the first instance report the matter in line with the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 and the Children First Act 2015 to ensure that the University complies with its statutory obligations

<sup>6</sup> The lawful grounds for processing data include (Article 6(1)(d) GDPR and Part 5 Clause 73(1)(b)(ii) Data Protection Act 2018) where the processing is necessary to protect the vital interests of a data subject or another person.

However, it should be noted that disclosing information to the Gardaí without the complainant's consent could cause significant harm as it is likely to undermine the relationship of trust and confidence between the university and the complainant and potentially result in the complainant declining any further support or assistance from the university or those associated with the university (which could make the complainant more vulnerable). Further, preventing a complainant from controlling the reporting process could cause them further distress. It is particularly important for those who are victims of sexual misconduct to feel that they are in control of the reporting process.

- 5.14 If universities decide that it is necessary for them to report the sexual misconduct to the Gardaí, then the reasons for taking that action should be explained to the complainant so that they understand what is happening and is prepared if/when the Gardaí contact them.
- 5.15 If the complainant decides not to make a report to the Gardaí where the accused is a student or staff member of the university, the complainant should have the option of requesting that the university deal with the matter under its policies and, in such circumstances, the university should follow its policies and procedures when determining what action should be taken. A clear explanation of how these approaches are different must be given to the complainant so that they understand the difference in outcomes. A university's policies should also provide that it has the ability to institute disciplinary proceedings against the accused of its own volition if the complainant does not wish to make a formal complaint (as set out in earlier section 3, pg. 5).

#### **Outcome of a Criminal Process**

- 5.16 If a student or a member of staff is convicted of a criminal offence then the conduct or behaviour that they have been found to have committed can be relied upon to establish a disciplinary offence within the university and the focus of any disciplinary process by the university should be to consider the impact and effect of the conviction in order to determine the sanction/s (if any) to be applied by the university.
- 5.17 If a student or a member of staff is acquitted of a criminal offence, then the university can still take disciplinary action against the person concerned if there is sufficient evidence that unacceptable behaviour, which constitutes a breach of discipline under the university's policies, 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 lower and the sanctions available will be different. The fact that a student or a member of staff has been acquitted of a criminal offence after a full trial is a relevant consideration and the weight to be attached to it will depend upon the circumstances of the case.
- 5.18 Where a student or a member of staff is acquitted of a criminal offence and no disciplinary action is taken against them, universities should be aware that the respondent and the complainant 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, consideration of steps that could be put in place to seek to ensure that both parties do not come into contact with each other, as well as access to the

relevant support services such as Health, Counselling, Employee Assistance Programme, etc..

- 5.19 Universities should note that any such action would be taken in order to protect the welfare and well-being of both parties and not as part of a disciplinary process. The rights and interests of both (and of other students and staff members where necessary) would therefore have to be balanced fairly and equally.

### **Record Keeping**

- 5.20 Universities must 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 are an essential element of best practice, and will enable decisions to be made effectively and allow for previous decisions to be reconsidered and reviewed when appropriate. All data must be retained in accordance with GDPR.
- 5.21 All involved in dealing with alleged sexual 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 Gardaí as part of a criminal investigation and individuals could be called to give evidence. Note taking that informs a decision in relation to breach of discipline, and the rationale for that decision, would be particularly important. Consequently, every effort should be made to ensure that written records are clear, accurate and appropriate.

## 6. Provision of Information and Support to complainants in relation to procedural options

6.1 No pressure should be put on the complainant to take any particular course of action. The support required by those who have experienced any form of Sexual Misconduct should be trauma-informed, and may range from counselling, educational supports, and information and help with accessing available services, either internal or external, such as Rape Crisis Centres or SATUs, in addition to any internal or external investigative process. Relevant policies should also stipulate clearly that no penalisation of a complainant will be tolerated.

6.2 In providing information and support in response to complaints, universities should assist complainants to understand the various options available to them and provide them with support in making a decision about the way forward.

The key decisions for the complainant will usually be as follows:

6.2.1 make a report to the Garda Síochána

6.2.2 take some time to consider the options (in this situation, where appropriate, universities should provide advice about attendance at the nearest sexual assault treatment unit (SATU) which can enable forensic evidence to be collected whilst a decision is being made about whether or not to make a report to the Garda Síochána. Forensic samples should be collected as soon as possible, but can be collected within up to seven days, and can be stored by the SATU for up to one year)

6.2.3 not report the matter to the Garda Síochána but request that the university consider the case under its disciplinary procedures (or other internal process)

6.2.4 report the matter to the university and the Gardaí such that a criminal investigation/prosecution and university disciplinary process may each be instituted

6.2.5 take no further action.

6.3 When outlining the options available, universities should ensure that the complainant understands the process related to each option and, in particular, understands the difference between criminal investigations/proceedings and university disciplinary investigations/proceedings.

6.4 A number of the key differences are set out below.

6.4.1 Under the criminal process, the complaint will be treated as a potential criminal offence. Under the disciplinary process, the complaint will be treated as a potential breach of discipline.

6.4.2 A disciplinary process will generally be completed in a much shorter timeframe than a criminal process

6.4.3 In a criminal trial, the Court (judge/jury) will consider the criminal charge, the evidence called by the State prosecutor, the challenges to that evidence made by or on behalf of the accused person, and any evidence given by or on behalf of the accused person. The Court will ultimately decide whether the prosecution has proved the case beyond reasonable doubt, in which case a

conviction will be recorded and a penalty (fine/imprisonment) will be imposed. In a university process, if a complaint of Sexual Misconduct is received, precautionary action will be considered, the complaint will be investigated and, if it is upheld on the balance of probability, a sanction (warning/suspension/expulsion/dismissal) will be imposed on the respondent/wrongdoer.

- 6.4.4 A disciplinary investigation will be more limited than a criminal investigation because forensic analysis and medical examinations may not be available to universities and universities have no general power to compel witnesses to give evidence.
- 6.4.5 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 most severe 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 them by the university will no longer be applicable. Likewise, the most severe sanction for a staff member would be dismissal. In addition, the complainant 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 the complainant or any other person. 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 obligations. Another key difference is that the criminal process may take a significant length of time whereas a university disciplinary process may be resolved within a shorter timeframe.



## APPENDIX 1 – Examples of Sexual Misconduct

### Examples of Sexual Misconduct

- Predicating inclusion or access to work or study opportunities or other advantages on participation in interactions of a sexual nature
- Grooming, psychological abuse and coercive contact
- Making unwanted/unsolicited remarks of a sexual nature, either directly, or via text or social media apps. (sexting)
- Kissing without consent.
- Touching inappropriately through clothes without consent.
- Non-consensual taking or sharing of intimate images (upskirting etc).
- Sexual cyberbullying.
- Verbal, non-verbal or physical harassment in a sexual context (including verbal or physical advances, requesting sexual favours, asking about a person's sexual preferences or activities, making disparaging remarks of a sexual nature)
- Inappropriately showing sexual organs or images of sexual organs to another person without consent.
- Creating, accessing, viewing or distributing child pornography material online or offline.
- Stalking behaviours whether online or offline.
- Attempting to engage in sexual intercourse or engaging in a sexual act without consent.
- Sexual violence or engaging in a sexual act without consent.

Note that in relation to certain items universities may be entitled to expect higher standards of behaviour from staff that they might expect from students.

## Appendix 2 – Example Risk Assessment

Risk assessment for Student A.

(This risk assessment should be drafted with assistance from specialists in this area).

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
<p><b>Academic progress:</b></p> <p>Student A failed to submit two pieces of coursework within the prescribed deadline</p>			
<p><b>Personal health and well-being:</b></p> <p>Student A has a history of mental health difficulties or is distressed with having to sit in a class with Student B.</p>			
<p><b>Safety :</b></p> <p>Student A is concerned that Student B will approach her in person or via social media/intent messaging and be abusive towards her</p>			
<p><b>[Others]</b></p>			

Review date .....