



Sexual violence and harassment in schools: best practice & remedies

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Sexual violence and harassment in schools

Context and overview of statutory framework

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Context and background

- 13 September 2016 - Women and Equalities Committee (WEC) report on sexual harassment and sexual violence in schools
- Uncovered scale and impact of sexual harassment and sexual violence in schools across England which required urgent action.
- Sexual harassment and abuse of girls as being accepted as part of daily life
 - a. children of primary school age learning about sex and relationships through exposure to hard-core pornography
 - b. teachers accepting sexual harassment as being “just banter”; and
 - c. parents struggling to know how they can best support their children
- Revealed
 - a. almost a third (29%) of 16-18 year old girls say they experienced unwanted sexual touching at school
 - b. nearly three-quarters (71%) of all 16-18 year old boys and girls say they hear terms such as "slut" or "slag" used towards girls at schools on a regular basis
 - c. 59% of girls and young women aged 13-21 said in 2014 that they had faced some form of sexual harassment at school or college in the past year



Further background

- June 2020 – ‘Everyone’s invited’ website founded – space to share and expose ‘rape culture’
- “When attitudes behaviours and beliefs in society have the effect of normalising and trivialising sexual violence. This culture includes misogyny, rape jokes, sexual harassment, online sexual abuse (up skirting, non-consensual sharing of intimate photos, cyber-flashing) and sexual coercion. When behaviours such as these are normalised this can act as a gateway to more extreme acts such as sexual assault and rape.”
- 3 March 2021 – Sarah Everard
- Outcry and predominantly female protest across the country over endemic sexual harassment and violence
- 29 March 2021 – BBC reports showed that more than 8,000 allegations had been made by school pupils on the Everyone’s invited website gathering testimonies of sexual violence and abuse
- By April it had collected thousands of testimonies
- By late September 2021, it had 54,000.
 - => NCPCC dedicated helpline launched in April 2021
 - => Ofsted rapid review announced 31 March 2021



Ofsted review 10 June 2021

- 8 week enquiry
- 32 schools and colleges
- over 900 children and young people about the prevalence of peer-on-peer sexual harassment and sexual violence, including online, in their lives and the lives of their peers
- Inspectors were so struck by the widespread prevalence of the problem they told school leaders to “act on the assumption” that sexual harassment was affecting their pupils, even where there were no complaints.
- Chief inspector of schools in England, Amanda Spielman, shocked by its findings.
- “It’s alarming that many children and young people, particularly girls, feel they have to accept sexual harassment as part of growing up. Whether it’s happening at school or in their social life, they simply don’t feel it’s worth reporting.”



Ofsted review 10 June 2021

- a. Sexual harassment and online sexual abuse for children and young people prevalent.
- a. For some, so commonplace that they see no point in reporting.
- a. Told by girls that sexual harassment and online sexual abuse, such as being sent unsolicited explicit sexual material and being pressured to send nude pictures ('nudes'), are much more prevalent than adults realise.
- b. Nearly 90% of girls, and nearly 50% of boys, said being sent explicit pictures or videos of things they did not want to see, happens a lot or sometimes to them or their peers.
- c. 92% of girls, and 74% of boys, said sexist name-calling happens a lot or sometimes to them or their peers - so much so considered as normal.
- d. Reluctance by children and young people, especially girls, to talk about sexual abuse



Recommendations

- School/ colleges - assume there is a problem
- Whole school/college approach
- Carefully planned RSHE curriculum, sanctions, intervention
- Provide support for children and young people
- Training , clear expectations staff and governors
- Listening to Pupil Voice
- See ‘Keeping Children safe in education’ guidance
- Record keeping / analysis
- Improved engagement with multi-agency safe guarding partners
- Govt to consider findings as it develops Online Safety Bill
- Develop online hub to access most up-to-date safeguarding guidance
- Guide for children and young people to explain what will happen after they speak to school staff



Legal duties

- Schools and colleges have statutory duties to safeguard and promote the welfare of the children at their school or college.
- Required to have regard to guidance issued by the Secretary of State.
- S175 of the Education Act 2002 requires governing bodies of maintained schools and colleges as to their functions relating to the conduct of the school or the institution to make arrangements for ensuring that such functions are exercised with a view to safeguarding and promoting the welfare of children who are either pupils at the school or are receiving education or training at the institution.
- The Education (Independent School Standards) Regulations 2014 apply a duty to proprietors of independent schools, in the case of academies and free schools is the academy trust, to ensure that arrangements are made to safeguard and promote the welfare of children.
- The Non-Maintained Special Schools (England) Regulations 2015 oblige non-maintained special schools to comply with certain requirements as a condition of their approval and whilst approved by the Sec of State.
- Includes arrangement for safeguarding and promoting health, safety and welfare of pupils.



Legal duties

- Schools and colleges also required to have regard to guidance issued by the Secretary of State.
- Must have regard to the Keeping Children Safe in Education guidance, last updated September 2021.
- (Consultation open to 8/3/22 on revised and combined guidance In January 2022, the DoE launched a consultation on revised Keeping Children Safe in Education guidance, intended to be implemented from September 2022.)
- Statutory duty to co-operate with safeguarding partnerships, once designated as relevant agencies, as set out in the Working Together to Safeguard Children 2018 – A guide to inter-agency working to safeguard and promote the welfare of children, last updated December 2020.
- Sexual violence and sexual harassment between children in schools and colleges - Advice for governing bodies, proprietors, headteachers, principals, senior leadership teams and designated safeguarding leads, September 2021.
- Required to have behaviour policy and measures in place to prevent all forms of bullying (cyber-bullying, prejudice-based and discriminatory bullying)
- Relationships Education (for all primary pupils) and Relationships and Sex Education (for all secondary pupils) and Health Education (for all pupils in state-funded schools) is now mandatory



Other relevant advice and guidance

- Relationship Education, Relationships and Sex Education and Health Education (statutory guidance for schools)
- Exclusions from maintained schools, academies and PRUs (statutory guidance for schools)
- Behaviour and Discipline in Schools (advice for schools)
- Children Missing Education (advice for schools)
- Cyberbullying (advice for schools)
- The Equality and Human Rights Commission (provides advice on avoiding discrimination in a variety of educational contexts)
- Equality Act 2010 and Public Sector Equality Duty (advice for schools)
- Equality Act 2010 Technical Guidance (advice for further and higher education providers)
- Mental Health and Behaviour in Schools (advice for schools)
- Rise Above (advice by Public Health England for schools)
- Preventing and Tackling Bullying (advice for schools)
- Promoting children and young people's emotional health and wellbeing (advice for schools) • Teaching about relationships sex and health (guidance for schools)
- Dpt Digital, Culture, Media and Sport, UK Council for Internet Safety guidance Sharing nudes and semi-nudes: advice for education settings working with children and young people



Human Rights Act 1998

Section 6 of the HRA 1998 - unlawful for a public authority, including the governing bodies of schools, local authorities & central government departments, to act in a way that is incompatible with the European Convention on Human Rights (ECHR).

These rights include:

- **Article 3** - the right to freedom from torture and inhuman and degrading treatment – also puts positive obligations on the state to protect people from having this right breached & to investigate allegations of such breaches
- **Article 8** - the right to respect for private & family life, including a duty to protect individuals' physical and psychological integrity
- **Article 14** - requires that all the rights and freedoms set out in the Convention must be protected & applied without discrimination; and
- **Protocol 1, Article 2** - protects the right to an effective education (to be interpreted in line with the UN Convention on the Rights of the Child (UNCRC))

Being subjected to sexual violence or sexual harassment may breach any or all of these rights, depending on the nature of the conduct and the circumstances.



Human Rights Act 1998

- Sexual abuse and violence of children engage fundamental values and essential aspects of private life.
- Where measures fall short of Article 3 treatment, they may nevertheless fall foul of Article 8 .
- Article 8 may apply to verbal abuse without physical violence
- *Association ACCEPT and Others v. Romania*, 19237/16 1/6/21 §§ 55-57



Association ACCEPT and Others v. Romania

“Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim. Furthermore, Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering. Hence, the treatment can be categorised as degrading when it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. The Court further reiterates that discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity. More specifically, treatment that is grounded in a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3.

Discriminatory remarks and insults must in any event be considered to constitute an aggravating factor when considering a given instance of ill-treatment in the light of Article 3....”



Association ACCEPT and Others v. Romania

*“63. The Court reiterates that the concept of “private life” is a broad term that is not susceptible to exhaustive definition and that also covers the physical and psychological integrity of a person. Such elements as a person’s sexual orientation and sexual life fall within the personal sphere protected by Article 8. In certain areas of private life (such as environmental issues and the right to reputation), in order for Article 8 to come into play, the Court considers that the alleged violation must attain a certain level of seriousness and be committed in a manner causing prejudice to the personal enjoyment of the right to respect for one’s private life (see *Beizaras and Levickas v. Lithuania*, no. [41288/15](#), § 109, 14 January 2020; also see, on the importance of analysis of the seriousness of the impugned interference for Article 8 to come into play in the context of different types of cases, *Denisov*, cited above, § 110-114).”*



F.O. v. CROATIA (Application no. [29555/13](#)) 6/9/21

“80. These principles may also be relevant in an education context. While under Article 2 of Protocol No. 1 the State has an obligation to secure to children their right to education, the sending of a child to school necessarily involves some degree of interference with his or her private life under Article 8. Moreover, functions relating to the internal administration of a school, such as discipline, are an inherent part of the education process and the right to education (see Costello-Roberts, cited above, § 27). 81. Although not all measures in the field of education will affect the right to respect for private life, it would be impossible to reconcile any acts of violence or abuse by teachers and other officials in educational institutions with the children’s right to education and the respect for their private life (see paragraphs 58-59 above). ...

82. In the context of provision of an important public service such as education (see Grzelak v. Poland, no. [7710/02](#), § 87 in fine, 15 June 2010), the essential role of the education authorities is to protect the health and well-being of students having regard, in particular, to their vulnerability relating to their young age. Thus, the primary duty of the education authorities is to ensure the students’ safety in order to protect them from any form of violence during the time in which they are under the supervision by the education authorities (see Kayak v. Turkey, no. [60444/08](#), § 59, 10 July 2012).”



Equality Act 2010

Equality Act 2010 (EA) prohibits **direct** (s. 13) & **indirect discrimination** (s. 19), **harassment** (s. 26) and **victimisation** (s. 27) in education on the grounds of certain **protected characteristics** (sex, race, disability, religion or belief, gender reassignment, pregnancy or sexual orientation).

S85 - the responsible body of the schools must not discriminate against pupils:

- In the way it provides education for them;
- In the way it affords them access to a benefit, facility or service;
- By not providing education, access to a benefit, facility or service to them;
- By excluding them or by subjecting them to any other detriment.

‘Detriment’ is given a very wide meaning: it will protect against *any* disadvantage whether or not the person subjected to the discriminatory treatment was aware of it at the time.



Public Sector Equality Duty

S149 EA 2010 - Public Sector Equality Duty (PSED) on public authorities.
Compliance with the PSED is a legal requirement for schools and colleges that are public bodies.

- Equality and Human Rights Commission provides guidance for schools that are subject to PSED.
- Under the PSED, schools and colleges that are public bodies have a general duty to have regard to the need
 - (1) to eliminate unlawful discrimination, harassment and victimisation
 - (2) to advance equality of opportunity between different groups
 - (3) to foster good relations between different groups



Public Sector Equality Duty

- Applies to all protected characteristics, whenever significant decisions are being made or policies developed, due regard to the equality implications such as, for example, the elimination of sexual violence and sexual harassment
- PSED should focus schools & colleges on key issues of concern & how to improve pupil and student outcomes.
- Eg where girls are being routinely sexually harassed, not only is the victim of sexual harassment being discriminated against, she is also very likely to have her equality of opportunity adversely affected by its impact on her education.
- Under the PSED schools & colleges need to consider what information they need to have due regard to
 - => the importance of good record-keeping
 - => monitoring of sexual violence & sexual harassment reports



Public Sector Equality Duty

- *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] Eq LR 60 see §25
- Affirmed by the Supreme Court in *Hotak v London Borough of Southwark* [2015] UKSC 30 [2016] AC 811 §73
 - “equality duties are an integral and important part” to meet “aims of anti-discrimination legislation”
 - important evidential element - recording of the steps taken
 - duty is upon the Minister or other decision maker personally
 - must assess the risk ... extent of any adverse impact .. the ways in which such risk may be eliminated - *before* and not merely as a "rearguard action"
 - "exercised in substance, with rigour, and with an open mind" ...
 - “not .. ticking boxes“ “no duty to make express reference” “reference to it and to the relevant criteria reduces the scope for argument.”
 - Non delegable
 - Continuing duty see *R (Bridges) v Chief Constable of South Wales* [2019] EWHC 2341 (Admin); [2020] WLR 672 at §158 - continuing duty



Public Sector Equality Duty

- *Rota (1) Good Law Project Ltd and (2) Runnymede Trust v The Prime Minister and Secretary of State for Health and Social Care* [2022] EWHC 298 (Admin), see [112-117]. The Court found a breach of the PSED.
- It set out in its reasoning there must be “*some evidence of what precisely the decision-maker did in the circumstances of these cases to discharge the obligation ...*”
- .. “*There is no evidence from anyone saying exactly what was done to comply with the public sector equality duty when decisions were taken ...*”



Sexual assault and harassment in schools: legal remedies

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24 February 2022



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Overview of options

- Negligence claims
- Human Rights Act 1998
- Judicial reviews
- Equality Act and Employment legislation
- School complaint procedure



Joel's case

- 6 year old boy who was sexually assaulted in school premises despite his parents telling staff about a previous assault
- Civil claim for damages brought against school and local authority- in particular relying on breaches of Articles 3 and 8 ECHR
- Reliance was placed on the failure of the school to conduct a thorough investigation and/or put in place sufficient measures to prevent further assaults taking place.
- The school and local authority conceded there had been a breach of duty but did not accept liability.
- A five figure settlement was eventually reached and was approved by the High Court.
- Further information is available on Garden Court and Leigh Day websites.



(1) Negligence claims

- A school may owe a duty of care to protect a pupil from harmful behaviour by other pupils, even if the harmful behaviour occurs outside school: *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 (but no breach of duty found in that case)
- See also *Shaw v Redbridge London Borough Council* [2005] EWHC 150 (QB) (but again, no breach of duty found in that case)
- A school's duty of care to its pupils during the school day is non-delegable: *Woodland v Swimming Teachers Association* [2013] UKSC 66



(1) Negligence claims (continued)

- Issues to consider:
 - Was the harm to the victim foreseeable?
 - What steps could the school have taken, and would those steps have been practical and effective?
 - Did the school act in accordance with a reasonable body of professional opinion?
- Time limit will be 3 years if you are claiming damages for personal injuries
- But time will not run against a child while they are still a child (section 28 of the Limitation Act 1980)



(2) Human Rights Act damages claims

- State schools are public authorities under the Human Rights Act 1998
- The State has a positive obligation under Article 3 ECHR to take measures to protect children from sexual assault in schools: *O’Keeffe v Ireland* (2014) 59 EHRR 15
- Three duties:
 - (1) Systemic duty to have a framework of laws that provides effective protection
 - (2) Operational duty, where authorities know or ought to know that a child is at real and immediate risk, to take reasonable measures to protect them (*Osman v United Kingdom* (2000) 29 EHRR 245)
 - (3) Investigative duty, to carry out an adequate investigation (*DSD v Commissioner of Police for the Metropolis* [2018] UKSC 11)
- Article 8 may also be in play, including where the harm is not serious enough to cross the Article 3 threshold.
- The right to private life includes a person’s moral and physical integrity, and the State may have a positive obligation to protect (see *X and Y v The Netherlands* (1986) 8 EHRR 235).
- Article 14 and Article 2, Protocol 1 may also be relevant.



(2) Human Rights Act damages claims (continued)

- Remember the time limit for a Human Rights Act damages claim – one year.
- Try to avoid relying on the “continuing act” doctrine – bring your claim within one year of the first breach you are complaining about.
- Time can be extended – but you will not automatically get an extension because your client is a vulnerable child (see *AP v Tameside MBC* [2017] EWHC 65 (QB): no presumption in favour of an extension where claimant is incapacitous).
- Evidence and strategy- think about medico-legal reports/psychological assessments, disclosure, witness statements (from child if appropriate or litigation friend).



(3) Judicial review

- May be an appropriate remedy where you are seeking prospective relief (mandatory, prohibiting or quashing order) rather than just damages
- Challenge can be brought on conventional public law grounds, e.g. Wednesbury unreasonableness
- Human Rights Act challenge can also be included in some instances
- Remember 3 month time limit for making a claim – and you need to act as promptly as possible
- Consider exhausting alternative remedies, including where relevant any school complaints/appeal processes
- R (CHF and CHM) v Headteacher and Governors of Newick CE Primary School [2021] EWHC 2513 (Admin)- mandatory off site schooling and “safeguarding separation”



(4) What should schools do?

- Make sure you are familiar with the Government guidance “Sexual violence and sexual harassment between children in schools and colleges”
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014224/Sexual_violence_and_sexual_harassment_between_children_in_schools_and_colleges.pdf
- Options available to schools:
 - (1) Manage internally
 - (2) Use the “early help” process
 - (3) Refer to children’s social care
 - (4) Refer to police
- Schools can also consider disciplinary action e.g. exclusion.
- Schools can implement mandatory off-site schooling as a safeguarding separation, even if the child is not excluded (see *R (CHF) v Newick CE Primary School* [2021] EWHC 2513 (Admin)).
- Remember that the school will have duties to all children involved.



Thank you

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