

Consent and witness engagement

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Consent and witness engagement in professional regulation

- Legal definition of consent
- CPS guidance: salient issues
- *Ntow*: guidance for Panels
- *Ahmed*: lessons to be learnt on engagement with complainants
- Vulnerability: lessons from academia and the judiciary
- Cultural intelligence

Sexual misconduct v sexual harassment: important differences

■ Defining sexual misconduct

- Sexual misconduct is a broader term that encompasses various forms of inappropriate sexual behaviour, including but not limited to harassment. While harassment typically takes place within a workplace or professional setting, sexual misconduct can occur in any environment. Examples include:

- Sexual assault
- Coercion or manipulation into sexual activities
- Exploitation of authority or trust for sexual gain
- Behaviour that violates laws, policies, or ethical standards

- All sexual harassment can be classified as sexual misconduct, but not all sexual misconduct constitutes harassment. Harassment typically involves a pattern of behaviour whereas sexual misconduct can involve a single act

Sexual misconduct v sexual harassment: important differences

■ Defining sexual harassment

- Sexual harassment in the workplace refers to unwanted behaviour of a sexual nature that violates an individual's dignity, creates an intimidating environment, or undermines their professional or personal well-being. It can be verbal, non-verbal, or physical and includes behaviours **such as**:

- Unwelcome sexual advances or requests for sexual favours
- Inappropriate or suggestive comments or jokes
- Sharing explicit images or messages
- Physical touching without consent

- Sexual harassment in the workplace often occurs within a power dynamic where the victim may feel coerced, threatened, or unable to speak out due to fear of professional or personal repercussions

Worker Protection (Amendment of Equality Act 2010) Act 2023

Inserted new section 40A into the Equality Act 2010
(from 26 October 2024):

40A Employer duty to prevent sexual harassment of employees

- (1) An employer (A) must take reasonable steps to prevent sexual harassment of employees of A in the course of their employment.
- (2) “Sexual harassment” in subsection (1) means harassment of the kind described in section 26(2) (unwanted conduct of a sexual nature).
- (3) A contravention of subsection (1) (or a contravention of section 111 or 112 that relates to a contravention of subsection (1)) is enforceable as an unlawful act under Part 1 of the Equality Act 2006 (and, by virtue of section 120(8) and (9), is enforceable only by the Commission under that Part or by an employment tribunal in accordance with section 124A (compensation uplift in employee sexual harassment cases)).

Legal definition of consent

- Consent is defined by Section 74 of the Sexual Offences Act 2003 as follows:

“A person consents if he or she agrees by choice and has the freedom and capacity to make that choice.”

- This means the person must:

- Agree by choice (not through pressure, force, or manipulation)
- Have the freedom to make that choice (not under threat, coercion, or undue influence)
- Have the capacity to make that choice (not incapacitated by age, mental disorder, or intoxication)

- Consent is relevant to sexual offences and to sexual harassment as defined by the Equality Act 2010, which requires that the behaviour be unwanted
- There is no requirement to communicate lack of consent

**CPS guidance: Rape and
Sexual Offences Annex A
Tackling Rape Myths and
Stereotypes**

Victim Behaviour

- Meeting people via dating apps and social media and sending sexual images is increasingly common. Consent cannot be implied from just the method of meeting or messages
- Consent cannot be implied from what might be interpreted as flirtatious behaviour or from the way a person is dressed or simply by the act of going back to someone's house
- Consent cannot automatically be implied simply because the victim shows signs of sexual arousal or stimulation

**CPS guidance: Rape and
Sexual Offences Annex A
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Stereotypes**

Delayed Reporting

- Many victims of rape do not report the attack to the police. The trauma of rape can cause feelings of shame and guilt which might inhibit a victim from making a complaint. The process of reporting rape itself can be traumatic, as well as prosecution process, and can deter victims from reporting the rape
- Some victims may tell a friend, GP or other individual. Many others will not tell anyone perhaps owing to feelings of shame, guilt and fear of the perpetrator and/or fear of being disbelieved
- A delayed allegation is not equivalent to a false allegation
- The time taken to make an allegation is not indicative of the level of upset

**CPS guidance: Rape and
Sexual Offences Annex A
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Inconsistent Account

- Inconsistencies in accounts can happen where a person is telling the truth or not
- Avoid an either/or argument that allows a complainant's evidence to be wholly dismissed because of a peripheral inconsistency. Don't pit it as either you believe the defendant OR you believe the complainant for this reason
- Rape can be very traumatic and memory can be affected in a number of ways. Understanding the effects of fear and the psychological mechanisms that may occur during a sexual assault is vital when considering recall and memory. Some, understandably, may try to avoid thinking about being raped or try to avoid recalling it all – this can impact upon recall

PSA v NMC & Ntow
[2026] EWHC 637
(Admin)

- PSA appeal successful, matter remitted
- One ground related to erroneous approach take by Panel to consent
- *“Furthermore, there was a more specific error in approach in the Panel’s reasoning that because Person A had not given a ‘clear and coherent recollection of the incident’, ‘therefore’ her account was ‘unreliable’. The fact that no clear or coherent recollection is given of an incident of sexual assault does not, of itself, indicate that the complainant’s account is unreliable.” (Butcher J, para 32)*

PSA v NMC & Ntow
[2026] EWHC 637
(Admin)

- *“The Panel’s reasoning in relation to Charge 3a is also flawed in a more specific way. Thus the Panel relied on the fact that Person A had not ‘explicitly conveyed’, prior to being kissed, that she did not consent to being kissed...The Panel does not appear to have considered that consent is an active matter, and a lack of an explicit statement of lack of consent did not mean, without more, that the Registrant would reasonably have believed that there was consent. The Panel also failed to take into account that there was no evidence, at the half way stage, that the Registrant had taken any steps to ascertain that Person A did consent.” (para 33)*

PSA v NMC & Ntow
[2026] EWHC 637
(Admin)

- *“..the Panel clearly took too atomised a view of the evidence in finding that, though Person A had given evidence that she had said no, and made an excuse, after the Registrant had kissed her, there was no evidence that he had acted without a reasonable belief that she had consented to being kissed prior to that happening. Given that there was evidence that she had not consented, and evidence that just after the kissing she had said no, and that there was no evidence at the half way stage that the Registrant had taken steps to ascertain that she did consent, or that he believed that she did, there was a case to answer on this aspect.” (para 37)*

***PSA v (1) GPhC &
(2) Ahmed [2024]***
EWHC 3335 (Admin)

- Pharmacist faced allegations of inappropriate and sexually motivated behaviour towards a receptionist (X) – some allegations were admitted. X had initially engaged but engagement became sporadic
- Panel closed the case on grounds that there was no case for the registrant to answer and no prospect of finding his fitness to practise impaired
- PSA appealed: the Panel took a flawed approach to X's evidence: the issue of a witness summons had been dismissed on grounds that X was vulnerable, but there was no evidence that he was or considered himself to be, and a finding of no case to answer was not open to the Panel

***PSA v (1) GPhC & (2)
Ahmed [2024] EWHC
3335 (Admin) cont...***

- Appeal allowed; matter remitted
- The Panel had taken an erroneous approach to X's evidence. The fact that a witness was the alleged victim of a sexual act did not automatically mean that they were vulnerable, and vulnerability was only relevant to the issue of whether special measures should be employed in the hearing

***Ahmed* – lessons to be
learnt about complainant
engagement**

- Complainant was adamant that he did not consider himself to be a victim and did not want to be treated as such
- Nonetheless the regulator adopted a ‘hands-off’ approach to seeking his engagement, including by not sending him a copy of the Notice of Hearing and deeming the issue of a witness summons to be “wholly inappropriate”
- Complainant attended the remitted hearing and gave evidence. The Panel accepted his evidence and Mr Ahmed was struck off the register
- Getting complainant engagement right meant the difference between no action and strike off – the ultimate sanction

Addressing vulnerability

- Revised provisions for vulnerable witnesses in civil courts in England now recognise inherent and situational vulnerability
- General Medical Council's proposed rules for regulation of AAs and PAs signal a new approach...
- Rule 38: 'Taking into account the interests of a witness and all of the circumstances of a case or matter to be determined, a case manager or Tribunal may direct that a witness be treated as a vulnerable witness.'
- Vulnerability to be considered:
 - holistically, at all stages of the process and in relation to all stakeholders
 - not solely inherent to a person, also about situational vulnerability
 - As potentially fluctuating over time

Reconstructing Witness Vulnerability

- Research undertaken in the context of the regulation of social work and social care professionals, University of Edinburgh 2024
- Taxonomy of vulnerability (Rogers, Mackenzie and Dodds, 2012)
 - Inherent vulnerability – part of the human condition
 - Situational vulnerability – context specific, caused or exacerbated by environmental, social, political structures
 - Pathogenic vulnerability – response to vulnerability could (inadvertently) make things worse
- Researchers called for a more holistic textual approach to how witness vulnerability is framed

Judicial guidance: CPR PD1A

- Core Principle (Overriding Objective):
 - Ensure parties are on an equal footing
 - Enable full participation and best evidence
- Definition of Vulnerability: A person is vulnerable if any factor may impair participation or evidence
- Can be personal, situational, temporary or permanent
- Common Factors: Age /immaturity, disability or health condition, mental health / learning difficulty, language or communication barriers, trauma, abuse, or intimidation, social or cultural circumstances
- Court's Duties: Identify vulnerability early (with parties' assistance), assess impact on understanding proceedings, communication and giving evidence and ability to engage with the process
- Required Action: Take all proportionate measures to address vulnerability. Make directions to ensure effective participation, reliable evidence and fairness in proceedings

**Judicial guidance:
Equal Treatment
Bench Book Chapter
2**

- Vulnerability defined broadly: includes any factor affecting participation or quality of evidence
- Core principle: fairness requires adjustment. Equal treatment does not mean identical treatment. Courts must adapt procedures to achieve effective participation
- Judicial duty: Identify vulnerability early, keep it under review and take active steps to address . Duty is linked to ensuring participation, fairness, reliability of evidence
- Impact of vulnerability: Can affect ability to understand proceedings, to communicate evidence clearly and to cope with questioning
- Active case management required, consider vulnerability at all stages

Judicial guidance

- Participation directions / special measures: Use tailored measures to support participation such as screens, video links, remote evidence, pre-recorded evidence where appropriate
- Use intermediaries to: Improve understanding and facilitate accurate communication
- Ground rules in hearings: Required where necessary to control questioning or set communication parameters
- Cross-examination must be adapted for vulnerability: Avoid complex or leading phrasing, prevent intimidation or confusion
- Communication adjustments: Judges must ensure simple language, appropriate pace, checking of understanding
- Ongoing review and feedback: Courts should monitor effectiveness of adjustments and modify as needed

Cultural issues/nuances to consider

Language and Understanding Barriers

A person whose first language is not English may struggle with drafting clear and accurate witness statements. They may not fully understand regulations or codes of conduct, exacerbating their anxiety/ increase their likelihood to not know their rights and to make more mistakes. They can feel as though they are on trial, even in non-criminal investigations or when being criticised for their work/ being put on a performance plan

Cultural Taboo Topics

Certain issues, such as sexual assault or mental health, may be taboo in some cultures, leading to additional apprehension when addressing/dealing with cases involving these matters. Individuals may have been conditioned to avoid discussing such topics, adding to their discomfort

Cultural Sensitivity in Code of Conduct Interpretations:

Recognise that interpretations of conduct rules/ certain work practices/culture may vary based on cultural or religious backgrounds:

For example, a practising Muslim or Jewish woman may view an unwanted hug as a form of sexual assault Or being excluded from social activities due to faith or cultural practices, such as dietary restrictions or religious observances, can be perceived as bullying

Pronouncing Names Correctly

If you struggle with someone's name, ask them directly how they would like to be addressed

Making parties/Judge aware of the pronunciation of a name

Questions

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