

## **UNIVERSITY OF CAPE TOWN DISCIPLINARY PROCEDURE FOR SEXUAL MISCONDUCT: SEXUAL OFFENCES AND SEXUAL HARASSMENT**

The purpose of the draft disciplinary rules is to ensure a fair trial to all parties to a hearing and to be more intentional about minimising retraumatising the complainant.

Further, to ensure expediency and best outcomes, a Tribunal that is specialised and appropriately trained to deal with sexual misconduct as defined in the policy will handle all formal cases of sexual misconduct. This is the Special Tribunal for Sexual Misconduct (hereinafter referred to as the Special Tribunal).

### **1. Preamble**

1.1 The purpose of a separate disciplinary procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment is to distinguish the process from the academic infringement cases in the student disciplinary system and the general misconduct cases in the Human Resources department. A separate procedure and Special Tribunal, dealing specifically with Sexual Misconduct, is consistent with the university's undertaking to effectively address gender-based violence and shows an intentional movement in meeting such objectives. This procedure supports the revised Sexual Misconduct: Sexual Harassment and Sexual Offences Policy which encourages and supports reporting and dealing with all sexual misconduct. This ensures a fair disciplinary enquiry to the respondent as well.

1.2 The objectives of the policy and this procedural guideline is to ensure that the university disciplinary process for such cases maintain an administrative procedure, based on the balance of probabilities, rather than a criminal process. This standard of proof informs the process and procedure. These procedural rules will assist all stakeholders in Human Resources and the Student Discipline structures in directing and addressing Sexual Misconduct. This procedure serves to ensure that all members of the Tribunal panel are suitably qualified and trained.

### **2. Preliminary Steps**

2.1 All allegations of Sexual Misconduct must be reported to the Office for Inclusivity and Change (OIC).

2.2 If the formal process is selected the OIC refers the matter to the Special Tribunal where the Evidence Leader will conduct and direct investigations and evaluate the evidence.

2.3 If the OIC is uncertain about referring the matter to the Special Tribunal for a formal disciplinary process, the matter may be referred to an Evaluation Panel which will consider several factors and either refer the matter to the Special Tribunal to progress or back to the OIC if the preliminary evidence cannot progress the investigation. The Evidence Leader may also refer appropriate cases to the

Evaluation Panel for recommendations on how to proceed based on an evaluation of the evidence. If the matter involves a member of staff, then the Evaluation Panel will include a member from Human Resources.

2.4 Where there is a credible basis for a disciplinary hearing this will be directed for a disciplinary adjudication before the Special Tribunal.

2.5 Formal cases involving staff members will include an appointed Human Resources/Employment Relations (HR/ER) officer working with the Evidence Leader. This HR/ER officer must attend all hearings where the respondent is a staff member.

2.6 The Evidence Leader must ensure that investigations are complete and that preliminary procedures of notification to the respondent, complainant and university witnesses have been complied with.

2.7 In preparation for a disciplinary hearing the complainant must be consulted on their preference for the method of leading evidence.

2.8 A pre-hearing meeting with the respondent will be scheduled once the charges are drafted and the investigation is completed.

2.9 The respondent must be provided with the evidence bundle and informed of their rights prior to the preliminary pre-hearing process.

2.10 The respondent/s will be given an opportunity to confirm both their intention to plead to the charges and confirm a decision with regards to representation at the formal hearing. Ideally, the decision to be represented and any necessary application thereof should be concluded prior to the pre-hearing meeting.

2.11 In the instance where the complainant chooses not to proceed with a case prior to the hearing, the Evaluation Panel will be constituted for consideration on whether to proceed with the case or not. The constituting and composition of the Evaluation Panel is as per paragraph 5.1.6 of the policy.

2.12 This decision is not limited to but must include:

2.12.1 the seriousness of the charges;

2.12.2 any pending and or previous convictions;

2.12.3 the safety of the campus community.

### **3. Jurisdiction**

3.1 The Special Tribunal shall have jurisdiction to hear all sexual offences cases directed for a formal disciplinary hearing.

- 3.2 staff and students facing any such allegations
- 3.3 any offence committed during the employment period of the staff member
- 3.4 any offence committed by a student during such student's registration at the university
- 3.5 any offence committed within the precincts of the university, including all university residences and at university related events/work/study conducted off campus.
- 3.6 In the event of an offence committed by students that is perpetrated off campus, the Special Tribunal will have the discretion on whether to proceed with the matter. Considerations will include whether there is a nexus with the university community, is deemed to be of a serious nature, and is in contravention of any institutional rules and policy.
- 3.7 In the event of an offence committed by staff that is perpetrated off campus, the Special Tribunal will have a discretion whether to proceed with the matter if there is a nexus with the workplace, is deemed to be of a serious nature, and is in contravention of any institutional rules and policy.

#### **4. Representation**

- 4.1 The respondent has an automatic right to be assisted/represented by a university staff member or student of their choice.
- 4.2 The respondent may bring a support person to all hearings. The support person may not be a party to the proceedings.
- 4.3 Should the respondent wish to engage the services of an external legal representative, a written application must be forwarded to a Disciplinary Chair (DC), prior to the pre-hearing meeting.
- 4.4 The DC will decide on the suitability of granting an application for an external legal representative based on:
  - 4.4.1 the seriousness of the offence
  - 4.4.2 the complexity and nature of the offence
  - 4.4.3 the reasonableness and fairness of such an application.
- 4.5 If the application for external representation is granted, this should be limited to a single legal representative.
- 4.6 The University will be represented by the Evidence Leader, who will present the complainant's case.

4.7 The complainant has a right to be supported throughout the process, including at the disciplinary hearing, by a Survivor Support Officer from the OIC or any person chosen by the complainant for such purpose.

4.8 The respondent has a right to be supported throughout the process, including the disciplinary hearing by any person chosen by the respondent for such purposes but the support person cannot be party to the proceedings.

4.9 The complainant has the right to apply to the DC for external legal representation.

4.10 External representation for the complainant is limited to:

- a) act as a watching brief on behalf of the complainant.
- b) ensure that the rights and interests of the complainant are protected; this does not include representation on the merits of the case.
- c) assist the Evidence Leader with the case preparation.
- d) provide legal advice to the complainant.
- e) attending pre-hearings, complainant consultations and the disciplinary hearings.
- f) direct submissions to the DC when it appears that any right or interest of the complainant is being infringed upon.
- g) advise and assist the complainant in external remedies.

## **5. Notification**

5.1 A respondent must be notified in writing of the scheduled disciplinary hearing. This notification is to be sent by the Evidence Leader.

5.2 This notification must be sent to the relevant university email address of the respondent and or via personal service by an authorised university member. This notification must reach the respondent within 7 working days prior to the hearing.

5.3 The evidence bundle, pre-hearing minute and charge sheet must accompany the hearing notification.

5.4 The date, venue and time must be clearly communicated with such notification. If the respondent is unable to attend the hearing, a written submission with reasons for non-attendance must be provided to the Evidence Leader within 48 hours of having received the hearing notification.

5.5 The assigned DC, having regard to any extenuating circumstances and the reasonableness of the reasons for non-attendance, may decide on whether the hearing proceeds in the absence of the respondent or not.

5.6 Where the DC decides that the matter should proceed without the respondent, the respondent must be invited to submit a written response to the allegations contained in the evidence bundle for consideration by the Tribunal.

5.7 Failure on the part of the respondent to submit a response will not stop the disciplinary hearing from proceeding.

5.8 Should the DC deem the reasons for non-attendance as reasonable, the hearing date is to be rescheduled as soon as is possible thereafter, having regard to the complainant's rights to have the matter heard sooner rather than later.

5.9 The office of the Evidence Leader must notify the complainant of the hearing date, time and venue as soon as the hearing date is confirmed.

5.10 The Evidence Leader must ensure that the complainant receives the necessary trial preparation within a reasonable time before the scheduled hearing.

5.11 The Special Tribunal members shall receive notification of the confirmed hearing date at least seven days prior to hearing. The evidence bundles, charge sheet, pre-hearing minutes and all witness statements are to be provided to the Tribunal members in order to ensure adequate preparation for the hearing.

5.12 Witnesses and the complainant shall receive a notification for the hearing seven days prior to the hearing. Such notification will indicate the date, time and venue of the hearing.

5.13 The respondent must ensure his/her witnesses are present at the hearing.

## **6. Composition of the Special Tribunal**

6.1 The Special Tribunal may be composed of three panel members. This must include a DC and two assessors.

6.2 The DC should be drawn from a pre-approved list of suitable members appointed by the Vice-Chancellor/nominee. DCs may be internal staff members or external candidates. If one of the parties is a member of staff the Special Tribunal panel must include an HR representative.

6.3 All appointed DCs must:

6.3.1 be legally qualified; and

6.3.2 have had training in sexual and gender-based violence; and/or

6.3.3 have extensive knowledge or a background in sexual offences and gender-based violence.

6.4 Notwithstanding any experience in sexual offences and gender-based violence, continuous training for disciplinary DCs and Tribunal members is mandatory.

6.5 Assessors: The DC shall hear a case with a student assessor and a staff assessor in any matter related to a student respondent.

6.6 The staff assessor must be selected from a pre-approved list of assessors appointed by the Vice-Chancellor/nominee. This list of assessors may include externally appointed members deemed to be suitably qualified and or experienced in sexual misconduct matters. Where the respondent is a staff member an HR appointed assessor must be included in the panel composition.

6.7 Student assessors will be appointed by the Vice-Chancellor:

6.7.1 from names submitted by the Student Representative Council,

6.7.2 approved by the SRC, and

6.7.3 approved by Vice-Chancellor

6.8 All student assessors must receive sexual offences and gender-based violence training prior to sitting in on any hearing.

6.9 The DC shall hear a matter together with at least two assessors appointed by the Vice-Chancellor/nominee when adjudicating a staff matter. This should include a legally qualified, suitable academic staff member or Senate appointed member and any other suitably trained and or experienced staff member.

6.10 Where any assessor is unable to begin the hearing session or continue with the hearing the proctor shall assume the role and vote of the missing assessor. The decision to continue without a second assessor will depend on the seriousness and complexity of the case and in consideration of fairness to both the respondent and the complainant.

6.11 A DC may sit alone in any matter where the sanction, on conviction, will not include a rustication, expulsion or dismissal of a respondent.

6.12 Once selected for a hearing the DC and assessors must disclose any conflict of interest where:

6.12.1 any party to the hearing is related to or have/had an existing relationship to them in a way that may compromise the partiality of an outcome

6.12.2 was part of any prior case investigation and/or adjudication against the same respondent

6.12.3 any other reason that is to be reasonably considered as a conflict of interest.

6.13 Where either the complainant or the respondent objects to any member that constitutes the Tribunal, reasons must be provided. Where the withdrawal of an assessor is requested, the DC shall consider whether these are reasonable grounds for such withdrawal. Where there is an objection to the DC, the Vice-Chancellor/nominee shall consider the appropriateness of the request for the withdrawal of the DC. If deemed as necessary, another DC shall be selected.

## **7. The Disciplinary Hearing**

7.1 The disciplinary panel will hear evidence from both the complainant and the respondent. Further/corroboratory evidence from witnesses may be led by both the Evidence Leader and the respondent or the respondent's representative.

7.2 All parties to the proceedings must have a copy of the evidence, charges and list of witnesses to be called.

7.3 The DC shall retain discretion for the format and procedures to be followed in a hearing. These procedures must comply with fairness, reasonableness and natural justice.

7.4 The onus of proof rests with the University in presenting the case for the complainant.

7.5 The standard of proof remains on a balance of probabilities.

7.6 Where the Evidence Leader believes that the nature of proceedings does not conform to the parameters of an administrative process, in compliance with the requisite standard of proof, an objection to the proceedings may be recorded. This objection must be considered by the Special Tribunal and a decision regarding conformity must be made before proceeding further.

7.7 The charges are to be read to the respondent and the intended plea of guilty or not guilty is recorded. Should an unrepresented respondent plead guilty the Special Tribunal must question the respondent in order to ascertain that the respondent is, in fact, correctly pleading guilty.

7.8 Where the respondent pleads not guilty the procedure for leading evidence must be confirmed by the Special Tribunal at the start of the proceedings.

## **8. Evidence**

8.1 The evidence of the complainant must be led, and the complainant may elect to provide evidence in any of the following ways:

- 8.1.1 face-to-face at the hearing;
- 8.1.2 remotely, via any appropriate online method;
- 8.1.3 at the hearing but from behind a screen;
- 8.1.4 at the University premises but *in camera*;
- 8.1.5 written submissions.

8.2 Where the complainant chooses any option from 8.1.1 to 8.1.5 the Special Tribunal may decide to put questions to the complainant with or without the respondent being present. The Special Tribunal may also question the respondent in the absence of the complainant. This should be done in a manner that protects the complainant from unnecessary trauma and in a way that balances the rights of the respondent.

8.3 Should the respondent object to any alternative means of leading evidence the Tribunal must consider:

- 8.3.1 the reasonableness of such an objection,
- 8.3.2 how, if at all, such manner of leading evidence compromises the respondent's right to a fair trial.

8.4 Where no reasonable grounds exist for such an objection the hearing must proceed as decided by the Special Tribunal.

8.5 Additional evidence in the form of, but not limited to, e-mails, photos and social media posts are to be accepted in as evidence.

8.6 Corroboratory witnesses called to give evidence may be given the option of alternative means of giving evidence, especially where such witnesses indicate that they are afraid or uncomfortable to be in the presence of a respondent.

8.7 Where there is no evidence to support an impingement of the respondent's rights, the request to give evidence outside of the hearing venue shall be granted.

8.8 The Special Tribunal must ensure that the complainant has a support person with them, unless otherwise decided by the complainant.

8.9 Irrespective of whether the complainant is present in person or not, the Special Tribunal must ensure that questions put to the complainant is neither aggressive nor deliberately intimidating.

8.10 This should be in the form of questions to rebut or for purposes of clarity. The Special Tribunal should, as far as necessary, consider directing the respondent's questions to the complainant via the Tribunal members.

8.11 The respondent may submit evidence by way of their own testimony and witnesses. The Evidence Leader and the Special Tribunal members may ask questions for purposes of clarity, and the respondent may submit any documentary evidence approved by the DC to be admitted.

8.12 The Special Tribunal has the discretion to decide on what evidence is admissible or not.

8.13 Any evidence of the complainant's previous sexual history will not be allowed at any stage of any hearing.

8.14 Sexual Offences cases may include the evidence of a gender-based violence expert or a suitable trauma counsellor. This is at the discretion of the DC on application by the Evidence Leader.

8.15 A recording of the proceedings must be kept by the Evidence Leader. Should any party to the proceedings request a transcript of the proceedings, this request must be directed to the office of the Evidence Leader. A respondent is responsible for the costs of any transcription requested.

8.16 At the conclusion of all evidence presented, closing statements from both parties may be submitted.

8.17 A verdict is decided by a two-third majority of the Special Tribunal members, with the DC retaining a casting vote.

8.18 If the Special Tribunal reaches a verdict of guilty, then the respondent is entitled to submit mitigating factors that favour a less harsh sentence.

8.19 The University is entitled to lead evidence in aggravation of sentence including any previous convictions against the respondent.

8.20 The Special Tribunal will consider both mitigating and aggravating factors before passing an appropriate sanction.

## **9. Sanctions**

Sanctions may include, but are not limited to:

Student:

- a) campus community service conducted at the direction of OIC;
- b) rehabilitative/restorative/educative programmes with the OIC;
- c) a period of suspension from the residence and or university;
- d) expulsion from the residence and or the university;
- e) any other appropriate sanction as considered by the Special Tribunal.

Staff:

- a) community service conducted at the direction of the OIC;
- b) rehabilitative/restorative/educative programmes with the OIC;
- c) warning;
- d) dismissal;
- e) any other appropriate sanction as considered by the Special Tribunal.

Respective sanctions will include a consideration of the relevant legislation and institutional policies and procedures as applicable to the status of the respondent whether as student or staff.

## **10. Appeal**

10.1 If a respondent believes that there are grounds for an appeal, this must be noted within 10 working days with the office of the Evidence Leader or HR (as applicable).

10.2 The grounds for appeal must be reasonable and based on a procedural or substantive irregularity at the initial hearing.

10.3 The Appeal Tribunal must include a DC and members who are suitably qualified and trained and or experienced.

10.4 Student: Heads of argument supporting the grounds for appeal must follow within 14 working days. The rules of procedure for such appeal will be as per the

prescribed rules of procedure in the General Rules and Policies: Handbook 3 and the University Disciplinary Student Tribunal Procedural Handbook.

10.5 Staff: HR policy for appeals to be followed. Any external application for a review may be applied for only after all internal remedies have been exhausted.

10.6 Any appeal must be before a panel that is suitably qualified and experienced in sexual offences and discrimination. The panel must include an HR appointed person.

10.7 In addition to the HR appointed panel member an HR representative may be present for such hearings. The HR representative must ensure that the hearing is recorded.

## **11. Interim Orders**

11.1 Any complainant who experiences any offence related to sexual misconduct may request that a No Contact Order, be issued as a protective measure.

11.2 Students: The process and considerations for the No Contact Order will be consistent with the procedure as contained in Handbook 3: General Rules and Procedures pertaining to students.

11.3 Where the continued presence of a respondent, in the work environment, student residences and or the University, poses a threat to the complainant/s or to the maintenance of good order the VC/Nominee may grant a suspension order.

11.4 Where the respondent is a staff member, a suspension of the staff member may be issued pending the conclusion of an investigation of the allegations. The procedure to be consistent with such suspension as contained in the university Staff Disciplinary Procedures.

11.5 The process and procedure will be consistent with the procedure as contained in Handbook 3: General Rules and Procedures and the HR policy for suspensions. Contained in a suspension notice will be an instruction to the respondent requesting that they refrain from making contact, directly or indirectly, with the complainant.

11.6 A breach of the No Contact order may result in an automatic suspension order coming into effect. This will be considered by a DC.

*Procedures and considerations for interim measures to be read together with the General Rules and Policies: Handbook 3 for Students and the Staff Disciplinary Procedures for Staff.*