



Spotted: Obligations to Protect Women Students' Safety & Equality

Using the Public Sector Equality Duty & the Human Rights Act in Higher and Further Education Institutions to Improve Policies and Practices on Violence Against Women and Girls.

Legal Briefing prepared by Louise Whitfield and Holly Dustin
for the End Violence Against Women Coalition

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About the End Violence Against Women Coalition

The End Violence Against Women (EVAW) Coalition campaigns for governments at all levels around the UK to take urgent action to eliminate all forms of violence against women and girls. We are the largest coalition of its kind in the UK representing over seven million individuals and organisations. A full list of members is on our website at <http://www.endviolenceagainstwomen.org.uk/>

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INTRODUCTION

Universities and Colleges play a critical role in supporting and developing young people as they move into adulthood. They are not only learning environments, but places where young people develop their characters, socialise and explore sex and relationships. Universities and Colleges are also major providers of accommodation for students, and some even *require* students to live in University accommodation for part of their course. Issues around women's safety, therefore, can permeate a woman's entire environment, not just where she studies but also where she lives. As women are most commonly assaulted by a man known to them, this may mean that women who experience violence live in close proximity to the man who assaulted them. Ensuring a safe and equal environment, therefore, is essential.

In recent years there has been growing concern about the safety of female students at Universities in England, as elsewhere in the world, and whether authorities are taking appropriate action to address this. This includes important research from the NUS, as well as frontline evidence from women's support groups and local students unions.

In the United States, there have been numerous high profile cases involving assaults on female students and inappropriate/unlawful action by Colleges. The high number of assaults on female students has led to the White House Sexual Violence Taskforce.

There are several initiatives in England and other parts of the UK. However there is concern that Central Government and Universities and Colleges in England are on the back foot in responding to this problem.

This legal briefing prepared by Holly Dustin and solicitor Louise Whitfield for the End Violence Against Women Coalition sets out legal obligations for Universities and Colleges, Central Government and other public bodies under the Public Sector Equality Duty and the Human Rights Act. It is intended to be used by all those concerned about improving responses to violence against women and girls, including students unions, women's groups and local activists.

About violence against women students

Young women are targeted for particular types of abuse. Furthermore, research by the NUS shows that 'lad culture' is a feature in Higher Education:¹

- Female students in full-time education are more likely to experience sexual violence than others.²

¹ "That's What She Said": Women students' experiences of 'lad culture' in higher education, NUS & University of Sussex, 2012

<http://www.nus.org.uk/Global/Campaigns/That's%20what%20she%20said%20full%20report%20Final%20web.pdf>

² An Overview of Sexual Offending in England and Wales: Statistics bulletin, Ministry of Justice, Home Office & the Office for National Statistics, 2013

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf

- One in seven women responding to the NUS Hidden Marks survey had experienced a serious physical or sexual assault during their time as a student.³
- Over two thirds had experienced verbal or non-verbal harassment, including groping, flashing and unwanted sexual comments, and 12% of respondents had been subjected to stalking.⁴
- Pornography is widely accessed by children and young people, boys in particular, and negatively affects their attitudes towards sex and relationships, women's equality and is linked to risky sexual activity.⁵
- 'Sexting' (e.g. sending sexually explicit images via mobile phones) is often coercive and linked to harassment, bullying and even violence.⁶
- Recent research shows that gender stereotypes are the most significant influence on young people's understanding of sexual consent.⁷
- One in three teenage girls has experienced sexual violence from a partner.⁸
- In 2013, the Government's Forced Marriage unit gave advice or support to 1302 victims of Forced Marriage - the vast majority being girls and young women under 21 years of age.⁹
- EAW's report *New Technology, Same Old Problems*¹⁰ and recent high profile cases of online abuse targeted at feminists¹¹ and women politicians¹² have highlighted the ways in which social media is used to abuse women and girls.

Call to end violence against women and girls was published by the Coalition Government in 2010.¹³ The strategy has prevention as a priority objective and in it the Home Secretary says,

We will work across the whole of government on preventative measures to stop violence from happening in the first place.

³ Hidden Marks: A study of women students' experiences of harassment, stalking, violence and sexual assault, NUS, 2010 http://www.nus.org.uk/Global/NUS_hidden_marks_report_2nd_edition_web.pdf

⁴ Hidden Marks: A study of women students' experiences of harassment, stalking, violence and sexual assault, NUS, 2010 http://www.nus.org.uk/Global/NUS_hidden_marks_report_2nd_edition_web.pdf

⁵ "Basically... porn is everywhere" A Rapid Evidence Assessment of the Effect that Access and Exposure to Pornography has on Children and Young People, Office of the Children's Commissioner, 2013 http://www.childrenscommissioner.gov.uk/content/publications/content_667

⁶ A qualitative study of children, young people and 'sexting', IoE, KCL and LSE for NSPCC, 2012 <http://www.nspcc.org.uk/preventing-abuse/research-and-resources/qualitative-study-sexting/>

⁷ "Sex without consent, I suppose that is rape": How young people in England understand sexual consent, OCC 2013 http://www.childrenscommissioner.gov.uk/content/publications/content_744

⁸ Partner exploitation and violence in teenage intimate relationships, University of Bristol for NSPCC, 2009 <http://www.nspcc.org.uk/preventing-abuse/research-and-resources/partner-exploitation-and-violence-in-teenage-intimate-relationships/>

⁹ Forced Marriage Unit: Statistics January to December 2013, Home Office and FCO, 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/291855/FMU_2013_statistics.pdf

¹⁰ New Technology: Same Old Problems, End Violence Against Women, 2013 <http://www.endviolenceagainstwomen.org.uk/news/129/rape-threats-online-should-be-treated-as-seriously-as-offline-new-evaw-report#sthash.GDZRd568.dpuf>

¹¹ Two Jailed for Twitter abuse of feminist campaigner, The Guardian, 24 January 2014 <http://www.theguardian.com/uk-news/2014/jan/24/two-jailed-twitter-abuse-feminist-campaigner>

¹² Peter Nunn jailed for Twitter abuse of MP Stella Creasy, BBC News, 29 September 2014 <http://www.bbc.co.uk/news/uk-england-29411031>

¹³ Call to End Violence Against Women and Girls, HM Government, 2010 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97905/vawg-paper.pdf

SECTION 1: WHAT DOES THE LAW SAY?

(A) *The public sector equality duty (the PSED)*

Under s.149(1) of the Equality Act 2010¹⁴, when a public authority exercises a function, it is required to have due regard to:

- the need to eliminate discrimination and harassment of women;
- the need to advance equality of opportunity for people with particular protected characteristics, which includes gender;
- the need to foster good relations between different groups, in this case between women and men.

Who does the PSED apply to?

The governing bodies of **higher and further education institutions** are public authorities for the purposes of the PSED.¹⁵ They **exercise a function** when they for example decide on a **policy** as to how to investigate allegations of sexual harassment by students or staff, or they **decide** on what resources to make available for victims of domestic violence, rape or forced marriage.

Thus when a University or College is making decisions about their **policies and practices on violence against women and girls** (which includes bullying and harassment), governance of student societies and sports teams, campus security, housing, bars and social spaces, they must have due regard to the need to eliminate discrimination and harassment, and the need to advance equality of opportunity for women. The duty applies to decisions on individual cases, as well as policy decisions¹⁶.

The Act also applies to **Ministers** of the Crown and to **Government Departments** such as Business Innovation and Skills and the Home Office. As with education institutions, these public authorities must meet the PSED when deciding on policies, guidance and funding or other functions they exercise that are likely to have an impact on ending violence against women and girls.¹⁷

s.149(2) of the Equality Act also requires **a body that is not a public authority but which exercises a public function** to meet the duty under s.149(1), as well; this would include Universities UK, Research Councils UK and the Higher Education Funding Council for England. The concept of “public function” is not specifically defined in the Equality Act but is described as “a function that is a function of a public nature for the purposes of the Human Rights Act”¹⁸. The Equality & Human Rights Commission’s Technical Guidance on the PSED describes this point in this way: “a person [or organisation] will be exercising a public function where it is carrying out activities on behalf of the State and which are not similar in kind to services that could be performed by private persons.”

¹⁴ See Annex A

¹⁵ See s.150 and Schedule 19 of the Act which lists the public authorities that must comply with the duty.

¹⁶ See *Pieretti v Enfield Borough Council* [2010] EWCA 1104.

¹⁷ Other public authorities that might be relevant in this context that are also bound by the duty would include the police, hospital trusts and healthcare providers, and local authorities.

¹⁸ See s.150(5), Equality Act 2010.

Students Unions and student societies

Students Unions will have to comply with the PSED themselves if they carry out a 'public function' on behalf of a University. For example, if they are funded by the University to carry out pastoral care or other activities on the University's behalf.

In addition, even where the PSED does not apply directly to Student Unions, the University or College may be in breach of the requirement to have due regard to the need to eliminate harassment if they do not take action in certain circumstances where women students are likely to be harassed, for example:

- If a Student Union allows discriminatory or sexist marketing material for events or club nights to be distributed on campus or other University owned property, e.g. if a Student Union allowed the promotion of an event such as a 'Freshers Violation' student event.¹⁹
- If the Student Union use University computers, email accounts or other resources to produce, display or distribute discriminatory material e.g. if a sports team used university accounts to advertise a 'Free Pussy' event encouraging members to spike their date's drink.²⁰
- If a Student Union books acts to perform on campus or other University owned property that are discriminatory, e.g. if a Student Union hosted a show by a misogynistic comedian.²¹

What does the PSED mean in practice?

While there is no requirement on a public authority to carry out an **equality impact assessment** (an EIA) on its decisions or policies, the courts do expect them to have **applied their mind specifically to the various parts of the duty** when taking decisions or developing policies that are likely to affect people with protected characteristics,²² and to document this process. Guidance from the Equality and Human Rights Commission and some court decisions have pointed out that **decision-makers should record how they have assessed the impact** of their proposed policy or decision on protected groups, and without such a record, it will be difficult for the court to accept that the public authority in question had "due regard" and met the duty. It is also good practice to publish EIAs and related documents.

There have been a number of court cases about breaches of the public sector equality duty and some of its fore-runners such as the race equality duty and the disability equality duty. Examples include a decision to stop funding a women's organisation that provided specialist services for BME women fleeing domestic violence;²³ and a decision to reduce council-funded services for disabled people. In both cases the public authorities in question had **failed to consider the equality duty properly** and so their **decision or new policy was quashed** by the High Court on the basis that the breach of the equality duty made the decisions **unlawful**.

¹⁹ Leeds 'Freshers Violation' Tequila Club Night Blasted For Promotional 'Rape' Video, Huffington Post, 9 October 2013 http://www.huffingtonpost.co.uk/2013/10/09/leeds-club-night-blasted-rape-promotional-video_n_4069644.html

²⁰ Oxford college rugby team instructed to spike freshers' drinks in leaked email, The Independent, 25 October 2013 <http://www.independent.co.uk/student/news/oxford-college-rugby-team-instructed-to-spike-freshers-drinks-in-leaked-email-8904459.html>

²¹ You've helped create a rapist's almanac, Chortle, 8 October 2014 http://www.chortle.co.uk/correspondents/2014/10/08/21082/youve_helped_create_a_rapists_almanac

²² See *Harris v London Borough of Haringey* [2010] EWCA Civ 703.

²³ *R (Kaur & Shah) v London Borough of Ealing* [2008] and *R (Chavda & Others) v London Borough of Harrow* [2007]

In these cases and others, the courts have repeatedly stated that the equality duty must be met in substance, with rigour and an open mind;²⁴ it must be **integral** to the decision-making process and cannot be an after-thought. If public authorities do not have enough information or evidence to have due regard, they must **obtain that evidence** to ensure they meet the duty properly.²⁵ This might mean the public authority has to **consult** on its proposals to ensure they have the right evidence about the possible impact on gender equality.

To have “due regard”, public authorities are also required to consider **each part of the duty** and the additional definitions included in s.149 (Annex A). S.149(3) provides that having due regard to the need to advance equality of opportunity involves having due regard to the need to **remove or minimise disadvantages**, to take **steps to meet the needs** of those with protected characteristics and to **encourage those groups to participate in public life** and any other activity in which participation by those people is disproportionately low. Under s.149(5), public authorities, when having due regard to the need to foster good relations, must have due regard to the **need to tackle prejudice and promote understanding**.

The PSED is however only a **procedural duty** and does not required a particular outcome. It is *not* a duty to eliminate discrimination but a duty to have due regard to the need to eliminate discrimination for example. So a public authority could have due regard to the needs in s.149 EA 2010, but reach a conclusion that there will be **no negative impact** on gender equality or that any negative impact can be **mitigated** or is **justified**. However, the courts would expect the education institution to be able to **explain its rationale** behind any decision to go ahead with a policy that appeared to have an adverse impact on gender equality, and that rationale should be recorded and in the public domain.

HE and FE institutions must also meet the **specific duties** which consist of a requirement to **publish information** to demonstrate their compliance with the PSED, and to prepare and publish one or more **equality objectives** to achieve any part of the PSED²⁶. Examples of information that a public authority could publish to demonstrate compliance include the records kept of how it has had due regard in making decisions, including any analysis undertaken and the evidence used. For more examples and more information on the specific duties see Chapter 6 of the EHRC’s Technical Guidance on the PSED.

In addition, Box 1 below outlines actions which could be evidence of compliance with the public sector equality duty in the context of policies and practices to end violence against women and girls. Box 2 is an example of a prevention initiative in an English university and Box 3 summarises initiatives by the White House Task Force.

²⁴ See R (Brown) v SSWP & SSBERR [2008] EWHC 3158 (Admin).

²⁵ See R (Hurley & Moore) v Secretary of State for Business [2012] EWHC 201 (Admin).

²⁶ See the Equality Act 2010 (Specific Duties) Regulations 2011.

Box 1: Actions which could show compliance with PSED obligations for Universities and Colleges include:

- Ensuring that female students or staff who experience any form of violence, harassment or abuse have access to specialist support in the community whether or not they report to the police (such as having strong links with Rape Crisis Centres, Refuges and support for minority students).
- Consulting with staff, students and women's groups to develop institution-wide policy that addresses all forms of violence against women and girls.
- Carrying out surveys and collecting data from female students and staff on their experiences of violence and harassment.
- Delivering or funding ongoing student and staff training on violence against women and girls.
- Running violence against women and girls prevention and bystander campaigns (such as the Intervention Initiative, below) which empower students to recognise abuse and intervene when they witness problematic behaviour.
- Working with experts to develop and deliver university/college specific public awareness campaigns which challenge myths and harmful attitudes and behaviours.

If an institution refuses to take actions such as these and does not give clear reasons, including how it meets PSED obligations when making that decision, it may be in breach of the Equality Act.

Box 2: The Intervention Initiative (England)

Information taken from: <http://www1.uwe.ac.uk/bl/research/interventioninitiative.aspx>

The University of the West of England's *Intervention Initiative* is "a free resource with an educational toolkit to be used by universities and colleges for the prevention of sexual coercion and domestic abuse in university settings".

The programme aims to:

- Work within a gendered understanding of power and control;
- Challenge myths and building empathy among students towards survivors of violence and abuse;
- Prompt universities and colleges to make links with their local specialist violence against women and girls support services;
- Inspire the non-abusive majority of the student population to challenge the social norms in their peer culture that support problematic and abusive behaviours;
- Empower students to intervene to prevent abuse through practice scenarios and scripted role plays.

Box 3: White House Task Force to Protect Students from Sexual Assault (USA)

Information taken from:

<http://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>

and

<http://www.whitehouse.gov/the-press-office/2014/04/29/fact-sheet-not-alone-protecting-students-sexual-assault>

The *White House Task Force to Protect Students from Sexual Assault* is “an interagency effort to address campus rape and sexual assault” which was created alongside wider central government action to raise awareness about sexual violence at Universities including the public disclosure of institutions with open Title IX sexual violence investigations and the public awareness campaign ‘It’s On Us’.

The Task Force launched a series of actions in January 2014 in response to repeated research findings of high levels of rape and sexual assault on campus. Some of the actions are summarised below:

- Providing a toolkit for conducting surveys on the prevalence of sexual assault, test students’ attitudes and develop solutions, and exploring ways of mandating institutions to do this.
- Reviewing and piloting primary prevention strategies, in particular bystander programmes to change social norms and ensure a consistent community response to sexual assault.
- Giving guidance for on-campus counsellors about supporting survivors, including a sample confidentiality and reporting policy.
- Providing specialist training for University staff so that they know how to respond to disclosures and reports, the tactics used by perpetrators and common reactions of victims. Training manuals also target officials involved in investigating and adjudicating sexual assault cases and campus health centre staff.
- Giving guidance for Universities on improving their investigative and adjudicative protocols.
- Providing a sample agreement (MOU) between Universities and Rape Crisis Centres so that survivors have a full network of services in place.
- Launching a dedicated website www.NotAlone.gov to provide resources to students and Universities, including students’ rights and how to make a complaint and the legal obligations of Universities.
- Outlining legal obligations on universities to prevent and respond to sexual assault. The new guidance makes clear that federal law protects all students, regardless of sexual orientation or gender identity, immigration status, or whether they have a disability. It also makes clear questions about a survivor’s sexual history with anyone other than the alleged perpetrator should not be permitted during a judicial hearing, that a previous sexual relationship does not imply consent or preclude a finding of sexual violence, and that institutions should take steps to protect and assist a survivor pending an investigation.
- Improving central government transparency with the Departments of Justice and Education entering into an agreement clarifying each agency’s role.

(B) The Human Rights Act 1998 (the HRA)

The Human Rights Act 1998 makes it unlawful for a public authority to act in a way that is incompatible with a right included in the European Convention on Human Rights, as listed in the HRA at Schedule 1.²⁷ The rights (known as “articles” under the Convention) include:

- Article 2 – the right to life
- Article 3 – the prohibition of torture (or the right to freedom from inhuman and degrading treatment)
- Article 8 – the right to respect for private and family life
- Article 9 – freedom of thought, conscience and religion
- Article 10 – freedom of expression
- Article 14 – prohibition of discrimination in relation to the enjoyment of the rights and freedoms in the Convention
- Article 2 of the 1st Protocol – the right to education

Who does the HRA apply to?

Under the HRA, a public authority is a body that **exercises functions of a public nature**, so this includes higher and further education institutions, along with ministers and government departments, and the police.

What does the HRA say?

Some of the rights are qualified, such as Article 8 which allows the state to interfere with this right in certain limited circumstances. Some rights are absolute such as Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.²⁸

Articles 2 and 3 also create **positive obligations** on the state to protect people from having these rights breached. So if a state body is aware of a threat to someone’s life or that they may be subjected to inhuman or degrading treatment, that public authority should take steps to protect the individual. So the duties on the police to protect people from a serious assault²⁹ have meant that a failure to do so has been found to be a breach of Articles 2 or 3. Although the vast majority of the court cases in this area have related to duties on the police and those responsible for investigating and prosecuting alleged breaches, public authorities in the education sector should be considering the duties that they owe students under the HRA when developing policies and practices relating to violence against women and girls. If their policies and practices do not provide adequate protection, they may be in breach of Article 2 or 3.

In some situations, the positive obligations on state bodies under Articles 2 and 3 may include a **duty to investigate** alleged breaches and a failure to investigate such allegations properly can amount to a breach of the investigative duties. Again the successful court cases in this area have usually related to failures by the police or

²⁷ See s.6 HRA 1998.

²⁸ Generally, the courts have set the threshold for a breach of Article 3 very high in that the ill-treatment must involve actual bodily injury or intense physical or mental suffering.

²⁹ For example in a recent case, the court held that the police failure to respond promptly to a 999 call was a breach of Article 2 and/or 3.

other investigative bodies (such as coroners) and have involved the most serious of breaches, but there may be an analogous situation if educational institutions fail to investigate allegations of serious sexual assault, or have policies which specifically say they will never investigate such incidents.

In terms of Article 8, the right to protection of private and family life, it can be very difficult to argue that public authorities have positive obligations, but this has been established in some more extreme cases and it can be a useful argument to raise this when lobbying on the policies and practices that educational institutions are adopting to protect women and girls from violence. Abuse and harassment in person, or over the internet which a University or College does nothing to address, may amount to a breach of Article 8.

The European Convention on Human Rights also includes a **right to education**, under Article 2 of Protocol 1, which extends to include **further and higher education** (although it focuses on primary schooling). Whilst the wording of the right is in the negative – “no person shall be denied the right to education” – the concept of “education” for human rights purposes is not confined to teaching or instruction; it covers the **whole social process** whereby beliefs, culture and other values are transmitted; this broad definition is therefore wide enough to include the **internal administration** of education institutions.

There is no case law on the right to education for women who are denied access as a result of being the victim of sexual harassment or lack of protection from breaches of the HRA, but this Article could be invoked to argue that a University or College may be in breach of the HRA if it fails to take steps to ensure that women are and feel safe when accessing education. If they are effectively **denied access** to certain activities, facilities or services and the institution takes **no steps to address this**, this may also be a breach of the HRA.

As Article 14 prohibits discrimination in relation to the enjoyment of the various rights and freedoms under the Convention, this can be used to argue against discrimination when someone is accessing education, although any such discrimination is likely to be unlawful under the Equality Act in any event.³⁰

Box 4 provides examples of potential breaches in the case of universities and colleges.

How does the Human Rights Act work?

In practice, the HRA works in two ways. Firstly, individuals whose rights have been breached can take the offending public authority to court to seek a **declaration and damages for the breach** of the HRA. Secondly, the Convention Rights can be used to **lobby public authorities** to change their behaviour, policies and practices; see Section 2 below in relation to both these strategies.

³⁰ See the EHRC’s Equality Act Technical Guidance on Further and Higher Education, November 2012 http://www.equalityhumanrights.com/sites/default/files/uploads/documents/Old_Guidance/PDFS/Educ_Provider/5_technical_guidance_on_further_and_higher_education.pdf

Box 4: Possible breaches of the HRA in relation to university and college policy and procedures

- If the institution's policies and practices on sexual harassment fail to protect women and girls from inhuman and degrading treatment, they may not be meeting their positive obligations and be breaching Article 3 (the right to freedom from inhuman and degrading treatment).
- If the institution takes no action on a report of rape or other serious criminal offence because it either has not been reported to the police or has been dropped by the police or CPS, this could be in breach of Articles 3 and 8 (the right to freedom from inhuman and degrading treatment and the right to respect for private and family life), as disciplinary procedures should not apply a criminal burden of proof.
- If an institution fails to address a woman's inability to attend lectures or seminars because of harassment, close proximity to her attacker or lack of support in the aftermath of violence, this may be a breach of Article 2 of the First Protocol (the right to education).
- If an institution fails to act on online abuse and harassment, such as their computers being used to send abusive material to, or about, female students, it could be a breach of the student's right to respect of her private life, which includes her psychological integrity. An institution must balance the qualified right of Article 10 (freedom of expression) with the woman's rights to protection under Articles 3 and 8 (the right to freedom from inhuman and degrading treatment and the right to respect for private and family life), when considering what action to take in respect of the type of online harassment that many women students face: see for example the screenshots set out below.



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³¹ Spotted: LSE Campus, <https://www.facebook.com/pages/Spotted-LSE-Campus/360683144028562> (accessed 7/11/2014)

³² Spotted: University of Birmingham, <https://www.facebook.com/SpottedUoBCampus> (accessed 07/11/2014)

SECTION 2: WHAT YOU CAN DO IF YOU THINK THE INSTITUTION YOU DEAL WITH IS IN BREACH OF THE HUMAN RIGHTS ACT OR THE EQUALITY DUTY

(A) Discussion and negotiation or formal complaint

The institution may be unaware of the duties they are under in terms of the HRA and/or the PSED. They may not understand the relevance of these laws to the decisions they are taking or the policies they are devising. Your starting point should always be to set out in writing to them where you think they are going wrong and what you think they should do to put matters right. Give them a deadline to provide a written response by and chase this mercilessly.

Ask the institution to provide you with copies of all their relevant policy documents. All policies affecting students should be in the public domain and readily available. Relevant policies include equal opportunities/diversity, bullying and harassment, housing, security, governance, health and safety, student discipline, contracts with students' unions etc. The institutions should also be developing specific policies on violence against women and girls to meet their duties under the public sector equality duty for the reasons set out above.

What do you do if they're not complying with their responsibilities?

Write directly to the relevant person who deals with the policy or decision you are concerned about but consider copying in others who may have a particular interest in the issue or some degree of power within the institution, especially if you are concerned that the person you are dealing with directly may not take your concerns seriously. These may be the Head of Legal Services and/or the Vice-Chancellor.

If you think a decision is wrong or that a policy has been devised without taking the HRA or PSED into account, ask the institution to provide you with all the materials, for example minutes of meetings, that were considered when the decision-maker took their decision, or when the policy was devised. You can then analyse this to see whether there was any consideration of the HRA and/or the PSED. If the material in question relates to a decision that affects an individual, then the individual is entitled to see the documents. If you are concerned about a policy that is having an adverse effect on women as a group and that the PSED is engaged as a result, these documents should be in the public domain in any event.

Offer to meet with the institution to resolve any dispute about their possible breaches of the HRA and/or the PSED. Consider taking an outside expert or support group with you. Make your own notes at the meeting, and follow it up immediately in writing to the institution, with your account of what the institution's representatives said, what they agreed to do to put matters right (or why they said there was no problem) and confirm any deadlines in relation to next steps. Set out what further action you will take if they do not act on the concerns you have raised (for example making a formal complaint, obtaining legal advice etc).

You should also consider using the institution's complaints procedure, for example if you do not get any response at all to your queries, if the institution

refuses to disclose documents or to meet with you, or fails to explain how it reached decisions and developed policies. Formal complaints should be succinct and to the point, factual and without any inflammatory language.³³ All institutions will have complaints procedures and whilst these are normally used for individual students complaining about specific incidents, you should be able to use them to complain about more general practice and policy issues as well.

Work out how the complaints procedure operates before you start: what stages there are, what the deadlines are, what it covers and who deals with complaints at different levels. Keep a record of your complaint, be prompt to respond to requests for further information, chase the institution quickly if they do not respond and be ready to take the complaint to the next level if you do not get a response at all or the response is inadequate.

(B) Report the institution to the Equality & Human Rights Commission (EHRC) or other oversight bodies

The Equality & Human Rights Commission has a statutory remit to promote and monitor human rights, and to protect, enforce and promote equality, including the public sector equality duty. Their role includes making sure that public authorities carry out their legal duties to tackle discrimination and promote equality. The EHRC has the power to launch investigations and undertake formal enquiries. Individuals or groups can report a public authority that they think is failing to meet its duties under the Equality Act or the HRA to the EHRC and ask the Commission to take action to address the failings. The Commission will sometimes work informally to put pressure on public bodies to change their practices or policies; this is relatively rare but can be important in getting an institution to engage with their duties.

If you are making no headway through negotiations and discussions, you can therefore consider notifying the EHRC of the failures by the educational institution you are dealing with and ask the EHRC to look into this. They will expect you to have tried to resolve matters yourself and to have a specific concern about equality/discrimination and/or human rights.

A recent example of the EHRC's involvement in gender equality in the education sector was the controversy over Universities UK's guidance on external speakers which included a case study suggesting that gender segregation at lectures was lawful. After considerable pressure from different groups, UUK withdrew the case study and is now working with the EHRC to produce new guidance that complies with the PSED and human rights legislation balancing the right to freedom of expression and religion, with the anti-discrimination provisions.

For Higher Education, the Office of the Independent Adjudicator³⁴ (OIA) was set up as an independent body to run a student complaint scheme in England and Wales. They do not have regulatory powers in relation to Universities and cannot

³³ It is often useful to get someone who is not directly involved in the issue to read through the draft complaint; this will ensure you have explained the problems clearly; numbered paragraphs help and you should always set out what you want the institution to do in response to your complaint, and when you expect a response by.

³⁴ The OIA is also arguably bound by both the PSED and the HRA.

punish or fine them, but they can adjudicate on complaints and if they uphold a complaint, they will make recommendations as to what the University should do to put matters right. Generally speaking the complaint must be made by a student, and they would need to have exhausted the University's complaints procedure first. The OIA will only investigate complaints that materially affect the complainant as a student, so it may be difficult to get the OIA to adjudicate on a complaint about a policy or failure to provide services generally, but if this has affected an individual student who has pursued a complaint with the university and got nowhere, the OIA is worth considering as their remit does cover investigating complaints about discrimination, welfare and bullying and harassment. For more information (including details of the procedure, deadlines that apply and examples of cases they have dealt with) see their website at: <http://oiahe.org.uk/default.aspx>.

For Further Education colleges in England, complaints can be made to the Skills Funding Agency (SFA), but again, this is only after the institution's complaints procedure has been exhausted and should be within three months of the institution's decision. They cannot decide on the merits of a case but can facilitate resolution. Additionally, they will not investigate complaints about equality/discrimination issues where there is a more appropriate mechanism for dealing with the matter, such as a claim to the county court.

(C) Legal action

Legal action should only be contemplated if you have tried negotiations, discussions or other alternatives such as formal complaints including complaining to regulatory bodies, but you need to ensure that taking such steps does not mean that you inadvertently miss the deadline for taking court action, and you will need to get specialist legal advice in good time before any deadline expires.

If an individual or group has been the victim of a breach of the HRA by an education institution, they can take the institution to court to get a declaration that there has been a breach and to get damages for that breach. Damages are usually relatively low (even for the most serious of breaches), but a declaration can be very powerful and even the threat of being taken to court can sometimes be enough to make a public authority act differently.

A claim for a breach of the HRA must be brought within one year of the act that you think is a breach. You need a specialist solicitor and as court proceedings are very expensive (and if you lose you must pay the other side's costs as well as your own), you will need to be eligible for legal aid, or very rich indeed. Sometimes there can be the possibility of crowd-funding for cases which are particularly high profile or which are brought as part of a wider campaign, but this can be difficult, risky and time-consuming.

Some solicitors will do advice work for a flat fee, so that you could pay a limited amount of money to get their advice on bringing a case, or for them to write a letter for you setting out the legal arguments you want to make. Sometimes this can make a public authority take your concerns more seriously.

If there is an ongoing breach of the HRA (such as a policy that is being implemented) and/or a breach of the PSED, you may be able to bring judicial review proceedings. This is a special type of court case where the judge looks at the policy, or a decision-making process, and rules on whether it is lawful or not. A breach of the HRA or the PSED can render a decision unlawful and susceptible to challenge by way of judicial review. So if you establish that a University decided to stop funding support services for victims of sexual assault, but failed to consider the PSED, that decision might be unlawful and you could use the judicial review process to get it quashed. A policy not to investigate allegations of rape may be in breach of the HRA if it fails to meet the investigative obligations imposed by Article 3, that state bodies must protect individuals from and also investigate serious allegations of anything that would amount to inhuman and degrading treatment.

Time limits for judicial review are very tight: a claim must be started promptly and within three months of the incident complained of, so if it is a specific decision, the court case must begin within three months of that decision, or the court could refuse to hear the case.³⁵ In the case of a policy, the three months would usually run from the date the policy was introduced, although if the policy is not published, or only comes to light at a certain point in time, it may be possible to bring a judicial review case more than three months after the policy was introduced. Either way, you must act quickly.

In a judicial review, the court can rule a decision or policy is unlawful because it breaches the HRA or the PSED. The court will also look at the decision-making process, and may quash the decision for other reasons: for example, if the public authority failed to take into account relevant considerations, if it is operating a blanket policy which fetters its discretion, if it is acting beyond its powers, if it failed to undertake sufficient enquiry or ask itself the right questions about a particular decision or issue.

So if a University or College stops funding support services for victims of sexual assault but doesn't look at the figures on levels of reported incidents, or dismisses evidence on low reporting and that women and girls are failing to attend lectures where they know they will be harassed, that could amount to an unlawful decision for failing to take into account relevant evidence, and/or failing to undertake sufficient enquiry about the issue it was deciding.

As with a claim for a breach of the HRA, judicial review proceedings are very expensive to bring and should not be embarked on lightly. Specialist advice at an early stage is vital. It can be worth getting advice at the point at which you anticipate an institution making a decision or publishing a new policy or guidance that you think will not be lawful because it breaches either the PSED or the HRA. This means you can be ready for a legal challenge and have the best chance of getting it off the ground successfully despite the tight time limits and issues around securing funding to cover legal costs.

³⁵ There are limited circumstances in which the court may extend this deadline.

Possible sources of help

Law Society

Equality & Human Rights Commission

Rights of Women

<https://www.lawsociety.org.uk/>

<http://www.equalityhumanrights.com/>

<http://rightsofwomen.org.uk/>

Annex A

149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
 - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
- (a) tackle prejudice, and
 - (b) promote understanding.
- (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
- (7) The relevant protected characteristics are—
- age;
 - disability;
 - gender reassignment;
 - pregnancy and maternity;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.
- (8) A reference to conduct that is prohibited by or under this Act includes a reference to—
- (a) a breach of an equality clause or rule;
 - (b) a breach of a non-discrimination rule.
- (9) Schedule 18 (exceptions) has effect.