



A presentation by

HILL DICKINSON

Psychological and legal perspectives on consent

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Legal perspectives on consent in professional regulation

- Legal definition of consent
- CPS guidance: salient issues
- Sexual misconduct v sexual harassment
- *Dugboyele*: aggravating features of sexual harassment
- *Ahmed*: lessons to be learnt on engagement with complainants

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 Tackling Rape Myths and 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 Tackling Rape Myths and Stereotypes

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

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)).

GMC & PSA v Dugboyele [2024] EWHC 2651 (Admin)

- Sexual harassment of 7 junior colleagues over a sustained period: touching, stroking, kissing, hugging
- In plain sight and having been warned about his behaviour
- Complainants reported feeling unable to complain given:
 - Fact that behaviour occurred in plain sight
 - His seniority
 - That they needed him to respond to their bleeps
- GMC charge: behaving inappropriately; abuse of position; sexual harassment contrary to the Equality Act 2010
- Misconduct; no impairment; warning

- GMC appealed: Panel had not paid proper regard to the public interest factors or the Sanctions Guidance and its decision that a finding of impairment was not necessary to fulfil the overarching objective was wrong
- PSA appealed: Panel had erred in not considering evidence of sexual motivation and its significance for seriousness and had failed to give adequate reasons
- GMC opposed the PSA's appeal and defended the decision to charge by reference to harassment, despite having changed its position on charging in the interim so as to emphasise the importance of charging motivation in cases of alleged sexual misconduct
- Both appeals allowed on all grounds; matter remitted
- Held (para 74): "There is, in short, no credible innocent explanation of Dr Dugboyele's conduct, given the factual findings of the Tribunal. The Tribunal was either wrong not to include a proper consideration of his motive in its deliberations and/or, by virtue of that omission's constituting a serious procedural irregularity, reached an unjust result, namely, that Dr Dugboyele's fitness to practise was not impaired."
- Dr suspended – suspension to be reviewed 25 September 2025

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
- 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



Questions

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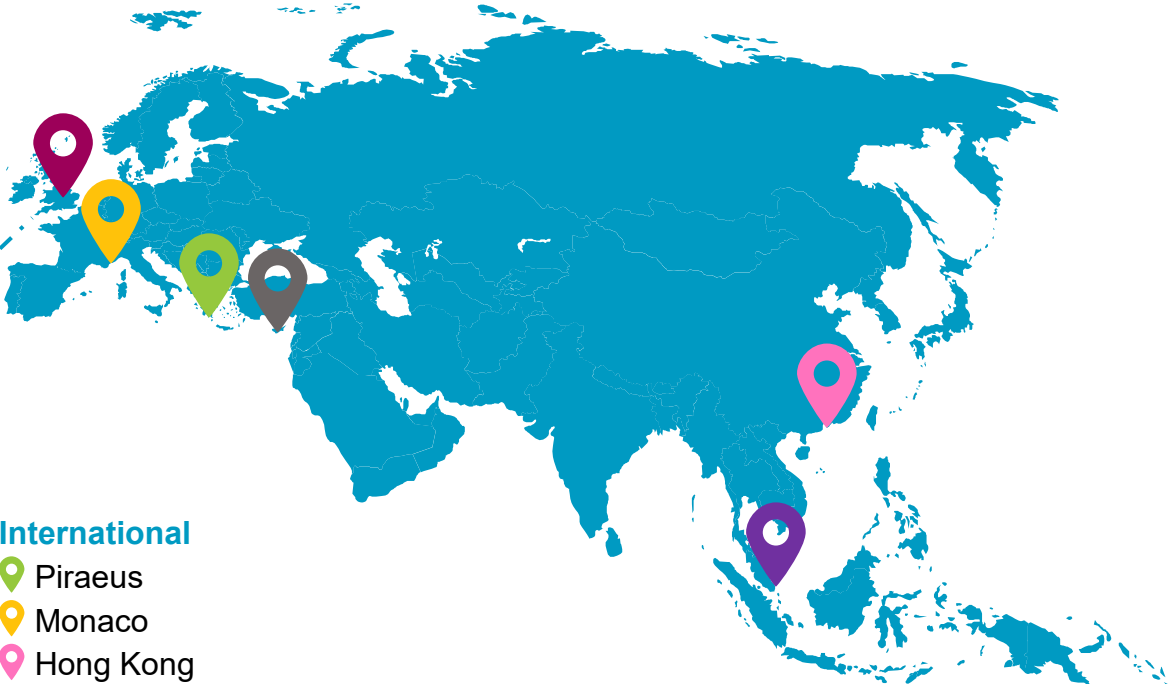


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