

SEXUAL ASSAULT ON CAMPUS: NOT JUST A POLICE MATTER — A RESPONSE TO Y V UNIVERSITY OF QUEENSLAND

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This article examines the case of Y v University of Queensland and the issue of university disciplinary action in cases of student-on-student sexual assault. In addition to the question of whether universities have legal jurisdiction to decide these matters, there is the more fundamental question of whether they should. Using Martha Fineman's theory of vulnerability as a theoretical lens, this article seeks to evaluate whether accusations of sexual assault should be treated exclusively as police matters or whether universities have a moral obligation to take independent action.

I INTRODUCTION

Sexual assault on college and university campuses has recently come to the forefront of public consciousness both in Australia and internationally. In 2017, the Australian Human Rights Commission released 'Audit of University Responses to the Change the Course Report' ('Change the Course'), a national report on the prevalence of sexual assault and sexual harassment at Australian universities.¹ In response to the report, many universities, including The University of Queensland ('UQ'), introduced a Sexual Misconduct Policy to allow specific and targeted disciplinary action to be taken in cases of sexual assault.² Most residential colleges have followed suit and introduced their own sexual misconduct policies, which reflect the UQ policy to varying degrees. This approach has raised concerns about whether universities should have the capacity to adjudicate on matters that amount to criminal accusations. For example,

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¹ Australian Human Rights Commission, 'Change the Course: National Report On Sexual Assault and Sexual Harassment at Australian Universities' (2017) ('Change the Course').

² Kate Jenkins, 'Audit of University Responses to the Change the Course Report', *Australian Human Rights Commission* (Web Page, December 2017) 40 <https://humanrights.gov.au/our-work/sex-discrimination/audit-2017?_ga=2.36641760.1736632119.1589769748-1647686250.1588469685>.

Shirley Alexander, the Deputy Vice-Chancellor (Education and Students) and Vice President of the University of Technology Sydney, notably posted a tweet following a Channel 7 *Sunday Night* interview with university rape survivors, which read ‘#SN7 penalties for sexual assault are determined by the criminal justice system, not universities!’.³ Journalist and activist Bettina Ardnt has also been running a campaign against what she describes as university ‘kangaroo courts’, which she believes ‘usurp the criminal law system, introducing new regulations for adjudicating sexual assault, using a “balance of probabilities” standard of proof, and making no provision for protecting the legal rights of the accused’.⁴

In the recent Queensland Supreme Court case of *Y v University of Queensland*, Lyons J considered whether UQ had jurisdiction to hear an allegation of sexual misconduct, which amounted to an allegation of criminal sexual assault.⁵ Lyons J’s decision turned on her interpretation of the UQ Sexual Misconduct Policy, which she held denied the University jurisdiction in these circumstances. However, some of her reasoning reflected a deeper criticism of the capacity of university disciplinary boards to adjudicate accusations of criminal sexual misconduct more generally.⁶ Lyons J effectively advocated for a ‘police matter’ approach, whereby the allegations of sexual assault are dealt with by the criminal justice system alone and the University may only take disciplinary action where there is a criminal finding of guilt. This interpretation has since been overturned by the Queensland Court of Appeal in a judgment written by McMurdo JA with Mullins JA, with Boddice J concurring.⁷

In the wake of this litigation, this article seeks, first, to illuminate the state of the law in relation to UQ’s jurisdiction in sexual assault matters and, secondly, to reflect on the deeper question of whether UQ and its residential colleges should adopt the police matter approach. An incidental effect of this analysis will be the exploration of the validity of Lyons J’s reasoning, in terms of both law and human rights implications. While some aspects of this response are specific to the

³ End Rape on Campus Australia, ‘Connecting the Dots: Understanding Sexual Assault in Australian University Communities’, Submission to the Australian Human Rights Commission, *University Sexual Harassment Project* (January 2017) 30 (‘Connecting the Dots’), citing @SAlexander_UTS (Shirley Alexander) (Twitter, 9 October 2019, 8:21pm AEST).

⁴ Bettina Ardnt, ‘Campus Courts a Degree too Far’, *The Australian* (Online, 7 November 2019) <https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fcommentary%2Fcampus-courts-a-degree-too-far%2Fnewsstory%2F82e23fc5ff7756cabb838db832d401f7&mementype=anonymous&mode=premium>; Bettina Ardnt, ‘Closing down Campus Kangaroo Courts’, *bettinaardnt.com.au*, (Web Page) <<https://www.bettinaardnt.com.au/kangaroo-courts/>>.

⁵ *Y v University of Queensland* [2019] QSC 282.

⁶ *Ibid* [41], [65]–[66], [67]–[68], [70].

⁷ *University of Queensland v Y* [2020] QCA 216.

policies of UQ and its residential colleges, much of it is also relevant to universities across Australia, which may be uncertain about the limitations of their disciplinary jurisdiction and the nature of their responsibilities as public institutions.

In order to address the latter question, and to weigh the competing interests of those affected, this article will employ Martha Fineman's theory of vulnerability. Fineman's theory centres around 'the vulnerable subject' and the role of public entities in alleviating that vulnerability.⁸ It fundamentally rejects the liberal conception of the legal subject as an independent and self-interested individual and instead argues that the defining characteristic of the human condition is our shared vulnerability.⁹ She argues that human beings have evolved to live in societies in order to alleviate our vulnerability through the accumulation of resources, which can include physical resources, like food, but also extends to human, social, ecological and existential resources.¹⁰ The purpose of the state, and its public institutions, is to provide its subjects with resources to help them to build resilience and alleviate their vulnerability.¹¹

In applying this theory, the starting point for analysis is to understand all parties as vulnerable. A common problem with the public discourse on sexual assault is that commentators tend to acknowledge the vulnerability of one gendered subject to the exclusion of the other. Historically, the courts have treated the accused, who is typically male, as the vulnerable subject in the context of sexual assault allegations because sexual offences were commonly understood to be 'very easy to fabricate, but difficult to refute'.¹² In the era of '#Me Too', the idea of the 'vulnerable male subject' has been strongly rejected and replaced with a growing recognition of the vulnerability of women who are disproportionately the victims of sexual assault. According to Fineman's theory, the vulnerable parties in the present context obviously include those who are falsely accused of sexual assault, as well as the survivors of sexual assault and the general student body. Fineman also extends the status of vulnerability to institutions that are

⁸ Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 132 ('Vulnerability and Inevitable Inequality').

⁹ Ibid 142–3. For the traditional liberal conception of the legal subject see John Locke, *Two Treatises of Government* (Hackett Published Company, first published 1632–1704, 2016 ed); Ngaire Naffine, 'Sexing the Subject of Law' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 18.

¹⁰ Fineman (n 8) 146–8.

¹¹ Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' in Martha Albertson Fineman (ed), *Transcending Boundaries of Law: Generations of Feminism and Legal Theory* (Taylor & Francis Group, 2010) 161, 163–6 ('The Vulnerable Subject').

¹² *Kelleher v The Queen* (1974) 131 CLR 534, 543 (Barwick CJ), 553 (Gibbs J), 559 (Mason J).

vulnerable to external forces, including economic loss.¹³ On this basis, this article also considers the vulnerability of universities and residential colleges.

While the culture wars continue over who is vulnerable and requires our protection, Fineman's theory avoids the need to engage in this war by providing a theoretical foundation upon which to consider and weigh the vulnerabilities experienced by all parties. This is similar to the human rights approach, which considers the human rights of both offenders and victims and is more commonly employed in a criminal law context.¹⁴ Where Fineman's analysis deviates from the human rights approach is in its understanding of the proper function of the state. Under a human rights approach, the proper function of the state is the 'prevention and reduction of harm', while showing 'respect for the (alleged) offender as a rational citizen'.¹⁵ In contrast, according to Fineman's theory, the 'state' is conceptualised more expansively to include public institutions, such as universities, and its proper function is not just to prevent or reduce harm to its subjects but to actively provide them with the resources they need to alleviate their particular vulnerabilities.¹⁶ Fineman's theory of vulnerability therefore affords a useful analytical lens through which to assess the approaches taken in response to sexual assault allegations by public institutions, such as universities, which have the capacity to be more interventionist within their communities than the more traditional branches of government.

This article argues that all students are fundamentally vulnerable but that vulnerability is not equally shared. The *Change the Course* report demonstrates that sexual assault is a prevalent and heavily gendered issue, with women being three times more likely to experience sexual assault than men.¹⁷ If UQ or its colleges took a non-interventionist stance and adopted a police matter approach, they would facilitate this inequality on their campuses and provide their female students with a less safe learning environment than their male peers. As a public institution, UQ has a responsibility to be responsive to the vulnerabilities of its students and use its resources to address instances of inequality.¹⁸ While a police matter policy would almost completely alleviate a student's vulnerability to false allegations or false findings of sexual misconduct, it would also exacerbate the vulnerability of survivors of sexual assault, the student body generally and,

¹³ Fineman, 'The Vulnerable Subject' (n 11) 173.

¹⁴ Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 5th ed, 2019).

¹⁵ *Ibid*, 50.

¹⁶ Fineman, 'The Vulnerable Subject' (n 11) 163–6.

¹⁷ *Change the Course* (n 1) 49.

¹⁸ Fineman, 'Vulnerability and Inevitable Inequality' (n 8) 148–9.

indeed, UQ and its colleges. For these reasons, this article argues that a police matter approach is not a responsible one to pursue.¹⁹

II CURRENT POLICY POSITIONS AND LEGAL LIMITATIONS

A *The Findings in Y v University of Queensland*

In *Y v University of Queensland*, the finding that UQ did not have jurisdiction turned on Lyons J's interpretation of cl 4.4 of UQ's Sexual Misconduct Policy, which reads:

The University acknowledges that Sexual Misconduct may include criminal behaviours and may be unlawful. The University does not have jurisdiction over criminal acts but can take action in respect of breaches of its rules, policies and procedures.

Lyons J held that the effect of this clause was to renounce any criminal jurisdiction, meaning that where an accusation amounts to criminal conduct, UQ has no jurisdiction to commence disciplinary proceedings unless the conduct is 'proven', either by a guilty plea or by a conviction.²⁰ On appeal, McMurdo JA disagreed with this interpretation and characterised cl 4.4 as 'an acknowledgement by the University that it has no jurisdiction to determine criminal responsibility, and that it would not make findings in the terms of criminal responsibility in the course of deciding whether there had been certain breaches of its rules, policies and procedures'.²¹

As this case turned on a point of interpretation, there is little discussion about the legality of the jurisdictional question. The key legal questions that remain may be summarised as follows:

1. Do disciplinary boards have the power to hear allegations of misconduct that also amount to a criminal offence?
2. If yes to 1, does this give rise to issues of double jeopardy or estoppel?
3. Do disciplinary boards have the power to conduct disciplinary proceedings concurrently with criminal proceedings?

¹⁹ Unlike UQ, residential colleges are not strictly 'public institutions'. The colleges form separate entities from UQ and operate as private businesses using their own sexual misconduct policies and procedures. Despite their operation as a private business, I argue that colleges should be included in my analysis by extension because they are part of a set of linked institutions, which allow UQ to deliver its education services. See Fineman, 'The Vulnerable Subject' (n 11) 164.

²⁰ *Y v University of Queensland* (n 5) [67]–[68].

²¹ *University of Queensland v Y* (n 7) [86].

B *Do Disciplinary Boards Have the Power to Hear Allegations of Misconduct that also Amount to a Criminal Offence?*

The leading Australian authority on the issue of whether disciplinary boards have the power to hear allegations of misconduct that also amount to a criminal offence is *Australian Communications and Media Authority v Today FM Pty Ltd* ('*Today FM*').²² That case concerned the question of whether the Authority had the power to cancel a broadcasting licence on the basis of its belief that there had been 'a commission of a criminal offence', despite the fact that no criminal action was ever brought against the licensee. The High Court held that inquiries take their legal character from the purpose for which they are undertaken and, where they are undertaken for a disciplinary purpose, an inquiry can have the power to form and express an opinion about an existing legal right and obligation, including whether alleged conduct amounts to a criminal offence.²³ This was thought to be no different to a civil court determining whether an offence had been committed for the purposes of making a civil award for damages.²⁴ This was not held to be an unconstitutional exercise of judicial power because the Authority did not conclusively resolve any controversy between the two parties, the Authority's view on whether an offence had been committed would have no legal affect, and the cancelling or suspending of a broadcasting licence was not an imposition of punishment for the commission of an offence against the state.²⁵

University disciplinary boards would not need to go as far as the Authority in *Today FM* because they only need to consider whether an alleged act is a breach of the University's policies, not whether that alleged act amounts to a criminal offence. While the substantive content of the Sexual Misconduct Policy may overlap with the criminal law, they remain entirely separate standards.

C *Do Issues of Double Jeopardy or Estoppel Arise?*

Where the same set of facts can give rise to disciplinary and criminal proceedings, judicial precedent indicates that the principles of double jeopardy and estoppel are not engaged because the proceedings are distinct processes, which serve different purposes. In *Purnell v Medical Board of Queensland*, Mackenzie J characterised disciplinary proceedings as being 'not criminal in nature. Nor are

²² *Australian Communications Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7 ('*Today FM*').

²³ *Ibid* [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ), [64] (Gageler J).

²⁴ *Ibid* [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

²⁵ *Ibid* [58]–[59] (French CJ, Hayne, Kiefel, Bell and Keane JJ), [65] (Gageler J).

they proceedings by way of punishment.²⁶ In *Hardcastle v Commissioner of Police*, which concerned disciplinary proceedings taken against a member of the Australian Federal Police ('AFP') who was accused of assault, the Court held that disciplinary proceedings are for the purpose of protecting the public, maintaining proper standards, and protecting the reputation of the AFP.²⁷ Similarly, in *ML v Australian Securities and Investment Commission* ('ML v ASIC'), the Court characterised proceedings that ASIC had brought against ML to the Companies Auditors and Liquidators Disciplinary Board seeking the cancellation of ML's registration as a liquidator as 'disciplinary' rather than 'civil' because their purpose was to protect the public interest.²⁸ This was echoed in *Council of the Law Society of the ACT v Bandrage*, where it was held that s 24 of the *Human Rights Act 2004* (ACT), which states that a person cannot be tried or punished for an offence more than once, does not preclude concurrent disciplinary and criminal proceedings.²⁹

The common law also holds that an acquittal at criminal trial cannot give rise to an estoppel in favour of the accused to prevent disciplinary proceedings. In *Helton v Allen*, the Court held that acquittal for murder did not act as an estoppel for a civil action on the grounds of unlawful killing and, furthermore, the acquittal was not admissible as an evidentiary fact.³⁰ The issue of estoppel was also raised in *Re Seidler*,³¹ where a hospital employee was charged with stealing, but the Crown entered a *nolle prosequi* and criminal proceedings were abandoned because there was insufficient evidence to proceed. There the Court held that disciplinary and criminal proceedings were different in nature and decided on different standards of proof and, in any case, the entry of *nolle prosequi* did not preclude the Crown from prosecuting in the future and could not be said to bar the bringing of disciplinary proceedings.³² This approach is also evident in the United States, as the Columbia University Gender-based Misconduct Policy reads: 'University and criminal justice systems work independently from one another ... law enforcement authorities do not determine whether a violation of this policy has occurred.'³³

²⁶ *Purnell v Medical Board of Queensland* [1999] 1 Qd R 362, 383 ('Purnell').

²⁷ *Hardcastle v Commissioner of Police* (1984) 53 ALR 593, 597 ('Hardcastle').

²⁸ *ML v Australian Securities Investments Commission* [2013] NSWSC 283, [50] ('ML v ASIC').

²⁹ [2019] ACTSCFC 1, [123]–[125].

³⁰ (1940) CLR 691, 710.

³¹ [1986] 1 Qd R 486.

³² *Ibid.* See also *Criminal Code 1899* (Qld) s 563.

³³ Andrea Durbach and Kristen Keith, 'On Safe Ground: Strengthening Australian University Responses to Sexual Assault and Harassment' (Report, August 2017) 90 <https://www.humanrights.unsw.edu.au/sites/default/files/inline-files/AHR0002_On_Safe_Ground_Good_Practice_Guide_online.pdf> ('On Safe Ground').

D *Do Disciplinary Boards Have the Power to Conduct Disciplinary Proceedings Concurrently with Criminal Proceedings?*

There is no strict rule that prevents criminal and disciplinary proceedings based on the same facts from being run concurrently, although courts in criminal cases retain the power to disrupt the disciplinary proceedings under some circumstances. In the English case of *North West Anglia NHS Foundation v Gregg*,³⁴ it was held that an employer does not need to wait for the conclusion of disciplinary proceedings to commence internal disciplinary proceedings. However, where these proceedings are pursued concurrently with criminal proceedings, the disciplinary proceedings can be disrupted where it is thought that they may give rise to ‘real (and not merely notional danger) that there would be a miscarriage of justice’.³⁵ This position is reflected in Australian law. For example, in *Baker v Commissioner of Federal Police*,³⁶ it was held that a government agency can dismiss an employee in relation to conduct subject to incomplete criminal proceedings, although prejudice to the employee is a factor to be considered by the employer.³⁷

E *Summary of the Current Law*

In summary, there appears to be no legal reason why universities would not have the jurisdiction to hear allegations of misconduct that might amount to violations of criminal law. The courts have consistently held that disciplinary, criminal and civil proceedings serve separate functions, apply different standards, require different standards of proof, and can operate concurrently. While disciplinary proceedings determine whether there has been a breach of policy and generally serve a wider public interest, criminal proceedings determine whether there has been a breach of criminal law via the adversarial criminal process.³⁸ Even where an accused is acquitted at criminal law, this does not prevent a university from finding that the same alleged conduct amounts to a violation of university policy.

It is, therefore, clearly within the power of UQ to conduct disciplinary proceedings independently from criminal proceedings. The question that remains is whether the University should pursue this policy in the light of the concerns

³⁴ *North West Anglia NHS Foundation v Gregg* [2019] EWCA Civ 387.

³⁵ *Ibid* [107].

³⁶ *Baker v Commissioner of Federal Police* [2000] FCA 1339 (‘Baker’).

³⁷ *Ibid* [30].

³⁸ *On Safe Ground* (n 33) 89. See also Universities UK, *Guidance for Higher Education Institutions: How to Handle Alleged Student Misconduct which may also Constitute a Criminal Offence* (October 2016) 4 (‘Zellick Guidelines’).

raised by Lyons J as to the lack of procedural fairness that may be afforded to students accused of sexual misconduct and the absence of legal protections that an accused receives under the criminal law.³⁹ In the following Parts, this article applies Martha Fineman's theory of vulnerability in order to outline the ways in which the parties affected by these policies are vulnerable and consider whether a police matter policy, such as that put forward in *Y v University of Queensland*, would exacerbate or remedy the vulnerabilities of the parties involved.

III VULNERABILITIES OF THE ACCUSED

A *Vulnerability to False Allegations*

Advocates for the police matter approach argue that university disciplinary proceedings leave students, and particularly male students, vulnerable to serious disciplinary consequences as a result of false allegations of sexual assault.⁴⁰

Being falsely accused of sexual assault is likely to induce stress, as well as other negative mental health consequences, which can take their toll on the student's capacity to work and study. UQ offers counselling to any student accused of sexual misconduct through its Sexual Misconduct Support Unit ('SMSU'). However, accused students rarely access this service.⁴¹ The accused may also be subject to 'reasonable measures' until the disciplinary proceedings are concluded.⁴² This was an issue in *X v University of Western Sydney*,⁴³ where a student accused of sexual assault was suspended as an interim measure. However, the University failed to provide him with an opportunity to respond to the allegations and did not properly consider the impact that the suspension might have on his studies. Under pt 8.3 of the UQ Sexual Misconduct Procedures, the 'reasonable measures' appear to be arrangements that the complainant can make

³⁹ *Y v University of Queensland* (n 5) [65], [66].

⁴⁰ See Suellen Murray and Melanie Heenan, *Study of Reported Rapes in Victoria 2000–2003* (2006) Office of Women's Policy, Department for Victorian Communities. This study looked at 850 allegations of rape over the three-year period and calculated that around 2.1 per cent of reported rapes were classified as 'false reports'. See also David Lisak et al, 'False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases' (2010) 16(12) *Violence Against Women* 1318. This study considered 136 allegations of sexual assault reported at a major northeastern university in the United States over a ten-year period and, in the context of similar research, concluded that false reporting rates are likely between two and ten per cent.

⁴¹ Kate Jenkins (n 2) 40.

⁴² University of Queensland, 'Sexual Misconduct Policy – Guidelines', *UQ Policy and Procedures Library* (27 October 2017) 8.3 <<https://ppl.app.uq.edu.au/content/1.50.13-sexual-misconduct>>.

⁴³ [2013] NSWSC 1280; [No 2] [2013] NSWSC 1318; [No 3] [2013] NSWSC 1329; [No 4] [2013] NSWSC 1334; [2014] NSWSC 82.

with UQ, rather than measures that can be directly enforced against the accused, for example allowing changes to the complainant's class timetable in order to avoid the accused student. There is no specific mention of 'suspension' or any other measure that might be imposed upon the accused. However, there is a catch-all clause enabling UQ to take 'other safety measures', and it seems likely that suspensions might be imposed on this basis in extreme cases. If the University were to notify potential placements required to complete practical components of some courses, the accused may also face prejudice from institutions, which may refuse to host them.⁴⁴ However, the UQ Sexual Misconduct — Procedures does not state that potential placements will be informed. Hence, such refusals are unlikely to occur in the absence of some external mandatory reporting requirement, or if the 'reasonable measures' in place had some impact upon the placement.⁴⁵

UQ disciplinary proceedings are also entirely confidential, and so there is little risk that a false allegation will result in widespread damage to a student's reputation.⁴⁶ While the complainant must be notified of the outcome of the proceedings, they will not be given details of the penalty imposed. It is possible that the police matter approach from *Y v University of Queensland* would encourage allegations to be brought publicly through the criminal justice system, exacerbating the accused's vulnerability to reputational damage.

B Vulnerability to False Findings and False Conviction

Disciplinary proceedings offer fewer protections to an accused student than do criminal laws and procedures, and are therefore more vulnerable to a false finding that sexual misconduct occurred. In *Y v University of Queensland*, Lyons J agreed with the submission that 'it would be a startling result if academics and students who are not required to have any legal training could decide allegations of the most serious kind without any of the protections of the criminal law'.⁴⁷ Her Honour also noted that, under the criminal law, accused persons are awarded significant protections that are not awarded in disciplinary proceedings.⁴⁸ If UQ finds that a student has committed sexual assault, this would be considered a 'level 3' breach of the UQ Student Integrity and Misconduct Policy, the penalty for

⁴⁴ *X v University of Western Sydney* [No 3] (n 43) [83]–[84].

⁴⁵ University of Queensland, 'Sexual Misconduct — Procedures', *UQ Policy and Procedures Library* (27 October 2017) pt 6 <<https://ppl.app.uq.edu.au/content/1.50.13-sexual-misconduct>>.

⁴⁶ Ibid pt 9.

⁴⁷ *Y v University of Queensland* (n 5) [70].

⁴⁸ Ibid [65].

which can be up to five year suspension or expulsion.⁴⁹ This would obviously have a seriously detrimental effect on the student's studies. Similarly, it should be considered that not all accused students will be affected in the same way. In her theory, Fineman distinguishes between the 'embodied' differences, which are static and exist between groups of people, and 'embedded' differences, which exist within those groups.⁵⁰ International students, for example, rely on their enrolment at the University for their student visa and students who receive welfare payments could stand to lose those payments. Where disciplinary proceedings are allowed to operate concurrently with criminal proceedings, the disciplinary proceedings may also prejudice the accused in their criminal trial. This could make the accused student more vulnerable to a false conviction, which carries more severe consequences.

The main differences between disciplinary proceedings and criminal proceedings are as follows:

1. Disciplinary proceedings employ a lower standard of proof than criminal proceedings and lack formal rules of evidence.
2. Students are less likely to have legal representation in disciplinary proceedings and may be prejudiced if they exercise their right to silence.
3. Disciplinary proceedings generally have a more limited review process than criminal proceedings.

1 *Standard of Proof and Rules of Evidence*

Unlike criminal proceedings, which require accusations to be proved 'beyond reasonable doubt', the standard of proof in disciplinary proceedings is only on 'the balance of probabilities'. Historically, where allegations of misconduct amounted to criminal allegations, disciplinary boards and tribunals were expected to apply the criminal standard of proof. Since the 1990 case of *Adamson v Queensland Law Society*, this position was changed when the Court held that disciplinary proceedings brought before a professional tribunal could not be regarded as criminal proceedings and that, consequently, the civil standard of proof applied.⁵¹ This was upheld in *Purnell v Medical Board of Queensland*, where a medical professional was accused of sexually assaulting multiple women on

⁴⁹ University of Queensland, 'Student Integrity and Misconduct Policy', *UQ Policies and Procedures Library* (10 July 2018) 8.9(c) <<https://ppl.app.uq.edu.au/content/3.60.04-student-integrity-and-misconduct>> ('UQ Student Integrity and Misconduct Policy').

⁵⁰ Fineman, 'Vulnerability and Inevitable Inequality' (n 8) 144–5.

⁵¹ *Adamson v Queensland Law Society* [1990] 1 Qd R 498, 505–6.

separate occasions at his medical practice and the Court held that disciplinary proceedings are distinct in nature from criminal proceedings and should operate under a lower standard of proof without applying criminal laws of evidence.⁵²

Without the criminal laws of evidence, there are few safeguards in place to protect accused students from having highly prejudicial evidence brought against them. This might include character evidence, propensity evidence or ‘hearsay evidence’, all of which are only admissible in criminal courts under certain circumstances.⁵³ Nonetheless, any evidence adduced would still be required to be logical and probative in order to support the conclusions.⁵⁴ The UQ Student Integrity and Misconduct Policy explicitly states that ‘the decision-maker must make a decision based on the finding of facts that are established on sound reasoning and relevant evidence’.⁵⁵

There is also precedent to suggest that the *Briginshaw* test applies to disciplinary proceedings, at least in relation to misconduct in legal and health professions.⁵⁶ This means that where the allegations made are serious in nature, a high degree of certainty is required before they can make a finding against the accused.⁵⁷ If these principles were to extend to university disciplinary proceedings for allegations of sexual assault, the disciplinary board would have to be satisfied to a higher degree of certainty than they would be if the accusation were less serious.

2 *Legal Representation and the Right to Silence*

In Australia, there is no common-law right to legal representation at the public’s expense at criminal trial. However, the judge in each case has the power to stay proceedings where the accused is unrepresented and this would result in an unfair trial.⁵⁸ Accused persons do, however, have the right to remain silent.⁵⁹ In disciplinary hearings, students may be allowed legal representation in certain circumstances, including where the charge or potential penalties are very serious.⁶⁰ They also have the right to remain silent. However, failure to present a

⁵² *Purnell* (n 26) 368–9, 383–5.

⁵³ See *Evidence Act 1977* (Qld) s 15, ss 83–103; *Makin v Attorney General for New South Wales* [1984] AC 57; *Pfennig v The Queen* (1995) 182 CLR 461; *R v Hughes* [2012] QCA 208; *R v Lester* [2008] QCA 354, [43]–[80]; *R v Hytch* [2000] QCA 315; *Baker v The Queen* [2012] HCA 27.

⁵⁴ Robert Lindsay, ‘Disciplinary Hearings: What Is to be Done?’ (2015) 80 (May) *AIAL Forum* 77, 83.

⁵⁵ UQ Student Integrity and Misconduct Policy (n 49), 8.6.

⁵⁶ Hon Justice PE Smith, ‘*Briginshaw* and Disciplinary Proceedings’ (Paper delivered to the Queensland Law Society, 18 June 2019).

⁵⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁵⁸ *Human Rights Act 2019* (Qld) s 32(2)(f); *Dietrich v R* (1992) 177 CLR 292.

⁵⁹ *Police Powers and Responsibilities Act 2000* (Qld) s 397.

⁶⁰ *R v Secretary of State for the Home Department ex parte Tarrant* [1984] 1 All ER 799, 816.

full defence when asked by the disciplinary board might practically prejudice the accused.⁶¹ Given that students are unlikely to be legally represented in disciplinary proceedings, this could cause the accused to incriminate themselves prior to the conclusion of criminal proceedings. If this were to occur, then the criminal court has the power to stay proceedings on a discretionary basis, although the risk of self-incrimination alone is not sufficient to warrant a stay.⁶² This approach has been criticised for not giving sufficient weight to the prejudice created by concurrent proceedings and the primacy of criminal proceedings in our legal system.⁶³ In *ML v ASIC*, it was argued that if the accused were to disclose his defence during disciplinary proceedings, then his defence strategy would become known prior to his criminal trial and this would allow others to modify or falsify evidence to respond to his defence.⁶⁴ The judge in that case, however, noted that this can also be an advantage because it also gives the accused an opportunity to practice cross-examining witnesses.⁶⁵

The prejudice caused to the accused is somewhat mitigated by the fact that university disciplinary proceedings are confidential and may be precluded from being introduced as evidence at criminal trial because of the unfair prejudice that it would cause. It should also be noted that the trial judge can direct the jury not to consider material that is not before the court and that the trial judge has the capacity to stay a criminal trial, although this power would be reserved for extremely rare cases where the prejudice against the accused is so great that there is no possibility for a fair trial.⁶⁶

3 *The Review Process*

Once the disciplinary decision of the relevant university body is handed down, the accused has limited avenues for review. The UQ Student Integrity and Misconduct Policy allows for the merits of the decision to be reviewed via an internal process, but only where the student can raise new information that has come to light since the making of the decision, where the decision was procedurally incorrect or unfair, or where the penalty imposed was disproportionate.⁶⁷

Disciplinary action by a university does attract the procedural protection of administrative law, most notably the right to procedural fairness. In Queensland, this means that an aggrieved student can have a decision against them reviewed

⁶¹ *Baker* (n 36) [27]–[28].

⁶² *McMahon v Gould* (1982) 7 ACLR 202.

⁶³ *Baker* (n 36) [34].

⁶⁴ *ML v ASIC* (n 28) [38].

⁶⁵ *Ibid* [55].

⁶⁶ *Ibid* [57]–[59]; *Jago v District Court of New South Wales* (1989) 168 CLR 23, 34, 75.

⁶⁷ UQ Student Integrity and Misconduct Policy (n 49) 9.1.3.

on the basis of any of the grounds contained in s 20(2) of the *Judicial Review Act 1991* (Qld). This means that universities need to ensure that their policies include certain procedural safeguards. For example, the accused student must receive fair notification of the accusations against them, must be allowed to respond to the accusations during a hearing,⁶⁸ and must have access to the documentary evidence that is ‘credible, relevant and significant to the decision to be made’⁶⁹ or that may be prejudicial.⁷⁰ In a study conducted by Bruce Lindsay into the perceptions and observations of students and staff of university disciplinary procedures, it was found that while there was general satisfaction with the particulars provided to accused students, issues did arise with the disclosure of evidence.⁷¹

Unlike courts, university decision-makers are not generally obliged to provide written reasons for their decisions.⁷² The absence of written reasons can lead to lower quality decisions, which are not as well reasoned and harder to scrutinise.⁷³ It may also make it difficult to determine whether a decision was affected by actual or apprehended bias by the decision-maker, something that was in issue in *X v University of Western Sydney*. In that case, the University’s decision-makers made multiple submissions that, even if they had provided the accused with proper details of the complaint made against him, his response would not have changed their minds with regard to suspending him. These submissions suggest that the University’s decision-makers did not approach their decision without bias, with honesty and in good faith.⁷⁴

The provision of written reasons would also protect accused students from unreasonableness in decision-making. Decisions that lack an evidentiary intelligible justification, including those that are a ‘disproportionate exercise of an administrative decision...’, are considered ‘unreasonable’ and may be judicially reviewed on those grounds.⁷⁵ Despite the lack of legal obligation to provide written reasons, there is clearly a strong case that doing so is in the best interests of natural justice.⁷⁶

⁶⁸ *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1.

⁶⁹ *Kiao v West* (1985) 159 CLR 550, 629, cited in Bruce Lindsay, ‘University Discipline and the “Higher Education Crisis”: Student Advocates’ Experiences and Perceptions of Quasi-Judicial Decision Making in the University Sector’ (2009) 31(4) *Journal of Higher Education Policy and Management* 327, 331.

⁷⁰ *Kanda v Government of Malaya* [1962] AC 322, cited in Lindsay (n 69) 331.

⁷¹ Lindsay (n 69) 330–1.

⁷² *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

⁷³ Lindsay (n 69) 331.

⁷⁴ *X v University of Western Sydney* [No 3] (n 43) [86]–[87].

⁷⁵ Lindsay (n 54) 81.

⁷⁶ *Ibid* 83.

Bringing a judicial review case, however, can be very expensive, and it cannot be expected that all accused students will have the financial resources to assert their rights in this way. In addition, it should be considered that if the university fails to comply with their own policies in the process of decision-making, this does not necessarily supply grounds for the courts to remit or quash a disciplinary decision. This is because university policies do not have the force of law, and so failing to comply with them is not 'an error in law'.⁷⁷

C *Summary*

The main concern for students who are falsely accused of sexual assault is the adverse consequences they may face if the accusation results in a false finding by the disciplinary board of sexual misconduct. Disciplinary proceedings do not offer the same protections to an accused that are offered under criminal law, and a false finding of sexual misconduct can result in long-term suspension or expulsion. The level of procedural protection differs depending on the policies of the university in question. At the bare minimum, accused students should receive a fair hearing, notice of the accusation in sufficient detail and a copy of the relevant evidence. While there is no obligation to provide written reasons, this would be strongly encouraged, as it provides an important procedural safeguard to protect the accused from bias and unreasonableness by the decision-makers. Failure to provide these procedural safeguards may mean that the accused would be able to access remedies under s 30 of the *Judicial Review Act 1991* (Qld), which remedies include the quashing or remitting of the decision. This legal protection, however, will typically only be available to students with the financial resources to access proper legal advice and representation.

It is also important to bear in mind that these vulnerabilities are not unique to students accused of sexual misconduct. Students are equally as vulnerable to being falsely accused of any other kind of crime and face the same procedural disadvantages in their disciplinary proceedings. If the police matter approach is taken with regard to sexual offences, then it should also apply to all other forms of criminal conduct.

⁷⁷ *X v University of Western Sydney* [No 4] (n 43) [266].

IV VULNERABILITIES OF SEXUAL ASSAULT SURVIVORS

A *Vulnerability to the Failures of the Criminal Justice System*

Sexual-assault survivors under a police matter approach would have to rely entirely on the criminal justice system in order to obtain a meaningful remedy, and would be left vulnerable to the efficacy issues that plague that system.

First, survivors may choose not to take criminal action. The Change the Course survey found that only 43 per cent of those who made a formal report of sexual assault to their university stated that they also made a report to the police.⁷⁸ Survivors may decide not to undergo criminal proceedings for a variety of reasons, including the public nature of those proceedings and the significant risk of re-traumatisation, particularly during cross-examination.⁷⁹

Secondly, where the matter is reported to the police, there is no guarantee that it will be taken to trial. This was considered in *Lewis v Prosthetists and Orthotists Board*,⁸⁰ which involved disciplinary proceedings against an orthotist who was accused of maintaining an inappropriate sexual relationship with a patient and having sexual intercourse with her without her consent. While criminal proceedings were contemplated, they did not ultimately go ahead, although the patient did bring a civil action for rape. The Court acknowledged that even where grounds might exist for a criminal charge, there are a range of reasons why the decision might be made not to prosecute, and that it ‘would be absurd if that position deprived a disciplinary committee of the jurisdiction to look into the matter’.⁸¹

Thirdly, even where criminal proceedings are undertaken, conviction rates for sexual assault in Australia are very low and have declined in recent years.⁸² The Connecting the Dots Report prepared by End Rape on Campus Australia quoted Amy Chmielewski, an associate attorney in the United States, who stated: ‘Often, the educational community provides the last meaningful chance to recognize a victim's injury, censure an offender's conduct, and communicate disapproval of sexual assault in general, with the possible result of deterring similar future conduct.’⁸³

⁷⁸ Change the Course (n 1) 138.

⁷⁹ Connecting the Dots (n 3) 32; See also Haley Clark, “‘What is the Justice System Willing to Offer?’ Understanding Sexual Assault Victim/Survivors’ Criminal Justice Needs’ [2010] *Family Matters* 28. [2001] EWCA Civ 837.

⁸⁰ Ibid, [19].

⁸¹ Ibid, [19].

⁸² Connecting the Dots (n 3) 32.

⁸³ Ibid, citing Amy Chmielewski ‘Defending the Preponderance of Evidence Standard in College Adjudications of Sexual Assault’ [2013] 1 *BYU Education and Law Journal* 143, 170.

Finally, sexual assault survivors who do pursue criminal charges are vulnerable to the additional trauma inflicted by the criminal justice process itself. Extensive literature has been written about the re-traumatisation of sexual assault victims during the criminal justice process. While in-depth discussion of this literature goes beyond the scope of this article, in broad terms it indicates that poor treatment by police, as well as the process of giving evidence and being cross-examined on that evidence, can cause further psychological harm to survivors of sexual assault.⁸⁴ Moreover, many sexual assault trials will turn on the issue of whether the alleged victim consented to the contact, meaning that 'the victim's character is put on trial in ways that are unparalleled in other areas of the law'.⁸⁵

If universities are unable to offer meaningful remedies, survivors are even less likely to come forward to disclose their experiences of sexual violence. According to the Change the Course report, 87 per cent of sexual assault victims did not make a formal report, and 79 per cent did not seek any support or assistance from their university at all.⁸⁶ Submissions to the Change the Course report identified that one reason for this is that victims do not believe that their university will take effective action if a formal report is made or help is sought.⁸⁷ If universities were to implement a police matter approach, student confidence in the effectiveness of their universities response would fall and reporting rates would continue to remain low.

⁸⁴ Kerstin Braun, 'Legal Representation for Sexual Assault Victims — Possibilities for Law Reform' (2014) 25(3) *Current Issues in Criminal Justice* 819, 821, citing: J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2005) 297; JL Herman, 'Justice from the Victims' Perspective' (2005) 11(5) *Violence Against Women* 571, 574; L Ellison, *The Adversarial Process and Vulnerable Witness* (Oxford University Press, 2001) 16; J Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' [2003] 14 *Women Against Violence: An Australian Feminist Journal* 17; P Resick 'Psychological Effects of Victimisation: Implications for the Criminal Justice System' (1987) 33(4) *Crime & Delinquency* 468, 475; Australian Law Reform Commission, *Family Violence — A National Legal Response* (Report No 114, 2010); Haley Clark (n 79) 28, 31–2; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 356–62; Mary Heath, 'Women and Criminal Law: Rape' in Patricia Easteal (ed), *Women and the Law in Australia* (Lexis Nexis Butterworths, 2010) 88, 88–92.

⁸⁵ Christine Morely, *Practising Critical Reflection to Develop Emancipatory Change: Challenging the Legal Response to Sexual Assault* (Taylor & Francis Group, 2014) 29, citing New South Wales Ministry for the Status and Advancement of Women, *Sexual Assault Phone-In Report: the NSW Government Response* (Report, 1993).

⁸⁶ Change the Course (n 1) 120.

⁸⁷ Ibid 145–6.

B *Vulnerability to Educational Cost*

Bringing an allegation of sexual assault to criminal trial would also take a serious educational toll on the survivors and, as was noted in an assessment of university responses to sexual violence in Canada, it is ‘women [who] bear the educational cost of men’s sexual violence’.⁸⁸ Survivors of sexual assault also have an immediate need to be safe on campus, and the criminal justice system is not well placed to meet these immediate needs, as matters can take up to several years to come to trial. The criminal law clearly cannot respond with the speed or redress necessary to allow the survivor to complete their education.⁸⁹ The complainant can request ‘reasonable measures’ to be taken by their university to ensure that they still feel safe to attend class, such as adjusting timetable amendments to ensure that the complainant and the accused are not in classes together.⁹⁰ However, this arrangement may not be possible in some courses — a difficulty that arose in *X v University of Western Sydney [No 3]*.⁹¹

C *Vulnerability to Ongoing Trauma*

UQ provides survivors of sexual assault with multiple resources through which they can build resilience. The UQ policy, and many of the college policies, state that they aim to be ‘trauma informed’ in order to reduce the emotional and psychological impact of the process on complainants. Complainants can access the counselling services at the Sexual Misconduct Support Unit, which offers counsellors who are specifically trained to help trauma victims and are more immediately available than the University’s general counsellors.⁹² The University also offers academic support, which can include extensions and special consideration, and has introduced a ‘First Responders Network’, which helps students to identify which staff have received the proper training in order to receive a disclosure regarding sexual violence.⁹³

D *Summary*

If UQ were to take a police matter approach, and thus only intervene in cases where there is a criminal conviction, it would inherit the efficacy issues that

⁸⁸ Elizabeth Sheehy and Daphne Gilbert, ‘Responding to Sexual Assault on Campus: What can Canadian Universities Learn from US Law and Policy?’ in Elizabeth Quinlan et al (eds), *Sexual Violence at Canadian Universities* (Wilfrid Laurier University Press, 2017) 291, 294.

⁸⁹ Ibid.

⁹⁰ University of Queensland, ‘Sexual Misconduct — Procedures’ (n 45) pt 8.

⁹¹ *X v University of Western Sydney [No 3]* (n 43) [16].

⁹² Kate Jenkins (n 2) 40.

⁹³ Ibid.

plague the criminal justice system's handling of sexual assault matters, including low reporting rates, low prosecution rates and low conviction rates. This would increase the educational cost that survivors must bear when UQ is not able to take immediate disciplinary action in response to an allegation. This is somewhat remedied, however, by resources provided by UQ, such as the provision of 'reasonable measures', the SMSU and the First Responders Network.

Furthermore, if the police matter approach were taken it would have to be applied to all criminal conduct and not just sexual offences. Otherwise, UQ or its colleges would be endorsing a double standard.

VI VULNERABILITIES OF THE UNIVERSITY AND COLLEGES

If UQ and its colleges implement a police matter approach, they may be vulnerable to economic losses as a result of legal action for failure to meet their duty of care and failure to comply with fundamental human rights under the *Human Rights Act 2019* (Qld) ('HRA').

The exact relationship between universities and students is not clearly legally defined. In *Griffith University v Tang* ('Tang'),⁹⁴ Gleeson CJ noted that the lack of evidence 'which bears upon the legal nature and incidents of the relationship between the parties is curious'.⁹⁵ In that case there was no evidence of a contract between the University and a PhD student. However, the Court left open the possibility that there might have been one.⁹⁶ In *X v University of Western Sydney*, it was held that there could be no contractual relationship between the University and the student because there was no certainty in the contractual terms.⁹⁷ Moreover, in *Tang*, the Court held that universities were also public entities, which means that their decisions are susceptible to judicial review.⁹⁸ This finding also suggests that universities would be considered 'public entities' for the purposes of the HRA and that their decisions must procedurally and substantively comply with fundamental human rights in accordance with the Act.⁹⁹ It should be noted that this would not apply to colleges, as they are not 'public entities'.

⁹⁴ *Griffith University v Tang* (2005) 221 CLR 99 ('Tang').

⁹⁵ *Ibid* 108.

⁹⁶ *Ibid*.

⁹⁷ *X v University of Western Sydney* [No 4] (n 43) [255].

⁹⁸ *Tang* (n 94) 135 (Kirby J).

⁹⁹ *Human Rights Act 2019* (Qld) s 58.

A *University Vulnerability to Negligence Claims*

Universities do appear to have a duty of care to protect students from foreseeable harm. However, the exact scope of this duty remains largely untested. There is no perfect analogy for the duty of care owed by a university because the student–university relationship is quite unique. Universities cannot exercise the level of control over its students that a school or prison can, but it is involved in the day-to-day lives of its students more than would be expected in a typical occupier–entrant relationship.¹⁰⁰ There is no precedent in Australia that establishes the extent to which a university might have an obligation to protect students from the criminal acts of other students. However, this issue has been considered in the United States.

In the US, the duty of care owed by the universities to students originally followed the doctrine of ‘*loco parentis*’ until the 1960s, when it was felt that this did not properly reflect the level of autonomy that students exercise.¹⁰¹ This change in attitude resulted in the so-called ‘no duty’ doctrine. However, that doctrine has recently fallen out of favour, as demonstrated by the landmark case of *Furek v University of Delaware*.¹⁰² That case concerned a personal injury case brought by a student who suffered significant burns when a cleaning product was poured on him as part of a hazing ritual at a college fraternity. The University had started an anti-hazing campaign, which largely consisted of placing anti-hazing posters around campus. The Court held that the University had an obligation to protect its students from the illegal actions of other students and that the current anti-hazing campaign was not sufficient to discharge its duty of care. In making this finding, the Court also relied on the fact that the University knew that there was a risk of injury to students because it was aware that dangerous hazing practices were occurring. The University was therefore in a better position than students to introduce measures to eradicate hazing practices and the student had a reasonable expectation that the University would protect him from foreseeable harm.¹⁰³

In the Australian context, Stanley Yeo has argued that whether a university owes a duty of care will turn on whether the harm was reasonably foreseeable and whether the university has assumed responsibility so that it was reasonable for the student to rely on the university to protect them from this foreseeable harm. The scope of that duty will then be determined by considering a number of factors,

¹⁰⁰ Stanley Yeo, ‘The Responsibility of Universities for their Student’s Personal Safety’ (2002) 6 *Southern Cross University Law Review* 77, 85–6.

¹⁰¹ *Ibid* 79.

¹⁰² *Furek v University of Delaware* 594 A 2d 506 (1991).

¹⁰³ Yeo (n 100) 83–4.

such as the seriousness of the injury and the practicality of the precautions.¹⁰⁴ In *Simundic v University of Newcastle*,¹⁰⁵ the New South Wales Supreme Court did not rule out the submission that the University's duty of care may require it to provide a suitably safe study environment and that harm would be reasonably foreseeable where the University was on notice about a student's mental health issues and their experience of trauma.¹⁰⁶

In *Waters v Winter and The University of New England* ('Waters'),¹⁰⁷ the court also suggested that, in some circumstances, the University may be liable for personal injuries that occur at residential colleges. In that case, a student brought an action for negligence against the University and a residential college for not providing security guards at a college event where he was assaulted by gatecrashers. The court found that the master of the college is primarily responsible for the welfare of students at college but that the University also has a general duty of care to protect students from injury and, in this case, no 'independent duty of care' was imposed on the University.¹⁰⁸ Unfortunately there was no elaboration on when an 'independent duty of care' might arise.

Applying the principles from the case law to the matter of sexual assault on campus at UQ, it could be argued that students would have a reasonable expectation that the University would use its Sexual Misconduct Policy to protect them from foreseeable harm of sexual assault. Whether the sexual assault was 'foreseeable' would depend on the facts. However, it would be difficult to argue that the harm was not 'foreseeable' where the University was already aware of an allegation of sexual assault against the accused perpetrator. This means that if the University took the police matter approach and another assault was committed by the same individual while the matter was coming to trial, the University would face a serious risk of being found liable for negligence. This argument was neatly expressed by Brett Solokov, CEO for the National Centre for Higher Education Risk Management in the US, when he stated: 'The first rape by a perpetrator is free. The second one is going to cost you seven figures.'¹⁰⁹

B Colleges' Vulnerability to Negligence Claims

The relationship between colleges and students is less complicated than that between the university and students. As identified in *Waters*, the master of the

¹⁰⁴ Ibid 98.

¹⁰⁵ *Simundic v University of Newcastle* [2005] NSWSC 586.

¹⁰⁶ Ibid [17]–[18].

¹⁰⁷ *Waters v Winter and The University of New England* [1998] NSWSCA 248 ('Waters').

¹⁰⁸ Ibid [26].

¹⁰⁹ Sheehy and Gilbert (n 88) 297.

college has the primary duty of care to students in relation to conduct that takes place on college campus so long as the harm was reasonably foreseeable.¹¹⁰ Moreover, *O'Meara v Dominican Fathers* raised the possibility that colleges may owe a higher duty of care under contract. In that case, it was held that it was an implied term that college authorities bore the responsibility of monitoring 'the conduct of persons on the premises so as to be able to recognise dangerous situations, or the development of dangerous practices, in order that appropriate measures could be utilised to guard against them'.¹¹¹ If colleges were to implement a police matter approach, they would be at even greater risk than the university of facing a successful claim for negligence and would likely face an additional claim for breach of contract.

C *University Vulnerability to Human Rights Actions*

As a public entity, it is unlawful for UQ to make decisions without complying both procedurally and substantively with the fundamental human rights contained in the *HRA*. However, it should be noted that any actions brought under the *HRA* need to be 'piggybacked' onto another pre-existing cause of action, such as judicial review or tort.¹¹² Even where an action under the *HRA* is successful, this does not amount to jurisdictional error by a university and the courts do not have the power to invalidate the decision.

The *HRA* is a new and largely untested piece of legislation in Queensland. However, case law from Canada suggests that a failure to warn individuals about a foreseeable risk of sexual assault may be considered a violation of their right to liberty and security of person.¹¹³ In *Jane Doe v Metropolitan Toronto Commissioners of Police*, a woman succeeded in arguing that the decision of the police not to alert women in the area to the existence of the 'balcony rapist' was a violation of her right to security of person and equality before the law.¹¹⁴ In another Canadian case, *Ford v Nipissing*, the Court held that it is not sufficient for a university to take threats and harassment seriously at the first instance; it must continue to 'remain diligent in pursuing the matter' and remain in contact with the complainant.¹¹⁵ This suggests that by implementing a police matter approach, a University may fail to protect the fundamental rights of students under the *HRA*.

¹¹⁰ *Waters* (n 107) 6.

¹¹¹ *O'Meara v Dominican Fathers* (2013) 152 ACTR 1, [118].

¹¹² *Human Rights Act 2019* (Qld) s 59.

¹¹³ *Human Rights Act 2019* (Qld) s 29.

¹¹⁴ *Jane Doe v Metropolitan Toronto Commissioners of Police* (1998) 39 OR (3d) 487.

¹¹⁵ *Ford v Nipissing University* 2011 HRTO 204, [72]–[73].

D *Vulnerability to the Limitations of the Criminal Justice System*

The police matter approach would also prevent universities and colleges from using their policies to address areas of the law that are unclear or in need of reform. Union College, for example, includes ‘stealthing’ as part of their definition of sexual misconduct, which refers to nonconsensual condom removal during sex.¹¹⁶ While this is an obvious betrayal of trust, it is currently unclear whether it would vitiate consent and be considered ‘sexual assault’ under the criminal law in Queensland.¹¹⁷ Similarly, Emmanuel College’s Respectful Relationships Policy also elevates the requirement of consent to the standard of ‘informed consent’, which is adapted to address the factors that contribute to sexual assault in a college context.¹¹⁸ For example, ‘informed consent’ must be ‘free from the influence of others, especially older community members’, which responds to the peer pressure and hazing identified as key issues in the Change the Course report.¹¹⁹ UQ and its colleges should also be aware that a police matter approach will not only restrict their capacity to address specific issues, but it will also mean that they will effectively endorse and inherit the controversial aspects of the criminal law around sexual assault, which are not present in the UQ Sexual Misconduct Policy. The most prominent example is the ‘reasonable mistake of fact’ defence, under which it is a complete defence if the accused honestly and reasonably believed the person to be consenting, even if they were in fact not consenting.¹²⁰ The debate around this defence is beyond the scope of this article and it is unclear to what extent such a defence could be relied upon under the current policy.¹²¹ Nonetheless, universities and colleges should be aware of its existence if considering taking a police matter approach.

It is commonly accepted that university and college general misconduct policies may include in their definition of ‘misconduct’ conduct that is deemed unacceptable but which is not necessarily illegal — for example, prohibitions around bullying and harassment. A police matter approach would mean that the

¹¹⁶ Union College, ‘Union College Policies 2019’ *Union College Policies* <<https://www.unioncollegeuq.com.au/unioncollegetpolicies/>> 12.

¹¹⁷ See Alexandra Brodsky, ‘“Rape-Adjacent”: Imagining Legal Responses to Nonconsensual Condom Removal’ (2017) 32(2) *Columbia Journal of Gender and Law* 183.

¹¹⁸ Emmanuel College, ‘Respectful Relationships Policy’ (January 2020) 1–2.

¹¹⁹ Change the Course (n 1) 187.

¹²⁰ *Criminal Code* 1899 (Qld) s 24.

¹²¹ Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper, December 2019) <https://www qlrc.qld.gov.au/_data/assets/pdf_file/0011/636554/qlrc-wp78.pdf>. See also Jonathan Crowe and Bri Lee, ‘The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform’ (2020) 39(1) *University of Queensland Law Journal* 39. cf Andrew Dyer, Submission to the Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (5 February 2020).

provisions of UQ's Sexual Misconduct Policy that deal with sexual assault would be the only instances where the University would not require a standard of conduct that is higher than the bare minimum required by the criminal law.

E *Vulnerability to Reputational Damage*

The risk of reputational damage to UQ is a controversial matter, which can justify conflicting policy approaches. In *Y v University of Queensland*, UQ submitted that allowing the Disciplinary Board to hear allegations of sexual assault assists the University in maintaining its reputation and enforcing the standards expected of students.¹²² Lyons J dismissed this argument by relying on the findings in *X v University of Western Sydney [No 4]*, where the Court found that the issue of the University's reputation was an 'extraneous issue' and introduced a potential conflict between the interests of the University and the interests of the accused, 'whose interests had to be considered in an impartial and objective matter'.¹²³ There are a number of issues with this approach.

First, it is not clear how this is compatible with the UQ Student Integrity and Misconduct Policy, under which 'behaving in a manner that prejudices the reputation of the University' is its own ground of general misconduct.¹²⁴

Secondly, the issues considered in *Y v University of Queensland* were fundamentally different in nature to those considered in *X v University of Western Sydney [No 4]*. When deciding the fate of an individual student accused of misconduct, it may be important to consider their interests in 'an impartial and an objective matter', but in *Y v University of Queensland*, the Court was considering the high-level policy question of whether the University had jurisdiction to hear these allegations at all. This is one example of where Lyons J only considered the specific circumstances of Y instead of the broader jurisdictional question.

Thirdly, it would be artificial to suggest that the integrity of UQ is not an underlying consideration in all University policy making matters. The case law surrounding professional disciplinary proceedings has found that one of the legitimate purposes of these proceedings is 'to protect the integrity of the profession' and, similarly, the University should have the capacity to use its misconduct policies to protect its reputation.¹²⁵

An irony associated with the reputational damage argument advanced by UQ is that, for many years, this argument was used to support the police matter

¹²² *Y v University of Queensland* (n 5) [41].

¹²³ *X v University of Western Sydney [No 4]* (n 43) [284].

¹²⁴ UQ Student Integrity and Misconduct Policy (n 49) 6.2.2(b).

¹²⁵ *Purnell* (n 26) [50].

approach. For example, in *Guidance for Higher Education Institutions: How to Handle Alleged Student Misconduct which may also Constitute a Criminal Offence* ('Zellick Guidelines'), it was recommended that universities should not take disciplinary action unless the victim has made a report to the police and those proceedings have concluded.¹²⁶ In recent years, however, this approach has been criticised on the grounds that it treats students like consumers rather than as individuals with human rights, and that it 'unduly [protects] institutions rather than supports students'.¹²⁷ The fact that UQ was prepared to argue in *Y v University of Queensland* that being able to enforce its Sexual Misconduct Policy was essential for the University's reputation seems to reflect a growing societal concern about the prevalence of sexual assault and the role of institutions in addressing this.

F Summary

UQ has an obligation to provide a safe and inclusive learning environment, and the implementation of a police matter policy would significantly hinder the University's capacity to meet that obligation. The case is even clearer for residential colleges as they owe a duty of care both in negligence and in contract. A police matter approach would also prevent the University and colleges from being able to target specific issues that contribute to sexual assault on campus and set a higher standard of conduct than is required under the criminal law. This not likely to satisfy the general public's expectation of what a responsible public institution should be doing to address the issue of sexual assault and leaves the University and the residential colleges vulnerable to reputational damage.

V VULNERABILITIES OF THE STUDENT BODY GENERALLY

A Vulnerability to Sexual Assault

There is also concern that the police matter approach from *Y v University of Queensland* may impair the protective function of disciplinary proceedings and leave the student body vulnerable to harm. Lyons J dismissed the 'duty of care' issue by applying the same reasoning used to dismiss concerns about damage to the University's reputation, arguing that this should not be relevant because it puts the University's interests in direct conflict with those of the student.¹²⁸ The difficulty with this approach is that it ignores the fact that a duty of care does not

¹²⁶ Zellick Guidelines (n 38) 4.

¹²⁷ On Safe Ground (n 33) 90.

¹²⁸ *Y v University of Queensland* (n 5) [41].

exist for the benefit of the University but rather for the benefit of the student body. Where the University is hindered in its ability to meet its duty of care, the student body is put at risk. In addition, Lyons J noted that ‘there appear to be no issues of public safety involved given that the applicant has continued in the medical faculty of the University for the last 19 months which included clinical placements’.¹²⁹ This observation appears to suggest that public safety was not endangered because no further accusations of sexual assault had been made against the applicant in the 19 months between the first complaint and the matter finally coming to court. Again, Lyons J appears to lose sight of the broader implications of the jurisdictional question. The relevant question is not whether public safety was in fact endangered in the case of Y, but rather whether it may be endangered if the University can never take immediate action after being notified of an allegation of sexual assault. It also ignores the fact that sexual assault goes largely unreported, especially in a university context.¹³⁰

The courts have distinguished disciplinary proceedings from civil proceedings on the grounds that the purpose of disciplinary proceedings are not punitive and serve to ‘protect the public’.¹³¹ The Australian Law Reform Commission also raised the concern that criminal proceedings are ‘often lengthy’, which can ‘impede the protective function of disciplinary measures’ when considering concurrent criminal and disciplinary proceedings for breaches of government policy by public servants.¹³² This is particularly the case at UQ, where the Sexual Misconduct — Procedure does not specifically endorse the use of interim measures against a student accused of sexual assault, such as suspension.¹³³ The University may also put people at risk who might not necessarily be covered by their duty of care, such as employees or clients at external businesses where the accused student might be put on placement. In *X v University of Western Sydney [No 3]*, the University stated that it would be necessary for them to notify potential placements of the allegations against the student. However, it is unclear whether such action would be taken by UQ.¹³⁴

¹²⁹ Ibid.

¹³⁰ Change the Course (n 1) 120.

¹³¹ See *Hardcastle* (n 27) 597; *Purnell* (n 26) 383; *ML v ASIC* (n 28) [50].

¹³² Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (ALRC Report No 112, 28 July 2010) 12.154 < <https://www.alrc.gov.au/publication/secrecy-laws-and-open-government-in-australia-alrc-report-112/12-administrative-obligations-in-the-australian-public-service/processes-for-dealing-with-breaches/>>.

¹³³ See University of Queensland, ‘Sexual Misconduct Policy — Guidelines’ (n 42) 8.3.

¹³⁴ *X v University of Western Sydney [No 3]* (n 43) [83]–[84].

VI CONCLUSION

University and college disciplinary boards have jurisdiction under Australian law to hear and decide allegations of sexual assault as a violation of their student misconduct policies, regardless of the existence or outcome of any concurrent criminal proceedings.

When looking at the issue through the lens of vulnerability offered by Fineman's theory, it is clear that it is the responsibility of the University, as a public entity, and the colleges, as institutions linked to a public entity, to be responsive to the vulnerabilities experienced by its students, and this cannot be achieved by taking a non-interventionist police matter approach such as that implicitly advocated for by Lyons J in *Y v University of Queensland*.¹³⁵ Fineman's theory provides a framework for universities and colleges to approach policy decisions in a way that acknowledges the inherent vulnerability of all students, while allowing for the fact that vulnerability is not equally shared, and to respond to this vulnerability by providing students with the resources they need to build resilience.

Accused students experience a high degree of vulnerability when considering the seriousness of the consequences that may follow such an accusation. On balance, a police matter approach would appear to be the most effective approach to address that vulnerability, as the student would be protected by all of the safeguards that exist within the criminal justice system (although, as noted, it is possible that this approach would encourage allegations to be brought publicly through the criminal justice system, exacerbating the accused's vulnerability to reputational damage). However, the police matter approach would do very little to address the vulnerability experienced by survivors of sexual assault, the university and the student body generally. The criminal process can be slow and traumatic, meaning that it is often not an effective mechanism to protect sexual assault survivors, as well as other students. Failure to protect the student body could leave universities open to negligence claims and reputational damage. The prevalence of sexual assault on university campuses suggests that police action is not sufficient to address this issue and that universities and colleges across Australia should exercise their disciplinary jurisdiction to provide a safe and supportive learning environment for all students. UQ has already taken a number of positive steps in order to provide students, whether they are the complainant or the accused, with the resources they need to build resilience, including services offered by the SMSU and the First Responders Network.¹³⁶ Nonetheless, these need to be complemented with robust and effective disciplinary processes in order to provide effective redress for survivors, to protect the student body generally

¹³⁵ Fineman, 'The Vulnerable Subject' (n 11) 164.

¹³⁶ Fineman 'Vulnerability and Inevitable Inequality' (n 8) 146–7.

and to ensure that the University and colleges are meeting their duty of care and human rights obligations.

Despite this, the vulnerability of accused students must be taken seriously by university administrators and university policies must ensure that these students receive appropriate notice of the allegations, including all of the relevant facts necessary to respond to the allegations, as well as access to the supporting documentary evidence, and a fair hearing. Providing students with written reasons for the university's decision is also recommended in order to reduce the risk of decisions being unreasonable or biased, and to make it easier for the accused student to have the decision reviewed.

In addition, the occurrence of false allegations, and the vulnerabilities that falsely accused students experience, are not unique to sexual assault. These vulnerabilities exist in all cases where a student is accused of any potentially criminal conduct. There is no reason why the police matter approach is necessary with regard to sexual offences but not with regard to other offences. Yet, it would clearly be an untenable position for universities if they required a finding of criminal guilt in order to take disciplinary action every time an allegation of misconduct was also a potential breach of the criminal law. Disciplinary proceedings and criminal proceedings serve distinct and important functions in protecting the public, and in helping survivors to lift the personal, psychological and economic burden that they carry as a result of sexual violence.