

**Welcome to Landmark Chambers’
‘Everyone’s Invited’: the legal implications’
webinar**

The recording may be accessed [here](#).

Your speakers today are...



Topic:
Running an
investigation

Fiona Scolding QC (Chair)



Topic:
Responsibilities
for Mental
Health
and Well-Being

Samantha Broadfoot QC



Topic:
The legal duties
on schools

Leon Glenister



Topic:
Information
Sharing

Joe Thomas

The legal duties on schools



Leon Glenister

Themes: what are the limits of a school's power?

- Do the school's duties stop at the school gate? If not, how much further do they stretch?
- Can a school investigate an incident being investigated by the police? What about the burden of proof?
- Does a school have a duties in relation to historic abuse allegations?

The different angles

- We will consider:
 - Safeguarding
 - Discipline
 - Historic allegations

Safeguarding: legislation

- Maintained schools: GB “shall make arrangements for ensuring that their functions relating to the conduct of the school are exercised with a view to safeguarding and promoting the welfare of children who are pupils at the school” (section 175 Education Act 2002).
- Academies / independent schools have to ensure there are “arrangements...to safeguard and promote the welfare of pupils at the school” (Education (Independent School Standards) Regulations 2014).

Safeguarding: key guidance

- ‘Sexual violence and harassment between children in schools and colleges’ (DfE, May 2018) (non statutory guidance)
- ‘Keeping children safe in education’ (DfE, January 2021) (statutory guidance)

Safeguarding: responding to a report

- ‘Victim’ should be reassured they are being taken seriously and be supported
- Scope of duty:
 - Where report away from school premises, the principles to promote safeguarding remain the same.
 - Applies where both students from same school, and where students from different schools

See para 45 of non statutory guidance.

Safeguarding: following report

- Designated safeguarding lead should carry out a risk assessment considering victim, alleged perpetrator and other children.
- Options to consider:
 - Manage internally
 - Early help
 - Referrals to social services
 - Reporting to policy.

Discipline: legal framework

- Headteacher responsible for “disciplinary penalties” (section 89 of Education and Inspections Act 2006).
- “Disciplinary penalty” includes “conduct which occurs at a time when the pupil is not on the premises of a school and is not under the lawful control or charge of a member of the staff of a school, but only to the extent that it is reasonable for the school imposing the penalty to regulate the pupil's conduct at such a time” (section 90(2)(a)).

Discipline: legal framework

- Behaviour and discipline in schools (DfE, January 2016)
- Behaviour policy of school

Discipline: concurrent investigations

- NSG: “Disciplinary action can be taken whilst other investigations by the police and/or children’s social care are ongoing.”
- However consider the following issues:
 - Different burdens of proof
 - Whether they would prejudice investigation or subsequent prosecution
- Any investigation has to be fair, balancing victim and perpetrator interests

Historic allegations

- Depends on case by case basis: primarily whether alleged perpetrator / victim still at the school.
- May be non-legal reasons to investigate.

Responsibilities for Mental Health and Well-Being



Samantha Broadfoot QC

OFSTED rapid review report

- Everyone's Invited: OFSTED rapid review report – 10 June 2021
- Available <https://www.gov.uk/government/publications/review-of-sexual-abuse-in-schools-and-colleges/review-of-sexual-abuse-in-schools-and-colleges>

Rapid Review – some contextual findings

- Incidents are commonplace
- 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 eg nearly 90% of girls, and nearly 50% of boys, said being sent explicit pictures or videos;
- Most sexual violence occurred outside school eg parties or parks without adults present
- Reluctance to report even where their school encourages them to.
Multifactorial: risk of being ostracised by peers, getting peers into trouble, worry about how adults will react, they think they will not be believed, or that they will be blamed, once reported the process will be out of their control.

Inadequacies identified

- RSHE they had received – felt to be too little, too late and did not equip them with the information and advice they needed to navigate the reality of their lives;
- Teachers and leaders at risk of underestimating the scale of the problem especially prevalence of online sexual abuse – even in pro-active schools.
- OFSTED found that there was a lack of safeguarding training, and even where there was training, it was not always clear that this included specific training on harmful sexual behaviour

OFSTED recommendations

- Better understand the definitions of sexual harassment and sexual violence, including online sexual abuse.
- Identify early signs of peer-on-peer sexual abuse.
- Consistently uphold standards in their responses to sexual harassment and online sexual abuse which are reported to them.
- Understand prevalence and what constitutes harmful sexual behaviour.
- Know good practice (in relation to hearing disclosures) and supporting children to bring issues to trusted adults.
- Understand the prevalence of harmful sexual behaviour in all schools

Responsibilities of the school

- Schools have a duty to promote the wellbeing of students.
- This includes: preventing impairment of children's health or development, and taking action to enable all children to have the best outcomes.
- Keeping Children Safe in Education (KCSIE) statutory guidance.

Promoting and supporting mental health and wellbeing in schools and colleges

- June 2021 DfE published guidance on this:
<https://www.gov.uk/guidance/mental-health-and-wellbeing-support-in-schools-and-colleges#whole-school-or-college-approach-to-mental-health-and-wellbeing>
- Draws on the 8 headings contained in PHE Guidance dated February 2021
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958151/Promoting_children_and_young_people_s_emotional_health_and_wellbeing_a_whole_school_and_college_approach.pdf

8 Principal Areas

- Leadership and Management *
- School Ethos and Environment
- Curriculum, teaching and learning *
- Student Voice
- Staff development, health and wellbeing
- Identifying need and monitoring impact
- Working with parents/carers
- Targeted support

2 Key Questions

Key question 1:

- How is the school or college providing visible senior leadership for emotional health and wellbeing?

Key question 2:

- What focus is given within the curriculum to social and emotional learning and promoting personal resilience, and how is learning assessed?

Leadership and Management

- DfE Guidance:
- Developing or introducing a whole school or college approach to mental health involves strategic change, ideally overseen by a setting's senior mental health lead.
- School staff are not expected to, and should not, diagnose mental health conditions or perform mental health interventions

Leadership and Management - resources (1)

- DfE is offering grants for training to develop a senior mental health lead in every state school or college from autumn 2021 and where established, Mental Health Support Teams (MHSTs) should also support senior leads to develop their approach.
- All state schools and colleges in England will be eligible for a training grant.
- Funding is available to offer a grant to around a third of all state schools and colleges in 2021 to 2022 financial year, and a waitlist will be created for grants beyond this period.

Leadership and Management - resources (2)

- Wellbeing for education recovery
- The Link Programme
- Mental Health Support Teams
- Psychological first aid training
- Mental health and wellbeing resources

Curriculum, teaching and learning

DfE Guidance:

- Plan and teach the compulsory RHSE modules
- Encourage physical activity, which is part of wellbeing, with the The School Sport and Activity Action Plan
- Use the Character and education framework to help with pupils' spiritual and mental development

Curriculum, teaching and learning – resources (1)

- The RHSE training module - <https://www.gov.uk/guidance/mental-health-and-wellbeing-support-in-schools-and-colleges#RHSE>
- Planning your RHSE curriculum – <https://www.gov.uk/guidance/plan-your-relationships-sex-and-health-curriculum>
 - E.g. section on handling difficult questions and a link to that section in the statutory guidance, holding answers etc.

Curriculum, teaching and learning – resources (2)

- Reminder: there is also a safeguarding, reports of abuse and confidentiality section of the statutory guidance. Staff should know how to manage the requirement to maintain an appropriate level of confidentiality.
- Useful resources on the approach to teaching at <https://www.pshe-association.org.uk/curriculum-and-resources/resources/guidance-teaching-about-mental-health-and> (which is in the process of being updated)
- Specific advice re the issue of sharing of nudes or semi-nudes - <https://www.gov.uk/government/publications/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people/sharing-nudes-and-semi-nudes-how-to-respond-to-an-incident-overview>

Information Sharing

The legal implications of Everyone's Invited



Joe Thomas

Introduction on Data Sharing

- Legal Framework (in outline)
- What this looks like in practice
- Retention

Background – Article 5 GDPR

- The General Data Protection Regulation (GDPR) and Data Protection Act 2018.
- Starting point is that the processing of data (including disclosure or sharing) follows the principals under Article 5:
 - (a) lawfully, fairly and transparently
 - (b) collected for specified purposes
 - (c) adequate relevant and limited
 - (d) accurate
 - (e) kept for no longer than necessary
 - (f) secure

Background – Article 6 GDPR

- What is lawful?
- Starting point is that the processing of data (including disclosure or sharing) is prohibited unless there is a lawful basis (Article 6 GDPR)
 - (a) Consent
 - (b) Performance of a contract (may be relevant to a private school)
 - (c) Performance of a legal obligation
 - (d) “processing is necessary in order to protect the vital interests of the data subject or of another natural person”;
 - (e) Public Interest
- (c) and (e) can be clarified and expanded under national law.

Special Categories of Data – Article 9

- Article 9 has more exacting tests for processing special categories of data
- Special categories of data include: data concerning an individual's health, their sex life or their sexual orientation
- (a) Consent
- (c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent
- (g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;

Data Protection Act 2018

- S.8 of the DPA 2018 clarifies that the public interest under Article 6(1)(e) includes the administration of justice.
- S.10(3) of the DPA 2018 provides:

The processing meets the requirement in point (g) [Substantial Public Interest] of Article 9(2) of the GDPR for a basis in the law of the United Kingdom or a part of the United Kingdom only if it meets a condition in Part 2 of Schedule 1

Substantial Public Interest under Part 2, Paragraph 18

Safeguarding and individuals at risk

18(1) Processing which is necessary

*(i) protecting an **individual** from neglect or physical, mental or emotional harm, or*

*(ii) protecting the physical, mental or emotional well-being of an **individual**,*

(b) the individual is—

(i) aged under 18, or

(ii) aged 18 or over and at risk,

*(c) the processing is carried out without the consent of the **data subject** for one of the reasons listed in sub-paragraph (2), and*

*(2) (a) in the circumstances, consent to the processing cannot be given by the **data subject**;*

*(b) in the circumstances, the controller cannot reasonably be expected to obtain the consent of the **data subject** to the processing;*

*(c) the processing must be carried out without the consent of the **data subject** because obtaining the consent of the **data subject** would prejudice the provision of the protection mentioned in sub-paragraph (1)(a).*

What does this look like in practice

- July 2018 guidance: ‘Information sharing Advice for practitioners providing safeguarding services to children, young people, parents and carers’
- Seven Golden Rules
 - 1) GDPR, the Data Protection Act 2018 and the Human Rights Act 1998 DOES NOT PREVENT data sharing without consent where appropriate.
 - 2) Be open and honest about when information will be shared
 - 3) Seek advice (e.g. the LADO).
 - 4) Wherever possible, share with consent.
 - 5) Base decisions on the safety and well-being of others and the data subject.
 - 6) Share only what needs sharing (e.g. relevant, proportionate, adequate etc)
 - 7) Keep a log of your decisions

Not one size fits all

- You will need to develop your own policy on when data will be shared. This policy needs to clarify the processes and principles for when information will be shared.
- You will need to consider the following:
 - When and how to inform the Local Safeguarding Children Boards
 - When and how to inform the Multi-Agency Safeguarding Hubs (MASH)
 - When to inform Universities regarding vulnerable young people who are moving on.

The Seven Principals in the context of Safeguarding

- Necessary and Proportionate – Information must be proportionate to the risks
- Relevant – Only information relevant to the safeguarding concern.
- Adequate – Needs to be sufficient so stake-holders can make decisions
- Accurate – Must distinguish between fact and opinion
- Timely – Particularly important in emergencies
- Secure – Electronic transfers must be secure
- Record – The decision to share must be recorded and justified

Record Keeping Transfers between Schools

- Keeping Children Safe in Education 2021 (from 1 September 2021)
- Paragraph 112:

112. Where children leave the school or college, the designated safeguarding lead should ensure their child protection file is transferred to the new school or college as soon as possible, to allow the new school or college to continue supporting children who have had a social worker and been victims of abuse and have that support in place for when the child arrives, also ensuring secure transit, and confirmation of receipt should be obtained. For schools, this should be transferred separately from the main pupil file

Retention

- Guidance from DFE, Information and Records Management Society and NSPCC recommend the following:
- For a young person:
 - Until they are 25 (i.e. 7 years after they finish school leaving age)
- For concerns about adult behaviour
 - Until they reach 65
 - Or for 10 years, whichever is the longer.

Running an investigation



Fiona Scolding QC

Running an investigation

- When
- How
- Dealing with appeals/complaints

When?

- The disciplinary guidance suggests that an internal disciplinary investigation to determine sanctions and/or exclusion in respect of an alleged perpetrator can occur contemporaneously with police and/or social services action.
- BUT
 - (a) A referral to children's social care should be made where "a child has been harmed or is at risk of harm" – which involves most cases of assault or even harassment without assault.
 - (b) If there is a report of rape, assault by penetration, or sexual assault, then the starting point is that it should be passed on to the police – in parallel with children's social services.

Issues with referrals – Police

- (1) Making the referral to those who are RASSO officers (you may well need to liaise with the LCSP to try and find out how to access these specialist officers) which enables you to have access to more specialist officers.
- (2) Otherwise, you end up with a crime reference number but maybe little else.
- (3) Timings – a police investigation could easily take a year before charge – what do you do in the meantime?
- (4) Is it realistic to have a safety plan in place for that length of time?
- (5) Police providing advice NOT to investigate pending their investigation – what should a school do?

Issues with referrals – Social Care

- Different “thresholds” for different local authorities as to whether or not social care will investigate and/or provide advice .
- This varies wildly (and is the subject of much debate nationally)
- If they do investigate – will assess and examine both the complainant and the alleged perpetrator
- May well make referrals to have specialist support.
- What do you do in the meantime?

Safety plans

- School has duty to put in place "safety plan"
- Do they work?
- How practical are they in the context of most schools?
- Ensuring sufficient therapy and support – what is out there?

If no criminal prosecution

- The vast majority of cases do not result in a criminal charge and/or prosecution
- What do you then do?
- No automatic assumption you can/will get the police information (complainant will need to give consent and/or court order)
- Social services may also not give you information (again dependent upon consent)
- Need to undertake an investigation which is fair to both victim and complainant.
- NFA or not charging does not mean that there is not a case to answer on a disciplinary basis.

Investigation

- Current guidance is inadequate on this issue.
- Is the complainant fit to be interviewed? If not, is there material which lead to the referral which is sufficient.
- Can the alleged perpetrator be interviewed – and if so, what are the implications of this
- Ensuring that the investigator has some understanding of (a) trauma informed approaches and (b) how to ask a non leading question.
- Very rarely surrounding information (save for texts/whats app between complainant and perpetrator)
- Using external investigators who have some experience of investigating sexual assaults.

Investigation (basics of natural justice)

- The alleged perpetrator has a right to know of the evidence against them
- Be careful about anonymizing witness evidence (one has to have a balance between the rights of the other children and the alleged perpetrator to know who is accusing them)
- Ensure that they have access to relevant texts/whats apps/other social media

Investigations (previous sexual history)

- This is not a criminal trial: someone's previous sexual history is nearly always irrelevant.
- Alleged perpetrators may wish to use/rely upon someone's sexual history – need to be very careful and there is a requirement for a careful balance.
- The nature of their previous sexual relationship does not mean that the sex on that occasion was consensual .

Dealing with complainants

- They will often be reluctant to report and/or continue with cases because of a fear of "upsetting their friends"
- How to ensure that the investigation is sensitive but also fair to all parties.

Hearings

- Should there be cross examination of the complainant and alleged perpetrator?
- If not direct xx, how make the hearing fair (and is that sort of xx needed)?
- Training for governing body so they understand sexual violence, have had up to date training on the relevant guidance but also that “rape myths” and misunderstandings about consent – have a 21st century understanding of these issues
- Knew about a trauma informed approach.

Decisions

- Decisions made “on the balance of probabilities”.
- In sexual offending, it is usually one person’s word against another.
- The head has to make that decision.
- You cannot hide behind “absence of corroborative evidence”.
- Both investigators and those who make the decisions (the heads) need training
- Needs to be much better DFE guidance than currently exists.

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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