7

Using the law to challenge gender based violence in university communities

Louise Whitfield

Although laws do exist to protect women from violence against women and girls[1] (VAWG) on campus, they are rarely used by survivors and routinely ignored by the institutions. There have been very few cases in this area, making legal analysis difficult but this chapter looks at the existing law and how it could be used more to bring about much-needed change in the accountability of universities and respect for women's rights. The very small number of cases to date reflect both the cultural and legal landscape as well as the difficulties women face in bringing such cases. However, there is scope under existing law to hold universities to account and this chapter, authored by a solicitor who has used these laws in recent cases (including *R (Ramey) v Governing Body of the University of Oxford*), examines in detail the UK, European and international legislation available to survivors of gender based violence (GBV), their advocates and activists.

Introduction

Governing bodies of universities must comply with two key pieces of legislation in relation to the vast majority of their activities: the Human Rights Act 1998 on the basis that they are state bodies, and the Equality Act 2010 on the basis that they are education and service providers. This chapter looks at the legal obligations that universities have in terms of protecting the human rights of women students (and staff) in the education setting, alongside the legal obligations under the Equality Act 2010 not to discriminate or harass women in the provision of education.

The Human Rights Act 1998 codified and implemented the protections of the European Convention on Human Rights directly into UK law. All public bodies (and other bodies carrying out public functions) must comply with the Convention rights. The relevant rights

in the context of VAWG in university communities include: Article 3 – the prohibition on inhuman and degrading treatment; Article 8 – the right to protection of one's private and family life; Article 14 – the prohibition on discrimination; and Article 2 of the First Protocol – the right to education.

The Equality Act 2010 prohibits discrimination on the grounds of sex in the provision of education, and services generally. The conduct prohibited under the Act includes direct and indirect discrimination as well as harassment. These concepts are explained further below along with the public sector equality duty under section 149 of the Act, which requires all public bodies in the exercise of any of their functions to have due regard to the need to eliminate discrimination and conduct prohibited under the Act, to advance equality of opportunity for those with protected characteristics[2] and to foster good relations between different groups. Thus the governing bodies of universities should not only behave in a way that ensures they do not discriminate against or harass women students when addressing VAWG in their institutions, but they must also be proactive in their policy development and decision making to ensure that they comply with this important statutory duty to have due regard to such matters to avoid women facing discrimination and disadvantage.

Both areas of law have the potential to be used in lobbying and campaigning on these issues as well as in litigation on behalf of survivors of VAWG, and examples of both are given in the final section of this chapter. Given the seriousness and prevalence of VAWG in university communities it may be somewhat surprising that the potentially powerful tools of the Human Rights Act and the Equality Act have not been used more but women students and staff face a number of barriers. Education for non-lawyers about human rights and equality protections is severely limited. There is also limited expertise in relation to discrimination law among lawyers themselves outside the employment field or disability discrimination in education for those under 18. There is limited scope for litigation in the higher education context given the severe restrictions on legal aid and the high cost and risk involved of bringing such cases.

A very significant barrier for many survivors of VAWG is the fact that the target of any court case is the very institution that they hope will be awarding them a degree. In addition, having survived the trauma of an assault few women will wish to face the additional trauma of a risky, high cost and very combative legal process. Strict court time limits also make bringing cases very difficult. In addition, strong cases settle at an early stage often with confidentiality clauses

or non-disclosure agreements, meaning very few claims are heard by a court so no precedents are set and there is no publicity. There must therefore be increased commitment to and emphasis on legal education and a rights-based approach for both state bodies and women students and staff themselves so that human rights and equality protections are embedded in all policy development and decision making processes. The status quo will remain unchanged if existing legislation proves unenforceable due to lack of funding, expertise, knowledge or political will.

Domestic legislation: the Human Rights Act 1998 and the Equality Act 2010

The Human Rights Act 1998

The Human Rights Act 1998 is composed of a series of sections that have the effect of codifying the protections of the European Convention on Human Rights into UK law. The relevant Articles of the Convention are discussed below. The governing body of a university, which is a public authority for the purposes of the Human Rights Act (because it exercises functions of a public nature), must comply with these Articles.

A breach of a Convention right can render a decision unlawful and susceptible to challenge by way of judicial review,[3] and can form the basis of a claim for damages. However, any such claim for a breach of a Convention right can only be brought by the victim who has suffered the breach. This is in contrast to judicial review claims generally which can be brought by anyone with sufficient interest in the matter, often allowing organisations (such as campaign groups) not directly affected by an unlawful decision or policy to bring a legal challenge without involving an individual.

Article 3 of the Convention, known as the prohibition on torture, reads: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. This Article is not simply about prohibiting the state from subjecting someone to inhuman or degrading treatment. It also creates a positive obligation on state bodies to protect people from having this right breached, even by a private individual. Thus if a state body such as the police or the governing body of a university is aware of the threat to someone's safety (that they may be subjected to inhuman or degrading treatment for example), that public authority should take steps to protect the individual. Generally, the courts have set the threshold for a breach of Article 3 very high in that the

ill-treatment must involve actual bodily injury or intense physical or mental suffering. However, in the context of the positive obligations on state bodies to protect people from such treatment, the failure by the police to protect people from a serious assault has been held by the courts to be a breach of Article 3.[4]

In certain situations, the positive obligations on state bodies under Article 3 may also include a duty to investigate alleged breaches. A failure to investigate such allegations properly can amount to a breach of the investigative duty under Article 3. Generally the litigation in this area is usually related to the failures of the police or other investigative bodies (such as coroners) and has involved the most serious of breaches, but there is arguably an analogous situation if educational institutions fail to investigate allegations of sexual assault, or have policies which specifically say they will never investigate such incidents. As discussed below, this was one of the problems with the Zellick guidelines which, until recently, many universities relied on to justify not dealing with allegations of sexual violence.

Article 8 of the Convention is the right to respect for private and family life. This is a qualified right in that Article 8(2) allows state bodies to interfere with the right in certain limited circumstances where it is justified (in the interests of national security, public safety or the protections of others' rights, for example). In terms of Article 8 it can be difficult to argue that public authorities have positive obligations to protect these rights, but this has been established in more extreme cases[5] and it can be a useful argument to raise in the context of policies and practices that educational institutions are adopting (or not, as the case may be) to protect women and girls from violence. The protection afforded by Article 8 includes protection of one's physical and psychological integrity. Thus a failure by a university to deal with repeated incidents of abuse or harassment in person or over the internet, when on notice of the harm this is causing a woman student, may breach Article 8.

Article 14 prohibits discrimination but only in the context of the other Convention rights. It is not a freestanding right, but can only be relied on in relation to the exercise of another Convention right (for example the right to access education). Article 14 provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Thus an individual can only rely on Article 14 if the discrimination relates to an issue which falls within the ambit of another Convention Article. Worth noting is the justification defence available to state bodies in relation to Article 14: if the discrimination is a proportionate means of achieving a legitimate aim, it will not amount to a breach of the Convention.

Article 2 of the First Protocol sets out the right to education: 'No person shall be denied the right to education.' The right to education is the right to access education being provided by the state, not a freestanding right to education per se. However, in the context of university education provided by state institutions, it is clear that when read with Article 14, any failure on the part of a university to provide the same access to women students as is provided to male students is likely to amount to a human rights violation.

The right to education is not limited to teaching in the classroom or instruction; it covers the whole social process whereby beliefs, culture and other values are transmitted. This broad definition is therefore wide enough to include the internal administration of education institutions and other activities ancillary to the teaching that is being provided. While there has been no litigation in this area in the UK as far as the writer is aware, there is clearly scope to argue that a failure to address VAWG that prevents women students from accessing not only their lectures but also any other university-based activities will constitute a breach of the right to education protected by Article 2 of Protocol 1.[6]

The Human Rights Act 1998 clearly provides potential to hold universities to account regarding their approach to VAWG although this potential has rarely been exploited. Similarly, the Equality Act 2010, discussed below, provides potential to protect women, to increase the accountability of universities and change the culture.

Equality Act 2010

Anti-discrimination provisions

The anti-discrimination provisions contained in the Equality Act 2010 prohibit various forms of discrimination including direct discrimination, indirect discrimination, harassment and victimisation, in the context of listed activities including the provision of education (Part 6 of the Act) and services (Part 3). Legal protection from discrimination is afforded on the basis of the 'protected characteristics'. The two forms of discrimination most likely to be relevant in the context of VAWG in university communities are indirect discrimination and harassment.

Direct discrimination (defined in section 13 of the Equality Act 2010) regulates less favourable treatment because of a protected characteristic, in this case sex. Direct discrimination can never be justified; there is no defence provided for in the legislation. Section 91 of the Act covers the provision of further education and states:

> The responsible body of such an institution must not discriminate against a student
>
> (a) in the way it provides education for the student;
> (b) in the way it affords the student access to a benefit, facility or service;
> (c) by not providing education for the student;
> (d) *by not affording the student access to a benefit, facility or service*;
> (e) *by excluding the student*;
> (f) *by subjecting the student to any other detriment*. (emphasis added)

This is clearly broad enough to prohibit discrimination and harassment in how a university addresses VAWG, arguments that formed the basis of the judicial review claim brought against the University of Oxford in 2015 and discussed below.

Indirect discrimination (set out in section 19) arises where an education provider (such as the governing body of a university) applies (or would apply) an apparently neutral practice, provision or criterion which puts either sex at a disadvantage, and applying the practice, provision or criterion cannot be objectively justified by the education provider. Thus, the situation where a university does not investigate an allegation of sexual assault, or has no policy for addressing sexual harassment of women students, can amount to indirect discrimination and be a breach of the Act. Indirect discrimination can be justified (and therefore is lawful) if it is a proportionate means of achieving a legitimate aim, but a failure to investigate sexual assaults is unlikely to be justifiable on any grounds, particularly in the light of the new guidance from Universities UK (2016a, b) on this issue (discussed in the final section of this chapter).

Harassment is defined in section 26(1) of the Equality Act 2010 as unwanted conduct related to a protected characteristic (such as sex) that has the purpose or effect of violating a person's dignity or that creates a degrading, humiliating, hostile, intimidating or offensive environment. The Act also specifically prohibits sexual harassment, under section 26(2); this is defined as any conduct of a sexual nature

that is unwanted by the recipient, including verbal, non-verbal and physical behaviour, and which violates the victim's dignity or creates an intimidating, hostile, degrading or offensive environment for them. Ordinarily, a university would be liable for harassment of a student by a member of staff but not for harassment by a student.

In addition, section 26 includes a prohibition on 'third-party harassment', that is, harassment done by a person other than the person held responsible for it under the Act.[7] A failure to investigate an allegation of sexual harassment or violence may itself have the effect (particularly if the perpetrator is allowed to remain in the university) of 'creating an intimidating, hostile, degrading, humiliating or offensive environment', and thus amount to harassment, putting the institution in breach of section 91 of the Act, even if the original incident of harassment was perpetrated by another student (for which the university would not ordinarily be liable).

In summary, in the context of universities, if an institution has, for example, a blanket policy – or a practice – of not investigating sexual harassment or sexual violence and simply refers such gender based incidents to the police, this may amount to direct discrimination as female students are being treated less favourably than male students, that is, the university is refusing to investigate the complaint because the complainant is a woman, although it would be unlikely to spell it out in this way given that it could so easily be interpreted as discrimination. It is also likely to be indirect discrimination in that it is a provision, criterion or practice that puts women students at a particular disadvantage when compared to men and it cannot be justified in terms of being a proportionate means of achieving a legitimate aim. It may also amount to harassment. Similarly a failure to take steps to ensure women students can access all elements of their course and the other benefits, facilities and services that the university offers may amount to subjecting them to 'any other detriment' such as to be in breach of section 91 of the Act.

A claim for discrimination under the Act can be brought as a civil claim in the county or high court with remedies including declarations, damages and injunctive relief, such as an order forcing the other party to do something or to stop doing something in order to address the unlawful discrimination. This type of discrimination claim can also form a ground of challenge within a claim for judicial review brought in the Administrative Court, for example where an individual seeks to challenge a policy that is discriminatory *and* a specific incident in which they were discriminated against. Usually civil claims are about what has happened to an individual, and resolve a dispute between

them and another party; most cases like this settle, but they can lead to changes in behaviour if institutions become increasingly concerned about the risk of litigation if they do not address particular problems. In contrast a judicial review may have more scope to consider wider issues, for example whether a policy that affects large numbers of people is discriminatory or not. In a judicial review, the Administrative Court is checking up on the behaviour of the public body in terms of whether they are acting lawfully or not.

The public sector equality duty

Under section 149(1) of the Equality Act 2010, when a public authority, such as a university, exercises any function, it is required to have due regard to:

- the need to eliminate discrimination and harassment of those with a protected characteristic (such as women);
- the need to advance equality of opportunity for people with particular protected characteristics (which includes sex); and
- the need to foster good relations between different groups (in this case between women and men).

The governing bodies of higher education institutions (HEIs) are public authorities for the purposes of the public sector equality duty. Examples of the relevant functions that they may be exercising on which the duty bites would include developing a policy as to how to investigate allegations of sexual harassment made by women students, or the decisions they take when dealing with individual allegations themselves. Thus when a university is making decisions about their policies and practices on violence against women and girls (which includes bullying and harassment), the governance of student societies and sports teams, campus security, housing, management of bars and social spaces, they must have due regard to the need to eliminate discrimination and harassment, and due regard to the need to advance equality of opportunity for women staff and students. The duty applies to decisions in individual cases, as well as policy decisions.

In practice this means that while there is no legal requirement on a university to carry out a specific equality impact assessment on its decisions or policies, the courts do expect them to have applied their minds specifically to the various parts of the duty when taking decisions or developing policies that are likely to affect people with protected characteristics, and to document this process. Guidance from the

Equality and Human Rights Commission (2014: 61, paragraph 5.51) and some court decisions[8] have pointed out that decision makers should record how they have assessed the impact of the proposed policy or decision on protected groups and, that without such a record, it will be difficult for the court to accept that the public authority in question has in fact had 'due regard' and met the duty.

The courts have repeatedly stated that the equality duty must be met in substance, with rigour and an open mind.[9] It must be integral to the decision making process and cannot be an afterthought. If public authorities do not have enough information or evidence to enable them to have due regard, they must obtain that evidence to ensure they can meet the duty properly. This might mean that a university has to consult women students, staff and those with particular expertise in VAWG on its proposals to ensure they have the right evidence about the potential impact on gender equality before a particular policy is introduced.

To have 'due regard', a university is also required to consider each part of the duty and the additional definitions contained in the relevant subsections of s.149. Section 149(3), about advancing equality of opportunity, stipulates that this involves having due regard to the need to: remove or minimise disadvantages (that women face); take steps to meet the needs (of women students and staff); and encourage women's participation in public life and any other activities in which their participation is disproportionately low. In addition, under section 149(5), having due regard to the need to foster good relations involves having due regard to the need to tackle prejudice and promote understanding.

The public sector equality duty is however only a procedural duty and does not require a particular outcome. It is not a duty to eliminate discrimination, but a duty *to have due regard to* the need to eliminate discrimination for example. It is unfortunately perfectly possible for a university to have due regard to the needs set out in section 149 of the Equality Act 2010, but reach a conclusion that any negative impacts (if they spot them in the first place) can be mitigated or are justified. However, the courts would expect an educational institution to be able to explain its rationale behind any decision to go ahead with the policy that appeared to have a significant adverse impact on gender equality, and that rationale would need to be recorded and in the public domain.

As part of the public sector equality duty, public authorities must also comply with the specific duties set out in the Equality Act 2010 (Specific Duties) Regulations 2011. This requires public authorities to publish information annually to show that they have complied with the

duty (see Regulation 2(1)). This must include information on those with protected characteristics who are affected by their policies and practices: Regulation 2(4). Universities should have been doing this every year since January 2012. Under Regulation 3(1), every four years universities are also required to publish equality objectives that they think they need to achieve to meet the statutory needs set out in section 149(1), that is, the elimination of discrimination, advancing equality of opportunity and fostering good relations. These objectives must be 'specific and measurable' (Regulation 3(3)). However, in practice such objectives are often extremely vague and very general with no specificity or any sensible means by which they can be measured.[10] There also seems to be little consultation on the objectives and limited publication of either the objectives or the information required under Regulation 2.

Before the specific duties were watered down by the 2010 coalition government, their more robust forerunners (linked to the individual race, gender and disability equality duties) were more commonly used to establish a breach of the general equality duty in question.[11] If a specific duty had been breached, this could be used as evidence that the equality duty itself had been breached. However, the current version of the specific duties is now so vague and general – essentially a requirement to publish objectives and information with no enforcement mechanism – that while a breach may assist in providing evidence of a public authority's general attitude to equality, it is unlikely to assist in establishing the duty has been breached in relation to a specific decision or policy.

If it *can* be established that the public sector equality duty has been breached, this can render the policy or decision unlawful and susceptible to challenge by way of judicial review, the court having discretion whether to quash the non-compliant decision or policy. Fewer cases are now brought on this basis for a variety of reasons, not least the fact that more public authorities are properly complying with their duty, or settling claims before they are issued when it is pointed out to them that they have failed to have due regard as required in respect of a specific decision or policy. Judicial review is a remedy of last resort and should only be used when all else has failed, although the tight court deadline of issuing a claim within three months of the decision under challenge makes attempts at negotiation or pursuing complaints procedures problematic. Judicial review also only allows the judge to consider the decision making *process*, as opposed to the merits of the decision itself; the public authority can therefore go ahead and re-take the decision on an apparently lawful basis, complying with the equality

duty but at the same time reaching the same conclusion – this latter decision then being very difficult to challenge if they have in fact had the due regard required.

European and international law and instruments

Notwithstanding the result of the 2016 referendum and the likelihood that the UK will leave the European Union, there are two significant pieces of European-based law that are relevant to decision making by UK state bodies in relation to VAWG in university communities. The first, the Istanbul Convention, is an international convention that is not in fact EU law but comes from the Council of Europe, a separate and distinct body from the EU. The second, the Victim's Directive, is an EU Directive but it has already been implemented in the UK in any event. These two legal instruments are therefore unlikely to be affected by withdrawal from the EU. In addition, the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been ratified by the UK and can be used in a number of ways to combat VAWG. These three instruments are discussed in turn below.

Istanbul Convention

The Istanbul Convention is a Council of Europe Convention from 2011. It addresses violence against women through measures aimed at preventing violence, protecting victims and prosecuting perpetrators. The Convention recognises violence against women as a human rights violation. It aims to bring societal change by challenging acceptance or denial of such violence and gender stereotyping. Of specific relevance to universities seeking to address VAWG are the prevention obligations:

> Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men. (Council of Europe, 2014: 7)

Specific obligations also include awareness raising, education, training of professionals, preventative intervention and treatment programmes, and participation of the private sector and media. This would easily cover obligations relating to training and education of all staff and students on campus.

Chapter IV covers protection and support including the general obligation to take necessary legislative or other measures to protect all victims of VAWG from any further acts of violence. Any such measures must be based on a gendered understanding of violence against women, and be based on an integrated approach which takes into account the relationship between victims, perpetrators and their wider social environment, arguably of particular relevance in the context of higher education. Such measures must allow for a range of protection and support services.The Istanbul Convention came into force in August 2014. To date it has been signed by 42 countries and ratified by 22. The UK has signed but not yet ratified the Convention, although ratification is edging closer after a widespread campaign by women's organisations with considerable support in Parliament. By ratifying the Convention, there would be a strong inference that UK law is compliant with the treaty. Upon ratification, the government would be undertaking to fulfil the Convention's positive obligations to exercise due diligence to prevent violence against women, to prosecute perpetrators and to protect victims (as set out above). While the Convention does not create enforceable rights for an individual woman (she cannot take the government to court over a breach of the Convention), once ratified, a failure to take the obligations into account in decision making may render any such decision unlawful and susceptible to legal challenge.

By signing the Convention the government has expressed its intention of abiding by it and it has already taken a number of steps to enable ratification (such as introducing new laws to criminalise coercive control and forced marriage). However, it will only become legally binding once ratified. Up until then, it can still be used in lobbying and campaigning.

EU Victims' Directive

Another piece in the jigsaw of law relevant to VAWG in university communities is the UK government's obligations towards victims of crime. The UK government has already set up a Code of Practice for Victims of Crime and this was amended to comply with the EU Directive on Victims of Crime, which came into force in November 2015. The aims and objectives of the Directive are to ensure that victims are recognised and treated with respect and dignity; are protected from further victimisation and intimidation from the offender and further distress when they take part in the criminal justice process; receive appropriate support throughout proceedings and have access to justice; and have appropriate access to compensation.

Thus when investigating and addressing VAWG in university communities, all state agencies must ensure that they comply with the EU Directive, as implemented by the Victims' Code. This includes for example the right to be offered the opportunity to have a person of the same sex conduct the police interview where someone is a victim of 'sexual violence, gender-based violence, or domestic violence' (see paragraph 1.8, Part A, of the Victims' Code). Paragraph 1.10 also states that victims of the most serious crime, those who are persistently targeted, vulnerable or intimidated, are entitled to additional support including special measures to give extra protection if giving evidence in court. They are also entitled to be referred to a specialist organisation (where available and appropriate) and to receive information on pre-trial therapy and counselling. These rights are likely to be highly relevant to survivors of VAWG and the Code requires all relevant state agencies to comply by providing the services in question. A failure to do so will be a breach of the Directive.[12]

CEDAW

This UN Convention has been both signed and ratified by the UK. The Convention defines discrimination against women as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. (CEDAW, Article 1)

The CEDAW Committee has made clear – in its General Recommendation no. 19 in 1992 (UN Women, 1992) – that 'gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'. Thus the steps that the state must take to end discrimination against women include ending VAWG.

As explained above, a Convention, even when ratified, does not create rights that can be enforced through the courts by individual women, but they can rely on the Convention to argue how laws should be interpreted in the UK, and a failure to take the Convention into account, or to comply with it, could render a decision unlawful and susceptible to challenge. In addition, the Optional Protocol to the

Convention establishes a system whereby individual women or an organisation on their behalf can complain to the UN Committee if there has been a Convention breach by the UK government.[13]

As articulated above, domestic law, as well as European and international legal instruments, provide opportunities to hold universities to account in terms of how they deal with – or fail to deal with – VAWG. The following section sets out how those laws have been used in action by individuals and campaigning groups to improve university approaches.

Law in action

Campaigners began using legal arguments to address VAWG in universities in January 2015, when the End Violence Against Women Coalition produced a legal briefing entitled 'Spotted: Obligations to Protect Women Students' Safety and Equality'.[14] Its subtitle explained its intended role: 'Using The Public Sector Equality Duty & the Human Rights Act in Higher and Further Education Institutions to Improve Policies and Practices on Violence Against Women and Girls'. The briefing was aimed at women's organisations working in this area, and was increasingly used as a lobbying tool with state bodies. It formed a significant part of an important discussion in March 2015 with the then Minister for Business, Innovation & Skills, whose brief included higher education. Later the same year, at the request of the new minister, Universities UK (the umbrella body for HEIs) set up a taskforce to explore what more could be done to support the higher education sector to prevent and respond to incidents of violence and sexual harassment against women, hate crimes and other forms of harassment.

Also in early 2015, Elizabeth Ramey, a former postgraduate student of the University of Oxford, took that University's governing body to court over their failure to properly investigate her complaint that she had been raped by another student.[15] The judicial review claim argued that the University's new policy on investigating allegations of sexual violence discriminated against women students and was in breach of the public sector equality duty as well as the Human Rights Act. The new policy, which had been developed partly in response to Elizabeth Ramey's complaint to the Office of the Independent Adjudicator (OIA) over the University's handling of her complaint, continued to rely heavily on the Zellick guidelines which suggested that allegations of serious sexual assault should only be investigated if they had been reported to the police, and then only in very exceptional

circumstances. For the reasons set out above this arguably amounted to unlawful indirect discrimination on the basis that women students would face a substantial disadvantage as a result of the policy, and that there could be no justification for such an approach. The policy would fail to protect women students adequately from inhuman and degrading treatment and there could be no justification for such interference with their right to protection of their private life. The University had failed to meet the public sector equality duty as there was no evidence that it had had due regard to the need to eliminate discrimination and harassment of women students when developing the policy.

The judicial review claim was unsuccessful, being dismissed at a relatively early stage on the basis that Ms Ramey was the wrong claimant for such a legal challenge as she was no longer a student at the University and therefore did not have standing to bring the case in those particular circumstances.[16] Although he held that the policy itself was not unlawful on the grounds alleged, the judge did indicate that he thought it could potentially be applied unlawfully in an individual case. The University continued to argue throughout the case that its policy and the Zellick guidelines were lawful, non-discriminatory and did not amount to a breach of the Human Rights Act (HRA).

Ms Ramey's case illustrates the barriers that individuals face in bringing claims and the limitations of judicial review challenges. It had taken her almost three years to find a solicitor with the necessary expertise to represent her. Although on a modest income at the outset of the case, she quickly became ineligible for legal aid; she was very lucky to secure funding for the claim from the Equality and Human Rights Commission but they fund only a handful of cases each year. She had to go through a tortuous internal complaint procedure and through the lengthy OIA process before she could embark on a legal challenge to Oxford's new policy. The original decisions taken by the University at the time of her complaint not to investigate further and to simply 'have a chat' with the perpetrator about his behaviour towards women, needed to be challenged within three months – an impossible feat for most rape survivors and very difficult indeed for those seeking to challenge the institution that they are currently studying with, which in many cases also provides their accommodation and funding.

However, Elizabeth Ramey's decision to waive anonymity led to considerable media coverage which significantly highlighted the problem (despite the preliminary hearing and judgment being on the day of the 2015 general election results). The case concluded two months after the End Violence Against Woman (EVAW) Coalition had met the relevant minister to lobby him on the wider issues. The

Taskforce was established in November that year, confirming in March 2016 that they intended to review the Zellick guidelines.

In October 2016, the Universities UK Taskforce produced its final report and new guidance for UK universities: *Guidance For Higher Education Institutions, How To Handle Alleged Student Misconduct Which May Also Constitute A Criminal Offence*. It is notable for what it left out: the Zellick guidelines have been largely abandoned. Universities are no longer advised to require complainants to have reported a matter to the police before they will investigate allegations of sexual assault, and they are no longer advised only to investigate such complaints in very exceptional circumstances. The new guidance has its flaws – most significantly that it fails to recognise GBV itself or that it requires a response that is compliant with the HRA and the Equality Act. There is nothing in the new guidance that refers to the fact that women are disproportionately the victims of sexual violence; there is no reference to gender discrimination in the context of sexual violence on campus, nor any guidance as to responding to it in terms of gender. There is one oblique reference to human rights but no analysis as to how to avoid a breach of students' human rights in dealing with allegations. The Universities UK (2016b) report published at the same time does attempt to focus on violence against women having a chapter devoted to responses to sexual violence, but its recommendations lump VAWG in with harassment and hate crime generally. Nor are the recommendations framed in terms of the institutions' duties under the HRA or the Equality Act 2010.

However, to some extent the new guidance and the report represent a step in the right direction following both a sustained campaign by the women's sector – using legal arguments – and Liz Ramey's legal challenge relying on submissions which revealed the inadequacy of the University's approach, summed up best in the advice in an internal document disclosed within the judicial review court case, and relied upon in the judicial review grounds of challenge:

> let him tell you what he wants to about his relations with Ms R and female students generally (so that you can form a view about whether he is in fact a risk to others); unless you have cause for concern, advise him to be more careful in the future about putting himself in situations with female students which are open to misinterpretation, and close the case on that basis.

While the new Universities UK (2016a) guidance is welcome, it was hard-fought and has its limitations. What it leaves out speaks volumes and its success depends upon HEIs' wholehearted and effective implementation of the recommendations. Although the current legal framework does allow for universities to be held to account, it remains the case that such action largely depends upon individuals bringing court cases – and fighting them all the way to trial. Legal interventions, then, can be only part of the strategy of holding universities to account and providing protection and justice for all women.

Notes

1 This is the term used by the End Violence Against Women Coalition, the leading UK coalition campaigning to end violence against women and girls, the work of which has informed many of the legal arguments explored in this chapter.

2 The protected characteristics of the Equality Act 2010 are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.

3 Judicial review is the court process by which an individual or a group can challenge the decision or policy of a public body; usually this consists of a review of the decision making process, not a merits review of the decision itself.

4 See, for example, the decision in *The Commissioner of the Police of the Metropolis v DSD & Another* [2015] EWCA Civ 646.

5 See, for example, the cases asserting positive obligations under Article 8 such as *Abdulaziz v United Kingdom* (1985) 7 EHRR 471 in the immigration context; or *Lopez Ostra v Spain* (1994) 20 EHRR 277 in the context of environmental pollution.

6 Women students in the US are using the equivalent laws there, known as Title IX – the prohibition on sex discrimination in education – to sue universities on the basis that when students suffer sexual assault and harassment, they are deprived of equal and free access to an education.

7 Although the specific prohibition on third-party harassment in employment has been scrapped, there is still case law that can be relied on to establish that a failure to treat sexual harassment in the education context may in itself create a hostile environment which is in breach of the anti-harassment provisions; see, for example, the decision of the 'Employment Appeal Tribunal Sheffield City Council v Norouzi' [2011] IRLR 897 in which the employer was liable for racial harassment of the claimant social worker by a resident in a care home in which the employee worked.

8 See the case of *R (Brown) v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin) for example, where the court held that:

> it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their [disability] equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their [disability] equality duties conscientiously.

[9] The leading case on public sector equality duty is *R (Bracking & Others) v Secretary of State for Work & Pensions*, [2013] EWCA Civ 1345; see paragraph 26, which sets out the agreed principles in some detail.

[10] For example, it is common to see objectives such as, 'provide an excellent and inclusive educational experience' or 'raise awareness of and engagement with equality and diversity', with little detail as to how this will be achieved and making no reference to tackling sexual violence. As far as the writer is aware and having considered a sample of five institutions, no university has set a reduction in VAWG as an equality objective despite it being one of the most widespread and devastating problems facing half the student population.

[11] Before the Equality Act 2010 introduced the public sector equality duty covering all protected characteristics, the law imposed a general equality duty on public bodies in respect of race, gender and disability. These general duties were supported by specific duties, which included important requirements such as consulting stakeholders and assessing the impact of policies and practices on say, gender equality. However, these were replaced with far less prescriptive specific duties undermining the value and significance of compliance.

[12] As the EU Directive has been implemented via the Code which is a type of statutory guidance, the state agencies listed must also follow the Code (unless they have a very good reason not to) to avoid making an unlawful decision which could be challenged in the UK courts without reference to the EU Directive itself.

[13] See for example the complaint made by a Bulgarian woman on behalf of her daughter who had been a victim of sexual assault; the UN Committee made a series of recommendations to the Bulgarian government including amendments to the criminal code as to the definition of rape and covering healthcare protocols and procedures to address sexual violence against women and girls: www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-53-D-31-2011_en.pdf

[14] This legal briefing was co-written by the author of this chapter.

[15] The author of this chapter was the legal representative for Elizabeth Ramey.

[16] *R (Ramey) v Governing Body of the University of Oxford*, [2015] EWHC 4847 (Admin).

References

Council of Europe (2014) *Preventing Violence Against Women: Article 12 of the Istanbul Convention*, https://rm.coe.int/168046e1f0

Equality and Human Rights Commission (2014) 'Technical Guidance on the Public Sector Equality Duty: England', www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty

United Nations Human Rights: Office of the High Commissioner (no date) 'Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979', www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx

Universities UK (2016a) *Guidance for Higher Education Institutions: How To Handle Alleged Student Misconduct Which May Also Constitute a Criminal Offence*, London: Universities UK, www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/guidance-for-higher-education-institutions.pdf

Universities UK (2016b) *Changing the Culture, Report of the Universities UK Taskforce Examining Violence Against Women, Harassment and Hate Crime Affecting University Students*, London: Universities UK, www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/changing-the-culture.pdf

UN Women (1992) 'CEDAW General Recommendation No 19', www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19