

Sexual abuse in school— adopting a zero-tolerance approach

Following testimonies of sexual abuse in school, Sara Ibrahim & Adam Riley consider the legal duties involved

IN BRIEF

- ▶ Outlines safeguarding and legal duties of schools and other educational establishments where pupils or students suffer sexual abuse and harassment.
- ▶ Addresses shortcomings evident in the current regulatory framework.
- ▶ Schools and colleges should adopt a proactive approach to safeguarding and sexual assault prior to the new academic year.

In April this year, thousands of anonymous reports were shared by students on Everyone's Invited, a website which encourages young survivors of sexual abuse to share their stories (<https://www.everyonesinvited.uk/>). After these reports were received, Everyone's Invited decided to name the schools implicated in these accounts. Of the 2,962 schools identified, 2,556 are secondary schools and 406 primary schools and 119 universities. To date, in excess of 51,000 testimonies have been shared on the site.

These testimonies have shone a light on the realities of the experience of school pupils today. This article focuses on the legal obligations of schools and colleges providing education to those under the age of 18. We recognise that lawyers can be involved from the earliest stages, including advising on the proper conduct of complaints, as well as in pursuing or defending civil claims. The vulnerable nature of victims means that it will often be very difficult for them to bring legal claims or to speak out about their experiences at all.

In advance of the new academic year, we summarise the regulatory framework,

updated guidance, Equality Act 2010 duties and human rights legislation relevant in sexual assault and harassment cases.

Statutory duty

All schools have a statutory duty to safeguard and promote the welfare of children who are pupils at their school or receiving education or training at their institution. This duty applies to both maintained and non-maintained schools as well as owners of independent schools. The nature and scope of any such duty will be largely informed by the detailed statutory and non-statutory guidance provided by the Department for Education and Ofsted.

Department for Education guidance

'Keeping children safe in education' (updated January 2021) is the statutory guidance that applies to both state and independent schools. The framework is general in nature and predicated on school staff being up to date with safeguarding training, so they can make appropriate decisions on the individual complaints they are required to deal with.

All parties will want to be aware of the 'Sexual violence and sexual harassment between children in schools and colleges' guidance that comes into effect in September this year (bit.ly/3ldQtqy). This stresses that it is essential that there are systems in place for children to report their concerns confidentially. Crucially the guidance states: 'It is essential that *all* victims are reassured that they are being taken seriously, regardless of how long it has taken them to come forward and that they will be

supported and kept safe. Abuse that occurs online or outside of the school or college should not be downplayed and should be treated equally seriously.' Although schools cannot delegate the safeguarding duties they owe to the children in their care, where the victim reports sexual violence or harassment that could be a crime, the matter ought to be referred to the police. Even when the matter is referred to the police, a school must still implement any safeguarding measures (including a thorough risk assessment) and consider any disciplinary action against the alleged perpetrators. Police reporting and investigation is therefore a separate, if linked, process rather than a substitute for school action.

Children or responsible adults who are considering making a complaint to a school should be reassured that reports of sexual violence or harassment, both online and offline, or incidents outside school, fall within the remit of the school. The sharing of nudes and semi-nudes among children and young people is of increasing concern and has given rise to new guidance from DDCMS (Department for Digital, Culture, Media and Sport), 'Sharing nudes and semi-nudes: advice for education settings working with children and young people' (23 December 2020). Such activity is likely to be potentially criminal, since sharing 'indecent' images of someone under 18 is illegal. If the sharing is non-consensual this can give rise to an offence under s 33, Criminal Justice and Courts Act 2015 as well as raising concurrent safeguarding fears for the children receiving, viewing, and sharing any such images.

Once a concern about the welfare of a child has been raised, the school should consider as a matter of priority how to support the victim and the alleged perpetrator properly. All schools are expected to adopt a zero-tolerance approach. It is often preferable to have legal advice and support at an earlier juncture to ensure a robust process (including any post-complaint safeguarding) is put in place.

For those anxious about the process, they have a legitimate expectation that all concerns, discussions, and decisions made by the school have been recorded and they should ask to see a copy of these. In a similar vein, the relevant school policies and training records of relevant staff should be made available if requested, to make sure the school or college has discharged their welfare obligations.

Ofsted

In April this year, Ofsted was tasked by the government with undertaking a review of safeguarding policies in schools and colleges

in relation to sexual abuse. The results were published in June ('Review of sexual abuse in schools and colleges', 10 June 2021). Of those Ofsted spoke to, 90% of girls and nearly 50% of boys said they or their peers had been sent explicit pictures or videos. The frequency of harmful sexual behaviours was sufficiently widespread that the review reported that children viewed them as normal. In summary, Ofsted advised that schools 'should assume that sexual harassment and online sexual abuse are happening in their setting, even when there are no specific reports...' In light of this, all schools and colleges will be expected to have revised their safeguarding and other associated policies, as well as ensuring staff are properly trained, before the new school year.

Equality Act 2010

All schools must comply with the Equality Act 2010 and the Equality and Human Rights Commission has prepared technical guidance on how this is to be applied in a school setting. Even where there are cases that fall short of criminal conduct, they could still constitute sexual harassment under the Equality Act. If a school subjects a pupil to a 'detriment' such as excluding them from class or subjecting them to disciplinary action for making a complaint of sexual harassment (or assisting another pupil with their complaint), this could amount to victimisation under the Act. This could give rise to a claim for discrimination under the Act against the school brought by a parent or carer on behalf of a child (subject to the six-month time period under the Act).

Public sector equality duty

All maintained schools are subject to an equality duty. This means that in carrying out their functions they need to have due regard when making decisions or policies to eliminate discrimination, harassment and victimisation. Where there are instances of bullying on the grounds of a protected characteristic, including sex, proactive measures need to be taken. Following Ofsted's review of sexual abuse in schools, that obligation is likely now triggered. It is possible that sexual harassment and violence might target more than one protected characteristic in a school, for example on the grounds of sexual orientation or gender reassignment. Schools and colleges will be expected to be responsive to the issues in their school community.

Independent schools

There is separate guidance for independent schools, which were a focal point of the recent testimonials on Everyone's

Human Rights Act 1998

Examples of breaches & their consequences

Pursuant to s 6 of the Human Rights Act 1998, it is unlawful for a public authority, such as a school, to act in a way that is incompatible with rights enshrined under the European Convention on Human Rights.

These rights include:

- ▶ Art 3: the right to freedom from inhuman and degrading treatment;
- ▶ Art 8: the right to respect for private and family life (a qualified right);
- ▶ Art 14: this right requires that all of the rights and freedoms set out in the Act must be protected and applied without discrimination; and
- ▶ Protocol 1, Art 2: this protects the right to an effective education.

Maintained schools should be mindful that the Human Rights Act 1998 obligations will bite alongside their obligations under domestic law and will be relevant where allegations of sexual assault or harassment impact on a child's education, for example by causing emotional distress or by isolating a victim.

Invited (bit.ly/3i8RHBf). The nature of the complaints suggests a lack of adequate training and oversight (by both school leaders and governors) or a preference to dissuade pupils from making complaints at all.

Independent schools will have concurrent contractual obligations in relation to the education they provide that could augment any claim(s) brought against them. It will be worth reviewing any contractual documents (including any codes of behaviour) when assessing the liability of these schools. Although there might be a preference to declaim behaviour outside of the school as outside their remit, cases of sexual assault and harassment can rarely be so neatly divided. Incidents outside a school can lead to safeguarding and welfare concerns within school hours for which they could become liable.

Irrespective of this, those schools with charitable status or other reputational concerns may wish to adhere to best practice rather than bare legal compliance.

Sexual assault & consent

The nature of the testimonials on Everyone's Invited suggests that schools will have to be mindful of questions of consent, duress or other forms of coercion or manipulation. In *London Borough of Haringey v FZO* [2020] EWCA Civ 180, [2020] All ER (D) 125 (Feb), the Court of Appeal found that the claimant had not consented legally to the sexual activity which had occurred after they had reached the age of consent. The Court of Appeal accepted the trial judge's proposition that: 'A person consents to sexual activity with another if they have the freedom and capacity to consent. Submission is not the same as consent.'

Schools will be assisted by the guidance detailed above which instructs safeguarding teams to consider any inequalities of power between the parties (including physical and mental) and age

differences. The designated safeguarding lead is generally best placed to direct the school or college's response, but where there is any doubt expert advice should be sought. Schools and colleges will be expected to have established contacts with relevant agencies to help determine what amounts to harmful sexual behaviour.

Fair processes

Where schools are running disciplinary processes in serious cases of sexual assault or harassment, they may have to consider whether, in the circumstances of the case, it might be appropriate to allow legal representation. Although this should not happen routinely, where there are allegations involving serious criminal conduct legal representation might be appropriate to ensure that the principles of natural justice are adhered to (as discussed in *AB v University of XYZ* [2020] EWHC 2978 (QB), [2020] All ER (D) 129 (Mar)). Schools may alternatively wish to seek legal advice about what would constitute fair procedures in any disciplinary hearing, including how to ensure an alleged perpetrator cannot directly cross-examine or question a victim.

Conclusion

The plethora of guidance from the Department of Education, alongside the Ofsted review, seeks to address the shortcomings evident in the current regulatory framework. Schools and colleges should adopt a proactive approach to safeguarding and sexual assault prior to the new academic year. Children and their parents or carers should feel empowered to seek redress, by formal claim or otherwise, with the new guidance making it clear that tackling harmful sexual behaviour in schools is a renewed priority. **NLJ**

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