

Sexual Misconduct

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Alexis Hearnden
39 Essex Chambers
Alexis.Hearnden@39essex.com

Today's session

- What is sexual harassment and sexual misconduct?
- What does the research tell us about the problem?
- Culture reviews – lessons
- Regulators' guidance – standards and sanctions
- Recent cases: sexual motivation, charging
- New Equality Act duty

What do we mean by sexual harassment?

- Defined by the Equality Act 2010 as when a person engages in **unwanted behaviour of a sexual nature, whether verbal, non-verbal or physical, that creates an intimidating, hostile, degrading, humiliating or offensive working environment**
 - unwelcome sexual advances, propositions and demands for sexual favours
 - unwanted or derogatory comments or nicknames about clothing or appearance
 - leering and suggestive gestures and remarks or jokes
 - intrusive questioning or suggestions about your sex life or a colleague's sex life, and discussing their own sex life
 - sexual posts or contact on social media
 - spreading sexual rumours about a person
 - sending sexually explicit emails or text messages
 - predatory behaviour
 - physical contact such as the invasion of personal space and unnecessary touching, hugging or kissing through to sexual assault, indecent exposure, stalking and rape (although rape is defined as a separate criminal offence).

What does the research say about the problem?

- UNISON study of members working in health in 2019, '**It's Never Ok: a report on sexual harassment against healthcare staff**', found that nearly one in ten (8%) respondents had been sexually harassed in the last year. Of these, nearly a third (31%) said the harassment was frequent/ regular, and more than one in ten (12%) said it occurred daily/weekly. The vast majority (81%) of those harassed identified as female.
- Most (61%) said the harasser was older than them, **nearly two in five (37%) said they were in a more powerful position**, with under a third (32%) experiencing harassment from a colleague with the same level of responsibility

PSA Research #1

Sexual behaviours between health and care practitioners: where does the boundary lie? (*Simon Christmas, Fiona Fylan*)

- Sexually motivated behaviour in front of patients
- What conduct says about the professional – lack of empathy, failure to assess what is appropriate
- Rehabilitation
- Sanction = message
- Loss of otherwise competent practitioner

PSA Research #2

- **Prof. Rosalind Searle 2019** - Looked at fitness to practise cases brought against doctors, nurses and midwives, and allied professionals
 - **232 cases related to sexual harassment or sexual abuse.**
 - It showed this commonly happened in general practice, surgical settings and mental health services.
 - 59% of the cases involved patients, just less than half of who were young, infirm or had a mental health condition.
 - **And 39% of the cases were about colleagues.**

Research – the impact of sexual harassment

- UNISON report - Many of those who experienced sexual harassment said it had a damaging effect on their lives. Some respondents even said they had felt suicidal, had resorted to self-harm or had been diagnosed with traumatic stress disorder (PTSD) as a result:
 - More than half (55%) reported they ended up isolating themselves or avoiding certain colleagues/situations
 - Two in five (40%) said that it made them want to leave/look for another job
 - More than a third (35%) said the harassment affected their mental health
 - More than a third (34%) said it had affected their confidence.
- Patient safety implications – patients cared for by dysfunctional teams have poorer outcomes (Breaking the Silence, September 2023)

Culture Reviews - lessons

- Egs: White Paper – Shaping a culture of inclusion (Walking the Talk); South Wales Fire and Rescue Service
- Hierarchical organisations.
- Senior leadership to call out problematic behaviours themselves.
- *“It is not enough to talk in the abstract about cultural change without personal practical action”*.
- Need for strong communication, consistent disciplinary, don’t tolerate breaches of boundaries, clear set of standards and expectations that are robustly enforced
- Policies all well and good – accountability “Walking the Talk”.
- Effective training, policies and grievance procedure.
- Zero tolerance for sharing discriminatory/inappropriate material.

Lambert-Simpson v Health and Care Professions Council [2023]

EWHC 481

Suppose someone in a private group of social workers thinks it will make other social workers laugh, to “use” disability, with a “combination” of a “blatantly” discriminatory “slur” and a “highly derogatory remark” about people with a disability. Suppose someone in a private group of police officers thinks it will make other police officers laugh, to “use” gender identity, with a “combination” of a “blatantly” discriminatory “slur” and a “highly derogatory remark” about people with a gender identity. No person with the disability, or gender identity, was ever supposed to hear what was said. The rest of the group were supposed to laugh. It was supposed to be funny. In my judgment, it is appropriate and important that a regulatory supervisory authority should be able to see in this a serious “attitudinal” problem. There is a hostility in this behaviour. There is a hostility in the state of mind of the person communicating. Attitudes matter. The relevant hostility can thrive in attempted ‘humour’, as it can in ‘ridicule’. The ‘private’ context may be relevantly – indeed may be especially – revealing.

GMC -

Good medical practice

57. You must not act in a sexual way towards colleagues with the effect or purpose of causing offence, embarrassment, humiliation or distress. What we mean by acting ‘in a sexual way’ can include – but isn’t limited to – verbal or written comments, displaying or sharing images, as well as unwelcome physical contact.

Maintaining personal and professional boundaries (30 Jan 2024)

Professional and respectful working relationships between colleagues are central to positive working cultures. It is essential that individuals feel safe and respected in their workplaces, that they feel able to speak up when they experience or witness negative behaviours, and that they are supported to do so.

GMC – relationships with colleagues

Consensual relationships

- Consensual and reciprocated personal relationships between colleagues are a private matter between individuals. However, it is important that professional boundaries are maintained, and the undertaking, and/or end of a relationship has no adverse impact on clinical practice or team environments.
- Higher risk factors for relationships between colleagues being seen as non-consensual (either during the relationship, or after a relationship has ended) might include situations with large differences in power levels between colleagues, or situations where training and career progression opportunities could be impacted.

What to do if you think you have been subject to sexual misconduct by a doctor

- A resource for patients and colleagues
- Sexual misconduct can have a negative and devastating effect on people, team cultures, and patient safety. A culture of civility and respect benefits everyone.
- A consensual relationship between colleagues is not sexual misconduct. However, consensual relationships can develop and become coercive, and sometimes abusive. This behaviour is sexual misconduct and is unacceptable. Consensual relationships between colleagues can be inappropriate when there's a difference in power levels between colleagues, or an educational or managerial relationship exists. It's important that professional boundaries are maintained in the workplace. And it's also important that a sexual relationship, or the end of one, has no negative impact on clinical practice or team environments.

Other healthcare regulators

NMC

- Sexual misconduct, domestic abuse, and the neglect or abuse of children or vulnerable adults are behaviours that are likely to impair a professional's fitness to practise.
- When they occur outside professional practice, these behaviours may both affect public confidence in the nursing and midwifery professions and also indicate deep-seated attitudinal issues capable of placing people using services at risk of harm. Professionals who behave in these ways are at risk of being removed from the register.

HCPC

- ISP includes colleagues, “sexual harassment, sexual assault, and any other conduct of a sexual nature that is without consent, or has the effect of threatening or intimidating someone”

Sexual harassment and sexual motivation

- Harassment – environment, EA definition. Power v. sexual gratification.
- Motive – act done in pursuit of sexual gratification or sexual relationship (e.g. *Basson*)
- Sexual relationship (inappropriate/abusive/lack of consent).
 - E.g. *Onyekpe* [2023] EWHC 2391 (Admin) (patient)
 - *Woods* [2019] EWHC 2819 (Admin) (patient)
 - *Flanagan* (listed July) (colleague)

GMC, PSA v Dugboyele

- OBGY who sexually harassed 7 colleagues (touching, stroking, kissing, hugging). MPT said fitness to practise was not impaired.
- GMC had charged:
 - the specific actions as “behaving inappropriately”.
 - An abuse of position, colleagues did not feel able to challenge/prevent/report
 - Unlawful sexual harassment (with ref to s.26 EA 2010). Hadn’t charged sexual motivation.
- Misconduct found. Dr had accepted his behaviour constituted harassment.
- No impairment because satisfactory level of insight and remediation – risk of repetition low.
- Warning.
- S.40A challenge and PSA appeal.

GMC, PSA v Dugboyele (part 2)

Why sexual motivation is important?

- Relevant to seriousness
- remediation/insight
- Sanction
- Court found failure to find motivation was a serious procedural irregularity leading to an unjust outcome (i.e. no impairment)

Relevant analysis:

- *Altemimi v GMC* [2024] EWHC 1731 (Admin)
- *Wood* [2019] EWHC 2819 (Admin) – para.56
- *Arunachalam v GMC* [2018] EWHC 758 (Admin) para.59
- *Arunkalaivanan v GMC* [2014] EWHC 873 (Admin) – para. 50, 63 and 64.

Preventative Duty – Equality Act

- Duty to take reasonable preventative steps to protect employees (Workers Protection (Amendment of Equality Act 2010) Act 2023).
- In force: 26 October 2024.
- All employers will be required to take proactive steps to prevent sexual harassment.
- Individual must bring a claim against employer for sexual harassment, if successful, breach of preventative duty will be examined.
- If failure to prevent, may lead to a 25% uplift in compensation.
- Breach of duty enforceable by the EHRC.

Equality and Human Rights Commission (EHRC)

- 1) Develop an effective anti-harassment policy
- 2) Engage staff
- 3) Assess and take steps to reduce risk in your workplace
- 4) Reporting
- 5) Training
- 6) What to do when a complaint is made
- 7) Dealing with harassment by third parties
- 8) Monitor and evaluate your actions

Any questions?

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