From Re-traumatisation to Rightful Recourse: Designing Just and Victim-Supportive Policies for Disciplining Campus Sexual Misconduct

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Declaration

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ABSTRACT

The issue of sexual misconduct in universities has come to a head in South Africa in recent years. Among the concerns that have been raised in student protests, scholarly studies, and research by the Department of Higher Education and Training is the question of effective institutional mechanisms to resolve complaints of sexual misconduct. This research is concerned with the disciplinary processes employed by universities to adjudicate complaints and impose disciplinary measures. The question asked is whether South African universities have policies on sexual misconduct that provide for just and victim-supportive processes, and what measures must be put in place in order for them to do so? My premise for this thesis is that an outcome is just if the determinative method is just, and as such I rely on the theory of Natural Justice and procedural fairness as the framework for developing a just process.

I approach this question from a policy perspective, with a focus on developing and implementing policies that lay out disciplinary procedures for sexual misconduct that are responsive to the needs of victims and cognisant of the procedural fairness rights of accused students. I do this by analysing the sexual misconduct policies of thirteen public universities to understand their disciplinary procedures and institutional approaches to sexual misconduct as a whole. I find that, in general, university policies are lacking in so far as providing clear procedural rules and guidelines for disciplinary tribunals that allow for just and victim-supportive adjudication. Current policies provide for an imbalanced adjudication system or do not provide sufficient guidelines for adjudication at all.

Ultimately, I make recommendations on how a hybrid model of adjudication can be fashioned; one that takes into account the need for procedural fairness in administrative decision-making, while simultaneously incorporating victim-supportive practices to minimise the trauma that disciplinary processes can inflict on victims of sexual misconduct. Among these recommendations are the inclusion of restorative justice practices in adjudication and sanctioning, the creation of an accusatorial/inquisitorial hybrid model of adjudication, and imposing justifiable limitations on the rules of Natural Justice to create a disciplinary process that is both just and victim-supportive.

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Dr Grace Moyo, daughter of the Most High.

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O University of KwaZulu-Natal: Gender Based Violence Procedure and Guidelines
P University of KwaZulu-Natal: Sexual Harassment Procedure and Guidelines
Q University of Pretoria: Code of Conduct on the Handling of Sexual Harassment
R University of Pretoria: Disciplinary Rules for Students
S University of the Witwatersrand: Sexual Harassment, Sexual Assault, and Rape Policy and Procedures
T Vaal University of Technology: Sexual Harassment Policy
U Walter Sisulu University: Sexual Harassment and Gender Discrimination Policy

CHAPTER 1

INTRODUCTION

1.1. FRAMING THE INQUIRY: DEVELOPING JUST AND VICTIM-SUPPORTIVE DISCIPLINARY PROCESSES FOR SEXUAL MISCONDUCT IN SOUTH AFRICAN UNIVERSITIES

This dissertation addresses the question: do South African universities have policies on sexual misconduct that provide for just and victim-supportive processes, and what measures must be put in place for them to do so?

The pervasive issue of sexual misconduct within universities is a global epidemic. While reliable recent South African statistics are difficult to come by, in 2017 the Ministry of Higher Education and Training reported 47 rape cases across universities that year, and as of March 2023, the same Ministry reported that "more than 6 200 individuals reported incidents of gender-based harassment, intimate partner violence and GBV across our campuses" (although the reporting period is unclear).[1] Additionally, research conducted by the South African Medical Research Council between 2018 and 2019 indicates that 20% of students surveyed reported having experienced some form of sexual misconduct in the preceding year.[2] Globally, some studies have gone so far as to suggest that as many as one in four undergraduate women will be sexually assaulted before graduating.[3]

In South Africa, universities, sometimes described as microcosms of broader society, reflect the disconcerting trends seen in national criminal studies: high levels of perpetration, low levels of reporting, infrequent prosecution, and inadequate sanctions.[4] It is an environment where justice seems elusive, and fear and silence prevail.

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[1] Edwin Naidu 'Universities Making Campuses Safer After 47 Rapes in 2017' *University World News* (2018); South African Government News Agency 'GBV Interventions at Higher Learning Institutions Yields Positive Results' *SAnews.gov.za: South African Government News Agency* (2023).
[2] Mercilene T Machisa et al 'Factors Associated With Female Students' Past Year Experience of Sexual Violence in South African Public Higher Education Settings: A Cross-Sectional Study' (2021) 16 *PLos ONE* at 1.
[3] David Cantor et al *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (2020) *Association of American Universities*.
[4] Jane Bennett 'Policies and Sexual Harassment in Higher Education: Two Steps Forward and Three Steps Somewhere Else' (2009) 23 *Agenda*.

Effective responses to the problem of sexual misconduct within universities must be multifaceted, encompassing measures to address specific misconduct, create prevention mechanisms, and manage victims' experiences holistically.[5] Nevertheless, the particular focus of this dissertation narrows down to one critical aspect: the disciplinary hearings that follow formal complaints of sexual misconduct. Other avenues for resolution are available to victims, but the disciplinary process remains an essential part of institutional responses to sexual misconduct, requiring careful consideration and conscientious and consistent application of agreed upon rules and norms.

University disciplinary tribunals serve as both a precedent and norm-setting mechanism.[6] They are sometimes the only aspects of the response to sexual misconduct where outcomes become publicly known, as mediation and other resolution mechanisms are often confidential. Furthermore, university adjudication is an important response to sexual violence that goes in tandem with the criminal justice system.[7] As Konradi points out, decisions of university disciplinary tribunals "(send) a message about community values and (give) victimised students a voice".[8] Despite these high stakes, there exists a concerning void in our understanding of how these tribunals should be conducted to be effective and just. The absence of a comprehensive decision-making framework and theoretical foundation for adjudicating these matters has become glaringly apparent, and it is this gap that this dissertation seeks to fill.[9]

In institutions where justice for victims of sexual misconduct can sometimes feel fleeting or elusive, the development and implementation of just, victim-supportive disciplinary tribunals within universities become more than a procedural necessity; they become a moral imperative. The importance of this dissertation, therefore, lies not only in its academic contributions but in its potential to bring about meaningful change in the lives of those most vulnerable within our universities. It is a call to action, a plea for empathy, and a roadmap towards a more just and compassionate educational environment.

[5] Department of Higher Education and Training *Policy Framework to address Gender-Based Violence in the Post-School Education and Training System* (2020)
[6] Amanda Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) 41 *Humanity & Society*.
[7] Ibid.
[8] Ibid at 393.
[9] Tammi Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) 2018 *Wisconsin Law Review*.

1.2. A Matter of Consequence and Novelty: The Pressing Need for this Research

This dissertation addresses a consequential question concerning sexual misconduct policies in universities and proposes a novel solution aimed at enhancing fairness and support for victims. By focusing on both the substantive need for reform and the development of a model for adjudication built on the theory of Natural Justice and procedural fairness and bolstered by victim-supportiveness, this dissertation contributes meaningfully to the ongoing dialogue on this critical issue within South African higher education.

1.2.1. The Consequential Nature of the Question

The investigation of sexual misconduct and institutional responses within universities holds significant implications. Per Vohlidalova,

> Universities play a major role in the process of establishing new social norms and reproducing old ones. They educate and socialise future professional and intellectual elites; they instil in people norms and rules of behaviour. The position they occupy in society makes them one of the key places where stereotypes are reproduced, or, conversely, where stereotypical attitudes are changed.[10]

If we take this to be true, which I do, then it is self-evident that universities should be a place where attitudes around sexual violence are changed, and offenders are dealt with accordingly. This dissertation approaches the recourse-seeking process through a policy lens because policies have a normative, deterrent, educational, and punitive effect.[11] The value of sound policies lies in their capacity to articulate clear guidelines on sanctionable conduct and provide students who have been victimised with accessible support and pathways to recourse.[12]

From my survey of current policies in thirteen of South Africa's public universities in Chapter 5 and my presentation of other South African-based meta-analyses of university sexual misconduct policies in Chapter 2, it will become clear that current policies are lacking in both victim-supportive adjudication and procedural protections. The need for reform calls for a

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[10] Marta Vohlídalová 'The Perception and Construction of Sexual Harassment by Czech University Students' (2011) 47 *Sociologický časopis / Czech Sociological Review* at 1121.

[11] Charlie Penrod & Marcelline Fusilier 'Improving Sexual Harassment Protections: An Examination of the Legal Compliance of US University Sexual Harassment Policies' (2010) 15 *Journal of Workplace Rights*.

[12] Marcelline Fusilier & Charlie Penrod 'University Employee Sexual Harassment Policies' (2015) 27 *Employee Responsibilities and Rights Journal*.

meticulous examination of existing policies, literature, and legislation, aiming to identify ways to enhance disciplinary processes – which I do in this dissertation.

1.2.2. The Novelty of the Question

The novelty of this research arises from its focus on an aspect that has not been thoroughly explored – that of process and the procedural aspects of sexual misconduct adjudication. While there exists literature on the content of sexual misconduct policies and ideas on how to make these better, a specific framework for decision-making, especially within South Africa, is absent.[13] Relying on the contributions of scholars, including Walker, O'Toole, Konradi, Goredema, Feltoe, BM Mupangavanhu, and Y Mupangavanhu, this dissertation proposes a new approach: a hybrid model of adjudication developed upon a procedural fairness framework for decision-making, and incorporating victim-supportive measures and restorative justice practices.[14] This model seeks to fill a gap in the current understanding of how to approach adjudication in sexual misconduct cases within South African universities so that it is just and victim-supportive.

1.3. A Qualitative Methodology: Examining Sexual Misconduct Policies in South African Public Universities

The methodology employed in this dissertation was that of an in-depth qualitative analysis of the sexual misconduct policies of the thirteen South African public universities whose policies I was able to obtain.[15] This analysis was conducted against the backdrop of the legislation and national policy frameworks informing institutional policy development on sexual misconduct, which are canvassed in Chapter 3.

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[13] T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9.

[14] Ibid; Sara O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) 79 *U. Pitt. L. Rev.*; A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6; Charles Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) 13 *ZL. Rev.*; Geoffrey Feltoe *A Guide to Administrative and Local Government Law in Zimbabwe* Legal Resources Foundation(2013); BM Mupangavanhu & Y Mupangavanhu 'Alignment of Student Discipline Design and Administration to Constitutional and National Law Imperatives in South Africa' (2011) 14 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*.

[15] These are Nelson Mandela University, North-West University, Rhodes University, Stellenbosch University, University of Cape Town, University of Fort Hare, University of the Free State, University of Johannesburg, University of KwaZulu-Natal, University of Pretoria, University of the Witwatersrand, Vaal University of Technology, and Walter Sisulu University.

Employing the theory of Natural Justice as a primary lens through which I conducted this analysis and looking also to themes arising from literature on victim-supportiveness, I developed twelve questions which I asked of each university's policy. These questions, which are elaborated further in Chapter 5, include those on the language and definitions used in the policies, victim-supportive measures provided (including protections before, during, and after hearings), procedural protections for accused students (including rights to representation and cross-examining the complainant), and rules of evidence. This comprehensive analysis illuminated both the strengths and weaknesses within current policies and provided a solid foundation for the recommendations I make in this dissertation.

1.4. The Core Proposition: Arguing for a Hybrid Approach to Sexual Misconduct Adjudication

The crux of the contribution I make in this dissertation is that of a new approach to adjudicating sexual misconduct cases in South Africa's public universities. Recognising the complex and sensitive nature of these cases, I argue for a hybrid model of adjudication that moves beyond traditional paradigms and seeks to blend elements from the adversarial and inquisitorial systems of justice. This hybrid model is firmly anchored in principles of Natural Justice, incorporating elements that prioritise both procedural fairness and victim-supportiveness. Such a hybrid is not merely a theoretical ideal; it is a practical necessity for ensuring that outcomes are not only just but also empathetic and restorative.

The proposed model recognises that traditional adversarial practices may be inappropriate in the delicate context of sexual misconduct cases.[16] Conversely, a purely inquisitorial approach may lack the procedural safeguards that ensure fair treatment for all parties involved,[17] and so lack credibility in a country with a strong adversarial legal culture. The synthesis of these two systems offers a pathway to justice that is both robust and compassionate.

In developing this model, I argue for a limitation on the right to be heard, recognising that an unfettered application of this principle of Natural Justice may unduly re-traumatise victims. I also argue for flexibility in the application of the rule against bias. This flexibility does not

[16] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6; Kelly Alison Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) 65 *Drake Law Review*.
[17] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14.

compromise the core principles of fairness, but rather further supports the model's adaptability. By carefully delineating these two tenets of Natural Justice within the context of sexual misconduct cases, the model aims to preserve essential legal protections without losing sight of the *sui generis* nature of sexual misconduct adjudication. Finally, I include restorative justice practices, which represent the transformative aspect of this model. Rather than focusing solely on punitive measures, restorative justice seeks to heal and rebuild, addressing the underlying harm and fostering a sense of community.[18]

I conclude that an outcome in these matters can only be just if it is arrived at through a process that is procedurally fair and victim-supportive – in their duality. And I argue that the hybrid model proposed herein does just that. By merging adversarial and inquisitorial practices, limiting certain rights, applying flexibility, and embracing restorative justice, this model seeks to create a process that is just, humane, and responsive to the complex realities of sexual misconduct in higher education.

1.5. Language and Context: Explaining the Terms Used in this Dissertation

Throughout this dissertation, I use the terms survivor, victim, and complainant to describe the person against whom the misconduct has been perpetrated. The Rhodes University Sexual Violence Task Team notes that neither of the terms survivor and victim can capture the experience of being victimised; a position with which I agree.[19] The use of both these terms is highly politicised, and neither can be deemed more valid than the other. Explaining why she uses survivor and victim interchangeably, Jones-Renaud states that both words are true.[20] "'Survivor' brings a sense of empowerment to someone who has been exploited while … 'victim' embodies the outrage that they and their communities rightfully feel".[21] Additionally, the term victim honours those who lost their lives to sexual violence or its aftermath. Not all who are violated survive, and it is important to honour them too. Complainant, on the other hand, is the formal term used to refer to a survivor or victim as they go through a legal (in this case disciplinary) process. Where appropriate, I use it too. None of these terms is intended to

[18] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16; Mary P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) 15 *Trauma, Violence, & Abuse*.

[19] Sexual Violence Task Team *"We Will Not Be Silenced": A Three–pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University/UCKAR* (2016) Grahamstown, South Africa,

[20] Lindsey Jones-Renaud *What Does a Survivor-Centered Approach to Workplace Harassment Look Like?* (2018) Medium, Cynara Development Services LLC via Medium.

[21] Ibid at 4.

diminish any one experience of people who have been subjected to sexual misconduct, but rather, they are used in their multiplicity to capture the varying experiences.

Likewise, dependent on the context, I use the terms assailant, perpetrator, offender, respondent, and accused to describe the person who perpetrates the violence. Where I refer to them in relation to the victim, they are an assailant or perpetrator, where I discuss them during the disciplinary process, they are an accused or respondent, and where I refer to them after a finding of guilt by a disciplinary tribunal, they are an offender.

Importantly, I do not use the term "alleged" in this dissertation, unless it is included in a quote. This is because I find the use of the term to be disbelieving of the victim, whether it is used to describe the misconduct ("alleged assault"), the assailant ("alleged perpetrator") or the complainant ("alleged victim"). For me, it is akin to adding "so she claims" to the end of each of those words: "she was raped, so she claims, by John, so she claims, and is a victim, or so she claims". It also goes without saying that the ultimate purpose of the disciplinary process is to test the veracity of an allegation of sexual misconduct. As such, the term is redundant.

Finally, I use sexual misconduct as the overarching term for all violations that are sexual in nature as this is the widely used term in the higher education sector.[22]

1.6. Navigating the Chapters: An Overview of the Journey

Each chapter of this dissertation marks a step in the journey of moving universities from a place of haphazard and harmful adjudication to a carefully crafted and theoretically grounded approach to the disciplinary process.

In the opening chapters, the reader is introduced to the landscape of universities, where sexual misconduct has emerged as a critical issue. Chapter 2 canvasses existing literature on sexual misconduct in universities and studies that have been undertaken in this area. This understanding of the landscape expands into Chapter 3, which delves into the laws and national policy frameworks upon which universities develop their sexual misconduct policies. In these chapters, I seek to provide the reader with an understanding of the background to sexual misconduct policy development and implementation and the context within which the core proposition of this dissertation is made.

[22] This is the term that is used most frequently in both policies and academic writing to refer overarchingly to all forms of sexual harassment and sexual violation.

Moving from the background to the fore, Chapter 4 delves into the theory that underpins my core proposition. In this chapter, I introduce the reader to the theory of Natural Justice and procedural fairness and propose it as the theoretical framework that universities should use in developing adjudication processes and practices. I underscore the importance of procedural fairness in producing just outcomes and highlight the repercussions of universities not engaging in procedurally fair adjudication.

Having provided a theoretical foundation for the dissertation, in Chapter 5 I undertake an analysis of the current policies of South African public universities through the lens of procedural fairness and victim support. In this chapter, I seek to answer the first half of my research question: do South African universities have policies on sexual misconduct that provide for just and victim-supportive processes? After conducting a careful analysis of the policy provisions of thirteen public universities, I answer this question in the negative.

Chapter 6 marks the point at which I pivot from theory and policy analysis to an important aspect of adjudication: that of victim-supportiveness. Here, I introduce the reader to the concept of victim-supportiveness and the crucial role that it plays in developing sound adjudication processes and practices. I canvass multiple victim-supportive measures across four themes, and advocate for their incorporation into processes built upon procedural fairness – arguing for the inclusion of just and victim-supportive practices, in their duality.

In the penultimate chapter, Chapter 7, procedural fairness and victim-supportiveness converge into a proposed hybrid model for adjudication within universities. It is in this chapter that I answer the second half of my research question: what measures must be put in place for South African universities to have sexual misconduct policies that are just and victim-supportive? This chapter is the culmination of a journey that has traversed through theoretical framings, policy analysis, and victim-supportive considerations. It presents a nuanced approach that transcends conventional methods. The hybrid model of adjudication that I propose embodies the core beliefs that justice can be compassionate, that victim support does not undermine fairness, and that a just process is integral to a just outcome.

As the dissertation draws to an end in Chapter 8, I offer a reflection on the journey from re-traumatisation to rightful recourse for victims and the transformative potential of the proposed hybrid model. This dissertation is more than an academic investigation; it is a journey laden with exploration and discovery. Each chapter is a stepping stone, leading the reader through a

carefully orchestrated argument that culminates in a novel solution that could reshape the very fabric of institutional adjudication on sexual misconduct. It tells a compelling narrative that invites the reader to think, to feel, and ultimately, hopefully, to act.

1.7. My Motivation: A Stark Realisation of a Flawed System

My inspiration and motivation for this dissertation rests in a story that has greatly impacted on me both on a personal and an academic level. It is a story I want to share because it illustrates so perfectly how broken reporting and investigating systems are in universities. If there was ever a demonstration of the need to address the question posed by this dissertation, this is it. It is my hope that in sharing something so close to my heart, there can be a moment – even a fleeting one – of deep reflection.

In May 2015, three women – all students at the time – reported sexual victimisation by the same man (also a student at the time) to the Rhodes University prosecutors, who were then both law lecturers. They accused him of sexual harassment and sexual assault. The women had no previous relationship with each other and only came to know about each other through mutual connections when they openly discussed their victimisation. After one interview with each of them, during which the prosecutors did not even request to see any of the text messages one of the complainants told them she had received and retained, they declined to prosecute the matter. They called in one of the complainants, who was their student, and asked her "what she would do" if she were in their position, you know, as a lawyer? They asked a victim to "think like a lawyer now" in her own case, reporting her own trauma, and asking the university to do something about it. They asked her if she *really* thought he intended to harass or assault the three of them or if he was maybe just "pushing his luck"? In another complainant's interview they told her that they had to be careful in deciding whether to prosecute because this could "amount to malicious prosecution".

On 11 August 2015 they sent the victims an email:

> Dear Tamara, Tasneem, and Tshego[23],
>
> We have completed our investigation into the alleged assaults that were reported to us.

[23] All pseudonyms.

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Kindly note that in the circumstances we decline to
prosecute.

Sincerely,

___________ and ________

Prosecutors: Student Discipline
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They did not provide the victims with reasons, or invite them to a conversation, or in any other way indicate any level of empathy or sensitivity. Upon being asked to furnish written reasons, they explained that one complainant had entered into mediation on the matter, and thus was barred from pursuing formal disciplinary action, whilst in the case of the other two intent to commit sexual assault could not be shown. They expressed that they did not believe that there was a *prima facie* case against the accused student. Their email ended curtly with the words:

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We consider the matter closed and we are not prepared to
enter into any further correspondence.
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That was it. Those victims were stonewalled by the university and met with hostility from the prosecutors.

In August they found out that their assailant was being considered by a department of the university for a job that would put him in a position of authority over a large number of students, including impressionable first years. They once again reached out to the university, this time engaging with the Chair of the selection committee to make their experiences known to her. The Chair affirmed the victims and assured them that their concerns would be take into consideration and that she, too, knew of other complaints against him. He was not appointed.

In October, they heard that the same division was allowing him to run in an election for a position which would also place him in authority over younger students. Once again, they reached out and asked that their stories be considered. The head of that division was initially resistant but ultimately spoke to the perpetrator about the allegations that were before her. He withdrew from the race.

In November, the complainants approached the Director of Student Affairs for a meeting with her and other stakeholders of the university including the university's legal advisor,

representatives from the Division of Student Affairs, and the heads of the aforementioned department. Their aim was to discuss their concern about student leaders who repeatedly committed sexual misconduct, the culture of impunity at the university, and how to make the reporting process more victim friendly. When criticised for his curt correspondence with victims, and faced with suggestions about how he could possibly be more supportive throughout the reporting process, one of the prosecutors exclaimed "I'm a lawyer, not a therapist", and then walked out of the room. The remainder of the meeting was productive, and the women left it at that.

Over a year later, a call was made for survivors to come forward following protest action relating to sexual violence on campus. One of the women stepped up to make a complaint, and the accused was found guilty of sexual assault by a disciplinary tribunal on the exact same facts the prosecutors had declined to prosecute in 2015. This time, the disciplinary process was conducted by an external legal expert in gender-based violence. The perpetrator was excluded from the university but somehow managed to evade any fallout from having an endorsed transcript.[24] The last time I checked, he was writing his exams to be admitted as an attorney.

It is evident from this story how the university failed to meet these women's needs. They were forced to perform their trauma multiple times to a department that failed to be proactive in keeping their assailant out of leadership positions, and their efforts to engage with university leaders came unstuck. Moreover, they were met with insensitivity by prosecutors who failed to properly investigate the reports, employ trauma-informed techniques in interviewing and corresponding with them, and who viewed their role as rigidly legalistic – everything I argue in this dissertation as misaligned with victim-supportive processes. They deserved better from this institution. They deserved a process like the one argued for in the next seven chapters.

I think of these women often. Of their story, their trauma, their healing, and their strength. Their bravery inspires the words on these pages.

[24] Endorsement of a transcript is when an academic transcript contains a notation indicating that the student's conduct while at the university was unsatisfactory.

CHAPTER 2

A SURVEY OF KEY ISSUES AND AREAS OF CONCERN IN SEXUAL MISCONDUCT POLICIES AND PROCESSES

2.1. INTRODUCTION

The journey to developing just and victim-supportive policies for adjudicating sexual misconduct begins with understanding the present situation and existing knowledge, along with what proposals exist to remedy weaknesses in current adjudication processes. In this chapter, I look at other meta-analyses of sexual misconduct policies in universities, as well as studies on why and how these policies have failed or succeeded. Initially I approach these studies broadly to consider general institutional approaches to policy development and implementation, and then more narrowly when I review South African studies in particular. Through engaging with existing scholarship and creating an understanding of the status quo, I make a case for the contribution that this dissertation will make to legal knowledge on adjudication processes for sexual misconduct.

2.2. THE CASE FOR STUDYING SEXUAL MISCONDUCT IN UNIVERSITIES

The case for studying sexual misconduct in universities is clear: universities are unique social institutions that provide not just a formal education, but a space for young people to self-actualise and begin to shape their futures.[25] Even so, there is evidence that sexual misconduct violations are not just under-reported, but also under-researched, and perpetration continues in large part because of weak response mechanisms in these institutions.[26] This dissertation addresses the dual question of whether South African universities currently have sexual misconduct policies that provide for just and victim-supportive processes, and what measures must be put in place in order for them to do so. I approach this question by examining sexual

[25] M Vohlídalová 'The Perception and Construction of Sexual Harassment by Czech University Students' (2011) *op cit* note 10 at 1121.

[26] Janice Joseph 'Sexual Harassment in Tertiary Institutions: A Comparative Perspective' (2015) 18 *Temida*at 138; Njoki Nathani Wane et al 'Kenya's Public Universities as a Locus for Sexual and Gender-Based Violence - A Case Study of Egerton University, Njoro Campus' (n.d.) 32 *Canadian Woman Studies/Les Cahiers De La Femme* at 24.

misconduct policies and the adjudication processes contained therein in light of scholarship on procedural fairness and victim-supportive measures.

Aside from laying out processes to be followed, policies are important because they are norm-setting, and a clear message from institutions to staff and students on intolerable behaviour is both important and necessary for preventing and responding to campus sexual misconduct.[27] Despite this, consensus is still lacking on what good policies for effectively addressing and adjudicating sexual misconduct might look like. Throughout this chapter, I canvass the themes that arise in key studies on university policies for sexual misconduct. These are that attention must be paid to the policy development process, policies must be comprehensive and accessible, and policies must be well implemented – including though training on their contents and creation of sound accountability mechanisms.

2.3. The Jurisdictional Question: Should Universities Adjudicate Sexual Misconduct?

An underlying premise of this dissertation is that institutions have and should have jurisdiction to respond to and adjudicate sexual misconduct cases. The Department of Higher Education and Training ("DHET") certainly thinks so. In 2020, the Minister of Higher Education, Science, and Innovation gazetted the Policy Framework to Address Gender-Based Violence in the Post-School Education and Training System ("the Policy Framework") on behalf of the DHET. This Policy Framework and the Implementation Protocols that followed it create a mandate for universities to address gender-based violence on their campuses, including sexual misconduct.

The Policy Framework outlines the international and national legal instruments that require universities to actively prevent and address gender-based violence ("GBV") on their campuses.[28] These include the South African Constitution,[29] the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[30] the Promotion of Equality and Prevention

[27] Eliana Rubiano-Matulevich *A Guidance Note for Preventing, Reporting and Responding to Sexual Assault and Sexual Harassment in Tertiary Education Institutions* (n.d.) The World Bank Group at 3; Alison M. Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) 25 *British Journal of Sociology of Education* at 146.
[28] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5.
[29] Constitution of the Republic of South Africa of 1996.
[30] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

of Unfair Discrimination Act,[31] the Higher Education Act,[32] and a range of parliamentary white papers on higher education and social inclusion.[33] With these, the Department supports the argument that universities should be pursuing disciplinary measures on sexual misconduct, although this question is still widely debated and has been asked by several legal professionals, academics, and commentators.[34] The primary points of contention are that there are insufficient procedural fairness protections in place at universities, that tribunals are not competent to hear these matters, and that universities have an inherent conflict of interest.

2.3.1. Arguments Against Universities Adjudicating Sexual Misconduct

Proponents of the notion that sexual misconduct must only be adjudicated in court, such as Anderson, argue that university tribunals deny accused students due process (or procedural fairness) protections.[35] This, they say, is particularly so because they employ the evidentiary standard of "on a balance of probabilities" rather than the criminal standard of "beyond a reasonable doubt".[36] This standard, they argue, is inappropriate for sexual misconduct matters, and leaves accused students in a vulnerable position where they are not given adequate protection and may be found guilty on the basis of otherwise insufficient evidence.[37] Writers for the Washington Examiner agree.[38] They say that given the seriousness of sexual assault and rape (in particular) as crimes, accused students must be given the fullest protection of the law.[39] Universities, they suggest, are simply not in a position to provide this protection, and as such, should not be adjudicating such matters.[40]

Anderson states that a further reason that universities are not competent to adjudicate sexual misconduct is that they do not have the legal tools, such as forensic examinations and

[31] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[32] Higher Education Act 101 of 1997.
[33] *The White Paper on Education and Training* (1995); *Education White Paper 3: A Programme for the Transformation of Higher Education (1997) ; The White Paper for Post-School Education and Training (2014).*
[34] Sexual Violence Task Team '"We Will Not Be Silenced": A Three–pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University/UCKAR' (2016) *op cit* note;John C Weistart 'Why Colleges Shouldn't Be Handling Sexual-Assault Complaints' (2018) *The Chronicle of Higher Education* at 1; Ashley Sarkozi 'Criminals, Classrooms, and Kangaroo Courts: Why College Campuses Should Not Adjudicate Sexual Assault Cases' (2017) 50 *Loyola of Los Angeles Law Review* at 147; Robin Wilson 'Should Colleges be Judging Rape' (2015) *The Chronicle of Higher Education* at 1.
[35] Michelle J Anderson 'Campus Sexual Assault Adjudication and Resistance to Reform' (2016) 125 *Yale Law Review* at 1984.
[36] Ibid.
[37] Ibid.
[38] Washington Examiner 'Send Campus Sexual Assault to Court' *Washington Examiner* (2018) at 1.
[39] Ibid at 1.
[40] Ibid at 1.

subpoenas, to make just determinations.[41] Although, arguably, these tools are not necessary in an administrative hearing. Additional arguments include that the competence of university disciplinary tribunals is compromised because adjudicators and investigators are often not adequately trained to handle these matters, and that institutions are unable to sufficiently and clearly define the misconduct that they claim to adjudicate.[42]

In addition to arguments on procedural fairness and competence, some scholars and practitioners, such as Sarkozi, assert that universities have inherent conflicts of interest that preclude them from adjudicating sexual misconduct fairly.[43] These include financial conflicts, as identified by Rice and Weistart, which can come from having high contribution donors and their attendant interests.[44] Institutions can also have reputational conflicts, Cohen states.[45] An example of this is provided by Wilson, who says that institutions have to balance their reputation in choosing or not choosing to investigate matters and find students liable.[46] On the one hand, they do not want to be branded as "rape havens" for failing to adequately address and adjudicate campus sexual misconduct, but on the other hand, they don't want to be perceived as a university with a problem of sexual misconduct if their public reports indicate high numbers of cases and findings of guilt.[47]

Finally, Wilson highlights the potential conflict that arises owing to the number of different hats adjudicators might wear in the same institution.[48] Universities sometimes call on academics in their law faculty and/or other administrators in the institution to serve as reporting officers, investigators, adjudicators, and internal reviewers.[49] This makes impartiality difficult.[50] Rice asserts that university disciplinary tribunals cannot be impartial to the interests

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[41] M J Anderson 'Campus Sexual Assault Adjudication and Resistance to Reform' (2016) *op cit* note 35 at 1994.
[42] Samantha Harris 'Campus Judiciaries on Trial: An Update From the Courts' (2015) 165 *Legal Memorandum* at 9; R Wilson 'Should Colleges be Judging Rape' (2015) *op cit* note 34 at 1; Rachael A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) 47 *Pepperdine Law Review* at 192.
[43] A Sarkozi 'Criminals, Classrooms, and Kangaroo Courts: Why College Campuses Should Not Adjudicate Sexual Assault Cases' (2017) *op cit* note 34 at 142.
[44] Kelly Rice 'Understanding the Implications of the 2011 Dear Colleague Letter: Why Colleges Should Not Adjudicate On-Campus Sexual Assault Claims' (2018) 67 *DePaul Law Review* at 783; J C Weistart 'Why Colleges Shouldn't Be Handling Sexual-Assault Complaints' (2018) *op cit* note 34 at 1.
[45] Philip N Cohen 'College Sex Assault Trials Belong in Court, Not on Campus' (2015) 61 *Chronicle of Higher Education* at 2.
[46] R Wilson 'Should Colleges be Judging Rape' (2015) *op cit* note 34 at 1.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] K Rice 'Understanding the Implications of the 2011 Dear Colleague Letter: Why Colleges Should Not Adjudicate On-Campus Sexual Assault Claims' (2018) *op cit* note 44 at 782.

of the university if the officers who service them are employed by that very same institution.[51] Courts, they say, are by design neutral bodies without conflicts of interest.[52] As such, they argue that courts should be left to adjudicate these matters.[53]

2.3.2. The Complementary Dual Role: How Universities Can and Should Address Campus Sexual Misconduct

Ultimately, there is room for both the criminal justice system and university tribunals in adjudicating sexual misconduct.[54] Indeed, as McNeill states, it would be inaccurate to position the former and the latter as mutually exclusive, arguing rather, that they are complementary and a victim can "go to one, both, or neither".[55] Beloff adds that if adjudication of sexual misconduct falls within the ambit of the rules of the university, not adjudicating it makes no sense.[56] Particularly, in the grey area between criminal and administrative law into which sexual misconduct falls, universities, they state, must "act with caution but with resolution".[57] This echoes Wilson, who says that there is a moral imperative for universities to hear sexual misconduct matters; a responsibility that they cannot simply abandon.[58] Universities are mandated to create a safe learning space for their students, and this involves investigating and adjudicating sexual misconduct.[59] This is the argument advanced by the DHET, and the position I take in this dissertation.

2.4. By The Numbers: Understanding the Prevalence and Effect of Sexual Misconduct

The numerous studies on the prevalence and effect of sexual misconduct in higher education globally present staggering statistics. Sivertsen *et al* report that one in four students in Norway has been sexually harassed – a statistic similar to the USA, while Rubiano-Matulevich reports that in Nigeria that statistic is 70% of female graduates, and in Ethiopia it is 78% of female students.[60] Despite this picture, 123 countries have no laws on sexual harassment in

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[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Claire McNeill 'Why Do Universities Handle Sexual Assault Cases, Anyway?' *Tampa Bay Times* (2017) at 1.
[55] Ibid at 2.
[56] Michael J Beloff '"Scholars, Students and Sanctions" - Dismissal and Discipline in the Modern University' (1998) 13 *The Denning Law Journal* at 26.
[57] Ibid at 26.
[58] R Wilson 'Should Colleges be Judging Rape' (2015) *op cit* note 34 at 1.
[59] Ibid.
[60] Børge Sivertsen et al 'Sexual Harassment and Assault Among University Students in Norway: A Cross-Sectional Prevalence Study' (2019) 9 *BMJ Open* at 7; E Rubiano-Matulevich 'A Guidance Note for Preventing,

education.[61] Wood *et al* state that being a white woman is a risk factor for campus sexual harassment, a fact that is disputed by Calafell, who asserts that women of colour report higher incidents of sexual harassment, with as many as 85% reporting it.[62] One study demonstrates how, in Zimbabwe, sexual exploitation of students is rampant and tolerated because students often engage in transactional sex with lecturers as a result of economic factors and the inability to afford school fees.[63] A further study of sexual harassment in Nigeria showed that the majority of female students experienced sexual harassment, but few reported it, and that 97% of surveyed students were aware of incidents of sexual harassment on their campus.[64]

According to Lombardo and Bustelo, knowing the statistics on prevalence is important for developing campus policies.[65] High prevalence rates, argue Sivertsen *et al,* influence victim services – both legal and support.[66] All the above studies agree that the impact of campus sexual misconduct on education is severe. Students report dropping out of classes, switching courses, skipping class, and dropping out of school as attempts to protect themselves.[67] They also report a perception of insecurity on campus following an incident.[68] In addition to the effects on education, sexual misconduct has been demonstrated to place students at higher risk of alcohol and drug misuse as well as physical and psychological illness.[69]

Given all of this, it is clear why much of the research undertaken has been focused on prevalence and finding out the "why" of campus sexual misconduct. The levels of victimisation are high, and universities can only intervene having understood the scope of the problem.

Reporting and Responding to Sexual Assault and Sexual Harassment in Tertiary Education Institutions' (n.d.) *op cit* note 27 at 2.

[61] E Rubiano-Matulevich 'A Guidance Note for Preventing, Reporting and Responding to Sexual Assault and Sexual Harassment in Tertiary Education Institutions' (n.d.) *op cit* note 27 at 2.

[62] Leila Wood et al 'Sexual Harassment at Institutions of Higher Education: Prevalence, Risk, and Extent' (2021) 36 *Journal of interpersonal violence* at 3; Bernadette Marie Calafell '"Did It Happen Because of Your Race or Sex?": University Sexual Harassment Policies and the Move Against Intersectionality' (2014) 35 *Frontiers: A Journal of Women Studies* at 75.

[63] J Joseph 'Sexual Harassment in Tertiary Institutions: A Comparative Perspective' (2015) *op cit* note 26 at 133.

[64] Ibid.

[65] Emanuela Lombardo & Maria Bustelo 'Sexual and Sexist Harassment in Spanish Universities: Policy Implementation and Resistances Against Gender Equality Measures' (2021) *Journal of Gender Studies* at 13.

[66] B Sivertsen et al 'Sexual Harassment and Assault Among University Students in Norway: A Cross-Sectional Prevalence Study' (2019) *op cit* note 60 at 8.

[67] L Wood et al 'Sexual Harassment at Institutions of Higher Education: Prevalence, Risk, and Extent' (2021) *op cit* note 62 at 3.

[68] E Rubiano-Matulevich 'A Guidance Note for Preventing, Reporting and Responding to Sexual Assault and Sexual Harassment in Tertiary Education Institutions' (n.d.) *op cit* note 27 at 2.

[69] LB Klein & Sandra L Martin 'Sexual Harassment of College and University Students: A Systematic Review' (2021) 22 *Trauma, Violence, & Abuse*.

2.5. The Importance of Sound Policy Development Processes and Good Definitions in Addressing Campus Sexual Misconduct

The first line response to sexual misconduct, especially when it is as prevalent as demonstrated above, is for universities to create policies that set out prevention and response mechanisms. International interventions on sexual harassment have used the "3Ps" (prevention, protection, prosecution) approach, with the Council of Europe adding a fourth P – policy, in recognition of its importance.[70]

In formulating policy, writers have made it clear that a "cookie-cutter" approach will not work and that there needs to be careful consideration by each university of what goes into a policy.[71] However, as Shanker and Tavcer point out, there isn't enough information on who makes the policies and how their position influences the policy development process.[72] Studying the policy development process, researchers have asked if the people who are making the policies can deliver what institutions need.[73] In response to this question, participants in Shankar and Tavcer's study said that they felt that their university often appointed "good people" with "good intentions", but with limited competency, in that they do not have the expertise or the necessary information to make responsive policies.[74] Typically, according to Thomas, universities either approach policy development in a consultative manner, or in a top-down fashion.[75] Those that adopt a more consultative approach, she says, tend to have policies that are more education focused, while those with a top-down approach tend to produce policies with a disciplinary focus.[76]

Shankar and Tavcer describe how there is the (mis)conception in some universities that lawyers should be at the helm of the process, to the exclusion of students who have the lived experience

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[70] E Lombardo & M Bustelo 'Sexual and Sexist Harassment in Spanish Universities: Policy Implementation and Resistances Against Gender Equality Measures' (2021) *op cit* note 65; *Convention on Preventing and Combatting Violence Against Women and Domestic Violence* (2011) at 3.
[71] A Gouws & A Kritzinger 'Dealing with Sexual Harassment at Institutions of Higher Learning: Policy implementation at a South African University' (2007) 21 *South African Journal of Higher Education* at 82.
[72] Irene Shankar & D. Scharie Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) 195 *Canadian Journal of Educational Administration and Policy* at 10.
[73] Ibid at 5-6.
[74] Ibid at 6.
[75] A M Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) *op cit* note 27 at 147.
[76] Ibid at 153.

of being victims of sexual misconduct.[77] Often these lawyers are not specially trained in sexual misconduct and gender-based violence and approach the process in a legalistic fashion.[78] As such, universities end up with policies that are not people focused, whereas the priority is to mitigate institutional risk.[79]

To combat such policy outcomes, Wilken and Badenhorst suggest that the policy development process must be inclusive.[80] Rodriguez-Rodriguez and Heras-Gonzalez agree, arguing that both policy development and policy revision should include all stakeholders in the university, as students and workers can provide valuable input.[81] Exclusion of key stakeholders and inclusion of policymakers who do not understand sexual misconduct, leads to the creation of policies that are centred on myths, and actions that do not reflect the true needs of the campus community.[82] An inclusive approach is especially important, as is argued by Thomas, because the way a policy is initially drafted and thereafter implemented influences its ability to gain the campus community's trust and determines its impact.[83] Further, Wood *et al* find that part of having responsive policies is that they must be culturally sensitive in recognising that identities affect potential victimisation and policies must be drafted with these nuances in mind.[84] For some universities, these complexities deter them from tackling campus sexual misconduct, but Shankar and Tavcer argue that this is exactly why we should be addressing it.[85]

Gonzales *et al* assert that the stronger the policies, the more they encourage reporting.[86] Shankar and Tavcer point out that low reporting is a problem for policy development because it means there is little data to work with, which undermines the employment of an evidence-

[77] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 6.
[78] Ibid.
[79] Ibid.
[80] E C Wilken & J W Badenhorst 'A Comparative Analysis of Sexual Harassment Policies at Selected Higher Education Institutions in South Africa' (2003) 17 *South African Journal of Higher Education* at 199.
[81] Ignacio Rodriguez-Rodriguez & Purificación Heras-González 'A Study of the Protocols for Action on Sexual Harassment in Public Universities—Proposals for Improvement' (2020) 9 *Social Sciences* at 6.
[82] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 10.
[83] A M Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) *op cit* note 27 at 155.
[84] L Wood et al 'Sexual Harassment at Institutions of Higher Education: Prevalence, Risk, and Extent' (2021) *op cit* note 62 at 12.
[85] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 9.
[86] Alberto R Gonzales et al 'Sexual Assault on Campus: What Colleges and Universities Are Doing About It' (2005) *Retrieved from National Criminal Justice Reference Service website: http://www. ncjrs. gov/pdffiles1/nij/205521. pdf* at 9.

based approach to policy development.[87] But one of the biggest barriers to reporting identified by researchers is a general lack of understanding of what constitutes sexual misconduct.[88] This lack of understanding is why clear definitions are necessary. Without clear definitions that include examples of sanctionable behaviour, there is an identified lack of understanding of what constitutes sexual misconduct.[89]

Kayuni illustrates this variance in understandings of misconduct by citing participants in their study who responded that individuals have different sensitivities and interpretation of behaviours and so what is misconduct to one may not be misconduct to another.[90] Joubert *et al*, in their study of South African universities, argue that precisely because campus communities represent a melting pot of religion and cultures, and personal definitions of misconduct are different, it is important to have clear uniformly applicable definitions.[91] As Vohlidalova states, having a gap between individual and institutional understandings of sexual misconduct is a reason why anti-harassment policies fail.[92]

It is important that the campus community understands the subject matter of a policy.[93] There must be standardised definitions, it is agreed, but even where studies of policy definitions have been conducted by scholars such as Gonzales *et al*, there is no data on the sufficiency of the definitions and compliance with those definitions.[94]

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[87] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 7.

[88] Happy Mickson Kayuni 'The Challenge of Studying Sexual Harassment in Higher Education: An Experience from the University of Malawi's Chancellor College' (2009) 11 *Journal of International Women's Studies* at 97; R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 192; T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9 at 115; M Vohlídalová 'The Perception and Construction of Sexual Harassment by Czech University Students' (2011) *op cit* note 10 at 1121; American Association of University Professors *Campus Sexual Assault: Suggested Policies and Procedures* (2012) American Association of University Professors at 369; Pierre Joubert et al 'The Effectiveness of Sexual Harassment Policies and Procedures at Higher Education Institutions in South Africa' (2011) 9 *South African Journal of Human Resource Management*.

[89] H M Kayuni 'The Challenge of Studying Sexual Harassment in Higher Education: An Experience from the University of Malawi's Chancellor College' (2009) *op cit* note 88 at 87.

[90] Ibid.

[91] P Joubert et al 'The Effectiveness of Sexual Harassment Policies and Procedures at Higher Education Institutions in South Africa' (2011) *op cit* note 88 at 7.

[92] M Vohlídalová 'The Perception and Construction of Sexual Harassment by Czech University Students' (2011) *op cit* note 10 at 1121.

[93] H M Kayuni 'The Challenge of Studying Sexual Harassment in Higher Education: An Experience from the University of Malawi's Chancellor College' (2009) *op cit* note 88 at 97.

[94] A R Gonzales et al 'Sexual Assault on Campus: What Colleges and Universities Are Doing About It' (2005) *op cit* note 86 at 5 & 11.

2.6. Comprehensiveness and Accessibility: Pillars of Effective Sexual Misconduct Policies

Overall, scholars make the case that however policies are made, and whoever writes them, they must be "clear, readable, and accurate",[95] as well as comprehensive and accessible.[96]

DeLong *et al* establish the concept of policy comprehensiveness.[97] In order for a policy to be considered comprehensive, they state, it must include ten specific content elements and, according to them, the more comprehensive a policy is, the less likely campus sexual misconduct is to occur.[98] These elements are: an introduction, a description of the scope of the policy, options for assistance, details of the person responsible for handling the complaint, definitions of sanctionable conduct, reporting policies and protocols, investigation procedures and protocols, a grievance procedure, provisions for prevention and education, and provision for training.[99]

Legault discusses the importance of policy comprehensiveness in their analysis of four Canadian university policies, although they aren't convinced that there is necessarily a correlation between a comprehensive policy and less incidences of sexual misconduct, as averred by DeLong *et al*.[100] In addition to the elements of comprehensiveness listed above, Legault specifically highlights the need for a clear investigative process to be detailed in the policy, as it creates certainty and transparency; and an outline of available sanctions on a finding of guilt.[101] They point out that policies must contain a balance of specificity and vagueness.[102] This, Legault argues, is because there are parts of the policy in which vagueness is appropriate because it maintains the breadth of application of the policy.[103] But there are

[95] American Association of University Professors 'Campus Sexual Assault: Suggested Policies and Procedures' (2012) *op cit* note 88 at 369.
[96] Stephanie M DeLong et al 'Starting the Conversation: Are Campus Sexual Assault Policies Related to the Prevalence of Campus Sexual Assault' (2018) 33 *Journal of interpersonal violence* at 3336; Konnor Legault *What is Canada Doing? An Analysis of Canadian University Sexual Violence Policies* Wilfrid Laurier University, 2021) at 50; Sanela Smolovic-Jones et al ''[PDF] beinghaRasseD?' Accessing Information About Sexual Harassment in New Zealand's Universities' (2013) 27 *Women's Studies Journal* at 44-45.
[97] S M DeLong et al 'Starting the Conversation: Are Campus Sexual Assault Policies Related to the Prevalence of Campus Sexual Assault' (2018) *op cit* note 96 at 3318 & 3321.
[98] Ibid at 3318.
[99] Ibid.
[100] K Legault 'What is Canada Doing? An Analysis of Canadian University Sexual Violence Policies' (2021) *op cit* note 96 at 81.
[101] Ibid at 84.
[102] Ibid at 93.
[103] Ibid at 91.

others, like the disciplinary process with which my dissertation is concerned, where specificity is a necessity.[104] In their review, Legault found that, overall, policies erred on the side of vagueness, to their detriment.[105]

While not drawing on this particular concept of policy comprehensiveness, others have also made contributions to the question of what would constitute a sufficiently comprehensive sexual misconduct policy. Gonzales *et al* state that a policy should be "user-friendly and easily accessible" and should contain clear definitions of the proscribed misconduct, list available support resources, and give advice on the steps to follow after an assault.[106] Joseph calls for the inclusion, specifically, of the legal definitions of different forms of sexual misconduct including examples of sanctionable conduct, as well as statements of responsibility compelling individuals to report misconduct, and universities to investigate it.[107]

Along with comprehensiveness, there is the assertion that policies need to be accessible to be effective.[108] Smolovic-Jones *et al* undertook a study on the accessibility of policies and other information relating to sexual harassment in New Zealand's universities.[109] Their rationale for the study was to see how easy it is for students to access information should they need to use it.[110] Alarmingly, they found that even though all universities had some form of information available, 61% of surveyed students were entirely unaware of it.[111] Their metrics for evaluation included the visibility of a policy – that is, how easy it is to find, and the accessibility of the policy – that is, how student-friendly it is in its language.[112] Overall, they found that New Zealand's universities are lacking, with many policies and information documents being cryptically labelled, and the language in the policies being sometimes misleading or overly

[104] Ibid at 92-93.
[105] Ibid at 93.
[106] A R Gonzales et al 'Sexual Assault on Campus: What Colleges and Universities Are Doing About It' (2005) *op cit* note 86 at 12.
[107] J Joseph 'Sexual Harassment in Tertiary Institutions: A Comparative Perspective' (2015) *op cit* note 26 at 138.
[108] A R Gonzales et al 'Sexual Assault on Campus: What Colleges and Universities Are Doing About It' (2005) *op cit* note 86 at 12.
[109] S Smolovic-Jones et al ''[PDF] beinghaRasseD?' Accessing Information About Sexual Harassment in New Zealand's Universities' (2013) *op cit* note 96 at 36.
[110] Ibid at 36.
[111] Ibid at 39.
[112] Ibid at 41-42.

legalistic.[113] They conclude that policies should be explicitly labelled as to what they are, as this makes them easier to find, and language should be carefully chosen and clear.[114]

2.7. Ensuring Effective Implementation of Policies

Policies are only as good as their implementation, it is argued, and thus require an ethical commitment from university leadership to putting adequate procedures in place, as freedom to learn can only be realised through the creation and provision of safe learning spaces.[115] Thomas argues that the disparity between policy development and implementation makes all the difference in its impact.[116] It is likely for this reason that there is a major focus on the implementation of policies across studies.

According to Joubert *et al,* there is a widespread perception in South Africa that implementation is currently ineffective, and that this severely limits the protection that these policies are meant to give both the accused and accusing students.[117] Gouws and Kritzinger agree, arguing that a gap exists between policy development and its implementation, often as a result of a lack of institutional support and poor attitudes and perceptions around the policy.[118] This is demonstrated in Kayuni's study, which showed a discrepancy between how tribunal processes are meant to run in terms of policy and how they actually were run at the university under study.[119] They found that disciplinary panel members frequently did not show up to hearings, resulting in panels that did not meet quorum, and that there was a general lack of commitment to seeing the process through.[120]

Lombardo tells us that implementation depends on several factors working in its favour and opposition, and often implementation is a political rather than technical matter.[121] This political

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[113] Ibid at 41-43.
[114] Ibid at 43.
[115] American Association of University Professors 'Campus Sexual Assault: Suggested Policies and Procedures' (2012) *op cit* note 88 at 366.
[116] A M Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) *op cit* note 27 at 152.
[117] P Joubert et al 'The Effectiveness of Sexual Harassment Policies and Procedures at Higher Education Institutions in South Africa' (2011) *op cit* note 88 at 7.
[118] A Gouws & A Kritzinger 'Dealing with Sexual Harassment at Institutions of Higher Learning: Policy implementation at a South African University' (2007) *op cit* note 71 at 72.
[119] H M Kayuni 'The Challenge of Studying Sexual Harassment in Higher Education: An Experience from the University of Malawi's Chancellor College' (2009) *op cit* note 88 at 95.
[120] Ibid.
[121] E Lombardo & M Bustelo 'Sexual and Sexist Harassment in Spanish Universities: Policy Implementation and Resistances Against Gender Equality Measures' (2021) *op cit* note 65 at 2 & 3.

nature of implementation is demonstrated in the reluctance of institutions to commit resources to implement policies, says Thomas, and ineffective implementation is among the primary reasons why the higher education sector has failed to make progress in dealing with sexual misconduct.[122]

Below, I discuss the need for sufficient education and training on the policies and on handling sexual misconduct cases, as well as effective reporting and record-keeping as instrumental aspects of effective implementation that are highlighted in studies on campus sexual misconduct.

2.7.1. Mandating Training and Education on Sexual Misconduct and its Policies

The first aspect of effective implementation is to ensure that members of the university community receive training and education on the contents of the university's policies on sexual misconduct and how to use them.[123] In their study, Fusilier and Penrod noted that the effectiveness of the training provided was the biggest predictor of policy satisfaction and impact.[124]

However, even with this knowledge, training remains lacking in universities. In Gonzales' study only four in ten institutions surveyed offered any training on sexual misconduct and the related policies, while Joubert *et al* report as few as 24% of academic staff members receiving training on the use of sexual misconduct policies.[125] Likewise, some participants interviewed in Shankar and Tavcer's study were unaware that policies exist, of the prevalence of misconduct, and of protocols on collaboration and information sharing in dealing with sexual misconduct complaints.[126] Gouws and Kritzinger found that most participants had little information on the policy and procedures and felt ill-equipped to implement or evaluate them.[127] As such, they saw them as something that was only available on paper.[128] Even among students, Wilken and Badenhorst found that very little education was offered and an

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[122] A M Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) *op cit* note 27 at 146.
[123] M Fusilier & C Penrod 'University Employee Sexual Harassment Policies' (2015) *op cit* note 12 at 51.
[124] Ibid.
[125] A R Gonzales et al 'Sexual Assault on Campus: What Colleges and Universities Are Doing About It' (2005) *op cit* note 86 at 6; P Joubert et al 'The Effectiveness of Sexual Harassment Policies and Procedures at Higher Education Institutions in South Africa' (2011) *op cit* note 88 at 5.
[126] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 7-8.
[127] A Gouws & A Kritzinger 'Dealing with Sexual Harassment at Institutions of Higher Learning: Policy implementation at a South African University' (2007) *op cit* note 71 at 82.
[128] Ibid.

understanding of what is contained in the policies was limited.[129] These studies, spanning four countries, show that this is not a localised problem.

The American Association of University Professors ("AAUP") asserts that training on policies and delivery of prevention programmes are vital elements of a robust policy.[130] While Dieujuste states that training is lacking among administrators who are meant to implement the policies, the AAUP argues that the conversation on training often excludes faculty, who are more likely to be first points of contact for reporting.[131] Taking a broad view, Legault states that education on the policy and on sexual misconduct in general should be for *all* members of the campus community.[132] Joseph agrees, adding that the training should be annual and mandatory and have the support of institutional leadership.[133]

In addition to the general training of the entire university community described above, there is a need for the employment of experts to administer the disciplinary process or specialised training for the administrators who fulfil this role.[134] Kayuni expresses this need, having found that disciplinary proceedings are run by administrators who do not have the knowledge and qualifications to conduct sexual misconduct hearings.[135] Kayuni argues that the composition of the disciplinary committee at the institution under their study is structurally defective, and student trust in the tribunal has been eroded.[136]

Adjudicators on disciplinary tribunals must be experts.[137] Disciplinary tribunals, Legault argues, grant a lot of discretion in decision-making and sanctioning and it is thus crucial that the right people sit on them.[138] Lombardo and Bustelo add that it is not enough that just some

[129] E C Wilken & J W Badenhorst 'A Comparative Analysis of Sexual Harassment Policies at Selected Higher Education Institutions in South Africa' (2003) *op cit* note 80 at 200.
[130] American Association of University Professors 'Campus Sexual Assault: Suggested Policies and Procedures' (2012) *op cit* note 88 at 369.
[131] Slandah Dieujuste *A Multi Case Study Of Sexual Assault Policies And Procedures Of Two Residential Higher Education Institutions In The Midwest* Andrews University, 2018) at 87; American Association of University Professors 'Campus Sexual Assault: Suggested Policies and Procedures' (2012) *op cit* note 88 at 370.
[132] K Legault 'What is Canada Doing? An Analysis of Canadian University Sexual Violence Policies' (2021) *op cit* note 96 at 111.
[133] J Joseph 'Sexual Harassment in Tertiary Institutions: A Comparative Perspective' (2015) *op cit* note 26 at 138.
[134] H M Kayuni 'The Challenge of Studying Sexual Harassment in Higher Education: An Experience from the University of Malawi's Chancellor College' (2009) *op cit* note 88 at 97.
[135] Ibid at 96-97.
[136] Ibid. At that university the committee consisted of the College Principal, Registrar, the Dean, and one senior member of staff.
[137] K Legault 'What is Canada Doing? An Analysis of Canadian University Sexual Violence Policies' (2021) *op cit* note 96 at 114.
[138] Ibid.

of the people involved are experts.[139] They assert that even where there are some GBV experts included in the adjudication process, if there are key actors who are not experts, this will work to the detriment of achieving policy goals because of those actors' ignorance of the complexities of GBV and sexual misconduct.[140]

2.7.2. The Importance of Accurate Record-Keeping, Timely Reporting, and Regular Evaluation

The second aspect of effective implementation highlighted by scholars is good reporting and record-keeping practices.[141]

Sexual misconduct is underreported by victims and institutions alike.[142] Studies show that universities do not keep accurate records, where records are kept at all.[143] As Shankar and Tavcer put it, data is not being collected and where it is being collected, it is not being reported.[144] This lack of data allows universities to feign ignorance of the severity of the problem on their campuses.[145] Thomas argues that there needs to be reporting to the entire campus community on outcomes of complaints so that people know that the policies are being taken seriously.[146] Even so, of the data requested by Thomas from the universities in her study, only half could produce any numbers, while 3% said the information was confidential, 10% provided no explanation for failing to produce any data, and 34% of institutions said they keep no records.[147] There is a clear lack of record-keeping, and a reluctance to account for work being done on sexual misconduct.[148]

Researchers agree that there is a need for regular evaluation of misconduct policies to ensure there is no complacency in their implementation, although it is unclear how this can be

[139] E Lombardo & M Bustelo 'Sexual and Sexist Harassment in Spanish Universities: Policy Implementation and Resistances Against Gender Equality Measures' (2021) *op cit* note 65 at 8.
[140] Ibid.
[141] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 7.
[142] H M Kayuni 'The Challenge of Studying Sexual Harassment in Higher Education: An Experience from the University of Malawi's Chancellor College' (2009) *op cit* note 88 at 96.
[143] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 7; A M Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) *op cit* note 27 at 148.
[144] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 7.
[145] Ibid.
[146] A M Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) *op cit* note 27 at 148.
[147] Ibid.
[148] Ibid.

conducted without adequate records.[149] Rodriguez-Rodriguez and Heras-Gonzalez found that despite ongoing revision being necessary, most universities did not conduct any evaluation.[150] Data-based policy evaluation is important due to the changing nature of knowledge on sexual misconduct, state Wilken and Badenhorst, and regular monitoring enhances policy effectiveness.[151]

2.8. Further Unpacking Local Literature: South African Studies on Sexual Misconduct in Universities

Of particular importance to this study are the other analyses of sexual misconduct policies in universities that have been conducted in South Africa. Understanding what work has already been done on the development and analysis of sexual misconduct policies in South African universities is important in demonstrating the need for, and relevance of, my research and the contribution it makes to knowledge on this subject in our context. What is immediately apparent is that there are few studies available and that much of what is written, while analysing policies in general, says little about the disciplinary process.

Here, I present studies on the manner in which South African universities approach policy development and implementation. The only inclusion/exclusion criteria applied in determining which studies to include were that the studies must approach sexual misconduct from an institutional policy perspective and undertake an analysis of the policies and their role in responding to sexual misconduct. Six studies met these criteria: those undertaken by Loots and Walker, Joubert *et al*, Gouws and Kritzinger, Bennett *et al*, Wilken and Badenhorst, and the Rhodes University Sexual Violence Task Team.[152]

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[149] P Joubert et al 'The Effectiveness of Sexual Harassment Policies and Procedures at Higher Education Institutions in South Africa' (2011) *op cit* note 88 at 8.

[150] I Rodriguez-Rodriguez & P Heras-González 'A Study of the Protocols for Action on Sexual Harassment in Public Universities—Proposals for Improvement' (2020) *op cit* note 81 at 6.

[151] E C Wilken & J W Badenhorst 'A Comparative Analysis of Sexual Harassment Policies at Selected Higher Education Institutions in South Africa' (2003) *op cit* note 80 at 200; E Rubiano-Matulevich 'A Guidance Note for Preventing, Reporting and Responding to Sexual Assault and Sexual Harassment in Tertiary Education Institutions' (n.d.) *op cit* note 27 at 6.

[152] Sonja Loots & Melanie Walker 'A Capabilities-based Gender Equality Policy for Higher Education: Conceptual and Methodological Considerations' (2016) 17 *Journal of Human Development and Capabilities*; P Joubert et al 'The Effectiveness of Sexual Harassment Policies and Procedures at Higher Education Institutions in South Africa' (2011) *op cit* note 88; A Gouws & A Kritzinger 'Dealing with Sexual Harassment at Institutions of Higher Learning: Policy implementation at a South African University' (2007) *op cit* note 71; Jane Bennett et al '"Gender is Over": Researching the Implementation of Sexual Harassment Policies in Southern African Higher Education' (2007) 8 *Feminist Africa*; E C Wilken & J W Badenhorst 'A Comparative Analysis of Sexual

2.8.1. Loots and Walker on Policy Development

The most recent South African study was undertaken by Loots and Walker, whose work focuses on gender equality policy in universities.[153] This study is concerned with how the concept of gender equality, as defined in university policies, impacts the measurable targets set in those policies and priorities for implementation.[154] The starting point for Loots and Walker is that definitions of terms in a policy must be clear.[155] This is because those definitions direct administrators in implementation and evaluation of policies.[156]

In this study, the focus was on the broader concept of gender equality in universities, which Loots and Walker state has, in large part, been defined to mean parity and equal distribution.[157] Because gender equality has been so narrowly defined, they assert, much of the focus on implementation has been restricted to ensuring equal access to and participation in higher education by women.[158] This has been achieved, with statistics revealing that women constituted the majority of enrolments and have higher participation rates in public universities.[159] But, as Loots and Walker point out, parity does not tell the full story.[160] In fact, they argue that defining gender equality to mean gender parity has resulted in gender equality falling off the radar as a policy priority once parity has been achieved.[161] This definition of gender equality failed to acknowledge the experiences of women once they were in these institutions, including experiences of sexual harassment.[162] Defining equality only as parity was shown to be inadequate in understanding the nuances of gender equality in universities.[163]

So, what does this mean for the present research? Loots and Walker suggest a different approach to policy development; one that is cognisant of the lived experiences of the people who are directly affected by the policies themselves, which is the approach they used in their

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Harassment Policies at Selected Higher Education Institutions in South Africa' (2003) *op cit* note 80; Sexual Violence Task Team '"We Will Not Be Silenced": A Three–pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University/UCKAR' (2016) *op cit* note 19.

[153] S Loots & M Walker 'A Capabilities-based Gender Equality Policy for Higher Education: Conceptual and Methodological Considerations' (2016) *op cit* note 152.

[154] Ibid at 260.

[155] Ibid.

[156] Ibid.

[157] Ibid at 261.

[158] Ibid.

[159] Ibid.

[160] Ibid.

[161] Ibid at 262.

[162] Ibid.

[163] Ibid.

empirical study.[164] They argue that when the policy goal of achieving gender equality is approached and delineated in a consultative manner with students and stakeholders – as they did in their study – it results in a more robust conceptualisation and definition.[165]

2.8.2. Joubert *et al* on Policy Awareness and Effectiveness

Joubert *et al* undertook a study on the effectiveness of sexual harassment policies in South African universities and focused on awareness of sexual harassment policies by academic staff members.[166] Their survey sought to establish if, where policies do exist, academic staff members know about them, and if the implementation is effective.[167]

To do this, Joubert *et al* surveyed 161 academic staff at ten public universities inquiring into, *inter alia*, whether they knew if their institution had a sexual harassment policy, if they were in possession of it, whether the policy was ever explained to them or if they received training on its contents and procedures, and whether they thought the policy was an effective tool to reduce sexual harassment on their campus.[168] Their findings indicate that while most institutions have policies in place, few faculty members are in possession of that policy, know its contents, or have received any training on it.[169] This ignorance, they say, has a negative impact on implementation, with their participants indicating their perception that implementation is currently ineffective.[170]

According to Joubert *et al,* for effective implementation to take place there must be an effort to raise awareness of the policy, including communicating it to employees on every level, conducting regular training sessions, and raising awareness among managers and supervisors on their duties in terms of the policy.[171] Their study highlights the fact that comprehensive policies on their own are not enough to combat sexual misconduct in universities; there must be a determined effort to raise awareness of policies once created and this must be followed through with effective implementation and evaluation.[172]

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[164] Ibid at 263-264.
[165] Ibid at 274.
[166] P Joubert et al 'The Effectiveness of Sexual Harassment Policies and Procedures at Higher Education Institutions in South Africa' (2011) *op cit* note 88 at 1.
[167] Ibid.
[168] Ibid at 3-5.
[169] Ibid at 5.
[170] Ibid at 7.
[171] Ibid.
[172] Ibid at 8-9.

2.8.3. Gouws and Kritzinger's Implementation Case Study

Gouws and Kritzinger examine policy implementation at a South African university.[173] Their point of departure is that there is a gap between the coming into effect of a policy and its implementation, and it is unclear if sexual misconduct policies are being successfully implemented, or what metrics should even be used to measure that success.[174] In justifying the need for studying sexual misconduct policies and their implementation, they canvass in-depth the multidimensional impact of sexual misconduct on victims and institutions alike.[175] The summation of their findings is that there is an implementation problem at the institution under study, which has resulted in a lack of student faith in the sexual misconduct policy and the systems that were put in place to implement it.[176]

Gouws and Kritzinger undertook a mixed methods study, in the form of surveys, questionnaires, and focus groups to find out a) what the views of different stakeholders across the campus were on the sexual misconduct policy, and b) the extent to which the policy was perceived to be effective.[177] Their primary findings were that:

1. In large part, line management is not meaningfully involved in implementation of the policy.[178]
2. Line managers have never received training on the policy.[179]
3. There is a lack of awareness on the policy and its contents among students and staff.[180]
4. There is a general feeling that implementation of the policy is not successful.[181]
5. There is confusion among students on the definitions of sexual harassment.[182]
6. Students do not feel that they are well informed of the facilities available to them should they become victims of sexual misconduct.[183]

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[173] A Gouws & A Kritzinger 'Dealing with Sexual Harassment at Institutions of Higher Learning: Policy implementation at a South African University' (2007) *op cit* note 71.
[174] Ibid at 68.
[175] Ibid at 69-71.
[176] Ibid at 68.
[177] Ibid at 74.
[178] Ibid at 75.
[179] Ibid.
[180] Ibid.
[181] Ibid at 77.
[182] Ibid at 79.
[183] Ibid at 80.

Gouws and Kritzinger did not inquire into the disciplinary process specifically, but do state that where possible, conflict-free mechanisms of resolution (such as mediation and counselling) should be preferred over formal disciplinary hearings.[184] They argue that once matters have reached the disciplinary stage at this institution, they become adversarial and involve lawyers who frequently minimise victim experiences and re-traumatise both victims and accused students.[185]

The findings of this study are important. As has been noted throughout this chapter, good policy implementation is important for ensuring adequate responses to sexual misconduct. The adjudication process is but one part of the overall matrix, and when it is not aided by effective implementation of other parts of the policy – including training on the policy itself – it cannot succeed.

2.8.4. Bennett *et al* on Implementation From a Gender Perspective

Bennett *et al*'s study on sexual misconduct at universities is undertaken from a gender equality perspective and concerns itself with gender and sexuality, and their influence on experiences and perceptions of sexual misconduct.[186] The authors state that policy development is an important institutional response to sexual misconduct, but that there isn't sufficient understanding of the extent to which policy affects discourse on campuses around sexual misconduct.[187] With this study, Bennett *et al* seek to analyse the impact of sexual misconduct policies on sexual harassment and recommend ways to strengthen the link between policy development and implementation.[188] As such, this study is predominantly on implementation, like that of Gouws and Kritzinger, albeit on a greater scale as it was conducted at three institutions in two countries.[189]

Bennet *et al* make the point that there needs to be a clear understanding from the outset of what the term "policy implementation" means.[190] This, they say, is because understandings at the time of conducting their research relied heavily on accessibility of policies and reporting

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[184] Ibid at 83.
[185] Ibid.
[186] J Bennett et al '"Gender is Over": Researching the Implementation of Sexual Harassment Policies in Southern African Higher Education' (2007) *op cit* note 152 at 85.
[187] Ibid at 91.
[188] Ibid.
[189] These countries are South Africa and Botswana.
[190] J Bennett et al '"Gender is Over": Researching the Implementation of Sexual Harassment Policies in Southern African Higher Education' (2007) *op cit* note 152 at 92.

statistics as indicators of successful implementation.[191] The researchers assert that the failure or success of implementation cannot be measured by looking at the rise or fall in numbers of complaints made, as this provides only a small representation of the problem.[192] As such, in their study they ask questions about awareness of policies, perception of the usefulness of policies, and evaluation of the policies by those who are responsible for implementing them as a means of gauging whether implementation was successful.[193]

Bennet *et al* found that in general, none of the three universities they studied were taking implementation seriously.[194] Participants reported confusion on the meaning and definition of sexual misconduct, and a lack of understanding of policy terms.[195] Further, the lack of a dedicated unit or office to receive complaints of misconduct at one institution left complainants unsure of where to go, while at the other two, participants reported feeling a sense of fragmentation caused by policy provisions which allow for an overwhelming number of people and units to serve as "first responders" for receiving complaints.[196]

On the question of disciplinary tribunals as a mechanism for addressing sexual misconduct, Bennett *et al* report an overall preference for resolution through mediation or counselling.[197] They argue that the disciplinary process is dichotomous, punitive, and "full of the divisions and language of competition".[198] Additionally, they found that disciplinary tribunals were traumatising for victims, and their research at all three institutions found evidence of withdrawal of complaints, emotional and academic breakdown of complainants, and lasting bitterness towards the institution and the accused.[199] Nonetheless, the researchers acknowledge the importance of tribunals and tribunal processes in acknowledging the seriousness of sexual misconduct.[200]

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[191] Ibid.
[192] Ibid at 92-93.
[193] Ibid at 93.
[194] Ibid at 94.
[195] Ibid.
[196] Ibid at 95.
[197] Ibid.
[198] Ibid at 95.
[199] Ibid at 96.
[200] Ibid.

Ultimately, Bennett *et al* conclude that while there are clear gaps in implementation, and an overall dissatisfaction among participants, there is an expressed optimism that there will be improvement in the usefulness of sexual misconduct policies in bringing about change.[201]

2.8.5. Comparative Analysis by Wilken and Badenhorst

Wilken and Badenhorst conducted a comparative analysis of sexual harassment policies at South African universities.[202] They consider the existing views on sexual harassment by conducting a review of policy literature, before canvassing the policies of eight selected universities, and ultimately making recommendations on what a good policy should contain.[203]

In canvassing the policy literature, Wilken and Badenhorst use as a point of departure the fact that there is an ethical and legal imperative for universities to develop effective policies for dealing with sexual harassment, and that failure to do so, not only compromises their core function of teaching and learning, but also opens institutions up to legal liability.[204] They suggest that there should be:

1. Open discussion and debate on sexual harassment, and not treating it as a matter that is only discussed privately and "behind closed doors".[205]
2. Comprehensive and simplified definitions of sexual harassment that are contained in a strongly worded policy which "denounces sexual harassment … in clear, unbiased language".[206]
3. A thorough consultative process and full participation of all stakeholders in the institution at all possible opportunities.[207]
4. Multiple avenues for reporting and recourse as well as effective procedures for dealing with sexual harassment.[208]
5. Separate hearing boards or tribunals for students and staff members.[209]

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[201] Ibid.
[202] E C Wilken & J W Badenhorst 'A Comparative Analysis of Sexual Harassment Policies at Selected Higher Education Institutions in South Africa' (2003) *op cit* note 80.
[203] Ibid at 197.
[204] Ibid.
[205] Ibid at 199.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] Ibid at 200.

6. Effective training and education on the policy provisions and procedures to be followed when an incident is reported.[210]
7. The creation of a dedicated contact person or persons for receiving complaints.[211]
8. A sound monitoring and evaluation system that regularly evaluates all aspects of the policy and its implementation.[212]

From these points, Wilken and Badenhorst develop a checklist, which they use to analyse the policies included in their comparative study.[213] This study uses metrics that consider the policy holistically, by including metrics on procedures, education and training, and implementation.[214] This study is similar to my own in its consideration of policies holistically, and as such, it provides a critical grounding for this dissertation. The key difference is my specific focus on the disciplinary process itself.

Wilken and Badenhorst's primary findings are three-fold: that in general, policies on sexual harassment are lacking; that most policies fare poorly in detailing the procedure to be followed, and worse still in providing implementation measures; and that the majority (75%) of institutions in their study did not detail their disciplinary proceedings, but rather referred to their institutional student disciplinary code.[215] All these findings are supportive of my own and foundational to the argument I will make for policies to contain strong procedural rules that create just processes.

The key recommendations that they make following their analysis are that it is essential for all universities to have a comprehensive, clearly worded, and accessible sexual harassment policy; that such policies should be developed using the checklist that they design and use in their study; and that there should be regular evaluations of the effectiveness and implementation of policies.[216]

2.8.6. The Findings of the Rhodes University Sexual Violence Task Team

In April 2016, in response to protest activity on its campus, Rhodes University set up a Sexual Violence Task Team to explore and make recommendations on various aspects of the

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[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid at 201-202.
[214] Ibid.
[215] Ibid at 203.
[216] Ibid at 203-204.

university's prevention mechanisms and responses to sexual misconduct on its campus.[217] The mandate of the Task Team was broad, and included the creation of safe spaces for complainants, consideration of approaches to justice for victims, a review of existing policies and procedures, systemic issues and issues related to the curriculum, and measures for monitoring and evaluation.[218] The Task Team's approach for identifying gaps in the above areas was consultative and participatory at all stages, and the report they published consolidates both their findings and recommendations.[219] For the purposes of this research, I focus only on those parts of the report that pertain to policies and processes, and the adjudication of sexual misconduct.

Primarily, the Task Team argues that a retributive justice system (which is how they refer to the disciplinary process) is in itself insufficient to deal with campus sexual misconduct, and recommends that the approach to justice be three-pronged and include restorative and reparative justice as well.[220] It additionally recommends that institutions create a greater network of support for victims; complainants be advised of the protective and supportive measures available to them; complainants be provided with multiple avenues for recourse; reporting officers be properly trained; and that sanctions be more severe where there is a power relationship between the parties or where the respondent is in a leadership position, such that they include suspension or removal from that position.[221]

Delving specifically into the policy aspect of campus sexual misconduct, the Task Team makes further observations and recommendations. This they do by first reviewing the multiple applicable Rhodes University policies, including the Staff Disciplinary Procedure, Staff Grievance Procedure, Policy on Eradicating Unfair Discrimination and Harassment, Protocol on Sexual Assault, Student Disciplinary Code, and the Sexual Offences Policy for Students.[222] They also reviewed the policies and procedures of the University of Johannesburg, the University of the Witwatersrand, and the University of the Western Cape.[223]

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[217] Sexual Violence Task Team '"We Will Not Be Silenced": A Three–pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University/UCKAR' (2016) *op cit* note 19.
[218] Ibid at 1.
[219] Ibid.
[220] Ibid. The principles of restorative justice and the role that it can play in sexual misconduct adjudication are laid out extensively in Chapter 6. For brevity, and in the interest of including what is relevant at this stage, I will not discuss these further here.
[221] Ibid at 3,6 & 7.
[222] Ibid at 31.
[223] Ibid.

While the Task Team makes numerous recommendations, I highlight here the six that are most pertinent to this research. These are that:

1. The institution must consolidate its multiple policies into a single comprehensive policy on sexual misconduct.[224]

   The Task Team found that having multiple documents with overlapping provisions on sexual misconduct created confusion amongst the campus community and created a duplication of roles across the policies.[225] As such, they recommend that these policies be consolidated into one comprehensive policy that is easily accessible for students and staff.[226]

2. Policies must contain clear definitions that are in line with legislation.[227]

   The Task Team recommends that definitions of misconduct be "clear and well thought out" and in line with the definitions contained in national legislation on sexual offences and sexual harassment.[228] I discuss this point further in my policy analysis in Chapter 5 and in Chapter 6 on victim-supportive measures.

3. All sexual harassment allegations must be categorised as serious.[229]

   In addition to the definitions of misconduct being in line with legislation, the Task Team recommends that policies should be clear that all forms of misconduct are serious, and the categorisation of that misconduct (where there are categories of disciplinary infractions) should reflect this.[230]

4. The university must create a sexual harassment office in charge of the overall handling of all cases.[231]

   The Task Team observed that there wasn't a single person or office directly in charge of overseeing institutional efforts to prevent and respond to sexual misconduct.[232] As

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[224] Ibid at 2 & 32.
[225] Ibid at 2 & 33.
[226] Ibid at 32.
[227] Ibid at 6.
[228] Ibid.
[229] Ibid at 35.
[230] Ibid.
[231] Ibid at 2.
[232] Ibid.

such, they recommend that the institution should establish such an office to fill this gap and fulfil this role.[233]

5. Prosecutors must have a background in dealing with sexual misconduct.[234]

   At the time of the report, sexual misconduct cases at Rhodes University were being investigated and prosecuted by law lecturers, who served as internal prosecutors and who had no specific expertise in sexual misconduct.[235] The Task Team identifies this as an issue to be addressed and includes in its recommendations that the prosecutorial team should include external prosecutors who are legally trained people with a background in dealing with sexual misconduct.[236]

6. Disciplinary panels must be comprised of experts.[237]

   Much like the recommendation for prosecutors, the Task Team also recommended that the disciplinary panel that adjudicates sexual misconduct cases also be comprised of subject-matter experts.[238]

7. There must be prescribed sanctions for rape and sexual assault.[239]

   It was identified that there was too much discretion given to adjudicators in sanctioning respondents who were found guilty of sexual misconduct.[240] One of the recommendations the Task Team makes in this regard is for the inclusion of prescribed sanctions for the serious offences of rape and sexual assault, which for students should be exclusion from the institution, and for staff, dismissal from employment.[241]

The *Rhodes Sexual Violence Task Team Report* provides an invaluable in-depth insight as well as practical recommendations on how institutions can better address sexual misconduct in a multifaceted way. While it was conceived out of events occurring at one institution, many of

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[233] Ibid.
[234] Ibid at 8.
[235] Ibid.
[236] Ibid.
[237] Ibid at 7.
[238] Ibid.
[239] Ibid at 36.
[240] Ibid at 38.
[241] Ibid at 36.

its recommendations are universal in application, and will be canvassed throughout this dissertation.

2.9. Moving Forward in Addressing Sexual Misconduct

The studies canvassed in this chapter are an illustration of some of the key issues that researchers have tackled on sexual misconduct policies in universities. In large part, they have focused on policy development and implementation, with some focusing on the comprehensiveness and accessibility of the policies themselves. What is missing in these studies, however, is the specific aspect that this dissertation addresses: that of the specifics of the disciplinary procedures themselves. In this dissertation, I establish that South Africa's public universities do not have sexual misconduct policies that adequately provide for just and victim-supportive adjudication processes, and then suggest measures that can be put in place for them to do so. What is evident from the studies above is that this is work in this context has yet to be comprehensively undertaken. A nuanced focus on processes – and on developing just and victim-supportive processes, in particular – is largely missing in other analyses of university sexual misconduct policies, and it is this gap that this dissertation seeks to fill.

CHAPTER 3

THE STATE OF THE NATION: REVIEWING RELEVANT LAWS AND POLICIES

3.1. INTRODUCTION

University policies are developed through the governance structures of an institution and this policy development is done against the backdrop of various statutes and national policy frameworks. In this chapter, I canvass these statutes and policy frameworks with a view to provide an understanding of the legal environment in which South African public universities exist, and the rules within which they develop and implement their policies. In so doing, I provide the context necessary for the institutional policy analysis that I will undertake in Chapter 5.

3.2. UNDERSTANDING THE STATUTORY LANDSCAPE

For the purposes of this dissertation, the focus is on two primary groups of statutes which are relied upon in the policy development process. These are, the statutes that relate to university governance and just process, and those that relate to sexual misconduct. All of these statutes exist in a hierarchical relationship with the Constitution of the Republic of South Africa,[242] which sits as the supreme law.

The statutes that form part of the first subcategory – that of governance and process – are the Higher Education Act,[243] the Promotion of Administrative Justice Act ("PAJA"),[244] the Promotion of Access to Information Act ("PAIA"),[245] and the Protection of Personal Information Act ("POPIA").[246] Those that constitute the second subcategory – that on the substance of sexual misconduct are the Criminal Law (Sexual Offences and Related Matters) Amendment Act ("SORMA"),[247] the Protection from Harassment Act,[248] the Domestic Violence Act,[249] and the Promotion of Equality and Prevention of Unfair Discrimination Act

[242] Constitution of the Republic of South Africa of 1996.
[243] Higher Education Act 101 of 1997.
[244] Promotion of Administrative Justice Act 3 of 2000.
[245] Promotion of Access to Information Act 2 of 2000.
[246] Protection of Personal Information Act 4 of 2013.
[247] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[248] Protection from Harassment Act 17 of 2011.
[249] Domestic Violence Act 116 of 1998.

("PEPUDA").[250] Primarily, universities have relied on SORMA and the Protection from Harassment Act in conjunction with the Higher Education Act and PAJA in their policy drafting, with a few also incorporating PEPUDA, POPIA, PAIA, and the Domestic Violence Act.

In addition to these laws, I include in this chapter a discussion of the Policy Framework for the Realisation of Social Inclusion in the Post-School Education and Training System,[251] and the Policy Framework to Address Gender-Based Violence in the Post-School Education and Training System.[252] While these are not Acts of Parliament, they are policy frameworks specifically developed by the South African Department of Higher Education and Training ("DHET") to guide all institutions in the post-school education and training sector – which includes universities – in developing policies on gender-based violence and sexual misconduct.[253]

3.2.1. The Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa is the supreme law of the country, and in s 33 grants the right to administrative action that is lawful, reasonable, and procedurally fair, as well as the right to written reasons for any person adversely affected by administrative action.[254] Section 33(3) provides the authority upon which the Promotion of Administrative Justice Act was enacted, in stating that "national legislation must be enacted to give effect to these rights".[255]

Additionally, s 12(1)(c) of the Constitution, which forms part of the Bill of Rights, is foundational to the laws on sexual misconduct. This section states:

> 12(1) Everyone has the right to freedom and security of the person, which includes the right - …

[250] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[251] *Policy Framework for the Realisation of Social Inclusion in the Post-School Education and Training System* (2016).
[252] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5.
[253] Ibid; *Policy Framework for the Realisation of Social Inclusion in the Post-School Education and Training System* (2016) *op cit* note 251.
[254] Constitution of the Republic of South Africa of 1996.
[255] Ibid.

(c) to be free from all forms of violence from either public or private sources.[256]

Indeed, SORMA,[257] the Protection from Harassment Act,[258] and the Domestic Violence Act[259] all cite this section of the Bill of Rights in their preambles, in recognition of the fact that the right to be free from violence is a fundamental human right.[260]

3.2.2. The Higher Education Act

The Higher Education Act 101 of 1997 was enacted to create a single system for the regulation and governance of higher education in South Africa. Section 1 of the Act defines a higher education institution (which includes universities) as:

> Any institution that provides higher education on a full-time, part-time or distance basis and which is—
>
> (a) established or deemed to be established as a public higher education institution under this Act;
>
> (b) declared as a public higher education institution under this Act; or
>
> (c) registered or conditionally registered as a private higher education institution under this Act.[261]

Section 20 of the Act provides for the establishment of public higher education institutions.[262] It states that a public higher education institution can be created, or an existing institution be declared a public higher education institution, by way of a notice gazetted by the Minister (s 20(1)) or by an Act of Parliament (s 20(2)).[263] Public higher education institutions are governed internally by a Council, as per s 27(1),[264] and are empowered by s 32(1) to create an institutional

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[256] Ibid.
[257] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[258] Protection from Harassment Act 17 of 2011.
[259] Domestic Violence Act 116 of 1998.
[260] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Protection from Harassment Act 17 of 2011; Domestic Violence Act 116 of 1998.
[261] Higher Education Act 101 of 1997.
[262] Ibid.
[263] Ibid.
Section 20 states:

> (1) The Minister may, after consulting the CHE [the Council on Higher Education], by notice in the Gazette and from money appropriated for this purpose by Parliament, establish a university, technikon or college. 30
> (2) Notwithstanding subsection (1), a university may also be established by an Act of Parliament and when so established it is deemed to be a public higher education institution established under this Act.

[264] Ibid.
Section 27(1) states:

statute to "promote effective management of the institution" and institutional rules to give effect to the institutional statute.[265] Such institutional rules include codes of conduct, and disciplinary policies that are used at the institution.

Public higher education institutions derive their disciplinary authority directly from the Higher Education Act which, in s 36, provides that:

> Every student at a public higher education institution is subject to such disciplinary measures and disciplinary procedures as may be determined by the institutional statute, subject to section 32(2)(d).[266]

Section 32(2)(d) referred to above states that:

> The disciplinary measures and disciplinary procedures relating to students, may not be made except after consultation with the senate and the students' representative council of the public higher education institution concerned.[267]

The Higher Education Act is thus essential in establishing both the existence of public higher education institutions and providing empowering provisions for their disciplinary authority and development of policies for their governance and management.

3.2.3. The Promotion of Administrative Justice Act

The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") is the governing statute for administrative justice in South Africa. It is the statute that I use in tandem with the theory of Natural Justice in analysing the components of procedural fairness in disciplinary proceedings. Importantly, PAJA only applies to administrative proceedings. In Chapter 4, I assert that disciplinary proceedings are administrative in nature and that the decisions taken at those proceedings constitute administrative action, providing case law to that effect, wherein the South African courts have settled it as law.[268] In this section, I lay out the provisions of PAJA

> (t)he council of a public higher education institution must govern the public higher education institution, subject to this Act, any other law and the institutional statute.

[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] *Oliver v Universiteit van Stellenbosch en andere* [2006] JOL 18108 (C); *Tsako v University of Fort Hare* [2001] JOL 8395 (Ck); *Yates v University of Bophuthatswana* [1994] (3) SA 815 (B); *Blacker v University of Cape Town and another* [1993] (3) All SA 638 (C); *Dhlamini v Minister of Education and Training and others* [1984] (2) All SA 218 (N).

that support this position, and the consequent duties that universities have when conducting disciplinary hearings.

Section 1 of PAJA defines administrative action as:

> Any decision taken, … by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, … which adversely affects the rights of any person and which has a direct, external legal effect.[269]

By this definition, PAJA requires that in order for decisions made by institutional disciplinary tribunals to constitute administrative action, there must be:

a. a decision,[270]
b. by a natural or juristic person,
c. exercising a public power or performing a public function,
d. in terms of an empowering provision,[271]
e. which adversely affects the rights of any person, and has a direct, external legal effect,

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[269] Promotion of Administrative Justice Act 3 of 2000.
Section 1 additionally states that the following acts are excluded from the definition of administrative action:

> *(aa)* the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) *(a)* , *(b)* , *(c)* , *(d)* , *(f)* , *(g)* , *(h)* , *(i)* and *(k)* , 85 (2) *(b)* , *(c)* , *(d)* and *(e)* , 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;
> (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) *(d)* , *(e)* and *(f)* , 126, 127 (2), 132 (2), 133 (3) *(b)* , 137, 138, 139 and 145 (1) of the Constitution;
> (cc) the executive powers or functions of a municipal council;
> (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
> (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
> (ff) a decision to institute or continue a prosecution;
> (gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;
> [Para. *(gg)* substituted by s. 26 of Act 55 of 2003.]
> (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
> (ii) any decision taken, or failure to take a decision, in terms of section 4 (1).

[270] Where *decision* is defined in s1 to include:

> making, suspending, revoking or refusing to make an order, award or determination" and "doing or refusing to do any other act or thing of an administrative nature.

[271] Where *empowering provision* is defined in s1 as:

> a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

f. and is not contained in the list of exclusions.[272]

Of particular concern are requirements (b), (c), (d), and (f) above. With (a) and (e), it is clear that in making a finding, a disciplinary tribunal would be making a decision, and that such a decision would have an adverse effect on the rights of either or both of the parties. Section 20(4) of the Higher Education Act[273] designates every public higher education institution as a juristic person, in fulfilment of requirement (b) above, and s 36 of the same Act grants public higher education institutions disciplinary authority, as laid out above.[274] This section, together with the institutional statute and the suite of policies on discipline and sexual misconduct for each university form the empowering provision(s) required as the basis of administrative action in point (d). Finally, PAJA lists a number of acts that are excluded from the definition of administrative action.[275] Disciplinary action by universities is not contained in that list.

Because disciplinary proceedings fall within the ambit of PAJA, the Act imposes the peremptory duties to conduct the proceedings in a procedurally fair manner, and to provide written reasons for the administrative action taken.[276] Section 3(1) provides that "administrative action which materially and adversely affects the rights of any person must be procedurally fair",[277] while s (3)(2)(a) recognises that "a fair administrative procedure depends on the circumstances of each case".[278] Despite this acknowledgement that circumstances may

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[272] Where the list of *exclusions* defined in s1 consists of:

> (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections … of the Constitution;
> (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 … of the Constitution;
> (cc) the executive powers or functions of a municipal council;
> (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
> (ee) the judicial functions of a judicial officer of a court referred to in s166 of the Constitution or of a Special Tribunal established under s2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
> (ff) a decision to institute or continue a prosecution;
> (gg) a decision relating to any aspect of the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;
> (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
> (ii) any decision taken, or failure to take a decision, in terms of s4(1).

[273] Higher Education Act 101 of 1997.
[274] Ibid.
[275] Promotion of Administrative Justice Act 3 of 2000. See note 269.
[276] Ibid s3.
[277] Ibid.
[278] Ibid.

vary, the Act provides for minimum procedural fairness protections that must be afforded to each person in s 3(2)(b), before making provision for some discretionary measures in s 3(3).[279]

Section 3(2)(b) provides that, at a minimum, a person affected by administrative action must be given:

i. adequate notice of the nature and purpose of the proposed administrative action;
ii. a reasonable opportunity to make representations;
iii. a clear statement of the administrative action;
iv. adequate notice of any right of review or internal appeal, where applicable; and
v. adequate notice of the right to request written reasons in terms of section 5.[280]

These protections are discussed in greater detail in Chapter 4 of this dissertation.

Additionally, in s 3(3) PAJA provides for other procedural fairness protections, which the administrator has the discretion to grant.[281] These are listed in the Act as being the opportunity to:

a. obtain assistance and, in serious or complex cases, legal representation;
b. present and dispute information and arguments; and
c. appear in person.[282]

Finally, PAJA provides in s 5(1) that any person whose rights have been affected by administrative action has the right to written reasons.[283]

3.2.4. The Criminal Law (Sexual Offences and Related Matters) Amendment Act

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") was enacted in 2007 to codify South Africa's laws on sexual offences and is the primary legislation for these offences. Prior to its enactment, some sexual offences existed only in the common law, while others (such as compelled rape,[284] compelled sexual assault,[285] and

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[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] Ibid.
[284] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s4.
[285] Ibid s6.

compelling a person to witness sexual acts[286]) were entirely non-existent in the criminal law. The preamble of the Act further solidifies the need for its enactment by stating that at that time, the South African statutory and common law "(did) not deal adequately, effectively, and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences".[287]

SORMA sought to bring all existing sexual offences into a single statute, expand the definitions of some of those offences, and create additional offences.[288] Since its enactment, SORMA has been amended three times – in 2012, 2015, and 2021 – with each amendment expanding the criminal law on sexual offences.[289] In this dissertation, I rely on SORMA for two things: its definitions of offences, and its normative value in institutional policy making.

SORMA extensively and comprehensively defines a vast number of offences, and it is impossible to canvass all of them here. For purposes of this dissertation, I focus on sexual offences relating to adults, to the exclusion of the detailed offences against children and persons with mental disabilities. This is because, in large part, students at universities have reached the age of majority (save for a small number who will turn eighteen after already enrolling) and have mental capacity. In particular, for purposes of this section, I focus on the definitions of the offences of rape,[290] compelled rape,[291] sexual assault,[292] compelled sexual assault,[293] compelled self-sexual assault,[294] flashing,[295] compelling an adult to witness sexual offences or sexual acts,[296] displaying child pornography,[297] attempt or conspiracy to commit a sexual offence,[298] and sexual intimidation.[299] Some of these offences are more common in universities than others, but all of them apply in that context and therefore warrant discussion. I also rely

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[286] Ibid s8.
[287] Ibid.
[288] Ibid.
[289] Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012; Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015; Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021.
[290] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s3.
[291] Ibid s4.
[292] Ibid s5.
[293] Ibid s6.
[294] Ibid s7.
[295] Ibid s9.
[296] Ibid s8.
[297] Ibid s10.
[298] Ibid s55.
[299] Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 s5.

on SORMA for its normative value, wherein it provides grounds for the state and departments of state to create policies that allow for swift response to, and eradication of sexual offences.[300]

Section 3 of SORMA defines rape as:

> Any person (''A'') who unlawfully and intentionally commits an act of sexual penetration with a complainant (''B''), without the consent of B, is guilty of the offence of rape.[301]

Section 5 defines sexual assault as:

> (1) A person (''A'') who unlawfully and intentionally sexually violates a complainant (''B''), without the consent of B, is guilty of the offence of sexual assault.
>
> (2) A person (''A'') who unlawfully and intentionally inspires the belief in a complainant (''B'') that B will be sexually violated, is guilty of the offence of sexual assault.[302]

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[300] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ss62-65.
[301] Ibid.
Where *sexual penetration* is defined in s1 as:

Any act which causes penetration to any extent whatsoever by—

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
(c) the genital organs of an animal, into or beyond the mouth of another person.

And where s4 creates the corresponding offence of *compelled rape* which is defined as:

Any person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of compelled rape.

[302] Ibid.
Where *sexual violation* is defined in s1 as:

Any act which causes –
(a) direct or indirect contact between the-
(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
(ii) mouth of one person and-
(aa) the genital organs or anus of another person or, in the case of a female, her breasts;
(bb) the mouth of another person;
(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could-
(aaa) be used in an act of sexual penetration;
(bbb) cause sexual arousal or stimulation; or
(ccc) be sexually aroused or stimulated thereby; or
(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

While these offences, together with sexual harassment, as will be shown below, are the most common forms of misconduct that are found in university policies, the Act also makes provision for additional offences. These include "flashing",[303] displaying or exposing an adult to child pornography,[304] compelling a person to witness a sexual offence,[305] and attempting,

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(iii) mouth of the complainant and the genital organs or anus of an animal;
(b) the masturbation of one person by another person; or
(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.

And where s6 creates the corresponding offence of *compelled sexual assault* which is defined as:

A person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual violation with a complainant ('B'), without the consent of B, is guilty of the offence of compelled sexual assault.

And where s7 creates the corresponding offence of *compelled self-sexual assault* which is defined as:

A person ('A') who unlawfully and intentionally compels a complainant ('B'), without the consent of B, to-
(a) engage in-
(i) masturbation;
(ii) any form of arousal or stimulation of a sexual nature of the female breasts; or
(iii) sexually suggestive or lewd acts, with B himself or herself;
(b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or
(c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus,
is guilty of the offence of compelled self-sexual assault.

[303] Ibid s9.
Where *flashing* or *exposure or display of or causing exposure or display of genital organs, anus, female breasts to persons 18 years or older* are defined as:

A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, exposes or displays or causes the exposure or display of the genital organs, anus or female breasts of A or C to a complainant 18 years or older ('B'), without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a person 18 years or older.

[304] Ibid s10.
Where *exposure or display of or causing exposure or display of child pornography to persons 18 years or older* is defined as:

A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, exposes or displays or causes the exposure or display of child pornography to a complainant 18 years or older ('B'), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography to a person 18 years or older.

[305] Ibid s8.
Where *compelling or causing persons 18 years or older to witness a sexual offence, sexual acts, or self-masturbation* is defined as:

(1) A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, compels or causes a complainant 18 years or older ('B'), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual offence.
(2) A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, compels or causes a complainant 18 years or older ('B'), without the consent of B, to be in the presence of or watch-
(a) A while he or she engages in a sexual act with C or another person ('D'); or
(b) C while he or she engages in a sexual act with D,
is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual act.
(3) A person ('A') who unlawfully and intentionally, whether for the sexual

conspiring, inciting, or inducing another person to commit a sexual offence.[306] Notably, SORMA does not include sexual harassment in its definitions or list of offences. The relevance of this exclusion will become evident in Chapter 5 when I consider the way university policies define sexual harassment and sexual assault.

The third amendment to SORMA, enacted in 2021, creates the additional offence of sexual intimidation which is defined as:

> A person ('A') who unlawfully and intentionally utters or conveys a threat to a complainant ('B') that inspires a reasonable belief of imminent harm in B that a sexual offence will be committed against B, or a third party ('C') who is a member of the family of B or any other person in a close relationship with B, is guilty of the offence of sexual intimidation and may be liable on conviction to the punishment to which a person convicted of actually committing a sexual offence would be liable.[307]

Finally, SORMA mandates the adoption of a national policy framework on sexual offences, the function of which includes to "ensure a uniform and coordinated approach by all Government departments and institutions in dealing with matters relating to sexual offences".[308] While public universities are not government departments, they fall within the remit of the Department of Higher Education and Training, and there is thus a clear mandate on that department to undertake policy work in addressing sexual offences in higher education.

> gratification of A or of a third person ('C') or not, compels or causes a complainant 18 years or older ('B'), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a person 18 years or older to witness self-masturbation.

[306] Ibid s55.
Where *attempt, conspiracy, incitement or inducing another person to commit a sexual offence* is defined as:

> Any person who-
>
> (a) attempts;
> (b) conspires with any other person; or
> (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,
>
> to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

[307] Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 s5.
[308] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ss62-65.

3.2.5. The Protection from Harassment Act

The Protection from Harassment Act 17 of 2011 was enacted in recognition of the Constitutional rights to privacy,[309] equality,[310] dignity,[311] and freedom and security of the person[312] – which includes the right to be free from violence.[313] In so enacting it, the legislature sought to provide victims of harassment with mechanisms to obtain relief from harassment.[314] In this dissertation, the Act is predominantly useful for its definitions of harassment and sexual harassment, when it comes to considering the effectiveness and accessibility of the definitions of sexual misconduct that universities use in their policies.

Section 1 of the Protection from Harassment Act, defines harassment as:

> Directly or indirectly engaging in conduct that the respondent knows or ought to know
>
> (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-
>
> (i) following. watching. pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
>
> (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
>
> (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to. or brought to the attention of, the complainant or a related person; or
>
> (b) amounts to sexual harassment of the complainant or a related person.[315]

Sexual harassment is defined in s 1 as:

[309] Constitution of the Republic of South Africa of 1996 s14.
[310] Ibid s9.
[311] Ibid s10.
[312] Ibid s12.
[313] Ibid s12(1)(c); Protection from Harassment Act 17 of 2011 Preamble.
[314] Protection from Harassment Act 17 of 2011 Preamble.
[315] Ibid.

> Any-
>
> (a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome:
>
> (b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;
>
> (c) implied or expressed promise of reward for complying with a sexually- oriented request; or
>
> (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.[316]

Notably, the definitions of harassment and sexual harassment in the Protection from Harassment do not include rape and sexual assault as defined in SORMA.

3.2.6. The Domestic Violence Act

The Domestic Violence Act 116 of 1998, although not readily used by most universities, is of relevance to this dissertation. Certain forms of campus sexual misconduct also constitute domestic violence, if the parties are in a domestic relationship, where a domestic relationship is defined in s 1 of the Act as:

> A relationship between a complainant and a respondent in any of the following ways
>
> (a) they are or were married to each other, including marriage according to any law, custom or religion;
>
> (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
>
> (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

[316] Ibid.

> (d) they are family members related by consanguinity, affinity or adoption;
>
> (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
>
> (f) they share or recently shared the same residence.[317]

Of note are ss (e) and (f) which present themselves frequently in campus settings, where parties are in an intimate relationship or when they share the same on- or off-campus residence.

The Act includes sexual abuse and harassment in its definition of domestic violence, where harassment is defined in s 1 as:

> Engaging in a pattern of conduct that induces the fear of harm to a complainant including—
>
> > (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
> >
> > (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
> >
> > (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant.[318]

And where sexual abuse is defined in s 1 as "any conduct that abuses humiliates, degrades or otherwise violates the sexual integrity of the complainant".[319]

3.2.7. The Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA") is South Africa's primary anti-discrimination law, which was enacted to give effect to s 9 of the Constitution – the clause on equality.[320] It outlaws unfair discrimination and

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[317] Domestic Violence Act 116 of 1998.
[318] Ibid.
[319] Ibid.
[320] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000Preamble; Constitution of the Republic of South Africa of 1996.
Section 9 of the Constitution states:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

mandates the state and private entities to promote equality.[321] For this dissertation it is relevant because the University of Pretoria has used it as the underlying Act for its sexual misconduct policy, on the basis that sexual violence is a form of gender-based violence which is described by PEPUDA, in s 8(a), as a form of unfair discrimination on the grounds of gender.

Section 8(a) states that:

> Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including –
>
> (a) gender-based violence.[322]

3.2.8. The Protection of Personal Information Act

The Protection of Personal Information Act 4 of 2013 ("POPIA") is the Act that regulates how personal information is collected, stored, distributed, and protected in South Africa.[323] It exists to protect the right to privacy, especially as it pertains to personal information, and it works in tandem with Promotion of Access to Information Act[324] to regulate and strike a balance between the right to privacy and the right to access information.[325] POPIA confers upon "responsible parties"[326] the right to process personal information and imposes strict duties to protect such information.[327] Universities are designated responsible parties by virtue of them being public bodies, as defined by the Act.[328]

> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[321] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s6.

[322] Ibid.
Where s6 states that "neither the State nor any person may unfairly discriminate against any person".

[323] Protection of Personal Information Act 4 of 2013.

[324] Promotion of Access to Information Act 2 of 2000.

[325] Protection of Personal Information Act 4 of 2013 s2.

[326] Ibid s1.
Where *responsible party* is defined as:

> a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.

[327] Ibid s1.

[328] Ibid s1.

Section 1 of POPIA defines personal information to include "information relating to the education … of the person".[329] This includes a student's disciplinary records, in addition to their academic and other records. As such, the processing of this information is highly regulated, where "processing" includes the dissemination of any such record.[330] This is relevant for the sections of this dissertation that consider the need for publication of disciplinary tribunal outcomes for accountability purposes. Such processing and dissemination are not entirely proscribed. The Act, in s 1(1)(f), permits the processing of personal information where it is "necessary for pursuing the legitimate interests of the responsible party or a third party to whom the information is supplied".[331] The justification would thus have to be made that the publication of outcomes is in pursuance of a legitimate interest.

3.2.9. The Promotion of Access to Information Act

The Promotion of Access to Information Act 2 of 2000 ("PAIA") works in tandem with and sometimes in contradiction to POPIA. It is the legislation that gives effect to s 32(1) of the Constitution,[332] which provides that everyone has the right of access to information held by the State, and to information held by any other person (juristic or natural), when that information is required for the exercise or protection of their rights.[333]

In its preamble, PAIA states that it is enacted to:

> … foster a culture of accountability in public and private bodies by giving effect to the right of access to information; (and)
>
> Actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect their rights.[334]

Where *public body* is defined as:

> (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
>
> (b) any other functionary or institution when –
>
> > (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
> >
> > (ii) exercising a public power or performing a public function in terms of any legislation.

[329] Ibid.

[330] Ibid.

[331] Ibid.

[332] Constitution of the Republic of South Africa of 1996.

[333] Promotion of Access to Information Act 2 of 2000 Preamble; Constitution of the Republic of South Africa of 1996 s32(1).

[334] Promotion of Access to Information Act 2 of 2000.

It appears from these objectives that the legislature intended for a society in which people are able to hold public and private bodies accountable and access the information necessary to do so. To this end, and of relevance to this dissertation, are two pertinent sections of PAIA. These are s 34, which deals with the mandatory protection of the privacy of a third party who is a natural person,[335] and s 46, which deals with mandatory disclosure in the public interest.[336]

Section 34(1) provides that:

> Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.[337]

In juxtaposition, s 46(1)(b) reads:

> Despite any provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1) … if … (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.[338]

There is a clear communal interest in sexual misconduct in public universities and the way it is dealt with by those institutions. These two sections of PAIA, read together with POPIA, provide a framework for regulating this interest. When there is a balance between publishing outcomes and holding perpetrators publicly accountable and protecting the privacy of parties to maintain a legal order, PAIA provides guidance on when one or the other must prevail.[339] In instances, for example, of a serial offender, or serious offender, the public interest may outweigh the private one. This is a weighting exercise that universities would have to undertake on a case-by-case basis.

[335] Ibid.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Ibid ss34(1) & 46(1)(b).

3.3. Key National Policies

3.3.1. The Policy Framework for the Realisation of Social Inclusion in the Post-School Education and Training System

In November 2016, the Minister of Higher Education and Training gazetted the Policy Framework for the Realisation of Social Inclusion in the Post-School Education and Training ("PSET") System for implementation.[340] The framework is designed to "assist public higher education and training institutions to implement and report on elements of social inclusion".[341] The framework calls on PSET institutions to create institutional policies that are "guided by principles of substantive equality (and) aim to remove all barriers that perpetuate and create inequalities in society".[342] To this end, the framework states that sexual misconduct policies must be mandatory for all PSET institutions, in recognition of the barrier that sexual misconduct creates to full participation in one's education.[343]

3.3.2. The Policy Framework to Address Gender-Based Violence in the Post-School Education and Training System

In July 2020, the Minister of Higher Education, Science, and Innovation gazetted the Policy Framework to Address Gender-Based Violence in the Post-School Education and Training System ("the Policy Framework").[344] The Policy Framework is a measure taken by the DHET to prevent and respond to gender-based violence ("GBV") across the higher education sector, of which sexual misconduct is a part.[345]

In this section I examine the Policy Framework in-depth, as it is the most relevant intervention by the state on sexual misconduct in universities. I additionally consider the three

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[340] *Policy Framework for the Realisation of Social Inclusion in the Post-School Education and Training System* (2016) *op cit* note 251.

[341] Ibid Preamble.

Where *social inclusion* is defined at 16 as:

> A concept (which) embraces the entire humanity and cuts across all the factors that divide human beings… It recognises that all human beings have human rights that enable them to participate optimally in society…

[342] Ibid at 27.

[343] Ibid at 28.

[344] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5; Government Gazette no. 43575 Notice 410 of 2020.

[345] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5 at 2.

implementation protocols that have been developed and published by Higher Health South Africa to guide institutions in implementing the Policy Framework provisions.[346]

3.3.2.1. Tracing the Evolution of the Policy Framework

The development of the Policy Framework came against the backdrop of a large push by government to curb the scourge of GBV in the country.[347] The DHET recognised the legal mandate that required it to intervene to address GBV, including sexual misconduct, across institutions, in acknowledgment of the severe adverse and long-term consequences that GBV can have on its victims.[348]

This mandate includes, first and foremost, the responsibility of the State to respect, protect, promote, and fulfil the rights enshrined in the Constitution.[349] Additionally, the Criminal Law (Sexual Offences and Related Matters) Amendment Act mandates the Department to act.[350] Section 62 of this Act requires the adoption of an overarching national policy framework for sexual misconduct to ensure a "uniform and co-ordinated" approach by government departments in addressing sexual misconduct.[351] The Act further requires that all staff are sufficiently trained to handle sexual misconduct matters, that victims receive adequate support, and that monitoring and evaluation mechanisms be put in place within departments.[352] These measures, together with an array of education white papers[353] and international legal

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[346] *Implementation Procedural Guidelines for Sexual and Gender Related Misconduct in Post Schooling Education and Training (PSET) Sector* (2021); *Implementation Protocol on Rape and Sexual Assault Cases* (2021); *Implementation Protocol on Code of Ethics* (2021).
Higher Health South Africa, also Higher Education and Training, Health, Wellness and Development Centre is "the implementation arm of the DHET to implement a comprehensive and integrated programme promoting health and wellbeing of students across South Africa's public universities and TVET colleges". *Briefing to Portfolio Committee on Higher Education, Science and Innovation: Monitoring the Implementation of the National Strategic Plan on Gender-Based Violence and Femicide* (2021) at 8.

[347] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5 at 1.

[348] Ibid at 2.

[349] Ibid at 9; Constitution of the Republic of South Africa of 1996 ss10 & 12.

[350] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s62.

[351] Ibid.

[352] Ibid s62.

[353] *The White Paper on Education and Training* (1995) *op cit* note 33; *Education White Paper 3: A Programme for the Transformation of Higher Education* (1997) *op cit* note 33; *The White Paper for Post-School Education and Training* (2014) *op cit* note 33.

instruments[354] made it imperative for the Department to intervene and for universities to now comply with the provisions of the Policy Framework.[355]

Following the gazetting of the Policy Framework, three implementation protocols were published by Higher Health South Africa to guide universities and all in the PSET sector in successfully implementing the elements of the Policy Framework. These are the Implementation Procedural Guidelines on Sexual and Gender Related Misconduct in Post Schooling Education and Training Sector,[356] the Implementation Protocol on Rape and Sexual Assault Cases,[357] and the Implementation Protocol on the Code of Ethics.[358]

3.3.2.2. Understanding the Strategic Goals and Mandates of the Policy Framework

The purpose of the Policy Framework is to create an enabling environment for education, and to this end, it provides measures that institutions must put in place and sets out a plan for oversight of institutions by the DHET on their development and implementation of GBV policies.[359]

The Strategic Objectives of the Policy Framework are three-fold:

1. To create an enabling environment for effective implementation of the Policy Framework.[360]
2. To ensure awareness of students and staff of the applicable policies and available services addressing GBV, as well as to put in place measures for its prevention.[361]
3. To ensure support and assistance is given to all survivors of GBV.[362]

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[354] *Beijing Declaration and Platform for Action* (1995) ;*Transforming our World: The 2030 Agenda for Sustainable Development* (2016)
[355] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5 at 8-11.
[356] *Implementation Procedural Guidelines for Sexual and Gender Related Misconduct in Post Schooling Education and Training (PSET) Sector* (2021) *op cit* note 346.
[357] *Implementation Protocol on Rape and Sexual Assault Cases* (2021) *op cit* note 346.
[358] *Implementation Protocol on Code of Ethics* (2021) *op cit* note 346.
[359] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5 at 13 & 15.
[360] Ibid at 15.
[361] Ibid.
[362] Ibid.

These objectives are informed by the principles of a zero-tolerance, rights-based, specialised, confidential, complainant-centred, accountable, comprehensive, and multi-faceted approach to GBV and GBV prevention.[363]

The DHET recognises the creation of strong policies, procedures, and guidelines and of just and specialised processes for the investigation and resolution of complaints as integral aspects of the first and third strategic objectives.[364] Therefore, in this section, I pay greater attention to these, for their direct relevance to this dissertation.[365]

3.3.2.3. The Mandates Created for Universities and the DHET

Among the strengths of the Policy Framework is the way in which it creates specific, actionable mandates for universities, and specific undertakings by the DHET to which they can be held accountable.[366] It does this by detailing under each strategic objective what the expectations are of both the Department and of institutions, and then follows this through with measures for monitoring and oversight.[367] Here I will discuss only those mandates under the first and third strategic objectives that are relevant to this dissertation.[368]

3.3.2.4. Strategic Objective 1: Enabling Environment

The DHET is committed to creating an environment that will allow institutions to effectively implement the Policy Framework.[369] To this end, the Department undertakes to develop national regulations, guidelines, and procedures to support the Policy Framework, as well as provide institutions with guidelines on developing and updating GBV policies.[370] The DHET states that it will establish "just, specialised, and efficient" procedures for handling and resolving complaints, and seek to standardise these procedures across institutions.[371] Additionally, the DHET undertakes to assist in monitoring and evaluation by creating a system

[363] Ibid at 7-8.
[364] Ibid at 15.
[365] While awareness and prevention are an important part of addressing sexual misconduct, they are not the focus of this dissertation and will thus not be discussed in detail.
[366] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5 at 17-21, & 25.
[367] Ibid.
[368] Strategic Objective 2, which is not directly relevant to this dissertation, is on prevention and awareness. Here, the DHET states that it is an objective of the Policy Framework to "promote the safety of all students and staff by putting in place comprehensive prevention and awareness programmes intended to raise the importance of policies and services addressing GBV, as well as other measures aimed at preventing incidents of GBV in PSET institutions". Ibid at 15.
[369] Ibid at 17.
[370] Ibid.
[371] Ibid at 18.

of accountability that involves mechanisms for monitoring and evaluating institutional policies and providing oversight of the implementation of the Policy Framework.[372]

Under the first strategic objective, universities are required to develop a single comprehensive policy that addresses GBV, includes codes of conduct and disciplinary procedures, and is cohesive with the other policies of the institution.[373] This element will be canvassed further in Chapter 5 wherein I analyse university policies. Universities are additionally mandated to set up the mechanisms and processes that will be used in prevention of and response to GBV, as well as mechanisms for effective reporting, monitoring, and evaluation.[374] The latter of these mechanisms will be of use in making quarterly and annual reports to the DHET on the implementation of the Policy Framework – which will be mandatory for all institutions to do.[375]

3.3.2.5. Strategic Objective 3: Support and Assistance

The third strategic objective requires that institutions provide comprehensive and specialised support to all survivors of GBV, and that such support must be "properly and systematically recorded and appropriately reported".[376] It states that in resolving complaints of GBV, institutions must apply their internal policies together with the provisions of this Policy Framework and national legislation.[377] However, where there is a conflict between internal policies of the institution and this Policy Framework, the DHET is clear that the provisions of this Policy Framework will supersede those of internal policies.[378] Further, any complaints of GBV made to an institution must be investigated, regardless of where the incident occurred.[379] The Policy Framework bars institutions from refusing to investigate complaints for lack of "territorial responsibility" or physical jurisdiction.[380]

The mandates imposed on universities include that they develop policies and procedures which include clear guidelines for reporting and identify the appropriate specialised reporting structures and the roles of the individuals within them.[381] Universities must further create support mechanisms for survivors that provide prompt, effective, and consistent support, as

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[372] Ibid.
[373] Ibid.
[374] Ibid.
[375] Ibid at 18 & 25.
[376] Ibid at 21.
[377] Ibid.
[378] Ibid.
[379] Ibid.
[380] Ibid.
[381] Ibid.

well as put in place protective measures for survivors.[382] Universities are additionally required to provide complainants with regular feedback on the progress of their case.[383]

In supporting the realisation of this strategic objective, the DHET undertakes to standardise reporting procedures through the creation of regulations, standards, norms, and guidelines for good reporting practices.[384]

3.3.2.6. National Coordination in Implementation of the Policy Framework

As part of ensuring effective and coordinated implementation of the Policy Framework, and in fulfilment of its duty to account for its implementation of provisions of SORMA, the DHET has created reporting obligations for institutions.[385] These obligations include that universities report:

i. The total number of cases reported to the institution, including ones where no action was sought or taken, with a distinction made between incidents that occurred on and off campus.[386]
ii. The number of cases resolved via disciplinary proceedings and the number resolved via alternative dispute resolution mechanisms, including an overview of case outcomes.[387]
iii. The amount of time taken to resolve cases and any mechanisms implemented to resolve cases expediently.[388]
iv. Training provided to staff members who are responsible for implementing GBV policies.[389]
v. The nature, extent, and processes used for educating staff and students on the available policies and procedures relating to GBV.[390]
vi. Details of any policies developed to supplement or assist in implementing the GBV policy.[391]

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[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Ibid at 25.
[386] Ibid.
[387] Ibid.
[388] Ibid.
[389] Ibid.
[390] Ibid.
[391] Ibid.

vii. An assessment of the implementation of the GBV policy which includes successes, failures, and any recommendations.[392]

These reports are to be submitted both quarterly and annually for tabling in Parliament.[393] It is hoped that they will increase accountability across institutions and allow for greater oversight by the Department.[394]

3.3.3. Operationalising the Policy Framework: The 2021 Implementation Protocols

One of the first commitments made by the Department to achieve the goals of the strategic objectives of the Policy Framework is that it will provide guidance on the implementation thereof.[395] In 2021, the first such guidance was rolled out in the form of three implementation protocols, namely the Implementation Protocol on Code of Ethics, the Implementation Protocol on Rape and Sexual Assault cases, and the Implementation Procedural Guidelines on Sexual and Gender Related Misconduct in the PSET Sector.[396] I will canvass these in turn here, to provide an understanding of the implementation measures that the Department is putting in place for institutions to follow.

3.3.3.1. Implementation Procedural Guidelines on Sexual and Gender Related Misconduct in the Post Schooling Education and Training Sector

The most extensive of the three guidance documents is the Implementation Procedural Guidelines on Sexual and Gender Related Misconduct in the Post Schooling Education and Training sector ("the Procedural Guidelines"), which outlines the approach that all institutions should adopt in preventing and responding to sexual misconduct.[397] This document reads as a model policy of sorts, providing mandatory policy provisions that should be adopted, in recognition of the fact that many institutions do not have sufficient policies and procedures in place.[398] Higher Health identifies this insufficiency as posing both a potential legal liability for institutions and constituting a dereliction of the duty of care that institutions owe their students

[392] Ibid.
[393] Ibid.
[394] Ibid at 3.
[395] Ibid.
[396] *Implementation Protocol on Code of Ethics* (2021) *op cit* note 346; *Implementation Protocol on Rape and Sexual Assault Cases* (2021) *op cit* note 346; *Implementation Procedural Guidelines for Sexual and Gender Related Misconduct in Post Schooling Education and Training (PSET) Sector* (2021) *op cit* note 346.
[397] *Implementation Procedural Guidelines for Sexual and Gender Related Misconduct in Post Schooling Education and Training (PSET) Sector* (2021) *op cit* note 346 at 26.
[398] Ibid at 3.

and employees.[399] As such, the aim of this document is to provide guidelines for "specialised, prompt, thorough, and equitable investigation and resolution of complaints".[400]

The Procedural Guidelines begin with an Institutional Statement of Intent, which universities are called to make to demonstrate their commitment to creating a safe environment through the adoption of a zero-tolerance approach to sexual misconduct, and the provision of an assurance that action will be taken following all complaints made.[401] Additionally, it provides that institutions must highlight the importance of having separate and specialised processes for resolving sexual misconduct matters, and must be clear in distinguishing between the administrative process of the institution and criminal proceedings.[402]

These Procedural Guidelines are underpinned by the principles of a "rights-based and complainant-centred" approach to GBV that espouses fairness, confidentiality, and freedom from fear.[403] They mandate institutions to adopt multifaceted and comprehensive prevention and response mechanisms and are unequivocal about the need for employing GBV specialists to address sexual misconduct.[404] Institutions are instructed to have a Code of Ethics, which is signed by the entire campus community.[405] The contents of such a Code will be canvassed in the section below on the Implementation Protocol on the Code of Ethics.

Following the statements on principles and values, the Procedural Guidelines provide an extensive list of definitions for institutions to adopt in their own policies, and notably includes a definition for rape that is consistent with that of SORMA.[406] Sexual misconduct is defined comprehensively in its own section and includes verbal and non-verbal sexual harassment, physical abuse, sexual assault, rape, sexual exploitation, sexual favouritism, sexual victimisation, intimate partner violence and domestic abuse, cyber revenge posting and re-posting, discriminatory abuse, trafficking and kidnapping, *quid pro quo* harassment, grooming, and the creation of a hostile work or learning environment.[407] Each of these forms of misconduct is given a clear definition.[408] The Procedural Guidelines continue with an iteration

[399] Ibid.
[400] Ibid at 4.
[401] Ibid at 3.
[402] Ibid at 3-4.
[403] Ibid at 4-5.
[404] Ibid at 5.
[405] Ibid.
[406] Ibid at 5-7.
[407] Ibid at 8-10.
[408] Ibid.

of mandatory policy wording that all institutional GBV policies must contain which is indicative of a victim-supportive approach.[409] This includes that sexual harassment may consist of a series of incidents or just one incident, that participation in prior sexual conduct does not indicate ongoing consent, and the determination of what conduct is unwelcome must be made from the subjective experience of the complainant.[410] In addition, these guidelines state that a part of creating a safe campus environment is ensuring that everyone has a complete understanding of consent.[411] As such, the document goes to great lengths to define consent in detail, including through the use of examples and clear statements of what does not constitute consent.[412]

Institutions are mandated by these Procedural Guidelines to investigate all complaints of sexual misconduct that are made to them – even if the complainant has no ties to the institution.[413] To this end, institutions are required to set up a responsible office or body that deals exclusively with sexual and gender related misconduct.[414] Here, the Procedural Guidelines are clear that simply co-opting an existing structure within the institution is insufficient, pointing out that the creation of a centralised responsible office allows for specialists to be employed in it, and makes for effective reporting and resolution of complaints, and greater accountability.[415] Further, it is stated that existence of a responsible office ensures consistent application of the rules without deviation.[416]

The responsible office is the focal point for handling all complaints.[417] The Procedural Guidelines provide that all reports are made to the responsible office either by the complainant or by the person to whom the complainant first discloses the misconduct.[418] Following this, the responsible office must initiate an investigation, provide protection and support to complainants, provide complainants with information on the different avenues for resolution

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[409] Ibid at 4.
[410] Ibid at 8-11.
[411] Ibid at 10-11.
[412] Ibid.
[413] Ibid at 11.
Article 7 of Section A of the Procedural Guidelines (p7) states that an institution's jurisdiction to act stems from whether it has jurisdiction over the respondent i.e., as a student, staff member, member of council, contractor, or other individual with ties to the institution. Such jurisdiction extends to conduct that occurs off-campus. The complainant's status with the institution does not factor in determining jurisdiction.
[414] Ibid at 13.
[415] Ibid.
[416] Ibid.
[417] Ibid at 14.
[418] Ibid.

and ensure that complainants are kept updated on the progress of their case by maintaining frequent and sensitive communication.[419] Confidentiality is emphasised throughout the reporting and resolution process; however, the guidelines protect an institution's right to disclose the name of a student found guilty of misconduct both to future employers and to the public.[420]

Where a complainant elects to pursue formal disciplinary proceedings, the Procedural Guidelines provide that the investigation must be conducted by an internal or external investigator who is well-versed in trauma-informed investigative techniques.[421] Upon completion of the investigation, the investigator must produce an investigation report, to which both the complainant and the respondent must be given an opportunity to respond.[422] If the report so recommends, a disciplinary hearing must be commenced within three days.[423] According to the Procedural Guidelines, the adjudication panel shall consist of a legally trained Chairperson, a GBV expert, and a student representative where the respondent is a student.[424] Notably, it does not stipulate any requirements for specialised training of all panel members. The complainant and respondent may object to any of the panellists, but the guidelines are clear that an objection cannot be made on the grounds of bias merely for the fact that a panellist is a GBV expert.[425]

During the hearing, both parties are permitted to have a support person present, and that person is not permitted to speak or participate in the proceedings, neither may they hold or be working towards a legal qualification.[426] Legal representation is ordinarily not permitted by the Procedural Guidelines but may be applied for by either party and granted in exceptional circumstances.[427] The Procedural Guidelines steer clear of a confrontational adversarial process by stating that the parties shall not be in the same room at the same time throughout the hearing, but shall rather appear separately before the panel for questioning.[428] The panel is an inquisitorial one that is designed to interview both parties and their witnesses and call

[419] Ibid at 14-15.
[420] Ibid at 15-16.
[421] Ibid at 20.
[422] Ibid.
[423] Ibid.
[424] Ibid.
[425] Ibid at 21.
[426] Ibid at 22.
[427] Ibid.
[428] Ibid.

additional witnesses (including the investigator) if needs be.[429] The Procedural Guidelines imply that cross-examination is permitted, although it is unclear how this would be conducted.[430] Following a finding of guilt by the panel, the Procedural Guidelines state that parties should be given an opportunity to make arguments in mitigation and aggravation of sanction, and that an appeal process should be provided for.[431]

These Procedural Guidelines are extensive and detailed, and their provisions are mandatory.[432] It is stated that there will be routine monitoring of their implementation, and that institutional management will be held accountable for effective implementation.[433] The responsible office is required to keep accurate records, and institutions shall review their policies every three years.[434] On a final note, the Procedural Guidelines emphasise the need for ease of access of policies, and institutions are mandated to make all GBV policies easily accessible on their websites, and to annex them to staff and student handbooks, manuals, and contracts.[435]

3.3.3.2. Implementation Protocol on Rape and Sexual Assault Cases

The Implementation Protocol on Rape and Sexual Assault Cases ("the Protocol on Rape and Sexual Assault") is premised on institutions' responsibility to provide victims of rape and sexual assault with humane care to minimise re-traumatisation.[436] It places the obligation on all members of the campus community to familiarise themselves with the relevant policies and to act when they know of or suspect a case of misconduct by reporting it to the responsible office.[437] A special obligation to report and refer cases is placed on those staff members who may find themselves as "first responders" for victims, including those who work in student affairs, student residences, campus security, and student wellness.[438] For these staff, the protocol requires that training be provided that equips them to receive and take reports from victims should no one from the responding office be available, and to then refer victims at the earliest opportunity.[439]

[429] Ibid.
[430] Ibid.
[431] Ibid at 23.
[432] Ibid at 25.
[433] Ibid.
[434] Ibid at 26.
[435] Ibid.
[436] *Implementation Protocol on Rape and Sexual Assault Cases* (2021) *op cit* note 346 at 2.
[437] Ibid.
[438] Ibid at 3.
[439] Ibid.

The Protocol on Rape and Sexual Assault requires that the responsible office inform complainants of their options for resolution and investigate all complaints received.[440] Emphasis is placed on the fact that there shall be no time limitation for victims to lay a complaint and no negative inference shall be drawn from the amount of time it takes a victim to come forward.[441] Finally, the Protocol on Rape and Sexual Assault requires the responsible office to keep a register of all rape and sexual assault cases reported to it.[442]

3.3.3.3. Implementation Protocol on Code of Ethics

The Implementation Protocol on Code of Ethics ("the Ethics Protocol") is the shortest of the three documents published by Higher Health South Africa.[443] It accompanies the Procedural Guidelines by providing a model code of ethics that institutions can adopt.[444] This code of ethics is a statement for all members of the campus community to sign that will hold them accountable to "behaviour of the highest standards of integrity, honesty, respect and responsible behaviour in their life at (the) institution".[445]

3.3.4. The Future of the Department's Responses in Higher Education

The Policy Framework and its implementation protocols seek to provide a discernible standard across institutions, and the consistent use of peremptory language throughout the documents indicates that many of its provisions are mandatory for institutions to implement. Such provisions include those on policy development, reporting and recordkeeping, the provision of specialised victim support, and effective adjudication.[446] However, it remains unclear how these provisions will be enforced, as the Policy Framework is silent on whether institutions will face any repercussions for failure to comply. Additionally, while the Policy Framework sets out a short-, medium-, and long-term High-Level Implementation Plan, there are no deadlines or guidelines for institutions to implement its provisions.[447]

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[440] Ibid at 4.
[441] Ibid.
[442] Ibid.
[443] *Implementation Protocol on Code of Ethics* (2021) *op cit* note 346.
[444] Ibid at 2.
[445] Ibid at 2.
[446] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5 at 2-3 & 17-25.
[447] Ibid at 28.

3.4. CONCLUSION

The legal landscape within which South African universities must develop and implement their policies on sexual misconduct is vast and comprehensive. Through a meticulous examination of the statutes and national policy frameworks, I have provided insight into the legal environment in which public universities operate. In light, especially, of the 2020 intervention by the DHET in the form of the Policy Framework on GBV, institutions cannot claim to be without guidance on policy development for sexual misconduct. Read together, the statutes and national policy frameworks provide a starting point for institutions in the development of their own policies and provide legal grounding for the institutional policy analysis that I undertake in Chapter 5.

As I transition to the next chapter, the focus will pivot towards the theory of Natural Justice and its applicability in university disciplinary proceedings. Together with the legal landscape canvassed in this chapter, Natural Justice is the lens through which I will analyse university policies in Chapter 5 and present my own proposition for just adjudication processes in Chapter 7. This theory will provide a critical perspective, evaluating the alignment of university policies with principle of procedural fairness, as required by the Constitution[448] and PAJA.[449]

[448] Constitution of the Republic of South Africa of 1996.

[449] Promotion of Administrative Justice Act 3 of 2000.

CHAPTER 4

THE THEORY OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS IN SOUTH AFRICAN ADMINISTRATIVE LAW

4.1. INTRODUCTION

Natural Justice as a theory is fundamental in ensuring that disciplinary tribunals conduct fair hearings that yield just outcomes. The premise of my argument throughout this dissertation is that an outcome is just if the determinative method is just, and Natural Justice provides a theoretical grounding for this. In the previous chapter, I canvassed the existing legal landscape in which public universities exist and develop their policies on sexual misconduct. What became evident during this exercise is that while there is much substantive guidance for universities to draw upon, there is little to guide the processes and procedures that universities select to conduct their disciplinary proceedings. Natural Justice and procedural fairness provide a framework for this selection.

In this chapter, I discuss the principles of Natural Justice and their relevance in designing disciplinary proceedings that yield just outcomes. This entails an exposition of how the principles of Natural Justice have been encapsulated and developed over time into the procedural fairness protections now present in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Following this, I demonstrate the interpretation of these principles and procedural protections by South African and international courts, with a view to illustrate the applicability of Natural Justice and procedural fairness to disciplinary tribunal proceedings in public universities.

4.2. UNDERSTANDING THE THEORY OF NATURAL JUSTICE

4.2.1. DEFINING NATURAL JUSTICE

Natural Justice is a legal theory that asserts the existence of two basic procedural rules that must be observed in decision making to provide legitimacy to the decisions arrived at.[450] These rules or principles are *audi alteram partem* and *nemo iudex in sua causa.*[451] Literally translated

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[450] A Chatterji 'Natural Justice and Reasoned Decisions' (1968) 10 *Journal of the Indian Law Institute* at 241.

[451] Hereinafter referred to as "the audi rule or principle", and "the rule against bias" or "the nemo rule or principle".

the meaning of these maxims is "hear the other side" and "no one should be a judge in his own case" and they protect the right to be heard and to be heard without bias.[452]

Chatterji defines Natural Justice as a "an assured minimum deal of fairness which, if denied, will render the administrative adjudication liable to be struck down".[453] Natural Justice aids substantive reasoning and justice as opposed to standing separately from it.[454] It provides the legal tools to allow a decision-making body to reach its substantial conclusions in a fair manner.[455] These principles have been a cornerstone of giving a fair hearing for time immemorial in South African law and are considered to be the very basic tenets of fairness in the law.[456]

4.2.2. The Roots of Natural Justice: From Graeco-Roman Morality to Legal Procedural Standards

Scholars assert that the origins of Natural Justice are rooted in natural law or *jus naturale.*[457] In Graeco-Roman times, natural law was understood to be "common conscience" or a moral understanding.[458] Lloyd describes natural law as being a set of universal moral values which everyone accepted.[459] It is believed that Natural Justice evolved from natural law as a means to give effect to the rules of natural law and provide a framework for procedural law.[460] Natural Justice embodies the legal principle that justice should not only be done, but be manifestly seen to be done, as the court in *R v Sussex Justices*[461] famously stated. This, Galligan says, makes Natural Justice defined by procedural fairness in order for justice to be done, and requires an observance of fair practices for justice to be seen to be done.[462] Without this, there is an erosion of public confidence in the administrative adjudication system.

4.2.3. *Audi Alteram Partem* – The First Pillar of Natural Justice

The *audi alterem partem* rule is one that is considered so fundamental to fairness that even God who, while certain of Adam's guilt, afforded him the opportunity to be heard before evicting

[452] A Chatterji 'Natural Justice and Reasoned Decisions' (1968) *op cit* note 450 at 241.
[453] Ibid.
[454] D J Galligan 'Review: Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies*.
[455] Ibid.
[456] Ibid.
[457] Vittorio Frosini 'A Theory on Natural Justice' (1996) 82 *Archives for Philosophy of Law and Social Philosophy*.
[458] Ibid.
[459] A C Lloyd 'Natural Justice' (1962) 12 *The Philosophical Quarterly (1950-)*.
[460] V Frosini 'A Theory on Natural Justice' (1996) *op cit* note 457.
[461] *R v Sussexes Justices, ex parte McCarthy* [1924] (1) KB 256 (KB).
[462] D J Galligan 'Review: Procedural Fairness and the Duty of Respect' (1998) *op cit* note 454 at 506.

him from the garden of Eden.[463] The rule, as held by the court in *Chataira v ZESA*, requires that one is allowed an opportunity to put forth their version and rebut prejudicial statements made against them, failing which the decision-making process is without integrity and is unjust.[464]

The court in *Chataira* said the fulfilment of the *audi* rule does not mean that the administrative decision-making body must observe "the rigorous standard of courts of law," rather that it ensures that the accused party is presented with the entirety of the case before them and an opportunity to put forward their own case.[465] The *audi* rule requires only that one is afforded the opportunity to be heard. If a party fails to appear at the hearing having been given adequate notice of it occurring, that party can be considered to have waived their right and the adjudicator can, at their discretion, proceed without that party.

There are many areas of contention regarding the discharge of the *audi* principle. These include whether a party is entitled to be heard through a representative, what information must be provided in order for them to make an informed representation, and what evidence a party should be permitted to present in making their case. Ultimately, the *audi* principle can be interpreted broadly. For so long as its core principle - that of a fair opportunity to be heard - is observed, it has been fulfilled.[466]

4.2.4. Bias-free Adjudication: Introducing the Principle of *Nemo Iudex in Sua Causa*

The second maxim of Natural Justice is the rule against bias.[467] This rule exists to protect parties from an unfair hearing due to a biased adjudicator.[468] Galligan describes the essence of the rule so aptly when he asserts that if an adjudicator's own interests, including their partiality to a particular issue, results in them exercising their authoritative decision-making power improperly, they have displayed bias, which undermines the legitimacy and justness of the decision reached.[469]

[463] *Copper v Wandworth Board of Works* [1863] (143) ER 414
[464] *Chataira v Zimbabwe Electricity Supply Authority* [2002] JOL 9985 (ZS) at 4.
[465] Ibid at 3.
[466] *Metsola v Chairman, Public Service Commission and another* [1989] (3) ZLR 146 (ZS).
[467] G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14 at 91.
[468] D J Galligan 'Review: Procedural Fairness and the Duty of Respect' (1998) *op cit* note 454.
[469] Ibid.

In explaining the application of the rule, Feltoe reiterates the principle that bias can be construed as actual or perceived bias.[470] Actual bias, a self-explanatory term, is when the adjudicator has actually behaved in a biased manner and this can be proven with certainty.[471] This is often difficult, if not impossible to prove as it would require that one shows with certainty the state of the adjudicator's mind at the time of making the decision.[472] Okpaluba and Juma describe bias as "ephemeral" because of its inability to produce a definition, test, or application that is certain.[473] Because of the above, most applications for review that come before the court for bias come on the grounds of perceived bias.[474] Perceived bias or a real suspicion of bias, on the other hand, is slightly flimsier.[475] It exists where, due to the prior actions or status of the adjudicator, there is the perception that bias may exist.[476] This cannot be a frivolous claim of bias, however; the party bringing the decision for review must show that there was a real possibility of bias that can be substantiated.[477]

Howie JA in *S v Roberts*[478] states the test for bias as follows:

a. There must be a suspicion that the judicial officer, might, not would, be biased;

b. The suspicion must be that of a reasonable person in the position of the accused or litigant;

c. The suspicion must be based on reasonable grounds.[479]

This test approaches the question of bias from an objective reasonable person's view, as opposed to the subjective view of the aggrieved party. Its importance lies in the fact that a subjective view of potential bias would be inappropriate as a measure for the court to use because the aggrieved party's viewpoint is heavily laden with their interest in a positive outcome of their case.[480] By approaching the perception of bias from an objective lay

[470] G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14 at 91.
[471] Ibid at 92.
[472] C Okpaluba & L Juma 'The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa' (2011) 14 *PER: Potchefstroomse Elektroniese Regsblad* at 14/261.
[473] Ibid at 15/261.
[474] Ibid at 14/261.
[475] G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14 at 92.
[476] Ibid.
[477] Ibid.
[478] *S v Roberts* [1999] (4) SA 914 (SCA) at 924 para 32.
[479] Ibid para 32.
[480] G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14 at 92.

onlooker's perspective, it removes the degree of proximity that could misguide the merits of the application for review.[481]

Feltoe alludes to what different situations could create bias – actual or perceived.[482] These include instances where an adjudicator is overly familiar and friendly with one party while being hostile to the other as a result of past events or events during the hearing.[483] It also includes when the adjudicator has pre-decided the matter or expresses an outcome before both sides have been heard, when the adjudicator has prior knowledge of the case, or where the adjudicator aligns with a party while playing the dual roles of adjudicator and prosecutor.[484]

4.3. Natural Justice as Procedural Fairness: Do the Principles Apply to Disciplinary Proceedings?

In South African law, Natural Justice manifests as procedural fairness which is defined by its twin principles – the right to be heard and the rule against bias. Procedural fairness in administrative law is protected by a statute – the Promotion of Administrative Justice Act ("PAJA"),[485] in addition to its being a general principle of the common law and "common conscience".[486] PAJA extends the two principles of Natural Justice to include adequate notice of impending action and written reasons for decisions arrived at as core procedural protections that must be afforded to every person when administrative action is taken against them.[487]

The question that then arises is whether the principles of Natural Justice and the procedural fairness protections of PAJA apply to proceedings of university disciplinary tribunals? This would only be the case if it can be shown that the decisions made by these tribunals are in fact administrative action.

As laid out in Chapter 3,[488] s 1 of PAJA outlines administrative action as:

a. a decision,[489]

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[481] Ibid.
[482] Ibid at 93.
[483] Ibid.
[484] Ibid at 94-96.
[485] Promotion of Administrative Justice Act 3 of 2000.
[486] V Frosini 'A Theory on Natural Justice' (1996) *op cit* note 457.
[487] Promotion of Administrative Justice Act 3 of 2000 ss3 & 5.
[488] See note 269.
[489] *Where decision is defined in s1 to include:*

> making, suspending, revoking or refusing to make an order, award or determination" and "doing or refusing to do any other act or thing of an administrative nature.

b. by a natural or juristic person,
c. exercising a public power or performing a public function,
d. in terms of an empowering provision,[490]
e. which adversely affects the rights of any person, and has a direct, external legal effect,
f. and is not contained in the list of exclusions.[491]

In Chapter 3, I laid out each of these requirements in turn to demonstrate how decisions made by university disciplinary tribunals constitute administrative action, drawing their authority from the Higher Education Act.[492]

This assertion is bolstered by the decisions of the courts who have on numerous occasions determined that disciplinary action taken by the tribunals of public universities constitutes administrative action.[493] In *Dyantyi*,[494] the learned judge stated that by virtue of being publicly funded to achieve the constitutional obligation[495] of making higher education progressively available, public universities are public bodies performing a public function or exercising a public power as envisioned by s 1 of PAJA.[496] In instituting disciplinary proceedings, the judge

[490] Where *empowering provision* is defined as:

> a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

[491] Where the list of *exclusions* defined in the Act consists of:

> (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections … of the Constitution;
> (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 … of the Constitution;
> (cc) the executive powers or functions of a municipal council;
> (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
> (ee) the judicial functions of a judicial officer of a court referred to in s166 of the Constitution or of a Special Tribunal established under s2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
> (ff) a decision to institute or continue a prosecution;
> (gg) a decision relating to any aspect of the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;
> (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
> (ii) any decision taken, or failure to take a decision, in terms of s4(1).

[492] See note 274.

[493] *Lunt v University of Cape Town and Another* [1989] (2) SA 438 (C); Tsako v University of Fort Hare *supra* note 268; *Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and others* [2000] (3) All SA 415 (C); *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* [2002] (5) SA 449 (SCA); *Dyantyi v Rhodes University and others* [2022] JOL 52644 (SCA).

[494] Dyantyi v Rhodes University and others *supra* note 493.

[495] Constitution of the Republic of South Africa of 1996 s29.

[496] Dyantyi v Rhodes University and others *supra* note 493 para 19.

continued, universities act in accordance with their disciplinary rules, which they are empowered by the Higher Education Act[497] to make; thus fulfilling the requirement for an empowering provision.[498] Finally, van der Merwe JA was clear that the action taken by Rhodes University in the disciplinary case against Dyantyi had an evident direct, external, and legal effect.[499] Thus, it was upheld that the decision, like all disciplinary action taken by universities, constituted administrative action, and the provisions and protections of PAJA apply.[500]

4.4. An Overview of Key Procedural Protections Under the Promotion of Administrative Justice Act

PAJA protects the rights to be given adequate notice of administrative action,[501] to be heard,[502] to written reasons,[503] and to be heard without bias.[504] These are set out below.

> Section 3(2)(b)(i) states:
>
> In order to give effect to the right to procedurally fair administrative action, an Administrator … must give a person … adequate notice of the nature and purpose of the proposed administrative action.[505]

Adequate notice requires three things: that the notice is drafted with "sufficient" clarity and detail of the administrative action to be taken so that the party affected knows what case they have to meet; that the notice provides a reasonable time, depending on the nature of the administrative action for the affected party to prepare their representations; and that the notice be given in an "effective" manner, that is that it is given in a manner that is accessible to the affected party.[506] There is no clear cut definition of what is considered adequate, rather that it is relative to and suitable for the context in which it is given.[507]

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[497] Higher Education Act 101 of 1997 s36.
[498] Dyantyi v Rhodes University and others *supra* note 493 para 19.
[499] Ibid para 20.
[500] Ibid para 20.
[501] Promotion of Administrative Justice Act 3 of 2000 s3(2)(b)(i).
[502] Ibid s3(2)(b)(ii).
[503] Ibid s5(1).
[504] Ibid s6(2)(a)(iii).
[505] Ibid.
[506] Cora Hoexter *Administrative Law in South Africa 2e* Claremont [South Africa], Juta and Company [Pty] Ltd(2012).
[507] Geo Quinot et al *Administrative Justice in South Africa: An Introduction* Cape Town, South Africa, Oxford University Press Southern Africa(2015).

Section 3(2)(b)(ii) states:

> In order to give effect to the right to procedurally fair administrative action, an Administrator … must give a person … a reasonable opportunity to make representations[508]

The right to make representations espouses the *audi alteram partem* principle of Natural Justice. Affording an accused party the right to be heard is not necessarily because their representations will be accepted.[509] Rather, it is so that their version can be taken into consideration during the decision-making process.[510] Hearing all parties concerned also allows the decision maker to arrive at an objective and justifiable conclusion, having heard from everyone concerned.[511] The default, it seems, is that the representations shall be made in writing for fear of overburdening and delaying the process.[512] Section 3(3)(c) of PAJA is clear that the right to appear in person is at the discretion of the administrator and is not a given when providing the opportunity to be heard.[513]

Section 5(1) states:

> Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may … request that the administrator concerned furnish written reasons for the action.[514]

The right to written reasons is inextricable from the two maxims of Natural Justice, as written reasons force the administrator to justify their decisions, thus sharpening them to come to more reasonable and fair decisions.[515] Feltoe argues that written reasons lessen the likelihood of decisions being made arbitrarily and increase public faith in administrative bodies.[516] This is important if the tribunals are going to be effective.

Section 6(2)(a)(iii) states:

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[508] Promotion of Administrative Justice Act 3 of 2000 s3(2)(b)(ii).
[509] G Quinot et al 'Administrative Justice in South Africa: An Introduction' (2015) *op cit* note 507.
[510] Ibid.
[511] Ibid.
[512] C Hoexter 'Administrative Law in South Africa 2e' (2012) *op cit* note 506.
[513] Promotion of Administrative Justice Act 3 of 2000.
[514] Ibid.
[515] A Chatterji 'Natural Justice and Reasoned Decisions' (1968) *op cit* note 450 at 242.
[516] G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14 at 78.

A court or tribunal has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias.[517]

The rule against bias is said to be based on two premises: that an unbiased adjudicator will make decisions that are more fair and sound, and that the public will have more faith in the administrative process, if they feel assured that justice is both done and seen to be done.[518] As such, PAJA protects against bias in administrative decision making and grants the judiciary the power to review decisions made with bias.

4.5. Judicial Interpretation of Natural Justice and Procedural Fairness

In South Africa, Natural Justice has been construed broadly, with the PAJA defining minimum protections and the courts and academics alike giving various insights into what these protections mean and how they manifest. As a result, while Natural Justice has been incorporated into a statutory instrument as a fundamental procedural protection, its interpretation and manifestation remain diverse. In this section, I discuss the ways that these principles have been interpreted and adopted by the courts both in cases reviewing decisions of university tribunals in particular, and administrative bodies and authorities more generally.

4.5.1. Application of Audi Alteram Partem in Judicial Precedence

The courts have held on many occasions that flouting the *audi* principle and not affording an affected party the opportunity to be heard is a fatal flaw, which will almost always result in the decision being set aside.[519] However, they have recognised that deviation from these principles may be acceptable in exceptional and compelling circumstances.[520] Thus, if the court is to uphold a decision where there is deviation from the *audi* principle, it would not do so lightly. The deviating party would have to show that there were exceptional and compelling circumstances.

One such example of this is a decision by the Zimbabwean High Court in the matter of *Students Union – University of Zimbabwe & others v Vice Chancellor – University of Zimbabwe &*

[517] Promotion of Administrative Justice Act 3 of 2000.
[518] C Hoexter 'Administrative Law in South Africa 2e' (2012) *op cit* note 506.
[519] *Student Union – University of Zimbabwe & others v Vice-Chancellor – University of Zimbabwe and others* [1998] JOL 4293 (ZH); Oliver v Universiteit van Stellenbosch en andere *supra* note 268; *Meyer v Law Society, Transvaal* [1978] (2) All SA 497 (T); *Hendricks v Cape Peninsula University of Technology and others* [2009] JOL 23708 (C); Chataira v Zimbabwe Electricity Supply Authority *supra* note 464.
[520] Student Union – University of Zimbabwe & others v Vice-Chancellor – University of Zimbabwe and others *supra* note 519.

others.[521] Here, the student union had led protests across the university and in the city, and there had been some destruction of property and threats of destruction of property on one night.[522] The next day, the Vice Chancellor issued a statement closing the university for the safety of personnel and property.[523] This decision was referred to by the applicants as an effective blanket suspension of all students.[524] The announcement closed the university for an indefinite period of time. The matter came before the high court some three months after the closure of the university.

The applicants alleged that they had been effectively suspended without being given a hearing and an opportunity to present their side of the matter.[525] The respondents argued that the circumstances were emergent and there was imminent threat of harm, and therefore there wasn't time to provide a hearing, and the Vice Chancellor took emergency action.[526] The court in this matter upheld the initial decision to close the institution and agreed that it was a decision made as a matter of emergency and there was no time for a hearing to be provided.[527] However, it failed to understand why, in the three months since the emergency decision was taken, the Vice Chancellor and other respondents had failed to give the applicants a hearing.[528]

In this judgment the court illustrated two things: deviation from procedural fairness can be acceptable in compelling circumstances; and the permissibility of deviation in an emergent situation will not be sustained after the emergency has passed.[529] In essence, the courts will only allow a denial of Natural Justice principles in compelling cases, and they will do so in the most restrictive manner.

This is a stark warning – if one may call it that – to university disciplinary tribunals that a failure to observe the rules of Natural Justice will leave the decision vulnerable to being set aside.[530] This is so even if the argument of the party denied the right is unmeritorious.[531] The case of *Students Union - University of Zimbabwe* provides that procedural fairness rests

[521] Ibid.
[522] Ibid at 4.
[523] Ibid at 5.
[524] Ibid at 7.
[525] Ibid at 9-10 & 13.
[526] Ibid at 16 & 21.
[527] Ibid at 22.
[528] Ibid at 22-23.
[529] Ibid.
[530] Blacker v University of Cape Town and another *supra* note 268.
[531] Student Union – University of Zimbabwe & others v Vice-Chancellor – University of Zimbabwe and others *supra* note 519 at 23.

separately to the substantive argument.[532] And so even where the finding of the merits is correct, and even if the opposing party presents a weak case, the lack of observance of procedural fairness will cause for a decision to be set aside.[533]

4.5.1.1. Understanding the Essence of the Right to be Heard

The court in *Chataira*[534] tells us that giving effect to the right to be heard means providing the accused party before the tribunal with an opportunity to put forth their version of events, as well as to contradict and correct any prejudicial statements made against them.[535] This opportunity to contradict prejudicial statements does not necessarily include the right to cross examine witnesses – as will be discussed in the following chapters. Simply, the bench in *Meyer*[536] states, that after hearing or reading the prejudicial statements, the accused must be given an opportunity to respond or rebut.[537]

4.5.1.2. Ensuring an Informed Defence: Upholding the Right to Adequate Information

In order for the rules of Natural Justice to be met and for an accused to have a true chance to be heard, they must know in adequate detail what charges and allegations they are facing, if they are to properly prepare and put forward an informed representation.[538]

It was held in *Chataira*[539] that it doesn't serve much to be offered the opportunity to speak without knowing fully what you are speaking to.[540] Requesting that an accused puts their version forward without knowing what exactly to discuss and contradict is fulfilling the requirement merely as a formality and not giving effect to the essence of the rule.[541]

4.5.1.3. Judicial Perspectives on Evidence Presentation in Tribunals

The courts have considered what would best give rise to being fully heard and what evidence one might need to call on to be so heard.[542] They have agreed on three main things: there is no entitlement for the opportunity to cross examine witnesses, or give oral testimony, or demand

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[532] Ibid.
[533] Ibid.
[534] Chataira v Zimbabwe Electricity Supply Authority *supra* note 464.
[535] Ibid at 5.
[536] Meyer v Law Society, Transvaal *supra* note 519.
[537] Ibid at 500.
[538] Chataira v Zimbabwe Electricity Supply Authority *supra* note 464 at 5.
[539] Ibid.
[540] Ibid at 5.
[541] Ibid.
[542] Oliver v Universiteit van Stellenbosch en andere *supra* note; Meyer v Law Society, Transvaal *supra* note 268 at 501.

discovery of all documents that will be used in the matter against them.[543] However, it can be requested that certain documents are adduced in order for the party to make informed representations, and it is not for the administrators to withhold information on the basis that it is irrelevant.[544]

4.5.1.4. Promptness in Affording the Right to be Heard

The right to be heard without undue delay is primarily canvassed in my discussion of the *Student Union - University of Zimbabwe* case above.[545] In that case, the Vice Chancellor made an emergency decision out of necessity that did not allow for representations to be made.[546] But in the three months, since making the decision, that the Vice Chancellor maintained the consequences of the decision, there should have been a hearing provided, held the court.[547]

4.5.1.5. To Represent or Not: The Complexities of Legal Representation in Administrative Tribunals

Arguably the most contentious aspect in the discharge of a fair hearing in which one is heard, is the question over whether this right includes the right to be heard through a legal representative.[548] Section 3(3) of PAJA[549] provides that one may, at the discretion of the administrator, be granted the right to legal representation in complex cases, and Feltoe concurs.[550]

In *Yates v University of Bophutatswana,*[551] the court held that even where not expressly stated, the right to be heard through a legal representative should not be denied lightly as it gives effect to the *audi* rule.[552] The learned judge in *TAWUSA obo Semenya*[553] found similarly, holding that while legal representation is not a *sine qua non* for a fair hearing, it is procedurally irregular for an adjudicator to not even entertain an application for representation.[554]

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[543] Oliver v Universiteit van Stellenbosch en andere *supra* note 268 ; Meyer v Law Society, Transvaal *supra* note 519 at 501.
[544] Oliver v Universiteit van Stellenbosch en andere *supra* note 268.
[545] Student Union – University of Zimbabwe & others v Vice-Chancellor – University of Zimbabwe and others *supra* note 519. See note 521.
[546] Ibid.
[547] Ibid.
[548] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 71-72.
[549] Promotion of Administrative Justice Act 3 of 2000.
[550] Ibid.
[551] Yates v University of Bophuthatswana *supra* note 268.
[552] Ibid at 846J.
[553] *TAWUSA obo Semenya / University of North West* [2005] (5) BALR 580 (CCMA).
[554] Ibid At 592. Chataira v Zimbabwe Electricity Supply Authority *supra* note 464 at 3.

The question then would be when such an application is received, what the criteria for allowing or disallowing representation would be? In *Khan v University of Kwa-Zulu Natal*,[555] the CCMA cited the following factors as considerations in deciding whether to permit representation:

a. The nature of the charges brought;
b. The degree of factual or legal complexity attendant upon considering the charges;
c. The potential seriousness of the consequences of an adverse finding;
d. The availability of suitably qualified lawyers among its (the institution) staff;
e. The nature of the prejudice to the employer should legal representation be permitted;
f. Whether there is a legally trained initiator; and
g. Any other factor relevant to the fairness of restricting the alleged transgressor to the kind of representation mentioned in the notice to attend the disciplinary inquiry.[556]

In this instance, the case concerned a lecturer who had leaked confidential documents to the press.[557] It was held that the issues were sufficiently simple, the accused had competent representation (even if such representation was not legal representation), and that the initiator of the proceedings representing the university did not have a legal background such that it would prejudice the accused to not have legal representation.[558] This was not the case in *Dyantyi*.[559]

A recent landmark judgment handed down by the Supreme Court of Appeal in *Dyantyi v Rhodes University*[560] illustrates that in applying criteria like the ones above, the court will do so meticulously and with careful consideration for the administration of justice. The brief facts are that Dyantyi had been involved in protest activity on the university's campus during which some students accused of sexual misconduct were forcibly removed from their residences and held against their will.[561] The university instituted disciplinary proceedings against Dyantyi in which she was charged for kidnapping, assault, and defamation.[562] At a point in the proceedings shortly before she was due to give her testimony, a date for continuance was set down by the

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[555] *Khan / University of KwaZulu-Natal* [2010] JOL 24910 (CCMA).
[556] Ibid para 103.
[557] Ibid para 14.
[558] Ibid para 104.
[559] Dyantyi v Rhodes University and others *supra* note 493.
[560] Ibid.
[561] Ibid para 3.
[562] Ibid para 4.

adjudicator despite the fact that both of Dyantyi's legal representatives had indicated that they were unavailable on that date.[563] The adjudicator noted their objection and proceeded to set down that date regardless.[564] Dyantyi and her representatives did not participate in the proceedings further, and she was found guilty on all charges and permanently expelled from the university.[565] Her unsuccessful review in the High Court gave way to this appeal.[566]

In *casu*, van der Merwe JA held that there is no general right to representation, but rather, "whether, when, and to what extent" a party must be permitted representation is dependent on a balancing exercise that includes the nature of the decision, the rights affected by the decision, and the consequences of an adverse finding.[567] The court in this matter was decided that the proceedings against Dyantyi were serious, and the consequences she was facing were severe.[568] As such, in the absence of any good reason being proffered by the adjudicator for denying her the opportunity to be heard through legal representatives and for doing so at a critical stage of the hearing, the decision of the university was set aside.[569]

Goredema cautions against the insistence on the right to be heard through a legal representative.[570] This, he says, carries the risk of over-judicializing the process by involving the participation of lawyers; which may be detrimental to the parties and to the administrative process.[571] This is especially important in the tribunals that are the subject of this dissertation, and the effect that lawyers can have in these bodies will be canvassed further in Chapter 6.

4.5.2. Perceptions and Prejudices: Judicial Insights on the Rule Against Bias in Decision-Making

The courts have deliberated at length about the rule against bias, which Okpaluba and Juma have discussed, and to which I have referred to earlier in this chapter.[572] In this section, I will

[563] Ibid para 12.
[564] Ibid para 14.
[565] Ibid para 17.
[566] Ibid para 18.
[567] Ibid para 22.
[568] Ibid para 24.
[569] Ibid paras 26-31.
[570] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 71-72.
[571] Ibid.
[572] C Okpaluba & L Juma 'The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa' (2011) *op cit* note 472.

shed light on what the judiciary has had to say on the implications of a pre-decided panel, and the importance of perception in administrative decision making.

4.5.2.1. THE IMPLICATIONS OF A PRE-DECIDED PANEL

A pre-decided panel is a biased one, and it unfairly shifts the burden of proving innocence onto the accused. A good illustration of this is the court's findings in the matter of *Tsako v University of Fort Hare*.[573]

Tsako had been convicted of a criminal offence and the university, as per its rules, expelled him.[574] The rule which the university relied on stated that the disciplinary committee had the power to expel any student convicted of criminal activity.[575] The committee summoned him to a hearing whereat he was told that he was being expelled from the university and was asked if he wanted to make any statements in mitigation.[576] By already deciding that he was guilty, the tribunal, as in the case of *Blacker*,[577] reduced the right to be heard to a mere formality. Further, the information put to the tribunal was prejudicial and him not being given a chance to challenge it or give his perspective was found to be grossly irregular.[578]

The court stated that a pre-decided panel is not only heavily biased, but also burdens the accused who now has to go further than just present his case and challenge the opposition's case; he has to prove to the tribunal panel that they were wrong.[579] This improperly increased the responsibility of Tsako before the tribunal and was deemed to be a violation of his right to unbiased proceedings.[580]

4.5.2.2. THE PARAMOUNTCY OF PERCEPTION IN ADMINISTRATIVE DECISION-MAKING

When considering the question of bias, perception is paramount. There is a reason that the saying "justice should not only be done but should manifestly be seen to be done" is so well-known and widely quoted in discourse on bias and procedural fairness.[581]

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[573] Tsako v University of Fort Hare *supra* note 268.
[574] Ibid paras 6 & 10-11.
[575] Ibid para 10.
[576] Ibid.
[577] Blacker v University of Cape Town and another *supra* note 268.
[578] Tsako v University of Fort Hare *supra* note 268 para 32.
[579] Ibid paras 40-41.
[580] Ibid para 41.
[581] R v Sussexes Justices, *ex parte* McCarthy *supra* note 461 at 259.

In the case of *R v Sussexes Justices, ex parte McCarthy*, the clerk to the justices in a criminal court was also a partner of the firm representing the complainant in civil proceedings arising from the same set of facts.[582] After the conclusion of the hearing, he accompanied the justices to their deliberation room carrying all the evidence and other legal information that he might be called on to provide.[583] He didn't participate in the proceedings, but when the defendant knew of his apparent conflict, they raised an objection and lodged an application for review of the decision on the basis that it was irregular and improper for the clerk to have retired with the justices.[584] The quote above arises. The court held that even if, as in the affidavit of the justices there present, the clerk had not participated in the deliberations at all, his presence there was grounds enough for there to a suspicion of bias.[585] The question isn't what was done but rather the perception of what could have been done.[586]

4.6. Adaptable Justice: The Case for Contextual Application of Procedural Protections

As the theory of Natural Justice has evolved into the statutory protections of procedural fairness, and the courts have continued to interpret the meaning of these provisions, there has been recognition that the application of these rules must be done in context.[587] Feltoe argues that while the procedural safeguards of Natural Justice are universal and fundamental, they are also broad in their contents and application.[588] The principles – he states, particularly as applied to administrative adjudication, must be adaptable to the situation at hand in order for them to be truly effective in achieving the justice they seek to protect.[589]

Indeed, s 3(2)(a) of PAJA[590] requires flexibility and application in context of procedural fairness protections wherein it states that "a fair administrative procedure depends on the circumstances of each case".[591] Administrative tribunals – including sexual misconduct tribunals – are flexible, in that they need not apply procedural protections with the same rigour

[582] Ibid.
[583] Ibid.
[584] Ibid.
[585] Ibid.
[586] Ibid.
[587] Dyantyi v Rhodes University and others *supra* note 493 paras 22-23.
[588] G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14 at 59.
[589] Ibid.
[590] Promotion of Administrative Justice Act 3 of 2000.
[591] Ibid.

that a criminal court would.[592] There are instances where reasonable departure from procedures and guidelines is warranted and permissible.[593] Quinot *et al* tell us that flexibility is the only way to ensure a process that is sensitive to the context on a case by case basis.[594] I couldn't agree more. PAJA[595] outlines the protections that must be provided, but (particularly in sexual misconduct tribunals) procedural fairness requires a sensitive application that recognises that the substance of fairness is not static.[596]

4.7. CONCLUSION

Natural Justice provides a theoretical grounding for university adjudication processes. Through its articulation of core procedural protections and its evolution in South African law into statutory procedural fairness, it provides an assured minimum standard of fairness to students appearing before disciplinary tribunals for sexual misconduct.

In the following chapter, I will examine the intricacies of the sexual misconduct policies of thirteen public universities through the lens of Natural Justice and procedural fairness. In so doing, I seek to analyse whether universities have incorporated the statutory mandates canvassed in the previous chapter and the procedural fairness protections canvassed in this chapter and are ensuring a just approach in sexual misconduct adjudication processes.

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592 G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14 at 59.
593 *Ngcongo v University of South Africa and others* [2012] JOL 28981 (LC).
594 G Quinot et al 'Administrative Justice in South Africa: An Introduction' (2015) *op cit* note 507.
595 Promotion of Administrative Justice Act 3 of 2000.
596 C Hoexter 'Administrative Law in South Africa 2e' (2012) *op cit* note 506.

Chapter 5

Analysing South African University Policies on Sexual Misconduct

5.1. Introduction

The first half of my research question asks: do South African universities have policies on sexual misconduct that provide for just and victim-supportive processes? This chapter is dedicated to answering this part of the question. To do so, I conducted an exhaustive policy analysis of the sexual misconduct policies of public universities against the backdrop of the statutes and national policy frameworks canvassed in Chapter 3 and the theoretical framework of Natural Justice discussed in Chapter 4. This approach aimed to uncover the intricacies of university policy provisions, offering a comprehensive understanding of the current landscape.

This dissertation exclusively delves into the policies of public universities, a deliberate choice guided by two key considerations. The first of these considerations is the status of private universities under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The second is the practicality of conducting a study that encompasses private universities.

5.1.1. The Role of the Promotion of Administrative Justice Act in Guiding Scope

PAJA's definition of administrative action, as stipulated in s 1, encompasses decisions made by an organ of state exercising a public power or performing a public function.[597] Notably, it extends its purview to decisions made by private individuals or entities when they are exercising a public power or performing a public function.[598] Public universities are recognised as organs of state, unlike their private counterparts. This distinction raises the question of whether private universities are exercising a public power or performing a public function when taking disciplinary action, so as to fall within the ambit of PAJA and the procedural fairness principles central to my argument.

This issue lacks a definitive resolution, as neither the courts nor scholars have established a clear boundary in delineating when a private actor assumes a public role.[599] The closest consensus reached suggests that the presence of a "public element" in a decision, or if there is

[597] Promotion of Administrative Justice Act 3 of 2000.
[598] Ibid.
[599] B Mupangavanhu & Y Mupangavanhu 'Alignment of Student Discipline Design and Administration to Constitutional and National Law Imperatives in South Africa' (2011) *op cit* note 14; Cora Hoexter *Administrative Law in South Africa* Claremont, South Africa, Juta and Company [Pty] Ltd(2012).

public interest involved, may indicate the exercise of public power or the performance of a public function.[600] However, this criterion remains somewhat nebulous, carrying the prospect of entangling discussions around whether an action qualifies as administrative and merits state intervention in otherwise private affairs. Such debates, while interesting, are tangential to the focused inquiry of this dissertation.

5.1.2. Practicality in Researching Private Universities

Registering and commencing operations as a private university in South Africa is relatively straightforward, allowing for entry into niche areas. However, pinpointing the exact number of private universities presently proved challenging, with estimates ranging widely from 35 to 300 institutions[601]—underscoring a lack of consensus on their quantity in South Africa. Adding to the complexity, there is no guarantee of the legitimacy of these private institutions.

In contrast to public universities established by statute under s 20 of the Higher Education Act 101 of 1997, private universities come into existence through registration with the Department of Higher Education and Training, as stipulated in s 51 of the same Act.[602] The absence of a centralised means to verify the legitimacy of private universities, other than manually inspecting the register and cross-checking each entry, rendered this task impractical within the dissertation's scope and timeline. Consequently, I opted to confine this analysis exclusively to public universities.

5.2. The Policy Retrieval Process and Resulting Sample

South Africa has 26 public universities and I sought to obtain sexual misconduct policies from all of them for this analysis. My first port of call was to search each university's website to see if the policies were publicly available, and this yielded policies for nine universities.[603] Two others had policies that I initially included in my analysis because they provided some insight into the university's position on sexual misconduct, but which I later excluded because they were not sexual misconduct policies for students, strictly speaking, and this would make my

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[600] C Hoexter 'Administrative Law in South Africa' (2012) *op cit* note 506.
[601] VCS College 'List of Universities, Colleges and Schools in South Africa' available at *https://vcscollege.com*, accessed on 24 December 2023.; Careers Portal 'A List of Public and Private Colleges in South Africa' available at *https://www.careersportal.co.za/colleges/tvet-colleges-public/a-list-of-public-and-private-colleges-in-south-africa*, accessed on 24 December 2023.
[602] Higher Education Act 101 of 1997.
[603] These are Rhodes University, Stellenbosch University, University of Cape Town, University of Fort Hare, University of KwaZulu-Natal, University of Pretoria, University of the Witwatersrand, Vaal University of Technology, and Walter Sisulu University.

sample inconsistent.[604] This left fifteen universities, one of which did not have a person listed on its website to whom a request for their policy could be directed.[605] I requested sexual misconduct policies for students from the Registrar and/or Student Affairs Divisions of the remaining fourteen universities. Four responded to my request with their policies, one provided a policy for staff, and the remaining nine did not respond at all. This means that I was able to conduct an analysis of the policies of thirteen universities, which represents 50% of all public universities in South Africa.

The universities whose policies are included in this analysis are Nelson Mandela University,[606] North-West University,[607] Rhodes University,[608] Stellenbosch University,[609] University of Cape Town,[610] University of Fort Hare,[611] University of the Free State,[612] University of Johannesburg,[613] University of KwaZulu-Natal,[614] University of Pretoria,[615] University of the Witwatersrand,[616] Vaal University of Technology,[617] and Walter Sisulu University of Science and Technology.[618] Some universities' sexual misconduct policies incorporated the general

[604] These were the University of the Western Cape's Staff Policy for Sexual Misconduct and the University of South Africa's "Guidelines for Student Discipline" and Student Disciplinary Code.
[605] This was the Sol Plaatje University.
[606] Nelson Mandela University *Policy on Sexual Harassment and Sexual Offences* (2017) Nelson Mandela University.
[607] North-West University *Sexual Harassment Policy* (2019) North-West University.
[608] Rhodes University *Sexual Offences Policy for Students* (n.d.) Rhodes University;Rhodes University *Student Disciplinary Code* (2023) Rhodes University.
[609] Stellenbosch University *Policy on Unfair Discrimination and Harassment* (2016) Stellenbosch University; Stellenbosch University *Disciplinary Code for Students of SU* (2020) Stellenbosch University.
[610] University of Cape Town *Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment* (2020) University of Cape Town; University of Cape Town *Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment* (2020) University of Cape Town.
[611] University of Fort Hare *Policy on Harassment, Sexual Harassment and Gender Based Violence* (2019) University of Fort Hare.
[612] University of the Free State *Sexual Harassment, Sexual Misconduct and Sexual Violence Policy* (2018) University of the Free State;University of the Freestate *UFS Rules on Student Discipline* (2005) University of the Free State.
[613] University of Johannesburg *Policy on Prevention and Management of Student Sexual Harassment and Rape* (2018) University of Johannesburg; University of Johannesburg *Policy on UJ Bullying, Harassment, Sexual Harassment and Rape* (2021) University of Johannesburg.
[614] University of KwaZulu-Natal *Sexual Harassment Procedure and Guidelines* (2017) University of Kwa-Zulu Natal; University of KwaZulu-Natal *Gender Based Violence Procedure and Guidelines* (2017) University of Kwa-Zulu Natal; University of KwaZulu-Natal *Gender Based Violence Policy* (2017) University of Kwa-Zulu Natal.
[615] University of Pretoria *Code of Conduct on the Handling of Sexual Harassment* (n.d.) University of Pretoria;University of Pretoria *Disciplinary Rules for Students* (2022) University of Pretoria.
[616] University of the Witwatersrand *Sexual Harassment, Sexual Assault, and Rape Policy and Procedures* (2013) University of the Witwatersrand.
[617] Vaal University of Technology *Sexual Harassment Policy* (n.d.) Vaal University of Technology.
[618] Walter Sisulu University of Science and Technology *Sexual Harassment and Gender Discrimination Policy* (n.d.) Walter Sisulu University of Science and Technology.

institutional disciplinary code or rules for student discipline into the sexual misconduct policy by reference, and as such, for these universities, those policies or rules were also included in this analysis.[619]

The table below summarises how I accessed their policies. University policies are dynamic and as such, constantly changing. The table below reflects the policies that were either available publicly or provided upon request as at 30 December 2022, which is the cut-off date after which I conducted my policy analysis.

TABLE 1: Access to sexual misconduct policies at South African universities (as at 30 December 2022)

University	Publicly Available	Requested	Provided
Cape Peninsula University of Technology	No	Yes	No
Central University of Technology	No	Yes	No
Durban University of Technology	No	Yes	No
Mangosuthu University of Technology	No	Yes	No
Nelson Mandela University	No	Yes	Yes
North-West University	No	Yes	Yes
Rhodes University	Available here and here[620]		
Sefako Makgatho Health Sciences University	No	Yes	No
Sol Plaatje University	No	No	No
Stellenbosch University	Available here and here[621]		
Tshwane University of Technology	No	Yes	No
University of Cape Town	Available here and here[622]		
University of Fort Hare	Available here		
University of the Free State	No	Yes	Yes
University of Johannesburg	No	Yes	Yes
University of KwaZulu-Natal	Available here, here, and here[623]		
University of Limpopo	No	Yes	No[624]
University of Mpumalanga	No	Yes	No

[619] These are Rhodes University, Stellenbosch University, University of the Free State, and University of Pretoria. Vaal University of Technology also incorporated its general disciplinary code by reference, but I was unable to access the code for analysis.
[620] Rhodes University has two relevant policies, and both were used in this analysis.
[621] Stellenbosch University has two relevant policies, and both were used in this analysis.
[622] University of Cape Town has two relevant policies, and both were used in this analysis.
[623] University of KwaZulu-Natal has three relevant policies, all of which were used in this analysis.
[624] University of Limpopo only provided a staff policy.

University of Pretoria	Available here and here[625]		
University of South Africa	No[626]		
University of Venda	No	Yes	No
University of the Western Cape	No[627]		
University of the Witwatersrand	Available here		
University of Zululand	No	Yes	No
Vaal University of Technology	Available here		
Walter Sisulu University for Technology and Science	Available here	Yes	No

5.3. Determining the Questions for Policy Analysis

This policy analysis was undertaken by asking twelve key questions of each university's policies. These are:

1. Does the university have a stand-alone policy for sexual misconduct and the disciplinary proceedings thereof?
2. Does the policy contain any statements of victim-centredness?
3. Which forms of misconduct are identified in the policy and how are they defined?
4. Does the policy provide for a specialised tribunal or specialised training for adjudicators?
5. Are the disciplinary proceedings characteristic of an adversarial process, an inquisitorial process, or a hybrid?
6. Does the policy grant the respondent the right to external legal representation?
7. Does the policy grant the complainant the right to legal representation and/or a support person?
8. Does the respondent have the right to directly cross-examine the complainant?
9. Are there prohibitions on any types of evidence, or guidelines on how evidence can and cannot be led?
10. Does the policy require that findings of the disciplinary tribunal be kept strictly confidential? What provisions are present, if any, that allow for the publication of findings?
11. What protective measures are available to the complainant, if any?
12. What ongoing support is available to the complainant and the respondent, if any?

[625] University of Pretoria has two relevant policies, and both were used in this analysis.
[626] University of South Africa, an entirely distance learning institution, did not provide a full policy, only a brief "guideline" document.
[627] University of the Western Cape only provided a staff policy.

In formulating my questions for analysis, I looked, first, to the twin principles of Natural Justice and the statutory procedural fairness protections canvassed in the previous chapter. In so doing, I sought to pinpoint the crucial components necessary for a policy to foster a procedurally fair adjudication process. Extending beyond this, I looked also for the prerequisites for a policy to not only embody fairness but to also be victim-supportive; this will be canvassed in depth in the following chapter. The questions presented here therefore reflect the theoretical framework of Natural Justice and themes distilled from the literature, emphasising the dual goals of procedural fairness and victim support in adjudication.

The resulting data is presented in the tables below.

5.4. AN IN-DEPTH ANALYSIS OF THE POLICIES

5.4.1. DOES THE UNIVERSITY HAVE A STAND-ALONE POLICY FOR SEXUAL MISCONDUCT AND THE DISCIPLINARY PROCEEDINGS THEREOF?

Scholars argue that it is vital that universities create separate policies for sexual misconduct in recognition of the *sui generis* nature of this type of misconduct and the unique needs of victims.[628] Stand-alone policies allow the university to address the multiple facets of sexual misconduct comprehensively, as opposed to it being as a single section of a broader policy.[629]

However, universities do not always have a separate stand-alone policy for sexual misconduct and related disciplinary processes. While some do, others may subsume it under their general disciplinary code, and others still under a broader policy on harassment and other forms of interpersonal misconduct such as bullying.

With this question, I sought to establish the nature of the policy that governs sexual misconduct at each university and its broad contents.

[628] Universities Australia *Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence* (n.d.) Universities Australia; A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6; A M Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) *op cit* note 27.
[629] K Legault 'What is Canada Doing? An Analysis of Canadian University Sexual Violence Policies' (2021) *op cit* note 96.

TABLE 2: Stand-alone policy for sexual misconduct and related disciplinary proceedings at South African universities

University	Yes/No	Details
Nelson Mandela University	Yes	Nelson Mandela University has a comprehensive single policy (and Annexures thereto) that sets out both the substance of the misconduct and the procedures and relevant university actors to address it.[630] It clearly defines which conduct constitutes misconduct, lays out the statutes on which the policy is based, and the structures that have been set up for implementation of the policy.[631] It further lays out the procedures to be followed by students and the university from the time of the first complaint being made to the time of final resolution and appeal of decisions, as well as providing a protocol for support services.[632]
North-West University	Yes	North-West University has a Sexual Harassment Policy; however, this policy only contains statements of its objectives and undertakings, and definitions of misconduct, and nothing further.[633]
Rhodes University	Yes	Rhodes University has a Sexual Offences Policy, which contains the policy principles, definitions of misconduct, directives, and persons responsible for implementation, as well as mechanisms for monitoring implementation.[634] The policy does not, however, lay out the disciplinary procedures applicable to sexual misconduct, as they relate to both investigation and adjudication. Instead, in s

[630] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606.
[631] Ibid ss 2, 3, 9 & 17.
[632] Ibid ss 9 and 11 & ss 1-6, 8-13 of Annexure 1 - Section 1: Procedures ("Annexure 1"), and ss A and B of Annexure 1 – Section 2: Protocols Associated with Psychosocial Support Services.
[633] North-West University 'Sexual Harassment Policy' (2019) *op cit* note 607.
[634] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note ss 1 & 3-7.

		1.2, it defers disciplinary proceedings to the Student Disciplinary Code.[635]
Stellenbosch University	No	Stellenbosch University has a broadly construed Policy on Unfair Discrimination and Harassment within which sexual harassment is just one form.[636] The policy states in its objectives that it applies to all matters on unfair discrimination, victimisation, harassment, and sexual harassment.[637] For purposes of this analysis, only those parts of the policy relevant to sexual harassment shall be considered. Stellenbosch University's policy contains the definitions of sanctionable misconduct, provisions for receiving and investigating misconduct as well as for those responsible for implementation and monitoring.[638] Additionally, there are three addenda annexed to the policy.[639] Addendum B: Complaint Procedures and Promotional Measures Against Sexual Harassment describes the process for laying a complaint, procedures to be followed pursuant to a complaint being made, and the role of different offices in complaint management.[640]
University of Cape Town	Yes	University of Cape Town has two policies governing sexual misconduct. These are the Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment ("the substantive policy"), and the University of Cape Town Disciplinary Procedure for Sexual Misconduct: Sexual Offences and

[635] Ibid.
[636] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609.
[637] Ibid s 3.1.
[638] Ibid ss 5, 7.2 & 8.
[639] Ibid Addendum A: Complaint Procedures and Promotional Measures Against Unfair Discrimination, Addendum B: Complaint Procedures and Promotional Measures Against Sexual Harassment, and Addendum C: Graphic Presentation of the Proposed Process in Case of a Complaint Lodged by a Student or Staff Member.
[640] Ibid Addendum B – introduction and ss 1-5.

		Sexual Harassment ("the procedural policy").[641] While there are some areas of overlap between the policies, the substantive one predominantly outlines the university's position on sexual misconduct, defines different types of misconduct, states the processes and persons responsible for implementation, as well as provides information on complaint management and investigation, and protective and supportive measures available.[642] The procedural policy deals exclusively with the procedures to be followed in a disciplinary hearing for a sexual misconduct matter.[643]
University of Fort Hare	Yes	University of Fort Hare has a Policy on Harassment, Sexual Harassment and Gender-Based Violence. The policy contains a list of the statutes on which it relies, principles of the policy, definitions of misconduct, procedures for reporting and managing complaints, responsible persons for implementation, provisions for disciplinary measures, and provisions for supportive and protective measures.[644]
University of the Free State	Yes	University of the Free State has a single Sexual Harassment, Sexual Misconduct and Sexual Violence Policy.[645] The policy details the purpose and the implementation of the policy, provides definitions of misconduct, as well as the reporting and

[641] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610; University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610.
[642] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 1, 3-5 & 7-13.
[643] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610.
[644] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611 ss 2,3,7,11-16 & 18.
[645] University of the Free State 'Sexual Harassment, Sexual Misconduct and Sexual Violence Policy' (2018) *op cit* note 612.

		investigating procedures.[646] It provides for supportive and protective measures, and gives a detailed description of the informal resolution process.[647] The policy, however, provides little detail on the formal adjudication process as it pertains to sexual misconduct.[648]
University of Johannesburg	Yes	University of Johannesburg has two applicable policies: the Policy on Prevention and Management of Student Sexual Harassment and Rape ("the Prevention and Management policy") and the "Policy on UJ Bullying, Harassment, Sexual Harassment, and Rape ("the Bullying and Harassment policy").[649] While the former is a policy specifically for sexual misconduct and the latter is a broader policy that also encompasses sexual misconduct, there is significant overlap between the two. Both policies are applicable to students, both policies make provisions for different aspects of handling sexual misconduct, and it is unclear which policy takes precedence in the case of a conflict. The Prevention and Management policy provides definitions of misconduct, and stipulations for sanctions and interventions for sexual misconduct.[650] Appended to it is the "Standard Operating Procedure: Prevention and Management of Student Sexual Harassment and Rape" ("the Prevention and Management Standard Operating Procedures").[651] This document details the procedures for reporting and

[646] Ibid ss 1-8.
[647] Ibid s 8.
[648] Ibid.
[649] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613; University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613.
[650] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 ss 5, 7, 14 & 17.
[651] Ibid Standard Operating Procedure: Prevention and Management of Student Sexual Harassment and Rape.

		investigating sexual misconduct under the policy.[652] The Bullying and Harassment policy details some forms of misconduct as well as prevention measures and provisions on confidentiality and complainant's rights.[653] Appended to the policy is the "Standard Operating Procedures" ("the Bullying and Harassment Standard Operating Procedures").[654] This document makes provisions for reporting, responding to, and investigating misconduct, as well as the roles of different departments and practitioners in implementing the policy.[655]
University of KwaZulu-Natal	Yes	University of KwaZulu-Natal has three applicable policies: the Sexual Harassment Procedure and Guidelines ("the Sexual Harassment policy"), the Gender Based Violence Policy ("the GBV policy"), and the Gender Based Violence Procedure and Guidelines ("the GBV Procedures".)[656] It appears that these three work in tandem to provide definitions of misconduct, persons responsible for implementation, a general outline of procedures for handling and investigating complaints, as well as protective and supportive measures.[657] The policies, however, are largely silent on procedures for the formal disciplinary process. The Sexual Harassment Policy states simply that "serious incidents will be dealt with in terms of a formal grievance

[652] Ibid ss 3, 4 & 6.

[653] University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 ss 5, 6, 9, 12 & 13.

[654] Ibid Standard Operating Procedures.

[655] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 ss 3-8.

[656] University of KwaZulu-Natal 'Sexual Harassment Procedure and Guidelines' (2017) *op cit* note 614; University of KwaZulu-Natal 'Gender Based Violence Policy' (2017) *op cit* note 614; University of KwaZulu-Natal 'Gender Based Violence Procedure and Guidelines' (2017) *op cit* note 614.

[657] University of KwaZulu-Natal 'Sexual Harassment Procedure and Guidelines' (2017) *op cit* note 614 ss 4 & 5; University of KwaZulu-Natal 'Gender Based Violence Policy' (2017) *op cit* note 614 ss 2 & 4; University of KwaZulu-Natal 'Gender Based Violence Procedure and Guidelines' (2017) *op cit* note 614 ss 2-5 & 7.

		procedure/ misconduct procedure or University statute regarding student misconduct", while the GBV Procedures state that "where appropriate and necessary, the University of KwaZulu-Natal Student Disciplinary Rules will be amended to make provision for GBV".[658] There is no further elaboration on what such amendments might look like, in terms of disciplinary procedures.
University of Pretoria	Yes	University of Pretoria has a Code of Conduct on the Handling of Sexual Harassment. The Code contains the definitions of misconduct, procedures for laying complaints, investigating such complaints, and options for formal or informal resolution.[659] Additionally, it provides for supportive measures and details the sanctions for sexual misconduct.[660]
University of the Witwatersrand	Yes	The University of the Witwatersrand has a single policy entitled "Sexual Harassment, Sexual Assault and Rape Policy and Procedures".[661] The policy defines sanctionable forms of misconduct and details the processes and persons responsible for receiving complaints, supporting victims, and executing informal and formal resolution proceedings.[662]
Vaal University of Technology	Yes	Vaal University of Technology has a Sexual Harassment Policy. Aside from providing definitions of misconduct, the policy also contains procedures for receiving and investigating complainants, providing support to both the complainant

[658] University of KwaZulu-Natal 'Sexual Harassment Procedure and Guidelines' (2017) *op cit* note 614 s 5.3; University of KwaZulu-Natal 'Gender Based Violence Procedure and Guidelines' (2017) *op cit* note 614 s 6.1.
[659] University of Pretoria 'Code of Conduct on the Handling of Sexual Harassment' (n.d.) *op cit* note 615 ss 3-5, 7 & 8.
[660] Ibid ss 8 & 9.
[661] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616.
[662] Ibid ss 4-7 & 9-15.

		and perpetrator, initiating formal or informal resolution processes, and general provisions for implementation and monitoring.[663]
Walter Sisulu University	Yes	Walter Sisulu University has a Sexual Harassment and Gender Discrimination Policy.[664] What is publicly available, however, and what I used for this analysis is a truncated version of the longer policy which I was unable to access. The version used for purposes of this dissertation contains substantive definitions of harassment, the roles of different officers of the university and general information on the informal resolution channels one can follow.[665] It does not provide any information on disciplinary procedures for sexual harassment.

5.4.2. Does the policy contain any statements of victim-centredness or victim-supportiveness?

The concept of victim-centredness or victim-supportiveness, which is central to this dissertation, is unpacked extensively in Chapter 6. At its core, victim-centeredness is an approach that requires that the needs of the victim are prioritised in the development and implementation of responses to sexual misconduct.[666]

In asking this question, I looked specifically for any statements in the policy that explicitly stated that the university's approach is designed to prioritise the safety and well-being of victims.

[663] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617 ss 2 ,4, 7-10, 12-14 & 18-31.
[664] Walter Sisulu University of Science and Technology 'Sexual Harassment and Gender Discrimination Policy' (n.d.) *op cit* note 618.
[665] Ibid ss 1-5 & 7.
[666] UN Women 'Victim/Survivor-centered Approach' available at *https://www.endvawnow.org/en/articles/1790-victim-survivor-centred-approach.html#:~:text=A%20victim%2Fsurvivor%2Dcentered%20approach,the%20forefront%20of%20any%20response.*, accessed on 14 December 2023.; Universities Australia 'Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence' (n.d.) *op cit* note 628.

TABLE 3: Statements of victim-centredness or victim-supportiveness contained in policies

University	Yes/No	Details
Nelson Mandela University	No	There are no such statements in the policy.
North-West University	No	There are no such statements in the policy.
Rhodes University	Yes	Section 4.2 of the Rhodes University policy titled "Complainant-centred" is clear on the university's priorities in its approach to sexual misconduct.[667] It states, inter alia: "assistance to complainants must support and encourage their sense of personal control, which includes respecting the complainant's informed decision at every stage of the process. The safety, physical needs and psychological needs of the complainant must be prioritised…"[668]
Stellenbosch University	Yes	Section 5.1 of Addendum B (Complaint Procedures and Promotional Measures Against Sexual Harassment) to the Stellenbosch University Policy states that "the main aim to be kept in mind throughout the procedure is to serve complainants' interests as far as reasonably possible".[669]
University of Cape Town	Yes	The University of Cape Town procedural policy states in its introduction that its purpose is to "ensure a fair trial to all parties … and to be more intentional about minimising retraumatising the complainant".[670] I read this to be an indirect statement of complainant-centeredness.
University of Fort Hare	No	There are no such statements in the policy.
University of the Free State	No	There are no such statements in the policies.

[667] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note 608.
[668] Ibid.
[669] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609.
[670] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610.

University of Johannesburg	Yes	University of Johannesburg's Bullying and Harassment policy suggests a complainant-centred approach where it states in s 8.1.c that "while the primary aim of the Policy is to assist victims/survivors, an alleged perpetrator may at any stage approach the GBV case manager to advise on the application and interpretation of the Policy".[671]
University of KwaZulu-Natal	Yes	University of KwaZulu-Natal's GBV Procedures suggests a complainant-centred approach where it states in s 5.1 that "while the primary aim of this policy is to assist complainants of GBV, an alleged perpetrator may at any stage approach the Chairperson of the GBVC for advice on the application and interpretation of the GBV policy".[672]
University of Pretoria	No	There are no such statements in the policies.
University of the Witwatersrand	Yes	The University of the Witwatersrand policy is clear in its complainant-centred approach to the disciplinary process. Section 14.1 of this policy states that "the process will, in general, be guided by the needs and wishes of the complainant".[673]
Vaal University of Technology	Yes	Vaal University of Technology's policy suggests a complainant-centred approach where it states in s 8.5.11 that "while the primary aim of this policy is to assist a complainant, an alleged perpetrator may…"[674]
Walter Sisulu University	No	There are no such statements in the policy.

[671] University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613.
[672] University of KwaZulu-Natal 'Gender Based Violence Procedure and Guidelines' (2017) *op cit* note 614.
[673] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616.
[674] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617.

5.4.3. WHICH FORMS OF MISCONDUCT ARE IDENTIFIED IN THE POLICY AND HOW ARE THEY DEFINED?

Sexual misconduct is a broad and overarching term that I use in this dissertation to describe all of the different types of sexual misconduct and categories of sexual harassment. However, it does not enjoy a uniform definition across universities. To begin with, different universities identify different types of conduct as misconduct, and even where the same forms of misconduct are identified, they are not always defined in the same way.

While the statutes set out in Chapter 3 (particularly the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA"), the Protection from Harassment Act 17 of 2011, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA")) all provide comprehensive and clear definitions of almost all forms of misconduct contained in university policies, there is no obligation for universities to adopt them, although I will later make the argument that there should be.

For this question, I looked at which conduct is identified as misconduct, and how such misconduct is defined, including whether the definitions align with statutory definitions.

TABLE 4: Forms of misconduct and definitions of misconduct contained in policies

University	Details
Nelson Mandela University	Nelson Mandela University identifies a broad range of acts of misconduct in s 2 of its policy including sexual assault,[675] compelled sexual assault,[676] compelled self-

[675] Where *sexual assault* is defined to mean:

> an unlawful and intentional act of sexual contact with another person without that person's consent.

[676] Where *compelled sexual assault* is defined to mean:

> when a person unlawfully and intentionally compels a third person, without the consent of the third person, to commit an act of sexual violation with a complainant, without the consent of the complainant.

	sexual assault,[677] sexual violation,[678] rape,[679] and compelled rape.[680] All of these are defined as per SORMA.[681]

[677] Where *compelled self-sexual assault* is defined to mean:

when a person unlawfully and intentionally compels a complainant, without the consent of the complainant, to –

2.5.1 engage in –

i) masturbation;

ii) any form of arousal or stimulation of a sexual nature of the female breasts; or

iii) sexually suggestive or lewd acts, with B himself or herself;

2.5.2 engage in any act which has or may have the effect of sexually arousing or sexually degrading the complainant; or

2.5.3 cause the complainant to penetrate in any manner whatsoever his or her own genital organs or anus, is guilty of the offence of compelled self-sexual assault.

[678] Where *sexual violation* is defined to mean:

any act which causes- direct or indirect contact between the –

i. genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

ii. mouth of one person and –

[1]. the genital organs or anus of another person or, in the case of a female, her breasts;

[2]. the mouth of another person;

[3]. any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could –

a. be used in an act of sexual penetration;

b. cause sexual arousal or stimulation; or

c. be sexually aroused or stimulated thereby; or

[4]. any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

iii. mouth of the complainant and the genital organs or anus of an animal;

[1]. the masturbation of one person by another person; or

[2]. the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration.

[679] Where *rape* is defined to mean:

an unlawful and intentional act of sexual penetration with another person without that person's consent, specifically including:

2.14.1 acquaintance, spousal and date rape;

2.14.2 where the complainant submits or is subjected to an act of sexual penetration as a result of:

i. the use of force or intimidation by the alleged perpetrator against the complainant, another person or the property of these persons;

ii. a threat of harm, real or perceived, by the alleged perpetrator against the complainant, another person or the property of these persons;

iii. an abuse of power or authority such that the complainant is inhibited from expressing her/his resistance or unwillingness to participate in the act;

iv. false pretences or by fraudulent means;

v. the inability of the complainant to appreciate the nature of the act of sexual penetration, including where the complainant is at the time thereof:

[1] asleep or unconscious;

[2] in an altered state of consciousness, including, but not limited to, under the influence of any medicine, drug, alcohol or other substance, to the extent that her/his ability to consent is adversely affected;

	Nelson Mandela University also identifies sexual harassment as a form of misconduct.[682] According to the policy, sexual harassment may also take the form of special victimisation,[683] *quid pro quo* harassment,[684] and creation of a hostile environment.[685] Further, Nelson Mandela University recognises grooming[686] as a form of misconduct.

[3] mentally disabled;
[4] a child below the age of 12 years.

680 Where *compelled rape* is defined to mean:

> when a person unlawfully and intentionally compels a third person, without the consent of the third person, to commit an act of sexual penetration with a complainant, without the consent of the complainant.

681 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

682 Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606 s 2.
Where *sexual harassment* is defined to mean:

> The unwelcome or unwanted conduct of an implicit or explicit sexual nature by an individual or group. It is conduct that the complainant reasonably experiences as offensive and distressing and which leads to the emotional, physical, and social discomfort of the complainant, or interferes with the complainant's work or academic performance, or creates an intimidating, hostile or defensive working, educational or social environment. It may take the form of special victimisation, quid pro quo harassment and the creation of a hostile environment.

And where *unwelcome sexual conduct* is defined to mean:

> Unwelcome sexual conduct includes physical, verbal, and non-verbal conduct of a sexual nature that is perceived by the complainant as demeaning, compromising, embarrassing, threatening and/or offensive. Such conduct may be direct or indirect and may include technological devices, images, and weapons. A single incident of unwelcome sexual conduct can constitute sexual harassment.

And where *unwelcome physical conduct* is defined as "rang(ing) from touching to sexual assault and rape".
And where *unwelcome verbal conduct* is defined to mean:

> Unwelcome verbal conduct includes innuendos, suggestions or hints of a sexual nature, sexual advances, sexual threats, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's physique, inappropriate enquiries about the person's sex life, wolf-whistle, and sending sexually explicit text/graphics via electronic means or otherwise.

And where *unwelcome non-verbal conduct* is defined to mean:

> Unwelcome non-verbal conduct includes gestures, indecent exposure and the display or sending of sexually explicit pictures or objects via electronic or other means.

683 Ibid s 2.
Where *special victimisation* is defined to mean:

> any form of victimisation, discrimination or intimidation of a person for failing to submit to sexual advances.

684 Ibid s 2.
Where *quid pro quo harassment* is defined to mean:

> *Quid pro quo* harassment involves the alleged perpetrator influencing or attempting to influence a person's employment circumstances (training, organizational or funding opportunities, grading or evaluation), or admission of a student to the University or University residences, or access to funding opportunities, by coercing or attempting to coerce that person to engage in sexual activities.

685 Ibid s 2.
Where *creation of a hostile environment* is defined as "occur(ing) where the purpose or effect is to interfere with another's performance at work or in study".

686 Ibid s 2.
Where *grooming* is defined to mean:

> an action or series of actions, which can initially appear to be conducted within the context of the academic project, but are taken with the overall aim of befriending and establishing a psychological

	In addition to these specific forms of misconduct, Nelson Mandela University also contains the catch-all prohibition of any sexual offence outlined in SORMA and the amendments thereto.[687] Notably, Nelson Mandela University is inclusive in its definition of genital organs for the purposes of defining misconduct, wherein it states that genital organs include those which are surgically constructed or reconstructed.[688]
North-West University	North-West University's policy identifies six forms of sexual harassment in s 4: physical,[689] verbal,[690] non-verbal,[691] visual,[692] *quid pro quo* harassment,[693] and sexual favouritism.[694]

and/or material connection with a person in order to facilitate subsequent sexual harassment or sexual offences and/or to hinder the reporting of various acts of harassment or assault. This includes 'online grooming,' which refers to grooming by means of modern-day technology, such as mobile phones and the internet.

687 Ibid s 2.

688 Ibid s 2.

689 Where *physical forms of sexual harassment* are defined as:

Physical conduct of a sexual nature such as unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite gender.

690 Where *verbal forms of sexual harassment* are defined as:

Unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.

691 Where *non-verbal forms of sexual harassment* are defined as:

unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

692 Where *visual forms of sexual harassment* are defined as:

exhibiting pornographic photos, comics, objects etc. that create a hostile environment.

693 Where *quid pro quo harassment* is defined to mean:

where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

Where an employee, supervisor or a member of management, undertakes or attempts to influence the marks of students, acceptance into residences, team selections for different sports, etc. in exchange for sexual favours.

694 Where *sexual favouritism* is defined to mean:

where a person who is in a position of authority rewards only those who respond to sexual advances made by such a person, whilst other deserving employees and/or students who do not submit themselves to any sexual advances are denied such benefits, e.g. promotions, merit rating or salary increases, acceptance into residences, etc.

Rhodes University	Section 3 of the Rhodes policy identifies rape,[695] sexual assault,[696] and sexual violation[697] as forms of misconduct under its policy, all of which are defined as per SORMA.[698] The policy additionally contains a catch-all phrase that states that any sexual offence described in SORMA is also an offence under the policy.[699] Sexual harassment[700] is also identified as a form of misconduct and its definition is the same as that of the

[695] Where *rape* is defined to mean:

A person who unlawfully and intentionally commits an act of sexual penetration, without consent, is guilty of the offence of rape.

[696] Where *sexual assault* is defined to mean:

1. A person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault.
2. A person ("A") who unlawfully and intentionally inspires the belief in a complainant ('B") without the consent of B that B will be sexually violated, is guilty of the offence of assault.

[697] Where *sexual violation* is defined to mean:

any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

- the genital organs or anus of another person or, in the case of a female, her breasts;
- the mouth of another person;
- any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
  - be used in an act of sexual penetration;
  - cause sexual arousal or stimulation; or
  - be sexually aroused or stimulated thereby; or
  - any object resembling the genital organs or anus of a person, and

  in the case of a female, her breasts, or an animal; or

(iii) mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and ''sexually violates'' has a corresponding meaning.

[698] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[699] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note 608 s 3.

[700] Ibid s 3.

Where *sexual harassment* is defined to mean:

any –

(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;

(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances in which a reasonable person would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) implied or expressed promise of reward for complying with a sexually oriented request;

(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with sexually-oriented request;

	Protection from Harassment Act[701] above, save for the addition of subclauses (e) and (f) in the Rhodes University policy.[702]
Stellenbosch University	Sexual harassment[703] is defined in s 5.9 of Stellenbosch University's Policy on Unfair Discrimination and Harassment as a form of discrimination and a manifestation of an unequal power dynamic.[704] It includes verbal,[705] non-verbal,[706] physical,[707] and visual[708] forms of harassment; and *quid pro quo* harassment.[709]
University of Cape Town	University of Cape Town's substantive policy adopts a broad definition of the term sexual offences[710] by

> (e) unwelcome sexually suggestive comments and jokes from a person who knows or ought reasonably to know that such attention is unwelcome; or
> (f) unwelcome intrusive questions about a person's private life or physical appearance, from a person who knows or ought reasonably to know that such attention is unwelcome.

[701] Protection from Harassment Act 17 of 2011.

[702] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note 608 s 3.

[703] Where *sexual harassment* is defined to mean:

> Behaviour typically experienced as offensive, which may include sexual approaches and which often are made within the context of a relationship of unequal power or authority; sexual harassment is a form of discrimination on the grounds of gender, sexual orientation or sexuality; it is unwanted and may be experienced as an expression of power, authority or control of a sexual nature; it creates a hostile environment that prevents those concerned to learn or work to capacity.
> Sexual attention becomes sexual harassment if the behaviour persists (although a single incident of harassment can constitute sexual harassment, too), if the complainant has made it clear that the behaviour is considered offensive and/or if the respondent should have known that the behaviour would be regarded as unacceptable.

[704] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609.

[705] Ibid s 5.9.1.

Where *verbal harassment* is defined to mean:

> Unwelcome enquiries regarding a person's sex life, telephone calls with a sexual undertone, continuous rude or sexist jokes or remarks, jokes with sexual innuendo, unwelcome requests for dates and remarks about a person's figure.

[706] Ibid s 5.9.2.

Where *non-verbal harassment* is defined to mean:

> leering, gestures with a sexual meaning and persistent unwelcome flirtation.

[707] Ibid s 5.9.4.

Where *physical harassment* is defined to mean:

> Unwelcome contact through patting, pinching, fondling, kissing, pawing, assault, molesting, and rape.

[708] Ibid s 5.9.3.

Where *visual harassment* is defined to mean:

> displaying pornographic photos, comics, objects, *et cetera* that create a hostile environment.

[709] Ibid s 5.9.5.

Where *quid pro quo harassment* is defined to mean:

> sexual bribery (e.g. promising a promotion in return for sexual favours) and sexual extortion (e.g. refusal to promote people if they do not consent to granting sexual favours).

[710] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 4.20.

Where *sexual offence* is defined to mean:

	defining it to include any sexual offence contained in SORMA.[711] It defines sexual harassment[712] as unwelcome sexual conduct, where unwelcome sexual conduct includes physical,[713] verbal,[714] and non-verbal[715] conduct. It further states that sexual harassment includes special

an unlawful and intentional act of sexual contact with another person without that person's consent; or where the person was not able to consent to, through the use of physical force, intimidation or coercion, including but not limited to:

a) aggravated sexual assault (sexual assault with a weapon);
b) attempted rape;
c) indecent assault;
d) penetration by objects and forced sexual activity that did not end in penetration;
e) rape (sexual penetration without consent);
f) gender-based violence of a sexual nature;
g) sexual violence;
h) Other sexual offences as listed in Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

[711] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[712] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 4.22.

Where *sexual harassment* is defined to mean:

unwelcome conduct of a sexual nature that violates the rights of a person and constitutes a barrier to equity in the institution, taking into account, but not limited, to the following factors:

a) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
b) the impact of the sexual conduct on the complainant;
c) whether the sexual conduct was unwelcome;
d) the nature and extent of the sexual conduct.

[713] Ibid s 4.22.3.

Where *unwelcome physical conduct* is defined to mean:

Rang(ing) from touching to sexual assault and rape.

[714] Ibid s 4.22.4.

Where *unwelcome verbal conduct* is defined to mean:

innuendos, suggestions or hints of a sexual nature, sexual advances, sexual threats, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body/appearance/clothing, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.

[715] Ibid s 4.22.5.

Where *unwelcome non-verbal conduct* is defined to mean:

gestures, indecent exposure and the display or sending by electronic or other means sexually explicit pictures or objects.

	victimisation,[716] *quid pro quo* harassment,[717] and the creation of a hostile environment.[718] Moreover, in s 4.22.7, the policy sets out and defines sexual coercion,[719] unwanted sexual attention,[720] gender harassment,[721] and sexual bullying[722] as "broad categories (which) will be used in determining the nature of the conduct that constitutes sexual harassment".[723]
University of Fort Hare	The UFH policy defines sexual misconduct[724] as unwelcome conduct of a sexual nature. It then identifies

[716] Ibid s 4.22.6.
Where *special victimisation* is defined to mean:
when a person is victimised or intimidated for failing to submit to sexual advances.

[717] Ibid s 4.22.6.
Where *quid pro quo harassment* is defined to mean:
when an alleged perpetrator:
i. influences or attempts to influence a person's employment circumstances by coercing or attempting to coerce that person to engage in sexual activities;
ii. influences or attempts to influence the admission of a
student to the University or to University residences by coercing or attempting to coerce that person to engage in sexual activities; and also;
iii. influences or attempts to influence the access of a student to training, organizational or funding opportunities, or interferes in grading or evaluation, by coercing or attempting to coerce a student to engage in sexual activities.

[718] Ibid s 4.22.6.
Where *creation of a hostile environment* is defined to mean:
where the purpose or effect is to interfere with another's performance at work or in study.

[719] Where *sexual coercion* is defined to mean:
entail(ing) sexual advances, and makes the conditions of employment (or education, for students) contingent upon sexual cooperation.

[720] Where *unwanted sexual attention* is defined to mean:
Sexual advances, but it does not add professional rewards or threats to force compliance. This category includes expressions of romantic or sexual interest that are unwelcome, unreciprocated, and offensive to the target; examples include unwanted touching, hugging, stroking, and persistent requests for dates or sexual behaviour despite discouragement and can include assault.

[721] Where *gender harassment* is defined to mean:
A broad range of verbal and non- verbal behaviours not aimed at sexual co-operation but that convey insulting, hostile, and degrading attitudes about a person's chosen gendered identity. Gender harassment is further defined as three types: sexism; hostility and crude harassment. Examples of the sexism and/or hostility experienced by women and marginalised populations who are gender diverse. Gender harassment takes the form of demeaning jokes or comments or behaviour that seeks to diminish a person's position based on their gender. The crude harassment form of gender harassment is defined as the use of sexually crude terms that denigrate people based on their gender.

[722] Where *sexual bullying* is defined to mean:
Behaviour, physical or non-physical, where sexuality or gender is used as a weapon against another. Sexual bullying is any behaviour which degrades someone, singles someone out by the use of sexual language, gestures or violence, and victimising someone for their appearance.

[723] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610.

[724] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611 s 3.

	and defines an extensive list of forms of misconduct including intimate partner violence,[725] gender-based violence,[726] rape,[727] sexual assault,[728] sexual

Where *sexual misconduct* is defined to mean:

> any unwelcome or unwanted conduct of a sexual nature, including GBV, assault or violation, whether physical, verbal or non-verbal, by a person of the same or opposite sex; committed without consent or by force, intimidation, threat, coercion or manipulation.

[725] Ibid s 3.

Where *intimate partner violence* is defined to mean:

> any act of violence committed between persons within an intimate relationship, including (a) physical abuse; (b) sexual abuse; (c) emotional, verbal and psychological abuse; (d) economic abuse; (e) intimidation; (f) GBV; (g) stalking; (h) damage to property; (i) entry into the complainant's residence without consent, where the parties do not share the same residence; or (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

[726] Ibid s 3.

Where *gender-based violence* is defined to mean:

> any act of violence, whether persistent or isolated, directed against any person on the basis of their gender, sex, marital status, or sexual orientation that results in or is likely to result in physical, sexual or psychological harm or suffering and includes but is not limited to intimate partner violence, Harassment, Sexual Harassment, sexual assault, rape, coercive sexual practices and harmful customary or traditional practices such as female genital mutilation and honour crimes.

[727] Ibid s 3.

Where *rape* is defined to mean:

> an unlawful and intentional act of sexual penetration, as defined in the Criminal Law Sexual Offences and Related Matters) Act 32 of 2007, between two or more persons, without the consent of one of those persons, including acquaintance, spousal and date rape where the complainant submits or is subjected to an act of sexual penetration as a result of:
>
> - The use of force or intimidation by the alleged perpetrator against the complainant, another person or the property of these persons;
> - A threat of harm, real or perceived, by the alleged perpetrator against the complainant, another person or the property of these persons.
> - An abuse of power or authority such that the complainant is inhibited from expressing her/his resistance or unwillingness to participate in the act;
> - false pretences or by fraudulent means;
> - the inability of the complainant to appreciate the nature of the act of sexual penetration; including where the complainant is at the time of the commission asleep or unconscious, in an altered state of consciousness including but not limited to, under the influence of medicine, drugs, alcohol, or other substances, to the extent that her/his ability to consent is adversely affected, where the person is mentally disabled or a child below the age of legal consent.

[728] Ibid s 3.

Where *sexual assault* is defined to mean:

> an unlawful and intentional act or attempted act of a sexual nature with another person without that person’s consent in which a person is threatened, coerced, or forced to comply against their will, or is incapable of giving consent or unconscious of the nature of the act.

	attention,[729] sexual favouritism,[730] sexual intimidation,[731] and victimisation.[732] Sexual harassment[733] is identified as a form of misconduct and is defined to include unwelcome

[729] Ibid s 3.
Where *sexual attention* is defined to mean:

> GBV if the behaviour is persisted in, although a single incident of harassment can constitute GBV, and/ or the recipient has made it clear that the behaviour is considered offensive and / or the perpetrator should have known that the behaviour is regarded as unacceptable. It is not only the intention of the alleged harasser that is the issue, but also the complainant's reasonable perception and experience of the alleged harasser's behaviour.

[730] Ibid s 3.
Where *sexual favouritism* is defined to mean:

> where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving persons who do not submit themselves to any sexual advances are denied benefits.

[731] Ibid s 3.
Where *sexual intimidation* is defined to mean:

> threatening another person by committing a sexual act against him/her or engaging in indecent exposure.

[732] Ibid s 3.
Where *victimisation* is defined to mean:

> the re-traumatisation of a person who has been subjected to for example GBV. It includes acts of denying promotion opportunities, subjecting the person to bigger workloads, demotions, unfair and biased performance appraisals, using authority to create an unbearable work environment as well as verbally discrediting the victim.

[733] Ibid s 3.
Where *sexual harassment* is defined to mean:

> unwanted, unwelcome, unsolicited and/or unreciprocated conduct of a sexual nature such as unwelcome sexual advances, requests for sexual favours, and other verbal, physical, or non-verbal conduct of a sexual nature.

	physical,[734] verbal,[735] and non-verbal[736] conduct of a sexual nature; as well as sexual exploitation,[737] special victimisation,[738] grooming,[739] *quid pro quo*

[734] Ibid s 3.
Where *physical sexual harassment* is defined to mean:

> unwanted and deliberate physical contact, including but not limited to inappropriate touching, sexual assault, actual/attempted rape, strip search by opposite sex, kissing and hugging and fondling.

[735] Ibid s 3.
Where *verbal sexual harassment* is defined to mean:

> demeaning verbal comments of a sexual nature; subtle or explicit demands for or offers of sexual favours which demand implicitly or explicitly a condition that may affect a decision or other action in respect of student admission, funding, grading or academic progress or carries a condition that may affect a decision or other action in respect of staff recruitment, selection, appraisal, promotion or career progress or carries a condition that may affect a decision or other action in respect of third party contractor's goods or services; unwanted or unwelcome innuendos, suggestions and hints of a sexual nature; and/or comments with sexual overtones which creates an intimidating or offensive and/or hostile learning or working environment that interferes with academic and/or work performance; unwelcome or inappropriate nicknames, derogatory or obscene remarks, unwelcome comments or enquiries about a person's sexual habits, unwelcome telephone calls or e-mails with sexual undertones, unwelcome sex-related jokes or insults, unwelcome graphic comments about a person's body made in their presence and/or directed towards them, non-verbal behaviour such as unwelcome whistling, unwelcome gestures with a sexual meaning, indecent exposure of private parts, persistent and unwelcome flirtation, unwelcome physical contact, a strip- search by or in the presence of the opposite sex, unwelcome display of pornographic or other offensive, derogatory and/or sexually explicit photos, caricatures, designs, objects, slides, movies or other material, *quid pro quo* harassment aimed at influencing a process of employment, promotion, training, discipline, dismissal, salary increments, test/exam marks, qualification for graduation or other educational benefits in exchange for sexual favours, and sexual favouritism where rewards are reserved only for those who respond to sexual advances, unwelcome suggestions or hints, sexual advances, comments with sexual overtones, sex-related jokes or insults.

[736] Ibid s 3.
Where *non-verbal sexual harassment* is defined to mean:

> the transmission, by any means, electronic or otherwise, or the gratuitous display of sexually explicit written or audio- visual materials; offensive gestures or actions of a sexual nature such as indecent exposure; stalking behaviour such as pursuing or following a person, or non-consensual communication or other contact, including but not limited to unwelcome gestures, indecent exposure, display of sexually explicit pictures and objects, sexually suggestive looks, staring or ogling, suggestive body language and sexually oriented letters.

[737] Ibid s 3.
Where *sexual exploitation* is defined to mean:

> taking non-consensual, unjust or abusive sexual advantage of another person, including but not limited to the electronically recording, photographing or transmitting intimate or sexual utterances, sounds, or images without the knowledge and consent of all parties involved; voyeurism (spying on others who are in intimate or sexual situations or in compromising positions); distributing intimate or sexual information about another person without that person's consent; grooming and/or prostituting or trafficking another person.

[738] Ibid s 3.
Where *special victimisation* is defined to mean:

> when a person is victimised or intimidated for refusing to submit to sexual advances.

[739] Ibid s 3.
Where *grooming* is defined to mean:

> an action or series of actions, which can initially appear to be conducted within the context of the academic project, but are taken with the overall aim of befriending and establishing a psychological and/or material connection with a person in order to facilitate subsequent sexual harassment or sexual

	harassment,[740] and creation of a hostile work or learning environment.[741]
University of the Free State	The University of the Free State policy identifies sexual assault,[742] sexual exploitation,[743] sexual harassment,[744]

assault and/or to hinder the reporting of various acts of harassment or assault. This includes 'online grooming,' which refers to grooming by means of modern-day technology, such as mobile phones and the internet.

[740] Ibid s 3.
Where *quid pro quo harassment* is defined to mean:

when:

- An alleged perpetrator influences or attempts to influence the admission of a student to the University or access to opportunities within the University, by coercing or attempting to coerce that person to engage in unwelcome sexual conduct or offering special treatment in exchange for unwelcome sexual conduct; and / or
- An alleged perpetrator influences or attempts to influence the grading, evaluation or professional advancement of the student, by coercing or attempting to coerce them to engage in unwelcome sexual conduct.

[741] Ibid s 3.
Where *creation of a hostile work or learning environment* is defined to mean:

where the purpose or effect of the conduct is to interfere with another person's performance at work or study.

[742] University of the Free State 'Sexual Harassment, Sexual Misconduct and Sexual Violence Policy' (2018) *op cit* note 612 s 2.
Where *sexual assault* is defined to mean:

Sexual misconduct that represents a range of behaviour, from forceful intercourse to non-physical forms of pressure that cause a person to engage in sexual activity without his/her consent, which can also be referred to as compelled sexual assault or compelled self-sexual assault.

[743] Ibid s 2.
Where *sexual exploitation* is defined to mean:

Taking non-consensual, unjust, or abusive sexual advantage of another person. Examples can include, but are not limited to, the following behaviour:

i) Electronically recording, photographing, or transmitting intimate or sexual utterances, sounds, or images without the knowledge and consent of all parties involved;
ii) Voyeurism (spying on others who are in intimate or sexual situations or in compromising positions);
iii) Distributing intimate or sexual information about another person without that person's consent; and/or
iv) Prostituting or trafficking another person.

[744] Ibid s 2.
Where *sexual harassment* is defined to mean:

Any form of unwanted or unwelcome conduct of a sexual nature, whether verbal in the form of unwelcome comments, unwelcome or inappropriate nicknames, derogatory or obscene remarks, unwelcome comments or enquiries about a person's sexual habits, unwelcome telephone calls or e-mails with sexual undertones, unwelcome sex-related jokes or insults, unwelcome graphic comments about a person's body made in their presence and/or directed towards them, non-verbal behaviour such as unwelcome whistling, unwelcome gestures with a sexual meaning, indecent exposure of private parts, persistent and unwelcome flirtation, unwelcome physical contact, a strip-search by or in the presence of the opposite sex, unwelcome display of pornographic or other offensive, derogatory and/or sexually explicit photos, caricatures, designs, objects, slides, movies or other material, quid pro quo harassment aimed at influencing a process of employment, promotion, training, discipline, dismissal, salary increments, test/exam marks, qualification for graduation or other educational benefits in exchange for sexual favours, and sexual favouritism where rewards are reserved only for those who respond to sexual advances.

	sexual intimidation,[745] and sexual violation[746] as forms of sanctionable misconduct.
University of Johannesburg	Both of University of Johannesburg's policies provide definitions of sanctionable misconduct.

[745] Ibid s 2.

Where *sexual intimidation* is defined to mean:

> threatening another person by committing a sexual act against him/her or engaging in indecent exposure.

[746] Ibid s 2.

Where *sexual violation* is defined to mean:

> the following non-consensual/forced behaviour:
>
> **i)** Direct or indirect contact between the:
>
> a. genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or animal, or any object, including any object resembling or representing the genital organs or anus of a person or animal;
>
> b. mouth of one person and:
>
> i. the genital organs or anus of another person or, in the case of a female, her breasts;
>
> ii. the mouth of another person;
>
> iii. any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could:
>
> 1. be used in an act of sexual penetration;
> 2. cause sexual arousal or stimulation; or
> 3. be sexually aroused or stimulated thereby; or
>
> iv. any object resembling the genital organs or anus of a person or animal and, in the case of a female, her breasts; or
>
> c. mouth of the complainant and the genital organs or anus of an animal;
>
> **ii)** The masturbation of one person by another person; or
>
> **iii)** The insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.

	The Prevention and Management policy defines sexual harassment[747] to include physical,[748] verbal,[749] and non-verbal[750] forms of harassment, as well as *quid pro quo* harassment[751] and sexual favouritism.[752]

[747] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 s 7.
Where *sexual harassment* is defined to mean:

> in terms of the Protection Against Harassment Act, Act 17 of 2011, as any:
>
> > 7.1.1 unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;
> > 7.1.2 unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances;
> > 7.1.3 implied or expressed promise of reward for complying with a sexually oriented request; or
> > 7.1.4 implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.
> > 7.2 If such forms of conduct come from a person in a position of institutional power over the person against whom the conduct is directed, that abuse of power will be judged to be an aggravating circumstance.

[748] Ibid s 7.
Where *physical conduct of a sexual nature* is defined to mean:

> all unwanted physical contact, ranging from touching to sexual assault and rape, or frisking or strip searches by another person.

[749] Ibid s 7.
Where *verbal forms of sexual harassment* are defined to mean:

> innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sexual-related jokes directed at a specific person or persons or insults or unwelcome graphic comments about a person's body made in their presence or directed at them, unwelcome and inappropriate enquiries about a person's sex life, unwelcome and inappropriate comments about a person's sexual orientation, and unwelcome whistling or any other physical movement directed at a person or group of persons which in the context could be reasonably interpreted as having a sexual undertone.

[750] Ibid s 7.
Where *non-verbal forms of sexual harassment* are defined to mean:

> unwelcome gestures, indecent exposure, and unwelcome displays of sexually explicit pictures and objects.

[751] Ibid s 7.
Where *quid pro quo harassment* is defined to mean:

> if a lecturer undertakes or attempts to influence any academic decision-making process about good marks, academic honours, or any other benefits, in exchange for sexual favours.

[752] Ibid s 7.
Where *sexual favouritism* is defined to mean:

> a person who is in a position of authority rewards only those who respond to her/his sexual advances, whereas other students who do not submit themselves to any sexual advances are denied good marks, academic honours or any other benefits.

	The Bullying and Harassment policy identifies compelled rape,[753] rape,[754] and sexual assault[755] as forms of misconduct which it defines as per SORMA.[756]
University of KwaZulu-Natal	University of KwaZulu-Natal's GBV policy identifies intimate partner violence,[757] gender-based violence,[758] rape,[759] sexual assault,[760] and sexual harassment[761] as sanctionable forms of misconduct.

[753] University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 s 5.
Where *compelled rape* is defined to mean:

> Any person (A) who unlawfully and intentionally compels a third person (C), without the consent of C, to commit an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence, compelled rape.

[754] Ibid s 5.
Where *rape* is defined to mean:

> a) Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B) without the consent of B, is guilty of the offence of rape.
> b) Rape includes using any kind of objects such as fingers, pens, sex toys, etc. used to penetrate complainant without consent.
> c) Rape is not limited to sexual penetration but include the act of sexual intercourse without consent.

[755] Ibid s 5.
Where *sexual assault* is defined to mean:

> a) A person (A), who unlawfully and intentionally sexually violates a complainant (B), without the consent of B, is guilty of the offence of sexual assault.
> b) Another way sexual assault may occur, is if a person (A), who unlawfully and intentionally inspires the belief in a complainant (B), that B will be sexually violated, is guilty of the offence of sexual assault.

[756] Ibid ss 5.1.5, & 5.1.19-5.1.21; Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[757] University of KwaZulu-Natal 'Gender Based Violence Policy' (2017) *op cit* note 614 s 2.
Where *intimate partner violence* is defined to mean:

> any act of violence committed between persons within a domestic relationship, including (a) physical abuse; (b) sexual abuse; (c) emotional, verbal and psychological abuse; (d) economic abuse; (e) intimidation; (f) harassment; (g) stalking; (h) damage to property; (i) entry into the complainant's residence without consent, where the parties do not share the same residence; or (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

[758] Ibid s 2.
Where *gender-based violence* is defined to mean:

> any act of violence, whether persistent or isolated, directed against any person on the basis of their gender, sex, marital status, or sexual orientation that results in or is likely to result in physical, sexual or psychological harm or suffering and includes but is not limited to: intimate partner violence, sexual harassment, sexual assault, rape, coercive sexual practices and harmful customary or traditional practices such as female genital mutilation and honour crimes.

[759] Ibid s 2.
Where *rape* is defined to mean:

> an unlawful and intentional act of sexual penetration between two or more persons, without the consent of one of those persons.

[760] Ibid s 2.
Where *sexual assault* is defined to mean:

> an unlawful and intentional act of a sexual nature with another person without that person's consent.

[761] Ibid s 2.
Where *sexual harassment* is defined to mean:

University of Pretoria	The primary framing of sexual harassment in the University of Pretoria policy is in terms of PEPUDA and not SORMA, in that it identifies sexual harassment as a form of unfair discrimination on the prohibited grounds of sex/gender/sexual orientation.[762] The policy identifies sexual harassment as unwelcome conduct of a sexual nature that violates the rights of the victim and constitutes a barrier to equity, taking into account certain factors.[763] These factors include that the harassment be on a prohibited ground, that the conduct must be unwelcome, and that the nature and extent, as well as the impact of the conduct must be taken into account.[764]

unwanted, unwelcome, unsolicited and/or unreciprocated conduct of a sexual nature such as unwelcome sexual advances, requests for sexual favours, and other verbal, physical, or non-verbal conduct of a sexual nature. Sexual harassment may include but is not limited to:

a) Physical harassment such as unwanted and deliberate physical contact.

b) Verbal harassment such as:

- demeaning verbal comments of a sexual nature;
- subtle or explicit demands for or offers of sexual favours which demand implicitly or explicitly a condition that may affect a decision or other action in respect of student admission, funding, grading or academic progress or carries a condition that may affect a decision or other action in respect of staff recruitment, selection, appraisal, promotion or career progress or carries a condition that may affect a decision or other action in respect of third party contractor's goods or services; also called quid pro quo harassment;
- unwanted or unwelcome innuendos, suggestions and hints of a sexual nature; and/or
- comments with sexual overtones which creates an intimidating or offensive and/or hostile learning or working environment that interferes with academic and/or work performance.

c) Non-verbal harassment such as:

- the transmission, by any means, electronic or otherwise, or the gratuitous display of sexually explicit written or audio-visual materials;
- offensive gestures or actions of a sexual nature such as indecent exposure;
- stalking behaviour such as pursuing or following a person, or non-consensual communication or other contact.

[762] University of Pretoria 'Code of Conduct on the Handling of Sexual Harassment' (n.d.) *op cit* note 615 s 3.

[763] Ibid s 4.

[764] Ibid ss 4-5.
Where s 5.1 establishes that the grounds of sex, gender, and sexual orientation are prohibited grounds.
And where s 5.2 defines *unwelcome conduct* to mean:

5.2.1 There are different ways in which an employee or student may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.
5.2.2 Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.
5.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, fellow student, superior, counsellor, human resources official, family member, friend, or the Protection Officer.

And where s 5.3 defines *the nature and extent of the conduct* to mean:

University of the Witwatersrand	The University of the Witwatersrand identifies rape[765] and sexual assault[766] as sanctionable misconduct and defines them per SORMA.[767] Sexual harassment[768] is defined as unwelcome conduct of a sexual nature, and

5.3.1 The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

5.3.1.1 Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex.

5.3.1.2 Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.

5.3.1.3 Non-verbal conduct includes unwelcome gestures, indecent exposure and the dispatching or sending by electronic means or otherwise of sexually explicit pictures or objects.

5.3.2 Sexual harassment may include, but is not limited to, victimisation, quid pro quo harassment and sexual favouritism.

5.3.2.1 Victimisation occurs where an employee or student is victimised or intimidated for failing to submit to sexual advances.

5.3.2.2 Quid pro quo harassment occurs where a person such as an employer, supervisor, member of management, co- employee or academic staff member influences or attempts to influence a student or an employee's circumstances (for example appointment, promotion, training, discipline, dismissal, salary increments or other benefits or academic progress, assignment, test, or examination results) by coercing or attempting to coerce the individual to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace or University community rewards only those who respond to his/her sexual advances.

5.3.3 A single incident of unwelcome sexual conduct may constitute sexual harassment.

And where s 5.4 defines *the impact of the conduct* to mean:

The conduct should constitute an impairment of the employee's/student's dignity, taking into account:

5.4.1 the circumstances of the employee/student; and

5.4.2 the respective positions of the employee/student and the perpetrator in the workplace or within the University community.

[765] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616 s 4.

Where *rape* is defined to mean:

an unlawful and intentional act of sexual penetration of any part of another person with any body part or object, without their consent.

[766] Ibid s 4.

Where *sexual assault* is defined to mean:

an unlawful and intentional act of sexual violation of another person, without their consent.

[767] Ibid s 4; Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[768] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616 s 4.

Where *sexual harassment* is defined to mean:

a wide range of practices, including unwelcome conduct of a sexual nature, or other unwelcome conduct as defined in paragraph 5 below, sexual assault and/or rape.

	includes unwelcome verbal,[769] non-verbal,[770] and physical conduct,[771] as well as special victimisation,[772] grooming,[773] *quid pro quo* harassment,[774] and creation of a hostile work or learning environment.[775]
Vaal University of Technology	Vaal University of Technology defines sexual harassment[776] as unwanted sexual attention, pressure, or

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[769] Ibid s 4.
Where *unwelcome verbal conduct* is defined to mean:

> innuendos, suggestions or hints of a sexual or sexualised nature, sexual advances, sexual threats, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.

[770] Ibid s 4.
Where *unwelcome non-verbal conduct* is defined to mean:

> gestures, behaviour with sexualised overtones, indecent exposure and the display of, or sending by electronic or other means, sexually explicit pictures or messages.

[771] Ibid s 4.
Where *unwelcome physical conduct* is defined to mean:

> physical conduct ranging from touching to sexual assault and rape.

[772] Ibid s 5.
Where *special victimisation* is defined to mean:

> when a person is victimised or intimidated for refusing to submit to sexual advances.

[773] Ibid s 5.
Where *grooming* is defined to mean:

> an action or series of actions, which can initially appear to be conducted within the context of the academic project, but are taken with the overall aim of befriending and establishing a psychological and/or material connection with a person in order to facilitate subsequent sexual harassment or sexual assault and/or to hinder the reporting of various acts of harassment or assault. This includes 'online grooming,' which refers to grooming by means of modern-day technology, such as mobile phones and the internet.

[774] Ibid s 5.
Where *quid pro quo harassment* is defined to mean:

> when:
>
> - An alleged perpetrator influences or attempts to influence the admission of a student to the University or access to opportunities within the University, by coercing or attempting to coerce that person to engage in unwelcome sexual conduct or offering special treatment in exchange for unwelcome sexual conduct; and / or
> - An alleged perpetrator influences or attempts to influence the grading, evaluation or professional advancement of the student, by coercing or attempting to coerce them to engage in unwelcome sexual conduct.

[775] Ibid s 5.
Where *creation of a hostile work or learning environment* is defined to mean:

> where the purpose or effect of the conduct is to interfere with another person's performance at work or study.

[776] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617 Section B.
Where *sexual harassment* is defined to mean:

> any unwanted sexual attention or any unwanted pressure involving one's sexuality and/or any unwanted, unsolicited and unreciprocated conduct of any sexual nature which substantially interferes with an individual's work or study performance, and/or has detrimental effect on the terms and conditions of employment or study, and/or creates an intimidating, hostile or offensive working environment.

	conduct which includes verbal,[777] non-verbal,[778] or physical[779] conduct, as well as *quid pro quo* harassment[780] and sexual favouritism.[781]
Walter Sisulu University	The Walter Sisulu University policy defines sexual harassment[782] as a form of misconduct which it defines per the Protection from Harassment Act.[783] It states that such harassment can take the form of unwelcome

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[777] Ibid Section D.
Where *verbal forms of sexual harassment* are defined to mean:

> unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or to them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling at a person or group of persons.

[778] Ibid Section D.
Where *non-verbal forms of sexual harassment* are defined to mean:

> unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

[779] Ibid Section D.
Where *physical conduct of a sexual nature* is defined to mean:

> all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

[780] Ibid Section D.
Where *quid pro quo harassment* is defined to mean:

> where a supervisor, member of management or co- employee undertakes or attempts to influence or influences the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.

[781] Ibid Section D.
Where *sexual favouritism* is defined to mean:

> where a person who is in a position of authority rewards only those who respond to his or her sexual advances, while other deserving employees who do not submit to sexual advances are denied promotions, merit rating or salary increases.

[782] Walter Sisulu University of Science and Technology 'Sexual Harassment and Gender Discrimination Policy' (n.d.) *op cit* note 618 s 1.
Where *sexual harassment* is defined to mean:

> 1.1.1 Unwelcomed sexual attention from a person who knows or ought reasonably to know that such attention is unwelcomed;
> 1.1.2 Unwelcomed explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or related person would be offended, humiliated or intimidated;
> 1.1.3 Implied or expressed promise of reward for complying with a sexually orientated request; or
> 1.1.4 Implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually orientated request. (Definition of the Protection from Harassment Act No. 17 of 2011).

[783] Ibid s 1; Protection from Harassment Act 17 of 2011.

	physical,[784] verbal,[785] or non-verbal[786] conduct, as well as special victimisation,[787] *quid pro quo* harassment,[788] and creation of a hostile environment.[789]

5.4.4. Does the policy provide for a specialised tribunal or specialised training for adjudicators?

With this question, I considered whether the university has, or the policy establishes, a specialised tribunal that deals exclusively with sexual misconduct matters and/or if there is provision for the selection of adjudicators who have expertise in sexual misconduct, or provision for specialised training in trauma-informed adjudication for sexual misconduct cases.

This question rests on the premise that effective sexual misconduct adjudication must not be re-traumatising for victims and, as such, the right people with the right training must constitute the adjudication panel.[790]

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[784] Walter Sisulu University of Science and Technology 'Sexual Harassment and Gender Discrimination Policy' (n.d.) *op cit* note 618 s 1.
Where *unwelcome physical conduct* is defined to mean:

> Rang(ing) from touching to sexual assault and rape.

[785] Ibid s 1.
Where *unwelcome verbal conduct* is defined to mean:

> innuendos, suggestion or hints of a sexual nature, sexual advances, sexual threats, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's physique, inappropriate enquiries about the person's sex life, wolf whistle, and sending sexually explicit text/graphics via electronic means or otherwise.

[786] Ibid s 1.
Where *unwelcome non-verbal conduct* is defined to mean:

> gestures, indecent exposure and the display or sending of sexually explicit pictures or objects via electronic or other means.

[787] Ibid s 1.
Where *special victimisation* is defined to mean:

> any form of victimisation, discrimination or intimidation of a person for failing to submit to sexual advances.

[788] Ibid s 1.
Where *quid pro quo harassment* is defined to mean:

> the alleged perpetrator influencing or attempting to influence a person's employment circumstances (training, organizational or funding opportunities, grading or evaluation), or admission of a student to the WSU or WSU residents, or access to funding opportunities, by coercing or attempting to coerce that person to engage in sexual activities.

[789] Ibid s 1.
Where *creation of a hostile environment* is defined to mean:

> where the purpose or effect is to interfere with another's performance at work or in study.

[790] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42; A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6; Sexual Violence Task Team '"We Will Not Be Silenced": A Three–pronged Justice Approach

TABLE 5: Provision for specialised tribunal or training of adjudicators contained in policies

University	Yes/No	Details
Nelson Mandela University	Yes	Section 6 of Annexure 1 to Nelson Mandela University's policy lays out the composition of the panel for a disciplinary hearing.[791] It states that the panel shall consist of four members who include the Chair – who is a legal professional or academic with expertise in human rights and/or gender equality (s 6.3.1), a member of the university's Sexual Harassment Committee (s 6.3.2), a professional in the gender-based violence sector (s 6.3.3), and a member of the Students' Representative Council where the respondent is a student or the Dean or his/her nominee of the faculty to which the staff member belongs where the respondent is a staff member (s 6.3.4).[792] The policy emphasises, in s6.5 of Annexure 1, that the panel members must have an appropriate amount of experience "taking into account the complexity and seriousness of the complaint".[793] Finally, Nelson Mandela University's policy states that the Vice Chancellor may permit a deviation from this composition where suitable members cannot be found or are not available, but that such deviation does not compromise the principles of both substantive and procedural fairness.[794]

to Sexual Offences and Rape Culture at Rhodes University/UCKAR' (2016) *op cit* note 19; Jay Kennedy Wilgus & John Wesley Lowery 'Adjudicating Student Sexual Misconduct: Parameters, Pitfalls, and Promising Practices' (2018) 2018 *New Directions for Student Services*.

[791] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606.

[792] Ibid.

[793] Ibid.

[794] Ibid s 6.6 of Annexure 1.

North-West University	No	The policy does not provide any information on the composition of the tribunal or any expertise that its members may have, or training that they may receive.
Rhodes University	No	Section 1.2 of the Rhodes University policy states that the disciplinary procedure is governed by the Student Disciplinary Code. Section 6.2 of the Student Disciplinary Code stipulates that a disciplinary board shall have jurisdiction to hear all misconduct of a serious nature, including sexual misconduct. Section 2 describes the composition of the disciplinary board as comprising "a panel of three suitably qualified people appointed by the Vice Chancellor".[795]
Stellenbosch University	No	The policy makes mention of a "disciplinary process" in s 7.2.7 and part C of the complaint process chart in the introduction of Addendum B.[796] It also states that this policy is "aligned with the newly revised Disciplinary Code for Students".[797] The Disciplinary Code for Students states in s 22.2 that any disciplinary matters arising from sexual misconduct shall be dealt with by the central disciplinary committee.[798] Section 23.2 of the Disciplinary Code for Students states that the central disciplinary committee shall comprise of a chairperson and three other persons.[799] It makes no provision for selection on the basis of expertise or of specialised training.

[795] Rhodes University 'Student Disciplinary Code' (2023) *op cit* note 608 s 2.
[796] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609.
[797] Ibid s 7.2.9.
[798] Stellenbosch University 'Disciplinary Code for Students of SU' (2020) *op cit* note 609.
[799] Ibid.

University of Cape Town	Yes	The introductory section of the procedural policy states that "a tribunal that is specialised and appropriately trained to deal with sexual misconduct … will handle all formal cases of sexual misconduct".[800] The creation of such a tribunal, the policy states, is reflective of the university's commitment to effectively addressing sexual and gender-based violence.[801] Section 6 of the procedural policy lays out the composition of the special tribunal and stipulates that the adjudication panel shall consist of a Disciplinary Chair a student assessor, and a staff assessor.[802] The Chair shall be legally qualified and have a background in, or extensive knowledge of, or training in sexual and gender-based violence.[803] The policy further states that notwithstanding any experience or expertise in sexual and gender-based violence, it is mandatory for all members of the tribunal to receive continuous training.[804] The procedural policy also stipulates that any appeal panel constituted to hear an appeal from the special tribunal must be comprised of individuals who are "suitably qualified and experienced in sexual offences and discrimination".[805]
University of Fort Hare	Yes	Section 13.1 of the policy states that "the University of Fort Hare commits itself to establishing a specialised Unit and just, specialised procedures for the reporting,

[800] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610.
[801] Ibid s 1.1.
[802] Ibid.
[803] Ibid s 6.3.
[804] Ibid s 6.4.
[805] Ibid s 10.6.

		investigation and resolution of complaints of GBV".[806]
University of the Free State	No	Section 8.4.2 of the policy stipulates that disciplinary proceedings shall be conducted in accordance with the institutional disciplinary codes and procedures.[807] Section 3 of the UFS Rules on Student Discipline lists multiple disciplinary bodies[808] that may adjudicate complaints of misconduct but does not state which of these would adjudicate sexual misconduct.[809] It does not provide for any specialised training of any of the disciplinary bodies.
University of Johannesburg	Yes	The Prevention and Management Standard Operating Procedures states that the University of Johannesburg "commits to establish a unit or office to deal solely with sexual harassment and rape including issues of gender-based violence".[810] The functions of such a unit would include "to ensure … (an) effective way of applying policies and measures to deal with sexual harassment and rape …"[811] It is unclear, however, on the face of it if this would also include adjudicating disciplinary cases on such matters. The Bullying and Harassment Standard Operating Procedures is clearer in that it stipulates that the Gender Equity Unit should establish a disciplinary committee

[806] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611.
[807] University of the Free State 'Sexual Harassment, Sexual Misconduct and Sexual Violence Policy' (2018) *op cit* note 612.
[808] These are House Committees, Wardens, The Director: Student Affairs, the Vice-Rector, and the Hearing Committee.
[809] University of the Freestate 'UFS Rules on Student Discipline' (2005) *op cit* note 612.
[810] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note s 17.1.
[811] Ibid.

		that will be responsible for the execution of disciplinary proceedings for gender-based violence cases.[812] It provides that this committee shall consist of "various experts" including "specialists from employee relations, legal, health, and mental health".[813] Notably, it does not include any experts on sexual or gender-based violence.
University of KwaZulu-Natal	No	The policies do not provide any information on the composition of the tribunal or any expertise that its members may have or training that they may receive.
University of Pretoria	Yes	Despite stating in s 1.4 that the policy provides "appropriate procedures to deal with sexual harassment", the policy does not provide any information on the disciplinary process, including on a tribunal.[814] Rather, in s 8.10.2.a, it states that disciplinary matters shall be dealt with "in terms of the existing disciplinary codes and practices of the university".[815] Section 4.1 of the Disciplinary Rules for Students states that the disciplinary committee shall comprise one member, being a legally qualified Chairperson.[816] Section 4.2 adds to this in stating that where "where the subject matter is of a complicated nature and/or requires specific expertise", a second member may be added to the committee.[817]
University of the Witwatersrand	Yes	The disciplinary panel that adjudicates sexual misconduct at University of the Witwatersrand is appointed by the Sexual

[812] University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 s 3.1.4.
[813] Ibid.
[814] University of Pretoria 'Code of Conduct on the Handling of Sexual Harassment' (n.d.) *op cit* note 615.
[815] Ibid.
[816] University of Pretoria 'Disciplinary Rules for Students' (2022) *op cit* note 615.
[817] Ibid.

		Harassment Safety Office on a case-by-case basis from a pool of candidates recommended by the Sexual Harassment Safety Office, Legal Office, and Sexual Harassment Advisory Committee.[818] The policy does not state how many members sit on the panel, but states that the members must collectively have "knowledge of sexual harassment and gender-based violence, knowledge of the law, and if necessary, knowledge of employment relations".[819] Depending on the nature of the charge and identity of the respondent, the policy provides that the panellists may be internal or external to the university.[820]
Vaal University of Technology	No	Section 10.4 of Vaal University of Technology's policy states that any disciplinary action is to be taken in accordance with the applicable Disciplinary Code of Good Conduct for Students.[821] Other than this statement, the policy does not provide any information on the composition of the tribunal or any expertise that its members may have or training that they may receive.
Walter Sisulu University	No	The policy does not provide any information on the composition of the tribunal or any expertise that its members

[818] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616 ss 11.1 & 11.2.
[819] Ibid s 11.3.
[820] Ibid ss 11.4-11.6.
Where s 11.5 states the following about internal persons:

> If a Panel made up of internal persons is to be used, the following people may be called upon, namely, academics in the Law School, academics with expertise in gender-based violence or academics with expertise in psychology or social work.

And where s 11.6 states the following about external persons:

> If a panel made up of external persons is to be used, as far as is possible, persons must be chosen from the legal profession with expertise in sexual crimes or organisations that deal with gender- based violence or sexual crimes.

[821] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617.

		may have or training that they may receive.

5.4.5. Are the disciplinary proceedings characteristic of an adversarial process, an inquisitorial process, or a hybrid?

I argue in this dissertation that just and victim-supportive adjudication for sexual misconduct is best achieved through a hybrid disciplinary process that borrows from aspects of both the adversarial and inquisitorial systems of adjudication. While a policy will typically not state outright the nature of the proceedings, it can be derived from the characteristics of the hearing process that are described.

An adversarial system is led by the parties and is comprised of two equal opponents who each lead their cases and evidence before a neutral and passive adjudicator.[822] The parties are responsible for presenting their evidence, calling and leading their witnesses, questioning their opponent's witnesses, and putting an argument before the adjudicator.[823] Orality,[824] legal representation,[825] and strict formal rules of procedure[826] are essential to adversarial proceedings. The adjudicator is responsible for enforcing rules of procedure and making findings of fact and law after hearing all of the evidence before them.[827] An adjudicator in adversarial proceedings does not solicit evidence or ordinarily question witnesses.[828]

An inquisitorial system is led by the adjudicator, who plays an investigatory role.[829] It is one in which the adjudicator has the information gathered from the investigation before them,[830] and plays an active role in fact-finding by questioning the parties and/or witnesses,[831] directing

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[822] Thina Makaula 'Adversarial System versus the Inquisitorial System' available at *https://www.blcattorneys.co.za/2020/11/13/adversarial-system-versus-the-inquisitorial-system/*, accessed on 20 December 2023.
[823] Ikenga Oraegbunam 'The Jurisprudence of Adversarial Justice' (2019) 15 *Ogirisi: A New Journal of African Studies* at 36.
[824] T Makaula 'Adversarial System versus the Inquisitorial System' (n.d.) *op cit* note; I Oraegbunam 'The Jurisprudence of Adversarial Justice' (2019) *op cit* note 822 at 36.
[825] I Oraegbunam 'The Jurisprudence of Adversarial Justice' (2019) *op cit* note 823 at 33.
[826] Ibid at 39.
[827] Ibid at 37; Lovemore Madhuku *An Introduction to Zimbabwean Law* Harare, Friedrich-Ebert-Stiftung (FES)(2010) at 107.
[828] I Oraegbunam 'The Jurisprudence of Adversarial Justice' (2019) *op cit* note 823 at 38.
[829] L Madhuku 'An Introduction to Zimbabwean Law' (2010) *op cit* note 827 at 107.
[830] T Makaula 'Adversarial System versus the Inquisitorial System' (n.d.) *op cit* note 822.
[831] L Madhuku 'An Introduction to Zimbabwean Law' (2010) *op cit* note 827 at 107.

the parties on which evidence to lead,[832] and investigating the facts before them.[833] Inquisitorial processes do not have strict formal rules of procedure or evidence,[834] and the parties do not lead or dominate the proceedings.[835] There is no requirement for confrontation between the parties nor is legal representation deemed indispensable.[836]

A hybrid process is one that combines aspects of the adversarial and inquisitorial systems to whatever degree and may infuse elements of other resolution methods such as customary law or restorative practices. As such, hybrid models of adjudication can vary greatly from each other, depending on the model on which they are predominantly built.[837]

In asking this question, I sought to determine the nature of the proceedings at each university, inquiring into whether they are characteristic of adversarial or inquisitorial proceedings, or a hybrid model. In making this determination, I was guided by the characteristics of each system described above.

TABLE 6: Are processes contained in policies adversarial, inquisitorial, or hybrid?

University	Nature of Proceedings	Details
Nelson Mandela University	Inquisitorial	There is active involvement of the adjudication panel in the soliciting of evidence and questioning of witnesses. Section 10.7 of Annexure 1 to the policy states that "the hearing is aimed primarily at allowing the panel to interview the parties on the basis of the investigation report".[838] This is evidenced by the provisions of sections 10.8 and 10.9 which state that the panel first reads through the investigation report before calling the investigator to ask any questions of clarity and thereafter calling the complainant and

[832] Ibid.
[833] Ibid.
[834] I Oraegbunam 'The Jurisprudence of Adversarial Justice' (2019) *op cit* note 823 at 39.
[835] Ibid at 37.
[836] Ibid.
[837] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14.
[838] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606.

		any witnesses, followed by the respondent and any witnesses, and asking them questions.[839] Additionally, it is the panel that poses any questions from the other party to the party being questioned and decides if additional evidence or witnesses need to be brought forward.[840] At no point in the proceedings is there any confrontation between the parties. These are all characteristics of an inquisitorial process.
North-West University	Unclear	The policy does not provide any information on the disciplinary process.
Rhodes University	Hybrid	Section 7.20 of the Student Disciplinary Code states that "the proceedings may be conducted in either the accusatorial or the inquisitorial method; alternatively, a combination of both may be used".[841] Notwithstanding this section, the provisions on the disciplinary process are indicative of a hybrid model. The adversarial characteristics of the process are that it is conducted orally,[842] and the parties dominate the proceedings by adducing evidence, calling and questioning witnesses, and cross examining each other's witnesses.[843] Additionally, the disciplinary board acts as an umpire who decides on matters of procedure and evidence, and decides on the outcome having heard the totality of the evidence.[844] The inquisitorial characteristics are that the disciplinary board may call or recall

[839] Ibid.
[840] Ibid s 10.9.
[841] Rhodes University 'Student Disciplinary Code' (2023) *op cit* note 608.
[842] Ibid.
[843] Ibid ss 7.4, 7.14 & 7.16-7.19.
[844] Ibid ss 7.21 & 7.24.

		witnesses to provide (further) evidence and may question any witnesses (including the respondent) at any time during their testimony.[845] This combination of characteristics indicates a hybrid model of proceedings.
Stellenbosch University	Inquisitorial	The process described in the Disciplinary Code for Students indicates that the proceedings are inquisitorial. The proceedings are initiated by the disciplinary committee who, at the start of the proceedings, must be furnished with "the preliminary record, the results of the further investigation as well as any additional relevant material".[846] Having read the record, the disciplinary committee embarks on a "fact-finding enquiry" and may call any member of the university community to appear before it, and may question both parties and any witnesses.[847] The university evidence leader and the respondent are permitted to ask questions of clarity.[848] These are all characteristics of an inquisitorial process.
University of Cape Town	Hybrid	University of Cape Town's procedural policy indicates that the proceedings are hybrid. The proceedings are initiated and evidence is led by the parties as in adversarial proceedings, and witnesses are called to testify by each party, and be questioned by the opposing side.[849] There is also confrontation between the parties, as would occur in adversarial

[845] Ibid ss 7.20 & 7.22.
[846] Stellenbosch University 'Disciplinary Code for Students of SU' (2020) *op cit* note 609 s 37.5.
[847] Ibid ss 37.6-37.7.
[848] Ibid s 37.8.
[849] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 8.

		proceedings.[850] There are rules of procedure and evidence which are determined by the adjudication panel, and the panel acts as an umpire who makes a decision after hearing the totality of the evidence presented by the parties.[851] However, the adjudication panel is able to pose its own questions to both parties (including in the absence of the other party) and their witnesses and request evidence from the parties.[852] This is indicative of a more inquisitorial approach. Further, the panel may decide that questions to the complainant be directed through the panel.[853] This combination of characteristics indicates a hybrid model of proceedings.
University of Fort Hare	Unclear	The policy does not provide any information on the disciplinary process.
University of the Free State	Unclear	The policies do not provide any information on the disciplinary process.
University of Johannesburg	Unclear	The policies do not provide any information on the disciplinary process.
University of KwaZulu-Natal	Unclear	The policies do not provide any information on the disciplinary process.
University of Pretoria	Adversarial	The provisions in the Disciplinary Rules for Students are indicative of adversarial proceedings. The proceedings are conducted orally and led by the parties who each have the right to present their case, call witnesses, as well as cross-examine each other's witnesses.[854] The disciplinary committee

[850] Ibid.
[851] Ibid ss 7.8, 8.12 & 8.16-8.17.
[852] Ibid s8.
[853] Ibid.
[854] University of Pretoria 'Disciplinary Rules for Students' (2022) *op cit* note 615 s 2.5.5.

		makes a decision after hearing the totality of the evidence before it.[855] These are all characteristics of an adversarial process.
University of the Witwatersrand	Unclear	The policy does not provide information on the disciplinary process.
Vaal University of Technology	Unclear	The policy does not provide any information on the disciplinary process.
Walter Sisulu University	Unclear	The policy does not provide any information on the disciplinary process.

5.4.6. Does the policy grant the respondent the right to external legal representation?

The first of the twin principles of Natural Justice and a core procedural protection of PAJA is that everyone should have the right to be heard before an adverse decision concerning them is made.[856] As canvassed in the previous two chapters whether this right to be heard includes the right to be heard through a legal representative is a contentious matter.[857] The courts have held that in complex proceedings and where the potential sanctions are severe, a respondent should be permitted legal representation.[858] However, the determination of whether sexual misconduct inherently qualifies as "complex" remains an open debate.

With this question, I sought to ascertain whether the policy explicitly grants or denies a respondent in a sexual misconduct matter the right to retain the services of a lawyer for the purpose of their defence.

TABLE 7: Right to external legal representation for respondent contained in policies

University	Permitted?	Details
Nelson Mandela University	Sometimes	Sections 10.4 and 10.5 of Annexure 1 provides that in general, the respondent may only have a support person and not a

[855] Ibid.
[856] G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14.
[857] Dyantyi v Rhodes University and others *supra* note 493; Yates v University of Bophuthatswana *supra* note 268; Blacker v University of Cape Town and another *supra* note 268; C Goredema 'Observations on the Observance of Administrative Law in University Student
Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14; G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14.
[858] Dyantyi v Rhodes University and others *supra* note 493.

		legal representative in order to maintain a "non-legalistic process".[859] The sections, however, make provision for the respondent to apply to the Chair of the disciplinary hearing to be permitted legal counsel at their own expense if there are "substantive and compelling reasons".[860]
North-West University	No	The policy makes no mention of legal representation for the respondent.
Rhodes University	Yes	Section 7.1 of the Student Disciplinary Code provides that a respondent may be represented by an attorney or advocate.[861]
Stellenbosch University	Sometimes	Section 31.2 of the Disciplinary Code for Students states that legal representation for the respondent is not ordinarily permitted, however, the respondent may apply to the disciplinary committee for permission to retain a legal representative.[862]
University of Cape Town	Sometimes	Sections 4.1 and 4.2 of University of Cape Town's procedural policy state that a respondent has the automatic right to a support person and to be represented by a university staff member or student (including, presumably, a legally qualified one).[863] Section 4.3 states that if a respondent wishes to retain external legal representation, they must make an application to the Chair of the disciplinary panel who may grant or deny the application, having due regard to the seriousness and complexity of the misconduct, and the reasonableness of the

859 Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606.
860 Ibid.
861 Rhodes University 'Student Disciplinary Code' (2023) *op cit* note 608.
862 Stellenbosch University 'Disciplinary Code for Students of SU' (2020) *op cit* note 609.
863 University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610.

		application. Should the application be granted, the respondent is restricted to a single representative.[864]
University of Fort Hare	No	The policy makes no mention of legal representation for the respondent.
University of the Free State	Yes	Section 3(1)(f)(v) of the Rules on Student Discipline state that a respondent may be "assisted" by a legal representative.[865]
University of Johannesburg	Yes	Section 6.11 of the University of Johannesburg's Prevention and Management Standard Operating Procedures and s 6.15 of the Bullying and Harassment Standard Operating Procedures both provide that the respondent is entitled to retain external legal representation.[866]
University of KwaZulu-Natal	Yes	Section 5.1.2 of the GBV Procedures provides that the respondent has the right to obtain legal representation.[867]
University of Pretoria	Yes	Section 2.5.3 of the Disciplinary Rules for Students states that a respondent is permitted to retain legal representation.
University of the Witwatersrand	Unclear	Section 14.5 of the University of the Witwatersrand policy makes reference to the respondent's "representative" with reference to the right to information prior to the disciplinary hearing, but it is unclear whether this is a legal representative.[868] No section in the policy explicitly grants or denies legal representation.

[864] Ibid.
[865] University of the Freestate 'UFS Rules on Student Discipline' (2005) *op cit* note 612.
[866] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 Standard Operating Procedure: Prevention and Management of Student Sexual Harassment and Rape; University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 Standard Operating Procedures.
[867] University of KwaZulu-Natal 'Gender Based Violence Procedure and Guidelines' (2017) *op cit* note 614.
[868] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616.

Vaal University of Technology	No	The policy makes no mention of legal representation for the respondent.
Walter Sisulu University	No	The policy makes no mention of legal representation for the respondent.

5.4.7. Does the policy grant the complainant the right to legal representation and/or a support person?

In Chapter 6, I delve into methods to make campus sexual misconduct adjudication more victim-supportive, acknowledging the often traumatic experiences of complainants navigating the disciplinary process.[869] One avenue is allowing complainants to have a person present throughout the process, sparking debates on the role and capacity of this person.

Some argue for legal representation, capable of advocating and assisting in the complexities of campus sexual misconduct proceedings.[870] Conversely, concerns about over-judicializing university processes lead others to advocate for lay support persons, focused on providing emotional support.

With this question, I aimed to identify universities permitting either legal representation or support persons for complainants and understand the extent of their participation in the proceedings. This matter will be explored further in the subsequent chapter on victim-supportive measures.

TABLE 8: Right to external legal representation or support person for complainant contained in policies

University	Yes/No	Details
Nelson Mandela University	Yes	Section 10.4 of Annexure 1 permits the complainant to have a support person present during the hearing and that person may assist them in formulating questions to be put to the panel.[871] Section 10.5 of Annexure 1 states that in the ordinary course of events, legal representatives are not permitted, but either

[869] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16.
[870] Ibid; Merle H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) 29 *Yale JL & Feminism*.
[871] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606.

		party may apply to the Chair of the panel for permission to bring legal representation.[872]
North-West University	No	The policy makes no mention of representation or support for the complainant.
Rhodes University	Yes	Section 7.35 of the Student Disciplinary Code states that the complainant may have a parent, legal guardian, counsellor, or "any person requested" present, and that such person shall play the role of an "observer" and may support the complainant but may not engage in the disciplinary process.[873]
Stellenbosch University	Yes	The policy states that "complainants have the right to obtain their own legal assistance from outside the university during the disciplinary process, should they wish to do so".[874]
University of Cape Town	Yes	The substantive policy stipulates that "a support person must be allocated to the complainant", and that a complainant has the right to legal representation.[875] However, while the procedural policy buttresses the substantive one regarding the allocation of a support person by stating that a complainant has the right to be supported throughout the process by a designated Survivor Support Officer or a person of the complainant's choosing, it makes clear that the "right" to legal representation is discretionary.[876] Section 4.9 provides that a complainant has the right to apply to the Chair of the panel for external legal representation.[877]

[872] Ibid.
[873] Rhodes University 'Student Disciplinary Code' (2023) *op cit* note 608.
[874] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609 s 5.9 of Addendum B.
[875] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 4.6.3.d & 5.1.2.2.a.iv.
[876] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 4.7, 4.9 & 8.8.
[877] Ibid.

		Where such representation is permitted, the participation of the complainant's legal representative is limited to the role of observer and advisor in relation to both the complainant and Evidence Leader, and they can only make direct submissions to the Chair in instances where there may be an infringement on the rights or interests of the complainant.[878]
University of Fort Hare	No	The policy makes no mention of representation or support for the complainant.
University of the Free State	No	The policies make no mention of representation or support for the complainant.
University of Johannesburg	Yes	Sections 6.11 of the Prevention and Management Standard Operating Procedures and 6.15 of the Bullying and Harassment Standard Operating Procedures permit the complainant to obtain external legal representation.[879] However, neither provides any detail as to the extent of participation that such representative is allowed per the procedural rules.
University of KwaZulu-Natal	No	The policies make no mention of representation or support for the complainant.
University of Pretoria	No	The policies make no mention of representation or support for the complainant.
University of the Witwatersrand	Yes	Section 14.5 of the University of the Witwatersrand policy makes reference to the complainant's "representative" when referring to the right to information prior to

[878] Ibid s 4.10.
[879] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 Standard Operating Procedure: Prevention and Management of Student Sexual Harassment and Rape; University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 Standard Operating Procedures.

		the disciplinary hearing, but it is unclear whether this is a legal representative.[880] No section in the policy explicitly grants or denies legal representation or a support person.
Vaal University of Technology	Unclear	Section 8.5.7 of Vaal University of Technology's policy states that a complainant must be provided with "information about … legal … counselling available (including during any disciplinary enquiry that may be instituted)".[881] It is unclear from the above if this section intends to state that a victim is entitled to legal advice or representation in the hearing itself, or to receive counsel from a legally qualified person at any point throughout the disciplinary process but not inside the hearing. It is also unclear what constitutes "legal counselling" and whether this rises to the level of legal representation.
Walter Sisulu University	No	The policy makes no mention of representation or support for the complainant.

5.4.8. Does the respondent have the right to directly cross-examine the complainant?

Cross-examination of complainants is a cross-cutting issue in sexual misconduct adjudication. On the one hand, it is a procedural question as it is a tool through which the respondent can challenge adverse allegations made against them, and further their version of events. However, on the other hand, it raises concerns of re-traumatisation of the victim, and as such can make the proceedings less victim-supportive.

In asking this question, I sought to establish if, and which, universities permit the respondent or their representative to cross-examine the complainant, in pursuance of the arguments I will make in the following two chapters on whether such cross-examination should be permitted.

[880] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616.
[881] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617.

TABLE 9: Direct cross-examination of complainant allowed for in policies

University	Permitted?	Details
Nelson Mandela University	No	Per s 10.9 of the policy, the respondent may put questions to the panel for the panel to ask the complainant, and the panel retains the discretion to not ask any inadmissible questions.[882]
North-West University	Unclear	The policy does not provide any information on whether direct-cross examination in permissible.
Rhodes University	Yes	Section 7.16 of the Student Disciplinary Code provides that each witness for the university may be cross-examined.[883]
Stellenbosch University	Sometimes	Section 37.9 of the Disciplinary Code for Students states that cross-examination is only allowed "with permission of the Chairperson".[884]
University of Cape Town	Yes	The procedural policy provides that the respondent is permitted to put questions of rebuttal or for the purposes of clarity to the complainant, but that the tribunal must ensure that these are not "aggressive or deliberately intimidating".[885] Section 8.10 further states that "as far as necessary, (the tribunal) should consider directing the respondent's questions to the complainant via the tribunal members".[886]
University of Fort Hare	Unclear	The policy does not provide any information on whether direct-cross examination in permissible.

[882] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606.
[883] Rhodes University 'Student Disciplinary Code' (2023) *op cit* note 608.
[884] Stellenbosch University 'Disciplinary Code for Students of SU' (2020) *op cit* note 609.
[885] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 8.9 & 8.10.
[886] Ibid.

University of the Free State	Unclear	The polices do not provide any information on whether direct-cross examination in permissible.
University of Johannesburg	Unclear	The policies do not provide any information on whether direct-cross examination in permissible.
University of KwaZulu-Natal	Unclear	The policy does not provide any information on whether direct-cross examination in permissible.
University of Pretoria	Yes	Section 2.5.5(f) of the Disciplinary Rules for Students states that a respondent is permitted to cross-examine "anyone who gives evidence against them".[887]
University of the Witwatersrand	Unclear	The policy does not provide any information on whether direct-cross examination in permissible.
Vaal University of Technology	Unclear	The policy does not provide any information on whether direct-cross examination in permissible.
Walter Sisulu University	Unclear	The policy does not provide any information on whether direct-cross examination in permissible.

5.4.9. Are there prohibitions on any types of evidence, or guidelines on how evidence can and cannot be led?

Of paramount importance to the argument I make in this dissertation on just process for sexual misconduct adjudication is that there needs to be formal rules of evidence for university proceedings. This includes both the substance of the evidence that is permitted, and the manner in which it is led.

With this question, I sought to ascertain whether universities presently have any such rules in their policies, and the nature of the content of those rules, if any.

[887] University of Pretoria 'Disciplinary Rules for Students' (2022) *op cit* note 615.

TABLE 10: Prohibition on evidence or evidentiary guidelines contained in policies

University	Yes/No	Details
Nelson Mandela University	Yes	Section 10.3 of Annexure 1 to the policy states that unless there is good reason not to, a gender expert will be included in the list of witnesses for the university.[888] Further, a witness may not be called to testify solely to the character of a party during the hearing on the merits.[889] This can only happen during argument in mitigation or aggravation of sanction.[890] Any previous complaints of sexual misconduct against the respondent may also only be brought up during the sanctioning phase of the hearing.[891] Section 10.8 of Annexure 1 provides that parties may provide any supporting material including cell phone and social media records, and that the Chair has the final say on the admissibility of any evidence.[892] The leading of oral evidence is initiated by the panel, who invite each of the parties and the witnesses on the list into the hearing room (one at a time) and interview them.[893] The parties may submit questions for each other and any witness to the panel who may then pose the question to the person being interviewed.[894] The panel retains the discretion to decline to ask any question which it deems inadmissible.[895] Finally, unless the complainant opts to do so, s 10.6 of Annexure 1 states that they are

[888] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606.
[889] Ibid s 10.2 of Annexure 1.
[890] Ibid.
[891] Ibid s 11.3 of Annexure 1.
[892] Ibid.
[893] Ibid s 10.9.
[894] Ibid.
[895] Ibid.

		not compelled to appear in the same room as the respondent.[896]
North-West University	No	The policy does not provide any information on the procedural aspects of sexual misconduct adjudication.
Rhodes University	Yes	The Student Disciplinary Code contains a number of provisions on evidence. To begin with, s 7.6 gives the prosecutor the authority to "direct that any student attends and gives evidence and remains in attendance until excused from a disciplinary hearing".[897] Section 7.14 states that where a respondent denies the misconduct they are charged with, the prosecutor shall lead oral evidence and may submit written statements by witnesses which will only be received into evidence if permitted by the Chair of the disciplinary board and if their contents are common cause.[898] Section 7.17 grants the respondent the right to remain silent, and states that where the respondent chooses to give evidence, they may be cross-examined by the prosecution.[899] Section 7.18 states that a respondent has the right to call witnesses, and where the respondent elects to do so, the respondent's evidence must precede that of their witnesses.[900] Finally, ss 7.20 and 7.22 give the disciplinary board the authority to call and question witnesses, while s 7.21 states that the disciplinary board will make all

[896] Ibid.
[897] Rhodes University 'Student Disciplinary Code' (2023) *op cit* note 608.
[898] Ibid.
[899] Ibid.
[900] Ibid.

		decisions on the admissibility of any evidence.[901]
Stellenbosch University	Yes	Addendum B to the Stellenbosch policy states that "the Anti-discrimination and Harassment Officer assisting the complainant may not be called as a witness during any disciplinary procedures".[902] Section 7.11 of the Disciplinary Code for Students states that "evidence can be presented either through oral testimony or witness statements".[903] Section 30.7 supplements this by stating that any student called to give evidence may apply to give their evidence "in writing, by way of closed-circuit television, or anonymously".[904] Finally, section 18.3 of the Disciplinary Code for Students states that "any functionary exercising disciplinary powers" may "request and receive the assistance of the Student Disciplinary Investigator to obtain such additional evidence as the disciplinary functionary considers necessary to properly consider the issue at hand".[905]
University of Cape Town	Yes	University of Cape Town's procedural policy contains extensive provisions pertaining to the leading of evidence during a hearing. To begin with, complainants may choose the manner in which they wish to give evidence, with options that include a face to face hearing, remotely on an online platform, at the physical hearing but behind a screen, on university premises but *in*

[901] Ibid.
[902] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609 s 5.5.5.
[903] Stellenbosch University 'Disciplinary Code for Students of SU' (2020) *op cit* note 609.
[904] Ibid.
[905] Ibid.

		camera, or in writing.[906] While a respondent may object to any alternative means of leading evidence, such an objection is only granted having due regard to the reasonableness of the objection and whether an alternative method of leading evidence would compromise the respondent's right to a fair hearing.[907] A similar provision exists for corroboratory witnesses appearing for the university who may also choose to give evidence in one of the alternative manners stated above especially "where such witnesses indicate that they are afraid or uncomfortable in the presence of the respondent".[908] Similarly, a respondent may object, and the tribunal will make a finding on the objection.[909] Section 8.2 permits the tribunal to question either of the parties in the absence of the other, having due regard to the need to not retraumatise the complainant and to balance the respondent's rights.[910] The respondent may lead evidence through their own testimony and may call witnesses.[911] Both the university evidence leader and the tribunal members may put questions to them.[912] The policy provides that additional evidence including emails, photographs, and social media posts may be submitted as evidence, and that the special tribunal retains the discretion to decide on the

[906] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 8.1.
To lead evidence *in camera* is to do so "in private", as opposed to in open court (in criminal cases) or in a hearing with all parties present (in administrative cases). This can be done for a variety of reasons, but in this case would be to protect the complainant from having to face the respondent.
[907] Ibid s 8.3.
[908] Ibid s 8.6.
[909] Ibid s 8.7.
[910] Ibid.
[911] Ibid s 8.11.
[912] Ibid.

		admissibility of evidence.[913] However, s 8.13 states that evidence regarding a complainant's previous sexual history shall not be admissible at any stage of the hearing.[914] Additionally, evidence regarding the respondent's prior convictions, if any, is only admissible during the sanctioning stage of the hearing, if the respondent is found guilty.[915] The policy further provides that in sexual misconduct matters, a gender-based violence expert or a trauma counsellor may be called to give evidence upon the application of the evidence leader and the granting of such application by the Disciplinary Chair.[916] Finally, the substantive policy states that the appointed advisor from the Office for Inclusivity and Change who is appointed to assist and advise the complainant may not be called as a witness during formal proceedings.[917]
University of Fort Hare	Yes	Section 14.2 stipulates that the Reporting Officer or member of GBV Unit assisting the complainant may not be called as a witness should disciplinary proceedings ensue.[918] Additionally, the policy states that the university's disciplinary tribunals are "not entitled to evidence gathered through the police investigation".[919]

[913] Ibid ss 8.5 and 8.12.
[914] Ibid.
[915] Ibid s 8.19.
[916] Ibid s 8.14.
[917] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 7.1.7.e.
[918] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611.
[919] Ibid s 14.12.

University of the Free State	No	The policy does not provide any information on the procedural aspects of sexual misconduct adjudication.
University of Johannesburg	Yes	The Bullying and Harassment Standard Operating Procedures provides that the GBV case manager and investigative officer who received, managed, and investigated a case may be called upon to give evidence in formal disciplinary proceedings.[920]
University of KwaZulu-Natal	No	The policies do not provide any information on the procedural aspects of sexual misconduct adjudication.
University of Pretoria	Yes	Section 2.5.5 of the Disciplinary Rules for Students states that a respondent does not have to provide any self-incriminating evidence and is permitted to call any witness to give evidence in their favour.[921] In turn, s 2.5.6 states, the university may call any witnesses, and may cross-examine the respondent's witnesses.[922]
University of the Witwatersrand	No	The policy does not provide any information on the procedural aspects of sexual misconduct adjudication.
Vaal University of Technology	Yes	The policy states that the university ombudsperson, who is the person responsible for receiving and seeing through complaints of misconduct, may not be called as a witness during a disciplinary hearing.[923]
Walter Sisulu University	No	The policy does not provide any information on the procedural aspects of sexual misconduct adjudication.

[920] University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 Standard Operating Procedure ss 8.1.e.iii & 8.3.c.ii.

[921] University of Pretoria 'Disciplinary Rules for Students' (2022) *op cit* note 615.

[922] Ibid.

[923] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617 ss 8.5.4, 8.5.11.4 & 10.6.

5.4.10. Does the policy require that findings of the disciplinary tribunal be kept strictly confidential? What provisions are present, if any, that allow for the publication of findings?

In asking this question, I sought clarity on two things: 1) whether universities insist on strict confidentiality (or secrecy) on the findings of sexual misconduct tribunals, and 2) if there are any means through which members of the wider campus community and perhaps even the general public can have access to those findings. Thus, this question is two-fold. I lay out the general principles on confidentiality and then state whether any exceptions are provided for.

There is an argument to be made for accountability of universities in their handling of sexual misconduct that is achieved through publication of information on the discipline of offenders, among other things, and this will be discussed later in this dissertation.[924]

TABLE 11: Requirements for strict confidentiality and rules related to publication contained in policies

University	Details
Nelson Mandela University	Section 11.9 of Annexure 1 to the policy permits the university to publish the findings of a sexual misconduct hearing and the sanction given, having redacted the names of the party, and having due regard to the provisions of the Protection of Personal Information Act.[925]
North-West University	The policy does not provide any information on this point.
Rhodes University	The Rhodes policy contains a confidentiality clause which stipulates that all responses to complaints of sexual misconduct are to be kept confidential in respect of both parties.[926] Confidentiality is also mentioned under the reporting duties of the university prosecutors and the Manager: Anti-harassment & Discrimination wherein it states that prosecutors must maintain confidentiality when reporting (although it is unclear on what and to whom) and that the Manager: Anti-harassment & Discrimination must keep an anonymised record of every reported case and present six-

[924] Zoe Ridolfi-Starr 'Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response' (2016) 125 *Yale L. J.*

[925] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606; Protection of Personal Information Act 4 of 2013.

[926] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note 608 s 4.1.

	monthly statistical reports to the Sexual Violence Task Team.[927] Aside from these provisions, however, there is no mention of confidentiality specifically as it pertains to the findings of the tribunal.
Stellenbosch University	Section 5.5.7 of Addendum B places a strong emphasis on confidentiality in handling cases of sexual misconduct and states that the Anti-discrimination and Harassment Officer must provide both parties with a "thorough explanation … regarding the boundaries of confidentiality".[928] It is unclear if this provision extends to the findings of a tribunal after a formal hearing. Additionally, s 8.4 limits the reporting of incidents to statistical reporting only which is to be done once a semester.[929]
University of Cape Town	University of Cape Town's substantive policy stipulates that disciplinary proceedings and findings shall be confidential, but that there may be instances in which it is not possible to maintain confidentiality.[930] These include where any person party to the proceedings is compelled by an order of court to disclose information, where communal interests outweigh individual ones, or where the matter is outside the jurisdiction of the university.[931]
University of Fort Hare	In general, University of Fort Hare requires that disciplinary proceedings and outcomes are kept confidential. This is evident in s 1.4 which states among the objects of the policy to "maintain confidentiality during the reporting and investigation of harassment, sexual harassment, or GBV and during the possible subsequent disciplinary inquiry".[932] It is also evidenced by s 17.1 which states that "recorded proceedings, including the outcomes thereof, shall be kept by HR in sealed and confidential files".[933]

[927] Ibid ss 6 & 7.
[928] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609.
[929] Ibid.
[930] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 4.6.1.
[931] Ibid s 4.6.2.
[932] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611.
[933] Ibid.

	However, there are provisions in this policy for disclosure. The first such provision is in s 7.7 which states that "The University of Fort Hare will cause a register to be kept of all complaints of GBV and of all persons found guilty of a case of GBV in terms of the policy, whether staff or student, and will make this information available to any future employers upon request and as provided for in the policy".[934] The second provision for disclosure is s 17.1 which states that while confidentiality will be enforced as far as possible, this may not be possible in instances where the university is "compelled by an order of court to disclose information, or if communal interests outweigh individual ones" with due regard to the provisions of the Promotion of Access to Information Act[935] and the Protection of Personal Information Act.[936] Finally, s 7.4 of the policy provides for quarterly statistical reporting on all reported cases.[937]
University of the Free State	Section 7.5 of the University of the Free State policy states that "confidentiality must be maintained by all persons involved in any of the proceedings, irrespective of the context".[938] This can be read to include the findings of a tribunal, although the policy is not explicit.
University of Johannesburg	Section 10 of the Prevention and Management policy and s 9 of the Bullying and Harassment policy provide the University of Johannesburg's stance on confidentiality of findings.[939] Both sections state that there is a general duty to ensure confidentiality in disciplinary enquiries emanating from the

[934] Ibid.
[935] Promotion of Access to Information Act 2 of 2000.
[936] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611; Protection of Personal Information Act 4 of 2013.
[937] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611.
[938] University of the Free State 'Sexual Harassment, Sexual Misconduct and Sexual Violence Policy' (2018) *op cit* note 612.
[939] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613; University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613.

	policy, but that there may be exceptions.[940] The former policy provides just one exception: where the university is compelled to disclose information by an order of court, while the latter states that disclosure may be necessary upon being so compelled by a competent court, or where communal interests outweigh individual ones.[941] Following this, both policies state that the relevant provisions of the Protection of Personal Information Act[942] and the Promotion of Access to Information Act[943] above as well as any other relevant legislation apply.[944]
University of KwaZulu-Natal	The GBV Policy stipulates that all complaints of gender-based violence must be handled in a way that protects the rights of both parties to confidentiality and privacy.[945] It further provides, in its section on reporting, that the university must keep records of all decisions taken in terms of the policy and present an annual statistical report to Senate.[946] It can thus be inferred that findings are confidential and subject to statistical reporting only, but this is not explicitly stated in the policy.
University of Pretoria	Section 8.6 of University of Pretoria's policy stipulates that the preliminary investigation is strictly confidential.[947] However, s 8.10.2.c then states that "the principle of confidentiality, as referred to in 8.6, shall not apply during any disciplinary investigation as intended in the Disciplinary Code for Staff or Students as the case may be".[948]

[940] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 ss 10.1-10.5; University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 ss 9.1-9.4.
[941] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 s 10.4; University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 s 9.3.
[942] Protection of Personal Information Act 4 of 2013.
[943] Promotion of Access to Information Act 2 of 2000.
[944] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 s 10.6; University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 s 9.5.
[945] University of KwaZulu-Natal 'Gender Based Violence Policy' (2017) *op cit* note 614 s 4.3.
[946] Ibid s 4.9.
[947] University of Pretoria 'Code of Conduct on the Handling of Sexual Harassment' (n.d.) *op cit* note 615.
[948] Ibid.

	This is then contradicted by the clause on confidentiality in s 10.2 which calls on all parties involved in a disciplinary investigation to maintain confidentiality.[949] It is thus unclear what University of Pretoria's position on confidentiality is, both regarding the process and the ultimate outcome.
University of the Witwatersrand	The University of the Witwatersrand policy contains a general provision on confidentiality which states that "all complaints of sexual harassment, sexual assault and rape will be investigated and dealt with in a manner that seeks to ensure, that the identities of the persons involved in a complaint are kept confidential".[950] Notwithstanding this, the Sexual Harassment Safety Officer is required to provide a detailed quarterly report to the Vice Chancellor of the university on the number of cases reported, the process followed, and the outcomes thereof.[951] The Vice Chancellor, in turn, will issue an annual, public, anonymised report to the University community that briefly outlines the number and nature of complaints received, the processes followed, and the outcomes attained.[952] Additionally, the policy requires that the Sexual Harassment Safety Officer keeps a record of statistical data on all reported cases and present a statistical report to the Sexual Harassment Advisory Committee periodically.[953]
Vaal University of Technology	The policy contains a general statement on confidentiality which includes confidentiality of the proceedings.[954] It is silent, however, on whether the findings must also be treated confidentially and if there are provisions for publication of findings.
Walter Sisulu University	The Walter Sisulu University policy states in its guiding principles that among them are to "provide appropriate procedures for dealing with sexual harassment … ensuring that confidentiality is maintained".[955] It further presses upon

[949] Ibid.
[950] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616 s 3.
[951] Ibid s 17.1.
[952] Ibid s 17.2.
[953] Ibid ss 6.1.iii & 6.3.
[954] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617 s 11.
[955] Walter Sisulu University of Science and Technology 'Sexual Harassment and Gender Discrimination Policy' (n.d.) *op cit* note 618 s 2.3.

	those "responsible for the implementation of this policy" to treat complaints "in the strictest confidence".[956] It is unclear, however, if these sections on confidentiality are intended only for the reporting, investigation, and adjudication processes or if they extend also to the findings of a tribunal.

5.4.11. What protective measures are available to the complainant, if any?

Protective measures are those steps or courses of action that a university can take to ensure the physical and psychological safety of a complainant before and during the resolution process.[957] They are designed to be interim and non-punitive, and do not impute the guilt of the respondent.[958] Rather, they simply create a safe space on and around campus for the complainant and can include steps such as suspending the respondent, changing either the complainant or the respondent's allocated residence, or issuing a no-contact order.[959]

With this question I sought to establish which universities provide protective measures, and what those protective measures are.

TABLE 12: Protective measures contained in policies

University	Details
Nelson Mandela University	Protective measures are provided for both in the policy and in Annexure 1 thereto. These measures are no-contact orders, a change in university residence, a change in academic classes, and the granting of special leave or a leave of absence.[960]
North-West University	The policy does not provide any information on protective measures.
Rhodes University	Rhodes provides protective measures for complainants of sexual misconduct in the form of no-contact orders, suspension orders, provision of alternative accommodation or safe house, leave of absence, and

[956] Ibid s 7.2.
[957] White House Task Force to Protect Students from Sexual Assault *Sample Language for Interim and Supportive Measures to Protect Students Following an Allegation of Sexual Misconduct* (2014) sections I & III.
[958] Ibid.
[959] Ibid.
[960] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606 s 11.2 and ss 7 & 8.2 of Annexure 1.

	support in obtaining a protection order from the Magistrate's Court.[961]
Stellenbosch University	Section 7.18 of the Disciplinary Code for Students states that a respondent may be suspended from the university or a university residence pending disciplinary proceedings.[962]
University of Cape Town	The procedural policy provides for protective measures for the complainant in the form of a no-contact order, a change of university residence where possible, leave of absence, and a suspension of the respondent pending disciplinary proceedings.[963]
University of Fort Hare	Protective measures offered by University of Fort Hare include secure access to certain areas, no-contact orders, change in accommodation or suspension of (the respondent's) university accommodation, suspension from academic activities, suspension from co-curricular activities, and limited access to certain university facilities.[964]
University of the Free State	Sections 8.2.3 and 8.2.4 provide that the Directorate for Student Discipline and Mediation may put in a place a variety of protective measures.[965] These include no-contact orders, a change in accommodation for the respondent or suspension from university accommodation, academic modification or suspension (of the respondent) from academic activities, suspension (of the respondent) from certain co-curricular activities and limited /secure access to certain university facilities.[966]
University of Johannesburg	The only protective measure provided for by the Prevention and Management policy is "temporary and immediate" suspension of the respondent.[967]

[961] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note 608.
[962] Stellenbosch University 'Disciplinary Code for Students of SU' (2020) *op cit* note 609.
[963] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 8.
[964] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611 ss 15.1.3 & 16.
[965] University of the Free State 'Sexual Harassment, Sexual Misconduct and Sexual Violence Policy' (2018) *op cit* note 612.
[966] Ibid s 8.2.4.
[967] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 s 14.2.

	The Bullying and Harassment policy also provides for a suspension order, and, in its Standard Operating Procedures, it additionally provides for alternative accommodation for the complainant, as well as assistance for the complainant to obtain a protection order from the Magistrates' Court.[968]
University of KwaZulu-Natal	Section 3.8 of the GBV Procedures indicate that the Gender Based Violence Committee whose role is to receive and investigate complaints of sexual misconduct may implement protective measures for the complainant, which include no contact orders, a change in university residence, and the granting of a leave of absence.[969]
University of Pretoria	Section 2.3 of the Disciplinary Rules for Students provides that a respondent accused of "serious misconduct" may be temporarily suspended from university premises.[970]
University of the Witwatersrand	University of the Witwatersrand, in s 12.3 of its policy, provides for no-contact orders, change of university residence where necessary, change of academic classes, provision of academic concessions, and provision of leave of absence in its policy.[971]
Vaal University of Technology	Section 23 of the policy provides for the suspension of a respondent as a protective measure for the complainant.[972]
Walter Sisulu University	The policy does not provide any information on protective measures.

5.4.12. What ongoing support is available to the complainant and the respondent, if any?

An aspect of the victim-supportive process that I argue for in this dissertation is the support that is offered to victims/complainants outside of the adjudication room itself. This includes ongoing psychosocial support, as well as legal and medical support. Additionally, respondents arguably also require support as they navigate campus disciplinary systems.

[968] University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 s 13.2 and Standard Operating Procedure (SOP) ss 8.1.a, 8.1.b.ii & 8.1.b.v.
[969] University of KwaZulu-Natal 'Gender Based Violence Procedure and Guidelines' (2017) *op cit* note 614.
[970] University of Pretoria 'Disciplinary Rules for Students' (2022) *op cit* note 615.
[971] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616.
[972] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617.

In asking this question, I sought to gain an understanding of what support is offered to both complainants and respondents before, during, and after disciplinary proceedings, to assist them in coping with the gravity of sexual misconduct adjudication.

TABLE 13: Provision for ongoing support to complainant and respondent contained in policies

University	Details
Nelson Mandela University	Section 10 of the policy states that supportive measures are available to complainants of sexual misconduct regardless of whether they institute disciplinary proceedings.[973] These measures include ongoing psychosocial support through the provision of free counselling services and access to medical services from the on-campus facilities.[974] Additionally, Annexure 1 to the policy states that where an incident of rape has been reported, reasonable effort must be made to transport the survivor to the nearest Thuthuzela Care Centre or other medical facility for medical treatment, including the provision of post-exposure prophylaxis and emergency contraception.[975] Finally, while the policy does not explicitly state that support is provided to the respondent, it is implied in s 9.1.1 wherein under the functions of the Sexual Harassment and Offences Committee, it includes that they must "ensure the provision of appropriate psychosocial support … to complainants and alleged perpetrators of sexual harassment and sexual offences".[976]
North-West University	The policy does not provide any information on ongoing support.
Rhodes University	Support for the complainant is provided for in s 5.3 which requires the Manager: Anti-harassment and Discrimination to refer the complainant to the university's healthcare centre for medical assistance, and in s 5.4 which provides for immediate and ongoing

[973] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606.
[974] Ibid s 11.1 & s 8.1 of Annexure 1.
[975] Ibid ss 2.6 & 2.7.
[976] Ibid. Note that the numbering of this section in the policy is incorrect. It falls under the heading "9.2 Functions of SHOC" but the subsections are numbered 9.2.1, 9.1.1, 9.1.2 & 9.1.3.

	psychosocial support for the complainant in the form of counselling from the university's Counselling Centre.[977]
Stellenbosch University	Section 5 of Addendum B states that complainants must be assigned an Anti-discrimination and Harassment Officer, whose role includes advising the complainant that there are psychological, legal, and medical services available to them, as well as trauma counselling.[978] Additionally, the Anti-discrimination and Harassment Officer must support the complainant throughout any disciplinary proceedings should the complainant so request.[979] For the respondent, ss 2.9 and 5.7 of Addendum B states that they too must be assigned an Anti-discrimination and Harassment Officer, and ss 2.9 and 2.10 of Addendum B stipulate that said Anti-discrimination and Harassment Officer support the respondent throughout any informal processes or formal disciplinary procedures.[980] Further, s 7.2.11 of the policy provides for psychological support for both parties, including the respondent.[981]
University of Cape Town	Supportive measures for both the complainant and respondent are provided for in University of Cape Town's substantive policy. For the complainant, the university provides crisis counselling, referrals for ongoing psychological, medical, and legal assistance, academic concessions, and any other supportive measures to "mitigate the impact of sexual harassment or the reporting thereof upon the complainant".[982] For respondents, the university provides "an opportunity to meet with the duly delegated person from the Office for Inclusivity and Change for respondent management", as well as a referral for psychological services, and advice on what to expect going forward.[983]

[977] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note 608.
[978] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609.
[979] Ibid s 2.10 of Addendum B.
[980] Ibid.
[981] Ibid.
[982] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 5.1.2.2.a & 8.d.
[983] Ibid.

University of Fort Hare	Section 15.1.1 of the policy states that the GBV Unit will "arrange that appropriate support is offered to both the complainant and alleged perpetrator".[984] However, it does not detail what that support would entail. Section 14.2 stipulates that the complainant will be provided with information about available counselling services.[985]
University of the Free State	The University of the Free State policy states in 8.2.2 that a reporting officer shall, immediately after receiving a complaint about any sexual misconduct, arrange for appropriate support for both the complainant and perpetrator, and any other persons affected by the incident.[986] This is buttressed by s 11 which creates a duty to provide the victim with counselling, and states that the perpetrator must be assisted in obtaining counselling, should they so require it.[987]
University of Johannesburg	The Prevention and Management Standard Operating Procedures states that a sexual harassment officer must advise a complainant about the availability of counselling and "other appropriate support services", it makes no mention of supportive measures provided for the respondent.[988] The Bullying and Harassment Standard Operating Procedures provides that a complainant must be provided with appropriate medical, psychological, and paralegal support, as well as support in obtaining academic concessions and a leave of absence if necessary.[989] Further, Both the Bullying and Harassment policy and the Standard Operating Procedures attached thereto provide the complainant with adequate information and support to decide on whether to lay a complaint with the SAPS,

[984] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611.
[985] Ibid.
[986] University of the Free State 'Sexual Harassment, Sexual Misconduct and Sexual Violence Policy' (2018) *op cit* note 612.
[987] Ibid.
[988] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 Standard Operating Procedure: Prevention and Management of Student Sexual Harassment and Rape s 3.4.
[989] University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 Standard Operating Procedures (SOP) ss 3.2.b, 3.2.e, 8.1.b.i, 8.1.b.iii & 8.1.b.iv.

	and where the complainant wishes to do so, they must be provided with adequate support.[990] Support for the respondent is provided in the form of advice on the applicable policies and the procedures that will follow a complaint, as well as referral for counselling.[991]
University of KwaZulu-Natal	All 3 of University of KwaZulu-Natal's policies provide for supportive measures for the complainant. The Sexual Harassment Policy provides that a complainant be provided with skilled advice and access to counselling services, the GBV Policy states that the complainant be provided with counselling and medical services, while the GBV Procedures state that a complainant be provided with immediate and ongoing counselling, legal advice about their various options, medical attention, and where an incident of rape has been reported, advice to seek medical attention and transport services to an appropriate facility.[992] Only the GBV Procedures provide for supportive measures for the respondent/perpetrator, wherein it states that an "alleged perpetrator" must be advised of the availability of counselling.[993]
University of Pretoria	Section 8.5.5 of University of Pretoria's policy states that a complainant must be provided with appropriate "advice, assistance, and counselling", while s 9 provides that any victim of sexual harassment may be referred to the Student Support Services Division for "counselling, attention, and support".[994] The policy does not make any provisions for respondents/perpetrators.
University of the Witwatersrand	The University of the Witwatersrand policy stipulates that the Sexual Harassment Safety Officer shall be responsible for providing a "comprehensive response" to victims regardless of whether they decide to pursue a

[990] Ibid s 10.3, and Standard Operating Procedures (SOP) s 3.2.c.
[991] Ibid Standard Operating Procedures (SOP) s 8.1.c.
[992] University of KwaZulu-Natal 'Sexual Harassment Procedure and Guidelines' (2017) *op cit* note 614 s 5.1; University of KwaZulu-Natal 'Gender Based Violence Policy' (2017) *op cit* note 614 s 4.4; University of KwaZulu-Natal 'Gender Based Violence Procedure and Guidelines' (2017) *op cit* note 614 s 4.1.
[993] University of KwaZulu-Natal 'Gender Based Violence Procedure and Guidelines' (2017) *op cit* note 614 s 5.1.2.
[994] University of Pretoria 'Code of Conduct on the Handling of Sexual Harassment' (n.d.) *op cit* note 615.

	disciplinary process.[995] Such a response includes the provision of free and ongoing psychosocial support from the Sexual Harassment Safety Officer, access to free further counselling from the Counselling and Careers Development Unit, and access to free medical services from Campus Health.[996] Additionally, where a victim elects to proceed with a formal disciplinary process, the Sexual Harassment Safety Officer will provide assistance throughout that process.[997] Where the incident is that of sexual assault or rape, the Sexual Harassment Safety Officer will support the victim in laying a complaint with the South African Police Services should the victim wish to do so.[998] Here, the policy provides that were possible, it must be arranged that the investigating officer comes to take the victim's statement at the Sexual Harassment Safety Officer's offices, failing which, the Sexual Harassment Safety Officer provides transport for the victim and two people of their choice to go to the nearest police station.[999] Further the Sexual Harassment Safety Officer must assist by liaising with the police and local hospitals to ensure that the victim is provided with a comprehensive service and that any forensic evidence is properly captured.[1000] With regard to the respondent/perpetrator, the policy states that an "alleged perpetrator" who requests counselling shall be referred to the Counselling and Careers Development Unit to receive free counselling.[1001]
Vaal University of Technology	The Vaal University of Technology policy stipulates that a complainant must be provided with medical support, psychosocial support (including trauma counselling) and assist in covering the cost thereof.[1002] Further, where the misconduct also constitutes a sexual crime, the policy stipulates that the university must assist in contacting

[995] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616 s 12.1.
[996] Ibid s 12.2.
[997] Ibid s 6.10.
[998] Ibid s 13.5.iii.
[999] Ibid s 13.5.iv.
[1000] Ibid s 13.5.v.
[1001] Ibid s 9.1.
[1002] Vaal University of Technology 'Sexual Harassment Policy' (n.d.) *op cit* note 617 ss 8.5.7 & 31.

	South African Police Services (with the consent of the complainant) as well as in referring the complainant for a medical exam and ensuring that they are able to get home safely.[1003] Support for the respondent in this policy is limited to advice on the processes that follow a complaint, which is to be given by a person from the university's office of the ombudsperson.[1004]
Walter Sisulu University	The policy does not provide any information on ongoing support.

5.5. Insights: A Synthesis of Major Findings

In asking each of the above questions of each university's policies, I gained a deeper understanding of the nature and contents of university policies on sexual misconduct. By homing in on those aspects that are central to just process and victim-supportiveness, I was able to analyse the policies in a way that seeks to answer the first half of my research question: do South African universities have policies on sexual misconduct that provide for just and victim-supportive processes? I answer this question in the negative, as a result of the following five key findings:

1. The majority of South African universities do not have readily accessible policies on sexual misconduct.
2. Most university policies under analysis do not identify and comprehensively define forms of sexual misconduct, and do not have definitions that are aligned with the primary statutes on sexual misconduct – SORMA[1005] and the Protection from Harassment Act.[1006]
3. The majority of policies under analysis do not stipulate provisions for a specialised tribunal, sexual misconduct experts on adjudication panels, or specialised training for adjudicators.
4. There is a lack, in most policies, of a defined process and clear procedures for adjudication.

[1003] Ibid ss 24 & 30.
[1004] Ibid s 8.5.11.
[1005] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[1006] Protection from Harassment Act 17 of 2011.

5. Victim-supportive language is not well integrated into existing sexual misconduct policies.

I elaborate further on each of these findings below.

5.5.1. The Urgency of Accessible Policies on Sexual Misconduct

I set out to analyse the policies of all 26 of South Africa's public universities. However, having searched the website of each university using search terms that included "policy", "sexual misconduct", "sexual harassment", "sexual offence", "sexual violence", "rape", "sexual", and "harassment", and perused their online policy repositories, I was able to access the policies of just nine universities.[1007] The remaining four that are a part of this analysis I received after requesting them from the universities directly.[1008] I was unable to access the policies (if they exist) of thirteen universities entirely.

This inaccessibility was surprising, most notably because of how prevalent campus sexual misconduct is and how it has come to the forefront on campuses and in public discourse in recent years in South Africa. The 2016 #EndRapeCulture[1009] and #RUReferenceList[1010] protests highlighted the endemic levels of sexual misconduct on campuses nationwide, and student dissatisfaction with the manner in which universities are handling it.[1011] While exact statistics on prevalence are difficult to come by, research conducted by the South African Medical Research Council between 2018 and 2019 indicates that 20% of students surveyed reported having experienced some form of sexual violence in the preceding year.[1012] With this level of prevalence and the level of media coverage and social pressure that the 2016 student protests brought, one would expect that universities are proactive in ensuring their position is clear and that their students know what resources are available to them. From my attempt to access policies, this is not the case. And this is cause for concern.

[1007] See Table 1 above.

[1008] See Table 1 above.

[1009] Z Orth et al '"What Does the University Have to do With it?": Perceptions of Rape Culture on Campus and the Role of University Authorities' (2020) 34 *South African Journal of Higher Education*.

[1010] Sexual Violence Task Team '"We Will Not Be Silenced": A Three–pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University/UCKAR' (2016) *op cit* note 19 at 1.

[1011] Floretta Boonzaier et al 'Communicating About Sexual Violence on Campus: A University Case Study' (2019) 17 *A Journal of Injury and Violence Prevention* at 18; Z Orth et al '"What Does the University Have to do With it?": Perceptions of Rape Culture on Campus and the Role of University Authorities' (2020) *op cit* note 1009 at 192.

[1012] M T Machisa et al 'Factors Associated With Female Students' Past Year Experience of Sexual Violence in South African Public Higher Education Settings: A Cross-Sectional Study' (2021) *op cit* note 2 at 1.

If students cannot access the policies that guide them in seeking recourse should they become a victim or in responding to an allegation of sexual misconduct, then it cannot be said that the system fosters trust and is one that students would be able to use. Indeed, Smolovic-Jones *et al* noted similar concerns in their attempt to access sexual harassment policies for universities in New Zealand.[1013] Among their findings, which resonate with mine, were that universities in large part did not have easily visible policies that a student in distress could find with a basic keyword search on their websites.[1014] Further, they note that the harder it is for students to access information on how to seek help, the less likely they are to do so.[1015]

But more than policy accessibility being a question of trust or of user-friendliness, it is a question of procedural fairness. University policies are a key instrument for respondents who are called before a sexual misconduct tribunal, and these students need to be able to find the policies so that they can use them. Likewise, complainants need to know what protections are offered to them throughout the disciplinary process, and they can only acquire this information if it is readily accessible. A disciplinary process that is laden with accessibility barriers cannot be said to be just, and as such, universities must ensure that their policies are easily accessible.

In addition to being accessible, there is a need for sexual misconduct policies to be separate policies from general harassment or other such policies. For one, as noted by Smolovic-Jones *et al,* when provisions are hidden within dense, generalised codes of conduct, students are less likely to find them.[1016] Secondly, institutional approaches to sexual misconduct specifically are less likely to be complete and comprehensive when they are integrated within another policy on harassment, bullying or other forms of interpersonal conflict.[1017] This is evident in the Stellenbosch University policy[1018] which is a general harassment policy, and further evident when you contrast the University of Johannesburg's two policies on sexual misconduct – that which is a stand-alone policy for the prevention and management of student sexual harassment

[1013] S Smolovic-Jones et al ''[PDF] beinghaRasseD?' Accessing Information About Sexual Harassment in New Zealand's Universities' (2013) *op cit* note 96 at 41.
[1014] Ibid.
[1015] Ibid at 44.
[1016] Ibid at 41.
[1017] K Legault 'What is Canada Doing? An Analysis of Canadian University Sexual Violence Policies' (2021) *op cit* note 96; Elena Mieszczanski 'Schooling Silence: Sexual Harassment and its Presence and Perception at Uganda's Universities and Secondary Schools' (2018) 2098 *Independent Study Project (ISP) Collection* at 39.
[1018] Stellenbosch University 'Policy on Unfair Discrimination and Harassment' (2016) *op cit* note 609.

and rape,[1019] and that which is a more general bullying and harassment policy.[1020] Stand-alone policies create room for universities to create rules which are comprehensive and address sexual misconduct as the *sui generis* offence that it is.

5.5.2. When Words Matter: The Struggle for Comprehensive Definitions in Sexual Misconduct Policies

There is a need for universities to have definitions of misconduct that are clear and comprehensive, which is presently not the case in the majority of policies analysed. It is important for students to understand what behaviour is sanctionable and for victims to know if what happened to them is reportable.[1021] Without this, victims may not feel able to report their experience to the university, and students standing accused in disciplinary hearings may feel that the action being taken against them is unfair or arbitrary.[1022] From a Natural Justice and procedural fairness perspective, giving effect to a respondent's right to be heard requires giving them "adequate notice of the nature and purpose"[1023] of the pending disciplinary action, per PAJA.[1024] Such notice requires a sufficient degree of clarity on the misconduct giving rise to the disciplinary action, such that the respondent knows what case they have to meet.[1025] Without clear definitions, universities are unable to provide clarity in such a notice, and this would violate the respondent's procedural fairness rights.

In addition to the need for definitions to be clear, there is a strong argument to be made for them to follow the definitions contained in the primary statutes – SORMA[1026] and the Protection from Harassment Act.[1027] While there is no obligation on universities to adopt the statutory definitions, doing so serves an important victim-supportive purpose – that of ensuring consistency and thoroughness in encapsulating the different forms of misconduct and providing appropriate means for recourse for victims.[1028] Indeed, Goldman states that even though the

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[1019] University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613.
[1020] University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613.
[1021] T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9 at 115.
[1022] Ibid.
[1023] Promotion of Administrative Justice Act 3 of 2000 s 3(2)(b)(i).
[1024] Ibid.
[1025] C Hoexter 'Administrative Law in South Africa' (2012) *op cit* note 506.
[1026] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[1027] Protection from Harassment Act 17 of 2011.
[1028] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 193.

criminal law (in their case, American federal law and in ours, SORMA[1029]) has evolved and is now comprehensive and inclusive in its definitions, universities have not followed the same trajectory.[1030] This is because of the wide discretion that universities have in determining what constitutes misconduct on their campuses.[1031]

From my analysis of the policies, it was evident to me that those universities that adopted statutory definitions of misconduct had definitions that were unambiguous and comprehensive. Better still were those universities, such as Nelson Mandela University and the University of Cape Town, that went beyond having rape, sexual assault, and sexual harassment as forms of misconduct, but also included other criminal offences such as compelled rape, compelled sexual assault, and compelled self-sexual assault.[1032] This was illustrative of a broad conception of sexual misconduct. Rhodes University and the University of Cape Town also included a "catch-all" phrase that any offence contained in SORMA[1033] constitutes misconduct under that policy.[1034] This, too, ensures a broad policy for addressing this violence. Universities like the University of KwaZulu-Natal that did not adopt or even refer to statutory definitions at all generally had more vague, narrower, and less comprehensive definitions of misconduct.

However, not all statutes are necessarily the right statutes. The University of Pretoria approached their policy development on sexual misconduct from a discrimination perspective by stating (as per PEPUDA[1035]) that sexual harassment constitutes discrimination on the basis of gender.[1036] As a result, its policy defines sexual harassment in line with the provisions of PEPUDA[1037] and determinations of whether misconduct occurred are made by applying a "test" that asks whether the harassment is on a prohibited ground, whether the conduct was unwelcome, and inquiries into the nature, extent, and impact of the conduct.[1038] Such a framing can be unnecessarily confusing and complex for students to understand. When a student has

[1029] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[1030] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 192.
[1031] Ibid.
[1032] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606 s 2; University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 4.20.
[1033] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[1034] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note 608 s 3; University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 4.20.
[1035] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[1036] University of Pretoria 'Code of Conduct on the Handling of Sexual Harassment' (n.d.) *op cit* note 615 s 3; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s 8(a).
[1037] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[1038] University of Pretoria 'Code of Conduct on the Handling of Sexual Harassment' (n.d.) *op cit* note 615 s 4.

experienced what they think is victimisation and they look for a policy document or engage in some form of help-seeking, what they are looking for is a definition that contains clear and accessible language.[1039] This framing in terms of PEPUDA[1040] may be confusing for students and even for adjudicators and may defeat the very purpose of the policy.

Further, it is important for universities to streamline the terms that they use and ensure that they define *all* of them. In general, this was the case, but the University of Cape Town was an exception here. The University of Cape Town uses many overarching terms including sexual misconduct, sexual offences, sexual violation, sexual contact, and sexual assault, but does not actually provide definitions for all of them.[1041] Sexual violence, sexual assault, and sexual contact are not defined anywhere in the policy despite being used to define other forms of misconduct and sexual assault and sexual violence being used to describe forms of misconduct that are not suitable for mediation.[1042] When a university does this, it renders these terms meaningless and in turn, the other forms of misconduct in which these terms are contained also meaningless. It makes the policy even more confusing and leaves adjudicators with the arduous task of attempting to decipher what the policymakers meant. It makes definitions of misconduct murky and deprives respondents of the procedural fairness right to clarity on the misconduct they are being summoned to answer to. It is thus important for universities to ensure that the terms that they use in their policies are streamlined and properly defined.

5.5.3. The Importance of Experts and Specialised Tribunals in Sexual Misconduct Adjudication

Having adjudicators with expertise in sexual misconduct and GBV and providing regular training on trauma-informed investigation techniques and adjudication processes is perhaps one of the most effective ways to ensure that disciplinary proceedings are victim-supportive

[1039] S Smolovic-Jones et al ''[PDF] beinghaRasseD?' Accessing Information About Sexual Harassment in New Zealand's Universities' (2013) *op cit* note 96.
[1040] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[1041] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 4.
[1042] Ibid ss 4.20, 4.23 & 10.

and not re-traumatising for complainants.[1043] Even so, only six[1044] of the universities whose policies I analysed provide for specialised tribunals, experts, or specialised training. Of these, the University of Fort Hare's policy only commits the university to create a specialised unit, but it does not actually create it, while the University of the Witwatersrand stipulates that the members of the adjudication panel shall collectively have knowledge of sexual and gender-based violence, the law, and employee relations.[1045] This is insufficient. It is not enough for a panel to collectively have this expertise and training, as this would mean that a panel is properly constituted as long as at least one member has the requisite knowledge. This exposes complainants in a hearing to re-traumatising conduct by the panellists without expertise or specialised training – whether it is intended or not.[1046]

A better formulation would be that which is contained in Nelson Mandela University's policy, which requires that each panellist have an "appropriate amount of experience" with regard to the circumstances of each case.[1047] Better still is the University of Cape Town's creation of a Special Tribunal for Sexual Misconduct wherein all panel members are carefully selected according to their knowledge and expertise on sexual misconduct and harassment, and that all panel members receive continuous training regardless of their level of expertise.[1048] This ensures not only that adjudicators are well-trained, but that they are uptodate with current practices on victim-supportive adjudication.

5.5.4. The Crucial Need for Clearly Outlined Disciplinary Processes

The lack of specific and defined procedures for disciplinary adjudication is cause for concern, and universities need to create policies that clearly lay out the procedures to be followed in

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[1043] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5; J Bennett 'Policies and Sexual Harassment in Higher Education: Two Steps Forward and Three Steps Somewhere Else' (2009) *op cit* note 4; Heather M Karjane et al *Sexual Assault on Campus - What Colleges and Universities are Doing About It* (2002) *National Institute of Justice*; I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72.

[1044] These are Nelson Mandela University, University of Cape Town, University of Fort Hare, University of Johannesburg, University of Pretoria, and University of the Witwatersrand.

[1045] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611 s 7.3; University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616 s 11.3.

[1046] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6; J K Wilgus & J W Lowery 'Adjudicating Student Sexual Misconduct: Parameters, Pitfalls, and Promising Practices' (2018) *op cit* note 790.

[1047] Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606 s 6.5.

[1048] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 6.3, 6.4 & 10.6.

disciplinary hearings. The majority of universities simply do not include information on specific rules or procedures for adjudication.

For example, only five[1049] universities' policies provided any information regarding questioning/cross-examining of complainants, only five[1050] provided information on the characteristics of their disciplinary proceedings which allowed me to determine whether the tribunals are adversarial or inquisitorial in nature, and eight[1051] provided some guidelines on how evidence is to be led before the tribunal and any prohibitions on certain types of evidence, with only four[1052] of those providing comprehensive procedures and guidelines for evidence.

When universities leave gaps in their policies by failing to mention applicable procedures, they create uncertainty in the process for students who must participate in it. This leaves respondents, especially, in a position where they cannot ascertain if they are being granted the process that is due to them and if they will be granted the full extent of their procedural fairness protections. For victims, uncertainty in the process can serve as a deterrent to reporting.[1053] But more than this, the lack of a clearly defined process and rules can expose them to practices that are not victim-supportive and can cause re-traumatisation. Sexual misconduct policies need to provide clear guidelines on processes to be followed during adjudication in order to ensure that the disciplinary process is both just and victim-supportive.

5.5.5. Words That Shape Justice: The Significance of Victim-Supportive Terminology in Policies

The language used in policies matters, and must be chosen carefully so as to avoid victim-blaming language and phraseology that furthers rape culture. Boonzaier *et al* write that

> the language deployed by institutions to communicate with their constituents about incidents of sexual violence … informs us how both perpetrators and victims of sexual

[1049] These are Nelson Mandela University, Rhodes University, Stellenbosch University, University of Cape Town, and University of Pretoria.

[1050] These are Nelson Mandela University, Rhodes University, Stellenbosch University, University of Cape Town, and University of Pretoria.

[1051] These are Nelson Mandela University, Rhodes University, Stellenbosch University, University of Cape Town, University of Fort Hare, University of Johannesburg, University of Pretoria, and Vaal University of Technology.

[1052] These are Nelson Mandela University, Rhodes University, University of Cape Town, and University of Pretoria.

[1053] S Smolovic-Jones et al ''[PDF] beinghaRasseD?' Accessing Information About Sexual Harassment in New Zealand's Universities' (2013) *op cit* note 96; T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9 at 115.

violence are perceived, it also tells us whose responsibility sexual violence is deemed to be.[1054]

The university policies analysed in this chapter contain both "good" victim-supportive language, and language that was concerning. An example of such concerning language would be the four[1055] universities that included caveats in their policies for false complaints and reports of sexual misconduct. This is something that the Department of Higher Education and Training cautions universities against including in sexual misconduct policies because such statements dilute the gravity of the scourge of sexual misconduct on campus.[1056] They also further perpetuate the (false) narrative that (predominantly) men are constant victims of malicious false complaints. Diluting statements such as these are not victim-supportive and should not be present in sexual misconduct policies.

Another place where language matters is in the definitions that universities use in their policies. For example, the University of Cape Town and the University of Fort Hare both contain phrases that are potentially damaging for victims. In defining "unwelcome sexual conduct", the University of Cape Town's substantive policy states that "the assessment of what is unwelcome should be informed by context, including culture and language".[1057] This is a dangerous slippery slope when it comes to sexual misconduct. For starters, an objective approach like this to determining unwelcome conduct does not take into account the very personal nature of sexual violation. Secondly, the inclusion of "culture" in the assessment of whether conduct constitutes harassment opens the door for accused persons to wield culture as a weapon in their defence, much like former President of the Republic of South Africa Jacob Zuma did during his 2005 trial for the rape of Fezekile "Khwezi" Kuzwayo.[1058] Indeed, the inappropriateness of

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[1054] F Boonzaier et al 'Communicating About Sexual Violence on Campus: A University Case Study' (2019) *op cit* note 1011 at 20.

[1055] North-West University 'Sexual Harassment Policy' (2019) *op cit* note 607 s 3.15; University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611 s 1.4; University of the Free State 'Sexual Harassment, Sexual Misconduct and Sexual Violence Policy' (2018) *op cit* note 612 s 4.3.5; University of Johannesburg 'Policy on Prevention and Management of Student Sexual Harassment and Rape' (2018) *op cit* note 613 ss 1.6 & 13.2; University of Johannesburg 'Policy on UJ Bullying, Harassment, Sexual Harassment and Rape' (2021) *op cit* note 613 ss 1.6, 12.1(b) & 7.5.b.v.

[1056] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5 s 2.3.vii.

[1057] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 4.22.1.

[1058] *S v Zuma* [2006] (3) All SA 8 (W).

The rape trial of former South African President Jacob Zuma is one that gripped South Africa's conscience and made national and international headlines. His victim, Fezekile "Khwezi" Kuzwayo was subjected to immense victim-blaming by the defence and the public alike, and ultimately had to seek asylum in the Netherlands for

"culture" as a consideration in sexual misconduct cases is recognised by the Criminal Law wherein s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 states that cultural and religious beliefs "shall not constitute substantial and compelling circumstances" when imposing a sentence for rape.[1059]

Equally of concern is the provision in the University of Fort Hare's policy that "in determining whether conduct amounts to sexual harassment, the following factors may be taken into account: … ii. Previous consensual participation in sexual conduct".[1060] It is problematic that a complainant's prior sexual history or consent to any previous sexual conduct is considered in determining whether there is consent in the present instance. It is established law that prior sexual history shall be of no consideration in determining the commission of a sexual offence in the courts,[1061] and it is of deep concern that the University of Fort Hare includes this in their policy. Such a statement could well serve to deter a complainant whose complaint arises out of an existing sexual relationship from coming forward to report their victimisation to the university.

In juxtaposition to the two examples above is the definition in the University of the Witwatersrand's policy, wherein it is stated that "the assessment of what is welcome should be informed by the subjective perception of the complainant".[1062] This is what victim-supportive policy wording looks like. This type of language acknowledges the personal nature of sexual misconduct and that an infringement on dignity of this nature cannot be assessed using "objective" measurements. This kind of language is more likely to encourage victims to speak

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her safety, following the trial. A key element of Zuma's defence was that Khwezi had wrapped herself in a Kanga (a traditional light African fabric) that he claimed was an invitation to have sex. The defence relied on culture and cultural interpretations of her attire to justify Zuma raping her. She died in 2016 without justice.

[1059] Criminal Law (Sentencing) Amendment Act 38 of 2007 s 1.

[1060] University of Fort Hare 'Policy on Harassment, Sexual Harassment and Gender Based Violence' (2019) *op cit* note 611 s 11.3.

[1061] Criminal Procedure Act 51 of 1977 s 227(2) which states:

> No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless-
> (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or
> (b) such evidence has been introduced by the prosecution.

[1062] University of the Witwatersrand 'Sexual Harassment, Sexual Assault, and Rape Policy and Procedures' (2013) *op cit* note 616 s 5.3.iii.

up with the knowledge that their universities will support them.[1063] Another good example is contained in s 4.2 of the Rhodes University policy where the university makes clear that its approach is complainant-centred and that those rendering assistance to victims must "support and encourage their sense of personal control … includ(ing) respecting (their) informed decision at every stage of the process".[1064] The university also states that the "safety, physical needs and psychological needs of the complainant must be prioritised" and information must be provided in a manner that is "non-judgmental, appropriate, clear, and sensitive".[1065] This language right at the outset of a policy is indicative of a university that cares about the needs of the victim and is invested in prioritising them, and more universities should incorporate it into their policies.

Universities have the opportunity in their policy development processes to determine who their policies serve and deploy language that is conscious of the impact it can have on institutional culture around sexual misconduct in general, and on victims in particular. Ideally, all of them would use this opportunity to indicate a victim-supportive approach to addressing this scourge of violence, but as I have shown above, this is not always the case.

5.6. Conclusion

My analysis of university policies on sexual misconduct in South African universities yielded interesting results. On the one hand, it shows the great strides that have been made by some universities to create policies that are inclusive and comprehensive in addressing sexual misconduct, and on the other, it exposes the long road that other universities still have ahead of them. The policy analysis reveals that much work is needed to be done if universities are to reach a point where their sexual misconduct policies provide for just, victim-supportive processes. If they are to get to that point, there would need to be clearer and more comprehensive rules and guidelines for evidence, procedure, and representation, as well as a shift towards specialised adjudication.

In the previous chapter I canvassed the theory of Natural Justice and procedural fairness as the theoretical framework upon which this dissertation is built, and through which lens this policy analysis was conducted. Natural justice and procedural fairness are fundamental aspects of

[1063] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6.
[1064] Rhodes University 'Sexual Offences Policy for Students' (n.d.) *op cit* note 608.
[1065] Ibid.

statutorily compliant administrative decision-making, rather than foreign concepts that I introduce to disciplinary proceedings. Procedural fairness forms the foundation of what I argue is necessary for a just process, and the realisation of such of such a just process requires that the status quo – to the extent to which it falls short of the requirements of procedural fairness – must be remedied to fully, fairly, and adaptively incorporate its core elements.

In the next chapter, I turn to the second element I argue is necessary for sound adjudication in sexual misconduct cases – that of victim-supportive measures. In this policy analysis, I have touched on aspects of what victim-supportiveness looks like. In Chapter 6, I discuss victim-supportiveness more comprehensively, and argue for its incorporation into adjudication processes to ensure that not only are they just, but also supportive of victims.

CHAPTER 6

REORIENTING AROUND A NEW PARADIGM: INCORPORATING VICTIM-SUPPORTIVE MEASURES INTO ADJUDICATION PROCESSES AT SOUTH AFRICAN UNIVERSITIES

6.1. A MORAL MANDATE FOR CHANGE: LAYING THE GROUNDWORK FOR VICTIM-SUPPORTIVE DISCIPLINARY SYSTEMS

The crux of this dissertation is two-fold: that we must develop disciplinary processes that yield just outcomes, and that we do so in a manner that is victim-supportive. The second of those elements is what is under discussion in this chapter. Having conducted an analysis of the sexual misconduct policies of thirteen public universities in the previous chapter, it is evident that where these policies are lacking is in strong procedural guidelines for disciplinary proceedings, and strong victim-supportive measures. This is particularly so when many universities are either silent on procedures to be followed, put few measures in place for victim support and protection, or do not utilise a victim-supportive approach in their development of disciplinary procedures.

A key part of making disciplinary processes more effective is to ensure that victims feel confident using them. This cannot be achieved without developing measures that make the hearings victim-supportive. I have identified four broad themes in putting such measures in place, and these are that 1) the victim must have a voice, 2) the victim must not be re-traumatised, 3) pathways to resolution must be as easy as possible, and 4) the victim must receive protection and support.

In this chapter, I will begin by defining the term victim-supportive and then I will discuss each of these themes in turn. I will also assess whether there is room for the incorporation of such measures into the kind of policies and adjudication processes envisioned in this dissertation. Ultimately, I make the argument that not only is there room for creating policies and processes that incorporate victim-supportive measures, but there is a moral imperative to do so if we are to adjudicate campus sexual misconduct fairly and effectively.

6.2. Unpacking 'Victim-Supportive': From Misconceptions to True Meaning

In this dissertation I use the term victim-supportive to emphasise the need for victims to be, and importantly to feel, supported throughout the process from reporting to final adjudication. In essence, the meaning is aligned with what is more often referred to as "victim-centred". UN Women defines a victim-centred approach as one that places the "needs and priorities of victims/survivors of violence at the forefront of any response".[1066] It then defines these needs and priorities as including being treated with dignity and respect, having access to information and a safe and supportive environment, being empowered to make informed choices, and having one's privacy respected.[1067] Universities Australia cites a similar definition by saying that a victim-centred approach is one that "prioritises the safety and well-being" of reporting parties, and that does so in both its design and implementation.[1068] And yet, even with what seem like fairly universal values of doing right by victims, Konradi notes that when comparing protections provided for accused students and victim-supportive measures for complainants, relatively few universities provide for the latter.[1069]

This may be because there is a misconception about what victim-centred/supportive means. Barnhart, for example asserts that victim-centred means the process is "focused entirely on the accuser" and states that the very fact that they are called "victims" in such an approach creates bias and a presumption of guilt for the accused.[1070] They further argue that in a victim-centred approach, men do not receive a fair hearing and are presumed guilty.[1071] This is simply not true.[1072] Victim-supportive approaches only make it so that the process is less traumatic for victims.[1073]

[1066] UN Women 'Victim/Survivor-centered Approach' (2019) *op cit* note 666.
[1067] Ibid.
[1068] Universities Australia 'Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence' (n.d.) *op cit* note 628 at 1.
[1069] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 376.
[1070] Drew Barnhart 'The Office of Civil Rights' Failing Grade: In the Absence of Adequate Title IX Training, Biased Hearing Panels and Title IX Coordinators Have Harmed Both Accusers and Accused in Campus Sexual Assault Investigations' (2017) 85 *UMKC Law Review*.
[1071] Ibid.
[1072] L Jones-Renaud 'What Does a Survivor-Centered Approach to Workplace Harassment Look Like?' (2018) *op cit* note 20 at 1; Matthew R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) 62 *Duke Law Journal*.
[1073] UN Women 'Victim/Survivor-centered Approach' (2019) *op cit* note 666; L Jones-Renaud 'What Does a Survivor-Centered Approach to Workplace Harassment Look Like?' (2018) *op cit* note 20 at 1.

For almost as long as it has existed, sexual misconduct adjudication has been a traumatic and insensitive process for victims and there is a need for universities to step up and do better.[1074] A careful balance must be struck between supporting victims and running a process that is fair and protective of the rights of the accused. However, these two are not mutually exclusive.[1075] Carefully constructed, there is room for both to run in tandem and a legally sound, supportive process to be conducted. Victim-supportive is not anti-accused, and it is critical that this is understood. Jones-Renaud describes it perfectly in saying that a victim-centred approach "does not ignore the needs or rights of the accused offender… They, too, deserve to have a … say… but not in a way that will cause further harm to the victim".[1076]

6.3. Amplifying Victims' Voices in University Disciplinary Processes

Sexual misconduct hearings in universities have become increasingly more complex, and victims are finding it difficult to navigate them and are thus losing their voice.[1077] This is especially problematic because for most victims, being heard and having a voice is a large part of their sense of having received justice.[1078] A victim-supportive approach restores voice to victims when the process is driven by the victim's wishes, including the victim's expressed wishes to report or not to, and to go further with a disciplinary hearing or not to.[1079] Gonzales *et al* provide the example of the Oklahoma State University whose policy makes it clear to victims that they have control over every stage of the process and can withdraw when they feel uncomfortable.[1080] However, it is difficult for survivors to use their voice, when their participation in the process is limited because reporting, investigating, and adjudicating officials fail to keep them a part of the process. In the study conducted by Gonzales *et al,* it was found that only half of complainants were kept apprised of the progress of their case, while respondent students were almost always notified.[1081] Victims should be meaningfully included

[1074] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 295-322.
[1075] M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.
[1076] L Jones-Renaud 'What Does a Survivor-Centered Approach to Workplace Harassment Look Like?' (2018) *op cit* note 20 at 1.
[1077] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 327-328.
[1078] Stephanie Jasmin Kirven 'Isolation to Empowerment: A Review of the Campus Rape Adjudication Process' (2014) 2 *Journal of International Criminal Justice Research* at 4.
[1079] E Rubiano-Matulevich 'A Guidance Note for Preventing, Reporting and Responding to Sexual Assault and Sexual Harassment in Tertiary Education Institutions' (n.d.) *op cit* note 27 at 5.
[1080] A R Gonzales et al 'Sexual Assault on Campus: What Colleges and Universities Are Doing About It' (2005) *op cit* note 86 at 13.
[1081] Ibid at 11.

throughout the process from intake to sanctioning, if there is any chance of creating a supportive process.[1082]

6.3.1. Giving Voice Through Lawyers for Victims

Arguably one of the most effective yet controversial means of ensuring victims have a voice in proceedings is the provision of or allowance for lawyers for victims. As Weiner argues, the omission of lawyers as a critical resource for victims has resulted in victims not receiving essential services to assist them in confronting and addressing their trauma and furthering their recovery.[1083] The support of a lawyer is important from the outset with reporting and decision-making and can have a significant impact on outcomes for the survivor.[1084] Sexual misconduct is characterised by power and is so traumatic in part because of the way that victims lose agency over their body and mind during and following an assault. The presence of a "trauma informed and client-centred" lawyer in seeking redress for that assault can help victims to begin to feel some semblance of control over the process that follows.[1085]

Following a campus-related assault, a victim has three potential avenues for redress: reporting to campus authorities in pursuit of the methods of resolution offered by the university, reporting to the police for the institution of criminal proceedings, or instituting a civil claim against their assailant. Many victims have no idea what these processes entail and which ones are available and best suited for their needs.[1086] A lawyer can assist a victim in navigating these three completely different systems and deciding which way to proceed.[1087] This assistance is vital for informed decision-making and voluntary and informed participation in whichever process they choose.[1088] When victims do decide to go through the campus disciplinary route, lawyers are important at all stages of the process: pre-hearing and reporting, during the investigation, during the hearing, and post-hearing.[1089] Victim-centred legal advice empowers victims to assert their rights and lessens re-traumatisation because it gives them the tools to make

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[1082] L Jones-Renaud 'What Does a Survivor-Centered Approach to Workplace Harassment Look Like?' (2018) *op cit* note 20 at 1.
[1083] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 125-126.
[1084] Ibid at 126.
[1085] Ibid at 146.
[1086] Ibid at 145.
[1087] Ibid at 144-148.
[1088] Ibid.
[1089] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 329-362.

informed choices about participating in the disciplinary process and gives them a voice throughout.[1090]

6.3.1.1 Navigating the Pre-Hearing Phase: The Value of Lawyers

Prior to the hearing, lawyers for victims are crucial. First, they serve to inform the victim of interim support and protection measures that are available to them, where the university may fail to do so.[1091] Further, they can protect the privacy of victims in evidence-gathering by stopping fishing expeditions by both the accused's legal representative and the university alike.[1092] Here, Behre gives an example of a case where a victim had more material than necessary downloaded from her phone and then shown to her assailant.[1093]

During the investigation interview, there is much that can go wrong. Victims can be victim-blamed or have their stories captured incorrectly or can be met with generally insensitive investigating officers.[1094] A lawyer present during an interview can advocate for the victim and ensure the accuracy of statements taken, and can inform their client of their right to not answer irrelevant or victim-blaming questions.[1095] The lawyer can assist the victim in choosing a comfortable place to be interviewed and ensure that their client is not having to endure the trauma of recounting their experience multiple times to different investigators.[1096] Additionally, and crucially, the presence of a lawyer can serve to remind the investigating officers to adopt trauma-informed interview techniques.[1097] They can remind them that "trauma impacts memory and demeanour"[1098] and ensure that the statement taken does not make negative inferences about the victim because of their trauma.[1099]

Additionally, in the pre-hearing phase, a lawyer serves the role of preparing the victim for the hearing – including preparing them for questioning by the respondent – and of keeping up to

[1090] Ibid at 329.
[1091] Ibid at 336-340.
[1092] Ibid at 336.
[1093] Ibid at 303.
[1094] Ibid at 296-316.
[1095] Ibid at 336.
[1096] Ibid at 334.
[1097] Ibid at 334-336.
[1098] Ibid at 334.
[1099] Ibid.

date with the relevant policies and guiding the victim through them.[1100] Lawyers also ensure that the university follows its own rules of procedure and can intervene when it does not.[1101]

6.3.1.2. The Indispensable Function of Lawyers for Victims in Hearings

The current formulation in five[1102] of the university policies analysed in Chapter 5 is that respondent students are permitted to have a representative present, and in four of those five, that can be a legal representative.[1103] On the other hand, four universities permit victims to be represented legally.[1104] In general, victims are permitted to bring lay "support persons" with them, to mostly function in an emotional support capacity. Weiner argues that this is insufficient and a clear imbalance;[1105] and I agree. Having a support person is not enough, especially where respondents are allowed to retain legal representatives.[1106] In Weiner's words, "there is a marked discrepancy between a lawyer's representation and a lay person's companionship".[1107] If respondents are permitted legal representation, then victims must be granted a parallel right. Otherwise, respondents' representatives can dominate the process and intimidate victims and adjudicators alike, especially where the adjudicators are not legally trained.[1108]

Access to a lawyer minimises secondary trauma because victims receive individually-tailored representation, legal counselling, and advocacy.[1109] For example, a lawyer can assist in invoking their client's right to choose which means they prefer to testify (including via video, face to face, or behind a screen) which is important for many victims as they do not wish to face their assailant.[1110] Further, they protect victims from being badgered by respondents' legal representatives who can be sleazy in their attempts to discredit and victim-blame testifying

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[1100] Ibid at 342.
[1101] Ibid at 335-336.
[1102] These are Nelson Mandela University, University of Cape Town, University of Johannesburg, University of KwaZulu-Natal, and University of the Witwatersrand.
[1103] These are Nelson Mandela University, University of Cape Town, University of Johannesburg, and University of KwaZulu-Natal.
[1104] These are Nelson Mandela University, Stellenbosch University, University of Cape Town, and University of Johannesburg.
[1105] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 165.
[1106] Ibid.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) 48 *J Law Soc.* at 327.
[1107] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note.
[1108] Ibid at 166.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 327.
[1109] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 327.
[1110] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 168.

victims.[1111] Lawyers can also shield victims from respondents' representatives who may attempt to lead inappropriate and inadmissible evidence. At universities where victims are permitted to lodge an appeal, lawyers are essential in understanding and navigating the technicalities of the appeal process.[1112]

6.3.1.3. *Implications and Impact of Lawyers in the Adjudication Process*

Victims' lawyers are client-centred in a way that prosecutors or evidence leaders are not, and they ensure that the well-being of the victim is kept in mind throughout.[1113] The risk of course is that permitting lawyers for victims may introduce an adversarial sensibility, counter to the efforts of developing less traumatising proceedings. However, this risk notwithstanding, permitting victims' lawyers adds a layer of protection and advocacy for victims which arguably outweighs the potential adverse effect. Indeed, Behre argues that the presence of a lawyer allows victims to effectively assert their rights, and that victims who go without representation are at a significant disadvantage.[1114] This disadvantage manifests in part in how unrepresented victims may be bullied into withdrawing their cases, or may eventually give up pursuing redress altogether for the overwhelming volume of information and complexity of the reporting and adjudication procedures.[1115]

Triplett acknowledges that victims' lawyers may serve some purpose in disciplinary hearings and should be permitted where respondents' legal representatives are also permitted.[1116] However, he places a limitation on this. He states that a party to a disciplinary hearing should only be able to retain legal representation if the other party also has the means to do so, for example, if a victim cannot afford to retain a lawyer, then the accused may not either.[1117] To

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[1111] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 343.
[1112] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 169.
[1113] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 362.
[1114] Ibid at 327.
[1115]M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 145.
[1116] M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 327.
[1117] M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 327.

cure this, Weiner advocates for universities to provide lawyers for victims and argues that while this may cost the university money, the overall benefit is greater.[1118]

6.4. Safeguarding Victims from Re-traumatisation During Proceedings

At the core of victim-supportive adjudication is ensuring that the process is as least traumatic for the victim as possible. To do so involves careful introspection into every aspect of the disciplinary process, from intake to sanctioning and ask the question "how can victims be protected from secondary traumatisation here"? This theme explores that question and provides some ideas of practices that have arisen in the higher education sector and those that are still in contention.

6.4.1. The Role of Expertly Trained Adjudication Officers

While policies put the necessary structures in place, it is ultimately the people who serve within the system who have a real impact on victims' experiences. It is thus important that their selection and training are carefully thought out.

In as far as selection of officers is concerned, the consensus seems to be that they must be as far removed from the university as possible. Indeed, some universities have hired specialist external investigators to investigate sexual misconduct.[1119] Konradi argues that not only is this necessary for the expertise that they bring in conducting sensitive and victim-supportive investigations, but it also assists in mitigating the perception of bias when investigators are external to the university.[1120] The Rhodes Sexual Violence Task Team also recommends that evidence leaders be external – or in my opinion be at least employed solely for that purpose – and have a background in sexual misconduct and gender issues, not just law.[1121] Goldman further calls for adjudicators to be experts external to the university, which Konradi believes would encourage victims to come forward if they trusted that the adjudicators in their case are specialists.[1122]

[1118] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 177.
[1119] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 215.
[1120] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 397.
[1121] Sexual Violence Task Team '"We Will Not Be Silenced": A Three–pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University/UCKAR' (2016) *op cit* note 19.
[1122] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 215; A Konradi 'Can Justice Be Served on Campus? An

Once appointed, training of these officials is crucial. Such training is to be specific, trauma-informed, broad, and mandatory – even (and maybe especially) for the officers with legal qualifications.[1123] Wilgus and Lowery go so far as to say that without such training, officials cannot be expected to perform their duties with "a reasonable degree of diligence".[1124] Universities must develop comprehensive trauma-informed curricula for the officials serving their disciplinary system to ensure that victims who interact with it are not subjected to bad practices and secondary victimisation.[1125]

6.4.2. Trauma-Informed Approaches in Pre-Hearing Stages

The pre-hearing stage is a crucial part of the adjudication process, and it is important that it is victim-supportive.[1126] Failure to ensure this can result in victims retracting from the process before it has really begun. For one, victims must be provided with adequate notice of their investigation interview so that they can be emotionally prepared and retain a support person or lawyer should they need one.[1127]

Following this, Dudley tells us that the manner in which a victim is interviewed makes the difference.[1128] In her words, "in a lot of cases the difference between holding someone accountable sometimes has more to do with how the victim is interviewed than with the underlying facts of the case".[1129] Statements are crucial pieces of evidence and victims go and report to campus officials, but campus officials are not always trained in trauma-informed interview techniques and thus gather inaccurate and inconsistent statements.[1130] Additionally, victims report experiencing secondary traumatisation when officials display victim-blaming

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Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 397.

[1123] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 215; Universities Australia 'Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence' (n.d.) *op cit* note 628 at 3.

[1124] J K Wilgus & J W Lowery 'Adjudicating Student Sexual Misconduct: Parameters, Pitfalls, and Promising Practices' (2018) *op cit* note 790 at 90.

[1125] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 397.

[1126] Universities Australia 'Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence' (n.d.) *op cit* note 628 at 2.

[1127] UN System Chief Executives Board for Coordination *Investigators' Manual: Investigation of Sexual Harassment Complaints in the United Nations* (2021) at 12.

[1128] Sara F Dudley 'Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements' (2016) 46 *Golden Gate UL Rev.*

[1129] Ibid at 117.

[1130] Ibid.

attitudes.[1131] As a result, the UN System Chief Executives Board for Coordination ("UNCEB") recommends that interviews in sexual misconduct matters must only be conducted by experienced investigating officers who should do so in a sensitive manner, as inappropriate interview techniques can cause re-traumatisation.[1132]

During an interview, victims will present differently as a result of their trauma, including over and under-sharing.[1133] They may also display an array of emotions ranging from sadness and shame to fear and mistrust.[1134] A good investigating officer should be able to read the situation and adjust their approach accordingly.[1135] Additionally, trauma can result in a victim failing to recall all the details of their assault at once.[1136] This does not make them a liar; it makes them traumatised, and a trauma-informed approach to interviewing victims understands that. But even when they do lie, Dudley provides for this.[1137] She says that "due to the unique context in which a sexual assault occurs, survivors omit or falsify information when interviewed".[1138] The shame that comes with sexual victimisation means it is normal to falsify some things and even react overtly in one way while feeling another. It is thus clear that failure to account for trauma in the interview process contributes greatly to the frequency of not guilty findings and impunity for offenders.[1139] Trauma-informed interview training for investigating officials not only makes for better statements, but it also makes the process less traumatising for the victim and makes it easier for them to cooperate.[1140]

On a final note, as far as the pre-hearing stage is concerned, the number of times a victim is interviewed must be limited.[1141] It is not uncommon for victims to find themselves having to tell their story repeatedly to different role players in the system and this can be incredibly traumatic and difficult. Universities Australia recommends that there be a single, well-trained

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[1131] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 325.
[1132] UN System Chief Executives Board for Coordination 'Investigators' Manual: Investigation of Sexual Harassment Complaints in the United Nations' (2021) *op cit* note 1127 at 13.
[1133] Ibid.
[1134] Ibid.
[1135] Ibid.
[1136] Ibid.
[1137] S F Dudley 'Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements' (2016) *op cit* note 1128.
[1138] Ibid at 118.
[1139] Ibid.
[1140] Ibid.
[1141] UN System Chief Executives Board for Coordination 'Investigators' Manual: Investigation of Sexual Harassment Complaints in the United Nations' (2021) *op cit* note 1127 at 13.

contact person who conducts the interview.[1142] Gonzales *et al*, with whom I align myself, agree, citing that there must be information sharing among the different offices or role players within the university to avoid re-traumatising the victim.[1143]

6.4.3. Navigating Adjudication Models: Balancing Justice and Victim Support

At present, South African universities have modelled different types of proceedings to address sexual misconduct on their campuses. While some have adopted what looks like an adversarial quasi-judicial process, some such as Nelson Mandela University, Stellenbosch University and the University of the Witwatersrand have adopted a more inquisitorial approach. Without a mandate on how to structure disciplinary hearings, universities are free to proceed as they see fit. This is the crux of this dissertation, and sits at the heart of the second half of this research question: what measures can be put in place in order for universities to have sexual misconduct policies that provide for just and victim-supportive processes?

What is evident is that there are pros and cons to each approach, and models such as the investigative model and restorative justice models are yet to be tried. Here, I will look at what impact the selection of a particular type of proceedings have on delivering justice and minimising trauma.

6.4.3.1. How the Adversarial Model Compounds Victim Trauma in Campus Proceedings

In its "purest form", an adversarial model presupposes a contest between the accusing and accused parties, where the accusing party must prove what harm they claim was done before an objective adjudicator, and the accused must defend their innocence.[1144] In the presently structured quasi-judicial system that universities use, victims report feeling re-traumatised and isolated.[1145] Behre candidly states "indeed, if one sets out to intentionally design a system for provoking symptoms of post-traumatic stress disorder, it might look very much like a court of

[1142] Universities Australia 'Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence' (n.d.) *op cit* note 628 at 3.
[1143] A R Gonzales et al 'Sexual Assault on Campus: What Colleges and Universities Are Doing About It' (2005) *op cit* note 86 at 13.
[1144] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 67.
[1145] S J Kirven 'Isolation to Empowerment: A Review of the Campus Rape Adjudication Process' (2014) *op cit* note 1078 at 4.

law".[1146] This gives a glimpse into how unsuitable this model is if the aim is to create a victim-supportive process that minimises re-traumatisation.

Re-traumatisation begins right at the start where victims have to tell their story while receiving little support and then have their credibility publicly questioned regarding an experience that was so harrowing.[1147] Victim-blaming and administrative incompetence are not rare in these hearings. In one study, one third of campus administrators conducting the hearings were not adequately trained.[1148] While this is an American study, the same is likely true here. Even though some policies provide for training, in my experience it does not always happen.

A process that is adversarial and not reconciliatory is unlikely to contribute to justice and fairness.[1149] In hearings, lawyers (for both parties and on the adjudication panel) put victims in "legal straitjacket(s)" that put their experiences in a box and don't allow them to express the grey areas of what happened to them.[1150] This legalistic and adversarial approach harms both victims and accused students alike as it undermines the efforts for redress.[1151]

6.4.3.2. Inquisitorial Model in Disciplinary Hearings: Advantages and Challenges

An inquisitorial model is one where the adjudicator or panel of adjudicators, as the case may be, play an active role in the fact-finding of a case.[1152] This can involve questioning both parties and calling other witnesses if the need arises.[1153] At the University of the Witwatersrand, this is done without the assistance of a prosecutor or evidence leader, the adjudication panel itself leads the proceedings.[1154] At the University of Cape Town, there is an evidence leader to initiate and lead the proceedings, but the panel may interject at any time to request additional evidence, or ask questions of witnesses.[1155] The panel may also interject to protect the victim from hostile

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[1146] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 324.
[1147] S J Kirven 'Isolation to Empowerment: A Review of the Campus Rape Adjudication Process' (2014) *op cit* note 1078 at 4.
[1148] Ibid at 5.
[1149] A Gouws & A Kritzinger 'Dealing with Sexual Harassment at Institutions of Higher Learning: Policy implementation at a South African University' (2007) *op cit* note 71.
[1150] Ibid.
[1151] Ibid.
[1152] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 68.
[1153] Ibid.
[1154] Sexual Violence Task Team '"We Will Not Be Silenced": A Three–pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University/UCKAR' (2016) *op cit* note 19.
[1155] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 7.1 & 8.11.

questioning.[1156] Such involvement of the adjudication panel can assist in bolstering the evidence that will be used in making a finding, and can ensure that victims before a tribunal are protected.

While there are benefits to this process in that it is less confrontational between the parties, and the adjudicator is actively involved in creating a productive and safe environment, Goredema worries about the involvement of an adjudicator in determining the facts.[1157] He states that an adjudicator who is actively involved in uncovering evidence cannot possibly remain unbiased in evaluating it, and this then flouts the rules of Natural Justice.[1158] At the very least, he argues, it creates the perception of bias.[1159]

6.4.3.3. The Double-Edged Sword of the Investigative Approach

Smith explores the idea of an investigative model for adjudicating campus sexual misconduct, either as a single investigator or two working together.[1160] With this model, parties are interviewed separately and then provided, in writing, with the other party's version which they can comment on.[1161] This is a no-contact process that allows the victim the opportunity to be heard and to challenge what has been put forward by the accused without the hostility of a hearing.[1162] The investigator upon hearing from both sides and any other witnesses either makes the final decision determining guilt or makes a recommendation for approval by the relevant office.[1163] Goldman, with whom I agree, is of the opinion that this model has inherent fairness flaws and that the investigator and adjudicator should rather be different people.[1164]

6.4.3.4. The Case for an Adversarial-Inquisitorial Hybrid for Justice

Hybrid models are not uncommon and can borrow from the best elements of different models. Smith suggests a hybrid that looks like a mix of the investigative and inquisitorial models in which the investigator interviews the party and drafts an investigative report, and then the adjudicator examines the report, examines the parties and witnesses, and then makes a

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[1156] Ibid s 8.9.
[1157] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 68.
[1158] Ibid.
[1159] Ibid.
[1160] Nicole E Smith 'The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct' (2017) 117 *Columbia Law Review*.
[1161] Ibid.
[1162] Ibid.
[1163] Ibid.
[1164] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 214.

finding.[1165] Goredema suggests that there can be hybrids of the adversarial and inquisitorial approaches in which universities can take parts from both processes and lean whichever way they deem most suitable.[1166]

Konradi argues that neither the adversarial nor inquisitorial systems are inherently victim-supportive, but they can be modelled to become so.[1167] Victims often do not define justice in the punitive way of the criminal justice system and disciplinary hearings modelled after it; they often want validation and vindication.[1168] Validation and vindication are not the primary goals of disciplinary hearings as they are presently structured, but there is room for change so as to incorporate them.[1169] In my opinion, this can best be achieved through an adversarial/inquisitorial hybrid, and this will form the crux of my contribution in the following chapter.

6.4.4. Embracing Restorative Justice in Campus Adjudication

While seemingly not practiced by any of the South African public universities surveyed, restorative justice practices appear promising for sexual misconduct.[1170] Adversarial and inquisitorial processes look back to weigh evidence and assign blame while restorative justice is forward-facing.[1171] As such, argue Koss *et al*, disciplinary hearings as they are currently construed are by their very nature incapable of adequately dealing with the complexities of sexual misconduct.[1172] According to Kirven, victim-centred reform can only happen through implementing restorative justice into the adjudication process, and there is an argument to be

[1165] N E Smith 'The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct' (2017) *op cit* note 1160.
[1166] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 68.
[1167] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6.
[1168] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 326. Anna Bull & Erin Shannon *Higher Education After #MeToo: Institutional responses to reports of gender-based violence and harassment.* (2023) *York, U.K.: The 1752 Group/University of York* at 28.
[1169] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 327.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 322.; A Bull & E Shannon 'Higher Education After #MeToo: Institutional responses to reports of gender-based violence and harassment.' (2023) *op cit* note 1168 at 28.
[1170] J K Wilgus & J W Lowery 'Adjudicating Student Sexual Misconduct: Parameters, Pitfalls, and Promising Practices' (2018) *op cit* note 790 at 91.
[1171] M P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) *op cit* note 18 at 246.
[1172] Ibid at 242.

made for this.[1173] Victim-supportive justice, per Koss *et al*, requires a process that empowers victims, acknowledges that harm was done, prevents future harm, and provides for reparations and restoration.[1174]

6.4.4.1. Defining Restorative Justice: From Harm to Healing

Cyphert provides such a befitting definition of restorative justice when she says,

> at its core, the conceptual foundation for restorative justice is that harm has been done and someone is responsible for repairing it. A restorative justice approach to harm seeks to answer three key questions: 1) who has been harmed?, 2) what are their needs?, and 3) whose obligation is it to meet those needs?[1175]

She further asserts that restorative justice is culturally sensitive and can neutralise certain power dynamics that exist in adjudicative hearings.[1176] As such, it is an attractive alternative to disciplinary hearings.[1177] The most common model of restorative justice that is used for student discipline (at least in the US) is that of restorative conferences in which a trained facilitator guides the parties through a carefully scripted dialogue in order to meet their needs.[1178] While these are effective, Cyphert cautions that restorative justice not be used as an escape by universities from "fully and fairly" resolving sexual misconduct matters on their campuses.[1179]

6.4.4.2. Harnessing the Benefits of Restorative Justice in Victim Support

One of the benefits of restorative justice, Kirven (quoting Koss (2006)) states is that it "offers the social acknowledgement, the validation and redress of harm that victims of sexual assault seek".[1180] And such justice can take many forms. It can include a victim-offender dialogue which is a direct meeting between the accuser and accused, sentencing circles which include

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[1173] S J Kirven 'Isolation to Empowerment: A Review of the Campus Rape Adjudication Process' (2014) *op cit* note 1078 at 8.

[1174] M P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) *op cit* note 18 at 247.; Julie Goldscheid '#MeToo, Sexual Harassment, and Accountability: Considering the Role of Restorative Approaches' (2021) 36 *Ohio State Journal on Dispute Resolution* at 707.

[1175] Amy B Cyphert 'The Devil is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX' (2018) 96 *Denver Law Review*at 66.

[1176] Ibid.

[1177] Ibid.

[1178] Ibid.

[1179] Ibid.

[1180] S J Kirven 'Isolation to Empowerment: A Review of the Campus Rape Adjudication Process' (2014) *op cit* note 1078 at 7.; J Goldscheid '#MeToo, Sexual Harassment, and Accountability: Considering the Role of Restorative Approaches' (2021) *op cit* note 1174 at 708 & 712.

the community in determining a punishment, circles of support and accountability, and the abovementioned restorative conferencing which involves a meeting of the parties and their family and friends to discuss the impact of the victimisation and find a way forward.[1181] Kirven, however, states the superiority of the empowerment model of restorative justice.[1182] This takes the form of the restorative conference and gives an opportunity for the parties to draft a contract of how amends will be made.[1183] There is potential that such a programme could work, but it would require good and careful implementation with well-trained facilitators.[1184]

6.4.4.3. The Role of Restorative Justice in Sanctioning

Koss *et al* make the argument that incorporating restorative justice is victim-supportive and it can run with the disciplinary process.[1185] One such example is incorporating it into the sanctioning part of a hearing where a sanctioning circle could be called.[1186] Traditional tribunals, they state, are not designed to meet victims' needs, and I agree.[1187] Often victims want unconventional "sanctions" such as an apology from the offender. As such, the incorporation of restorative justice practices has the potential to meet these victims' needs.

6.4.5. Revisiting Cross-Examination: Evaluating its Role in Victim Re-traumatisation

Perhaps the most contentious topic in discussing re-traumatisation of victims during the disciplinary hearing process is the bar (or lack thereof) on direct cross-examination of the victim (i.e., the cross-examination of the victim by the accused or his representative). Currently, the practices in South African universities on this are a mixed bag. Some universities permit it (e.g., University of Cape Town), others do not (e.g., Nelson Mandela University), while others still are ambiguous (e.g., the University of South Africa which gives the

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[1181] M P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) *op cit* note 18 at 247-248.; J Goldscheid '#MeToo, Sexual Harassment, and Accountability: Considering the Role of Restorative Approaches' (2021) *op cit* note 1174 at 709.

[1182] S J Kirven 'Isolation to Empowerment: A Review of the Campus Rape Adjudication Process' (2014) *op cit* note 1078 at 8.

[1183] Ibid at 9.

[1184] Ibid.

[1185] M P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) *op cit* note 18 at 249.

[1186] Ibid at 253.

[1187] Ibid 18 at 249.; A Bull & E Shannon 'Higher Education After #MeToo: Institutional responses to reports of gender-based violence and harassment.' (2023) *op cit* note 1168 at 28.

respondent the right to "respond" although it is not clear if this is through questioning or a responding statement.)[1188]

The main question that is raised is whether the ban on direct cross-examination violates the accused's procedural fairness rights?[1189] Hendrix argues that the gravity of the potential sanctions on a finding of guilt for sexual misconduct necessitates that the accused be granted the right to cross-examine his accuser.[1190]

To further this argument, Migler states that because there are often no eyewitnesses to sexual misconduct and it is a he-said-she-said case, the only way for an accused to show that it is more likely that he did not do it than that that he did is to be given an opportunity to vigorously question his accuser.[1191] Triplett concurs, saying that cross-examination is the only way to determine witness credibility, and credibility may well be the turning point in a case.[1192] As such, Migler points out that perhaps victims should just be adequately prepared by their lawyers for what cross-examination might feel like.[1193]

However, despite the reverence that cross-examination receives, there is no evidence that it is useful as a fact-finding tool.[1194] It does nothing to uncover falsehoods where you have a "prepared and/or skilful lying witness" who can mislead the adjudicator with their confidence, or where you have a witness with a genuine mistaken memory.[1195] There is, in fact, much research that says cross-examination is neither useful nor necessary and it is based on an "unfounded mistrust" of sexual misconduct complainants and investigations.[1196] Cross-examination forces the victim to recount their experiences of "one of the most terrifying crimes

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[1188] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ; Nelson Mandela University 'Policy on Sexual Harassment and Sexual Offences' (2017) *op cit* note 606; *Guidelines for a Student Disciplinary Hearing* (2018) University of South Africa.

[1189] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 513.

[1190] Barclay Sutton Hendrix 'A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused Of Sexual Assault In Campus Disciplinary Proceedings' (2013) 47 *Georgia Law Review*.

[1191] William J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) 20 *Chapman Law Review* at 367.

[1192] M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.

[1193] W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 368.

[1194] Ibid.

[1195] Ibid.

[1196] Amy Poyer 'Separate and Unequal: The Genesis of a Gender-Biased Campus Disciplinary System for Sexual Violence Survivors in California' (2021) 57 *California Western Law Review*.

in which the victim survives," and may serve as a deterrent to reporting.[1197] Research shows that victims believe they would feel "exposed and vulnerable" while on the stand being asked invasive questions about one of their most traumatic memories and that this is part of why they fail to report their victimisation.[1198] Allowing a practice that deters students from coming before the tribunal defeats universities' mission of creating safe learning spaces.[1199] Further, the United States Supreme Court in *Mathews v Eldridge*[1200] held that the harm caused by cross-examination far outweighs its limited benefit.[1201] Accused students should have the opportunity to test the veracity of the evidence given and the credibility of the witness, but it must be done while providing the victim with a sense of safety to prevent re-traumatisation.[1202]

6.4.5.1. Cross-Examination's Influence on Traumatised Victims

Where cross-examination is conducted by the accused's legal representative, it is often used to bully and intimidate the victim and force witnesses to question or change their testimony by placing them under undue pressure.[1203] A vulnerable victim on the stand may well become flustered and falter or change their version when presented with manipulative techniques like aggressive "rapid fire" questioning.[1204] It is hoped that victims' lawyers or evidence leaders would object in such an instance, but some universities - such as the University of Cape Town - also place a positive duty on the adjudicator(s) to intervene where this should happen.[1205] Symptoms of trauma manifest differently in victims and can lead to behaviours adjudicators

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[1197] W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 370.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 328.

[1198] A Poyer 'Separate and Unequal: The Genesis of a Gender-Biased Campus Disciplinary System for Sexual Violence Survivors in California' (2021) *op cit* note 1196.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 328.

[1199] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 538-539.

[1200] *Mathews v Eldridge* [1976] (424) U.S. 319

[1201] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 513.

[1202] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 395.

[1203] W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 369.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 328.

[1204] W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note.

[1205] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 8.9.

might not "expect".[1206] When those adjudicators are not trained in how trauma impacts evidence and demeanour, these behaviours can be wrongly interpreted to the detriment of the victim.[1207]

6.4.5.2. Beyond Direct Cross-examination: Seeking Trauma-Informed Approaches in Adjudication

Given the problems that cross-examination can cause for victims and the fact that it does not support victim-supportive adjudication, it is important to explore other alternatives. Triplett suggests that to minimise contact and confrontation, cross-examination could be conducted with the victim behind a shield or a veil, or via video.[1208] Konradi and Migler (separately) suggest that the respondent poses their questions via the adjudication panel with the panel having the discretion to filter the questions.[1209] O'Toole agrees with this approach, citing that student respondents do not have the emotional tools to mindfully question a victim, but the adjudication panel does.[1210]

However, Shingleton argues against this as they believe that questioning via a panel is not as effective as direct cross-examination because questions become diluted, and victims get the chance to craft palatable answers.[1211] On the potential unsuitability of adjudication panels for questioning victims, Ehrlich's article tells a cautionary tale.[1212] It details a hearing in which the panellists themselves ask deeply problematic questions with victim-blaming undertones.[1213] In condemnation of cross-examination as traumatic and perpetuating a hostile environment and suggesting questioning through a panel, caution must be taken of the assumption that the panel

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[1206] W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 371.
[1207] Ibid at 371.
[1208] M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 329.
[1209] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 395; W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 374.
[1210] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 540.
[1211] Mara Emory Shingleton 'Dear Colleague: Due Process Is Not Under Attack at Colleges and Universities, as Shown Through a Comparative Analysis of College Disciplinary Committees and American Juries' (2018) 27 *William & Mary Bill of Rights Journal*.
[1212] Susan Ehrlich 'Communities of Practice, Gender, and the Representation of Sexual Assault' (1999) 28 *Language in Society*.
[1213] Ibid.

is properly trained in trauma-informed techniques and is sensitive to the victim. Otherwise, this means of questioning can be just as bad, if not worse, than aggressive direct cross-examination.

To conclude this section, I found a quote by Migler to be particularly gripping and insistent that the reader pause for reflection. He states that the "absence or restriction (of cross-examination) in proceedings … whose outcome could determine the course of a young person's life, is quite striking. At the same time, however, forcing a complainant to directly answer questions from the very individual who may have assaulted her is a prospect that rightly makes reasonable people hesitate".[1214]

6.5. Creating Clear, Accessible, and Victim-Supportive Pathways to Adjudication

Aside from the substance of the adjudication process itself, it is important that the pathways to adjudication themselves must not be obstructive for victims and should be as clear and accessible as possible. Responding "safely and effectively" to campus sexual misconduct requires a system that meets legal obligations and has sound policies and processes.[1215] The features of the process can significantly impact victims' decisions to come forward.[1216] As such, universities must have a process that is both victim-supportive and legally sound so that students can come forward with the confidence that their university will act.[1217] Instilling this confidence can be achieved by ensuring that policies are clear and appear legitimate, that the language in them is supportive of victims, and that they are easily accessible and user-friendly.[1218]

[1214] W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 383.
[1215] Universities Australia 'Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence' (n.d.) *op cit* note 628 at 3; N N Wane et al 'Kenya's Public Universities as a Locus for Sexual and Gender-Based Violence - A Case Study of Egerton University, Njoro Campus' (n.d.) *op cit* note 26 at 26.
[1216] T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9 at 119-120.
[1217] Ibid.
[1218] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 394; A M Thomas 'Politics, Policies and Practice: Assessing the Impact of Sexual Harassment Policies in UK Universities' (2004) *op cit* note 27 ; L Jones-Renaud 'What Does a Survivor-Centered Approach to Workplace Harassment Look Like?' (2018) *op cit* note 20 at 1; James Kay *Prevalence, Perception and Consequences of Sexual Harassment in Kenyan Instituions of Higher Learning* (2018) Kabarak University, Nakuru, Kenya, at 202; E Mieszczanski 'Schooling Silence: Sexual Harassment and its Presence and Perception at Uganda's Universities and Secondary Schools' (2018) *op cit* note 1017 at 39.

A primary obstruction for victims wishing to pursue justice through university disciplinary systems is that of a lack of definitional clarity.[1219] The criminal law (through SORMA) has clearly and comprehensively defined the various sexual offences, but universities are still lacking. They need to adopt clear, consistent definitions that align with SORMA and the Protection from Harassment Act as this is an important part of making the process victim-supportive. A lack of clarity on definitional issues leads to mistrust of the system, and impedes procedural fairness protections.[1220] Accused students must know *why* they are being punished, otherwise it is arbitrary; and victims must be able to identify in the policy if what happened to them is reportable behaviour so that they can engage in reporting procedures.[1221] Universities need to incorporate consistent, and preferably statutory, definitions into their policies if they are to be able to properly address sexual misconduct.[1222]

The UNCEB recommends that there be one person or "focal point" to whom reports are made and who disseminates information.[1223] Rubiano-Matulevich agrees, stating that there must be a single point of contact for centralised reporting.[1224] Having centralised reporting ensures that there is follow-through on reports of victimisation and that the people who are designated reporting officers are specially trained.[1225] Where universities fail to provide this, victims may find themselves being sent from department to department to simply have their story heard and an investigation started. This poses a barrier to justice as they may well give up on the prospect of a hearing or other resolution for their matter. It is further recommended that the reporting office maintains a relationship with the police, both to facilitate information sharing for victims who wish to pursue a criminal case, and for assisting victims in navigating the two systems.[1226]

When it comes to the hearings themselves, Konradi recommends that faculty and students are included on the adjudication panel to ensure fairness.[1227] Some universities, such as the

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[1219] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 216-220.
[1220] T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9 at 116.
[1221] Ibid.
[1222] Ibid.
[1223] UN System Chief Executives Board for Coordination 'Investigators' Manual: Investigation of Sexual Harassment Complaints in the United Nations' (2021) *op cit* note 1127 at 6.
[1224] E Rubiano-Matulevich 'A Guidance Note for Preventing, Reporting and Responding to Sexual Assault and Sexual Harassment in Tertiary Education Institutions' (n.d.) *op cit* note 27 at 5.
[1225] Ibid.
[1226] R A Goldman 'When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students' (2020) *op cit* note 42 at 221-223.
[1227] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 396.

University of Cape Town, already implement this.[1228] Additionally, she adds, testifying before the panel should be made easy by, for example, granting concessions for students that need to miss classes to testify at a hearing.[1229]

Another structural issue for victims is the time that it can take for their matter to be investigated and come before an adjudicator for resolution.[1230] Sometimes it is so lengthy that accused students graduate before their hearing date. Other times, the victim is forced to coexist with their assailant in shared learning and living spaces for a prolonged period. McGregor emphasises that investigations should not only be independent, but they should also be timely to avoid a perpetually hostile environment.[1231] The UNCEB agrees but cautions that there are many things that can frustrate the investigation process for sexual misconduct, and it is thus important for all parties to be flexible.[1232]

On a final note, for pathways to adjudication, the UNCEB recommends that there be no prescription of matters, a position with which I strongly agree.[1233] Many victims take time to process their trauma, and some are not even able to name it for months or years after. Setting a period after which sexual misconduct prescribes is not victim-supportive and makes it more difficult for victims to access justice.

6.6. Incorporating Comprehensive Victim Protection and Support Mechanisms

The fourth and final theme that presents itself is that the victim needs to receive protection and support. I have separated this into support personnel who must exist, and structural support and protection which must be provided. What is clear is that protection and support need to be incorporated into the disciplinary process right from where it starts: in the documentation. The language used in policies should be supportive of reporting students and be unambiguous in its assertion that "people matter more than institutions".[1234] Further, as per the Department of

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[1228] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 6.5-6.9.

[1229] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6.

[1230] UN System Chief Executives Board for Coordination 'Investigators' Manual: Investigation of Sexual Harassment Complaints in the United Nations' (2021) *op cit* note 1127 at 19.

[1231] Kelsey M McGregor 'Raped a Second Time: The Mental Health Impact of Campus Sexual Assault Investigation and Adjudication' (2015) 18 *Quinnipiac Health LJ*.

[1232] UN System Chief Executives Board for Coordination 'Investigators' Manual: Investigation of Sexual Harassment Complaints in the United Nations' (2021) *op cit* note 1127 at 19.

[1233] Ibid at 6.

[1234] S Smolovic-Jones et al ''[PDF] beinghaRasseD?' Accessing Information About Sexual Harassment in New Zealand's Universities' (2013) *op cit* note 96 at 45.

Higher Education and Training's Policy Framework for Gender-Based Violence, policies should indicate a zero-tolerance attitude towards sexual misconduct, clear of any "diluting phrases" about false complaints.[1235]

6.6.1. Ensuring The Presence of Support Personnel Throughout the Process

A large part of universities being able to provide a victim-supportive environment, is ensuring that there are enough sufficiently trained people to provide it. This can start from the investigating officers availing themselves to victims for any questions regarding the process.[1236] An impartial investigation can still be victim-supportive by ensuring that the victim is aware of the progress of their case and knows that they can freely contact the investigator should they need to.[1237] To assist with this, the UNCEB recommend the employment of case manager(s) that are assigned to both the victim and the accused as their central point of contact and information.[1238] The case manager – or other appropriate person – can and should emphasise to the victim that interim protective measures such as no-contact orders are available to them.[1239]

6.6.2. Comprehensive Structural Support and Protection: Meeting The Immediate and Enduring Needs of Victims

In addition to support personnel, there needs to be structural support and protective measures in place throughout the disciplinary process. Policies must include support and protection mechanisms that take both "immediate safety and justice" and "long-term recovery" into account.[1240] One innovative support structure at the University of the Witwatersrand is the Gender Equity Office.[1241] Most universities have a neutral reporting office where complainants can go and report their victimisation and proceed with an investigation. As Dugard mentions in the Rhodes University Sexual Violence Task Team's report, though, the Gender Equity Office is different.[1242] It is an office that is proactively and explicitly for victims and does not

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[1235] Department of Higher Education and Training 'Policy Framework to address Gender-Based Violence in the Post-School Education and Training System' (2020) *op cit* note 5.

[1236] UN System Chief Executives Board for Coordination 'Investigators' Manual: Investigation of Sexual Harassment Complaints in the United Nations' (2021) *op cit* note 1127 at 9-10

[1237] Ibid.

[1238] Ibid.

[1239] Universities Australia 'Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence' *op cit* note 628 at 2.

[1240] Ibid.

[1241] Sexual Violence Task Team '"We Will Not Be Silenced": A Three–pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University/UCKAR' (2016) *op cit* note 19.

[1242] Ibid.

position itself to be neutral.[1243] This is an important support structure that other universities could benefit from instating.

Rodriguez-Rodriguez and Heras-Gonzalez as well as Koss aptly sum up what measures universities must put in place.[1244] Koss states that support must be holistic and must include medical, academic, procedural, spiritual, and financial support.[1245] Additionally, physical support must be provided, which includes creating a safe space for the victim.[1246] McGregor adds onto that element in saying that where physical distance is required for protection of the victim, it must be the accused that is moved between departments or residence or whatever other shared space, and not the victim.[1247] Rodriguez-Rodriguez and Heras Gonzalez's conception of support is that it must involve psychosocial and medical support, legal assistance, protection – at least on campus, and "any other assistance that the victim may require".[1248]

Ultimately, victim protection and support are at the core of creating an adjudication process that is victim-supportive, and universities should take implementing protective and supportive measures seriously.

6.7. Empowering Victims in the Sanctioning Process

Two additional matters present themselves that relate to the sanctioning process that occurs after a respondent has been found guilty of the misconduct of which he is accused.

The first is the question raised by Konradi of whether victims should be permitted to give victim impact statements.[1249] Victim impact statements are largely a feature of the American

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[1243] Ibid.

[1244]I Rodriguez-Rodriguez & P Heras-González 'A Study of the Protocols for Action on Sexual Harassment in Public Universities—Proposals for Improvement' (2020) *op cit* note 81 at 5; M P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) *op cit* note 18 at 249.

[1245] M P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) *op cit* note 18 at 249.

[1246] Ibid.

[1247] K M McGregor 'Raped a Second Time: The Mental Health Impact of Campus Sexual Assault Investigation and Adjudication' (2015) *op cit* note 1231.

[1248] I Rodriguez-Rodriguez & P Heras-González 'A Study of the Protocols for Action on Sexual Harassment in Public Universities—Proposals for Improvement' (2020) *op cit* note 81 at 5; A Bull & E Shannon 'Higher Education After #MeToo: Institutional responses to reports of gender-based violence and harassment.' (2023) *op cit* note 1168 at 28; J Kay 'Prevalence, Perception and Consequences of Sexual Harassment in Kenyan Instituions of Higher Learning' (2018) *op cit* note 1218 at 206; N N Wane et al 'Kenya's Public Universities as a Locus for Sexual and Gender-Based Violence - A Case Study of Egerton University, Njoro Campus' (n.d.) *op cit* note 26 at 26.

[1249] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 398.

criminal justice system whereby a victim is permitted to give a statement in court detailing the impact of the crime on their lives during the sentencing hearing.[1250] The idea is to give the victim a chance to confront their assailant and to express to the court why they should receive a (typically) harsh sentence. Konradi asks whether these can be incorporated into university disciplinary systems as a feature that gives voice to victims to not just tell the facts of their victimisation but describe its impact for both the adjudicators and assailant to hear.[1251] It would be a novel feature in South African administrative proceedings, but one that could lend itself to providing closure for victims of sexual misconduct.

The second, raised by Wilgus and Lowery, is the question of notation or endorsement of an offender's transcript.[1252] While they refer to it as notation in their work, I will use the term endorsement as it is more commonly utilised in South Africa. Essentially, endorsement of a transcript is when a student who has been found guilty by a disciplinary tribunal has their academic transcript written up to reflect that their conduct at the university was unsatisfactory, and in some cases the transcript will reflect the nature of the misconduct they were found guilty of. Wilgus and Lowery argue that where an offender has been suspended or expelled following a sexual misconduct hearing, their transcript must be endorsed.[1253] While this in itself might not seem supportive of the present victim, it is helpful in ensuring that offenders are not simply passed on from university to university and continue to victimise other students.

6.8. In Conclusion: Emphasising Victim Support for a Safer Campus Environment

It has been shown that universities that offer strong victim-supportive protections also offer strong protections for the accused, therefore disproving the myth that victim-supportive measures and procedural fairness exist in a "zero-sum" relationship.[1254] Developing an adjudication process that is victim-supportive benefits all involved – the university, the victim, the accused, and the greater university community. It protects the interests of those who have been violated in what is arguably one of the worst traumas one can survive and enhances institutional responses. Victims should be at the heart of policy development on campus sexual

[1250] Ibid.
[1251] Ibid.
[1252] J K Wilgus & J W Lowery 'Adjudicating Student Sexual Misconduct: Parameters, Pitfalls, and Promising Practices' (2018) *op cit* note 790 at 92-93.
[1253] Ibid.
[1254] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 387.

misconduct if there is any hope of creating educational communities that are safe and in which all students are equally able to participate.

In the following chapter, I make my proposition for the development of a hybrid model of adjudication that provides strong procedural fairness protections and is rooted in Natural Justice, while also incorporating robust victim-supportive measures. I argue that the adoption of such a model answers the second half of the research question asked in this dissertation: what measures must be put in place for South African universities to have sexual misconduct policies that provide for just and victim-supportive processes? By mapping out the disciplinary process from inception to resolution, I make the case for a model of an adjudication process that is clear, comprehensive, and protective of the rights of both parties.

CHAPTER 7

DEVELOPING A JUST AND VICTIM-SUPPORTIVE HYBRID MODEL OF ADJUDICATION

7.1. INTRODUCTION

This chapter marks the point where my dissertation converges to present an innovative solution to the question of developing just and victim-supportive processes for adjudicating sexual misconduct in South African universities.

I began this dissertation by delving into existing studies on campus sexual misconduct, followed by a meticulous examination of the legal and national policy frameworks shaping university policies. Introducing the theoretical framework of Natural Justice and procedural fairness, I employed this lens to analyse the sexual misconduct policies in South Africa's public universities. Having conducted this analysis, I evaluated the significance of victim-supportiveness in fostering sound adjudication and proposed its incorporation into adjudication processes.

In this chapter, I synthesise the elements of procedural fairness and victim-supportiveness into a compelling proposition: the development of a hybrid model of adjudication for sexual misconduct grounded in the theoretical framework of Natural Justice and procedural fairness and enriched by the integration of victim-supportive measures. My premise is that an outcome is just if the determinative method is just. Adding to this is the notion that a process that is perceived as just reinforces trust in both the process and the resulting decision.[1255] Thus, crafting a fair system is not merely an academic exercise, but a practical necessity that serves the interests of all parties involved – complainants and respondents alike.[1256]

Walker tells us that ideas on how to make better policies for campus sexual misconduct adjudication are plentiful and that, instead, what is needed is a sound framework for decision-making.[1257] I have identified Natural Justice and procedural fairness as the best framework for

[1255] Ibid at 375.
[1256] Ibid at 374-375; T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9 at 124.
[1257] T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9 at 114.

university sexual misconduct adjudication as they are robust enough to navigate the multifaceted challenges intrinsic to the university adjudication process, and allow adjudicators to arrive at fair decisions that garner the support and respect of the university community.[1258] According to Walker, procedural fairness is "the embodiment of how we think about what is fair and reasonable with respect to the manner in which … decisions should be made".[1259] The adjudication process is a vital aspect of institutional responses to sexual misconduct, and by approaching it from the theoretical framework of Natural Justice and procedural fairness, I am able to develop a process which is responsive to the *sui generis* nature and needs of sexual misconduct adjudication.[1260]

[1258] Ibid at 125.
[1259] Ibid at 121.
[1260] Ibid at 125.

The process of adjudication is typically structured as follows:[1261]

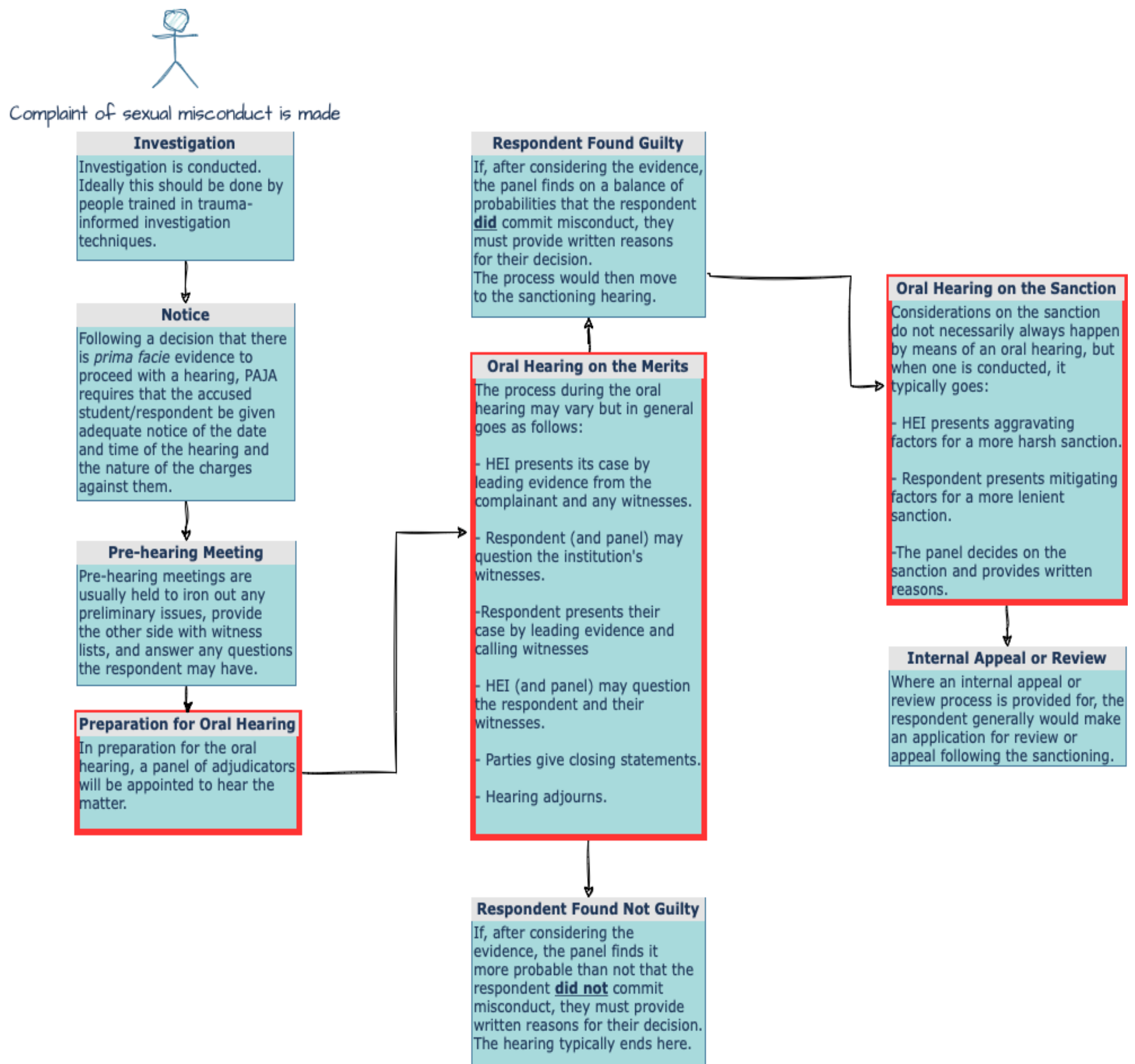

DIAGRAM 1: FLOWCHART OF THE ADJUDICATION PROCESS

This dissertation is concerned with the stages outlined in red in Diagram 1 above, with the specific aim of developing an adjudication model that is best suited for these key parts of the process.

This chapter sets forth my proposed approach – a hybrid model that is focused on the procedural aspects of various stages of adjudication, specifically, the selection of adjudicators in the pre-

[1261] Michael Opperman *A Practical Guide to Disciplinary Hearings* Cape Town, Juta & Co. Ltd(2011) at 1-34.

adjudication phase, the proceedings of the oral hearing, and the sanctioning process. Central to this discussion is the nature of the forum of the hearing, the details of the procedure to be followed, the incorporation of victim-supportive measures, and the development of rules for the selection of the panel, as well as rules on evidence, representation, and sanctioning.

My argument in favour of this hybrid model rests on a set of carefully balanced assertions: that it is possible to impose justifiable limitations on Natural Justice without undermining the essence of the principle, that the involvement of gender-based violence (GBV) specialists in adjudication does not infringe on the rule against bias, and that the inclusion of lawyers for victims and incorporation of restorative justice practices can transform victims into active participants in the sanctioning and solution-building process.[1262]

Throughout this chapter, I will engage in a thorough analysis of each component of this hybrid model, systematically addressing how this model aligns with procedural fairness, and how the inclusion of victim-supportive measures, limitations on Natural Justice, and restorative justice practices are not just feasible, but necessary. This comprehensive analysis is aimed at validating the proposition that this hybrid model, complete with thoughtful limitations and strategic inclusions, can result in a process that is both just and supportive of victims in adjudicating cases of campus sexual misconduct.

7.2. Identifying an Adjudication Model

In developing a hybrid model of adjudication, I start from the position that an outcome is just if the determinative method is just.[1263] This highlights the critical role that the adjudication method plays in delivering a just outcome.[1264] The process, or "how" proceedings are conducted, is as important as the decision itself, particularly in the context of safeguarding the procedural rights of the accused.[1265] In their most basic form, these rights are encapsulated in

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[1262] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 382, 391, 398 & 395; S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 533-534 & 539-540; and I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 11; M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.

[1263] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 375.

[1264] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 152.

[1265] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 375.

the two pillars of Natural Justice: *audi alteram partem* and *nemo iudex in sua causa*, which, as we saw in Chapter 4 have been subsequently expanded into the broader statutory procedural fairness protections of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").[1266] The adjudication model opted for should ideally uphold and fully realise these principles for both parties, but more so for accused students who potentially have much at stake.[1267] Aside from its robustness, a procedural fairness framework (correctly) emphasises the notion that decisions made correctly and fairly are more likely to be accepted as legitimate and this, in turn, encourages students to participate in the administration of justice system and accept its findings.[1268]

7.2.1. Anchored in Procedural Fairness: Using the Adversarial Model as a Foundation

In the context of adjudication hearings, there are two preeminent types of proceedings: the adversarial model and the inquisitorial model.[1269]

Adversarial proceedings, which closely mirror criminal trials, allow parties to independently lead their evidence before a passive, objective adjudicator.[1270] The university, as *dominus litis*, carries the burden of proving misconduct, based purely on the presented evidence, without anticipating the participation or cooperation of the respondent.[1271] The respondent, in turn, is tasked with defending against these allegations.[1272] The adjudicator, in general, does not interfere with the proceedings.[1273] They wait to assess the total evidence without engaging in fact-finding or questioning the evidence's validity.[1274] Adversarial proceedings are typically

[1266] A Chatterji 'Natural Justice and Reasoned Decisions' (1968) *op cit* note 450; Promotion of Administrative Justice Act 3 of 2000.
[1267] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 375; S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 512.
[1268] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6; S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 512.
[1269] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 387.
[1270] Ibid at 388; C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 67.
[1271] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 67.
[1272] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 388.
[1273] Ibid at 388; C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 67.
[1274] C Goredema 'Observations on the Observance of Administrative Law in University Student

conducted orally[1275] and have strict formal rules of procedure.[1276] Adversarial proceedings align well with a procedural fairness framework as their objectivity can serve as a bulwark against bias.

Proponents of adversarial proceedings argue that they best safeguard the procedural fairness rights of respondents by maintaining objective and impartial decision-makers.[1277] However, adversarial proceedings alone may not always provide a supportive experience for the victim. They are marked by a level of hostility between the parties and the inherent tension can culminate in aggressive cross-examination of victims and risk placing victims, rather than accused students, on "trial".[1278] Such proceedings can also increase the likelihood of re-traumatisation of victims.[1279]

The challenge, therefore, is to develop a hearing model that protects the needs of victims while also ensuring the procedural fairness rights of the respondent. I suggest that this can be achieved through the use of the adversarial model as the foundation upon which a hybrid model is built, and the introduction of three key measures:

1. Incorporating inquisitorial practices into the proceedings;
2. Involving specialists in gender-based violence in the adjudication process; and
3. Allowing the presence and full participation of victims' lawyers during proceedings.

7.2.2. Building a Hybrid: Interweaving Inquisitorial Elements

Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 67; A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 388.

[1275] T Makaula 'Adversarial System versus the Inquisitorial System' (n.d.) *op cit* note 822; I Oraegbunam 'The Jurisprudence of Adversarial Justice' (2019) *op cit* note 823 at 36.

[1276] I Oraegbunam 'The Jurisprudence of Adversarial Justice' (2019) *op cit* note 823 at 39.

[1277] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 389-390; C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 68; G Feltoe 'A Guide to Administrative and Local Government Law in Zimbabwe' (2013) *op cit* note 14.

[1278] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 389.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 332.

[1279] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note. 6 at 389. C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 332.

A hybrid, inherently, signifies a fusion of elements. In this context, I aim to blend the objective scrutiny inherent to adversarial proceedings with the active involvement of adjudicators characteristic of inquisitorial proceedings to create a forum that better caters for victims' needs.[1280]

Goredema adequately explains the essence of such an approach.[1281] While adversarial proceedings are laden with confrontation and trial-like aspects, inquisitorial proceedings offer quite the contrast.[1282] Inquisitorial proceedings entail an adjudicator that actively partakes in the process - questioning witnesses, requesting additional evidence, and providing direction throughout the process.[1283] Unlike the passive observer role that characterises adversarial proceedings, an inquisitorial adjudicator is actively involved in the adjudication process.[1284]

This active involvement empowers adjudicators in sexual misconduct matters. It equips them to apply rules that are specific to the *sui generis* nature of such misconduct, which may be embedded in university policies.[1285] It also empowers them to flesh out incomplete or vague evidence.[1286] This dual power to participate and protect not only safeguards the victims from aggressive cross-examination but also defends the rights of the accused.[1287] Additionally, the active involvement of the adjudicator enhances the panel's fact-finding ability. By proactively requesting information, questioning the victim, the respondent, and other witnesses, the adjudicator ensures a thorough evaluation of facts before a decision is made.[1288]

However, the question of bias then arises. Can an adjudicator maintain an unbiased stance while actively involved in the fact-finding process? Despite common apprehensions, I answer

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[1280] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 68-69.
[1281] Ibid.
[1282] Ibid at 67.
[1283] Ibid at 68; A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 388.
[1284] This is not to be confused with becoming a *party* to the proceedings, which adjudicators should not do, as it indicates that they have become vested in a particular outcome and have ceased to be impartial.
[1285] T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9 at 125.
[1286] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 68; A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 388.
[1287] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 375.
[1288] C Goredema 'Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa' (1996) *op cit* note 14 at 68.

this question in the affirmative. Such involvement doesn't necessarily convert the adjudicator into an investigator or distort their role.[1289] Rather, it gives greater control and influence to the adjudicator, acknowledging the unique power dynamics prevalent in sexual misconduct cases.

The hybrid model I propose utilises the objective nature of the adversarial system as its core structure, with the incorporation of inquisitorial techniques. Parties independently present and examine their evidence - the cornerstone of adversarial proceedings. However, the model extends this by allowing the adjudicator to question parties, request additional evidence, test its veracity, and intervene when proceedings risk re-traumatising the victim. This hybrid approach marries the objectivity of adversarial proceedings with the active involvement of inquisitorial proceedings, thereby mitigating bias and promoting a victim-supportive process.[1290]

7.2.3. Gender-Based Violence Specialists: An Imperative for Fair Adjudication

Adjudication panels can only be effective in ensuring victim-supportiveness if they are comprised of GBV specialists who understand the subtle nuances of sexual misconduct cases and have undergone trauma-informed training.[1291] These specialists bring with them a wealth of understanding, encompassing the broad range of behaviours exhibited by victims under questioning, the potential for discrepancies between initial statements and those made at later stages, as well as the ability to critically analyse evidence without being swayed by the many myths and harmful assumptions often associated with sexual misconduct accusations.[1292]

However, there are concerns among some critics that the expertise of these specialists could inadvertently introduce bias into the process.[1293] This stems from the belief that these

[1289] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 512.
[1290] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 375.
[1291] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 11.; A Bull & E Shannon 'Higher Education After #MeToo: Institutional responses to reports of gender-based violence and harassment.' (2023) *op cit* note 1168 at 38.
[1292] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note at 11.
[1293] C Okpaluba & L Juma 'The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa' (2011) *op cit* note 472.

specialists, who have likely dedicated much of their careers advocating against gender-based violence may harbour a pre-existing bias against the accused students.[1294]

In response to these concerns, it is important to understand the distinction between bias and expertise. As former Justice Edwin Cameron of South Africa's Constitutional Court famously stated, judges are not “ideological virgins".[1295] In other words, every adjudicator, by virtue of their life experiences, brings with them a unique perspective, which may include their own biases.[1296] These biases shape who they are and cannot be separated from their person. What is essential is their ability to objectively assess the evidence at hand and deliver a fair judgment.[1297] Proponents of the argument that GBV specialists should not sit on panels for sexual misconduct cases often argue that specialists, due to their extensive knowledge, experience, and vested interest in GBV cases, could inherently favour certain outcomes, thus skewing the adjudication process.[1298] However, this argument fails to distinguish between impartiality and neutrality – a concept explored by the Constitutional Court in the case of *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing*.[1299]

The court in this case articulated the difference between a judge (or adjudicator in this case) being impartial versus neutral.[1300] This distinction is crucial. Everyone, the court held, including an adjudicator, carries their own set of opinions and beliefs, and people are seldom neutral on an issue.[1301] And there is no requirement for a decision-maker to be neutral, as this would be near impossible.[1302] They are, however, required to be impartial, which the court determined to mean that state of having a mind that is open to being convinced on the evidence.[1303] When critics argue against having GBV specialists on panels due to perceived

[1294] Ibid.
[1295] Edwin Cameron 'Judicial Accountability in South Africa' (1990) 6 *South African Journal on Human Rights*at 258.
[1296] Ibid.
[1297] Ibid.
[1298] C Okpaluba & L Juma ‘The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa’ (2011) *op cit* note 472.
[1299] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* [2000] (3) SA 705 (CC) para 14.
[1300] Ibid.
[1301] Ibid.
[1302] Ibid.
[1303] Ibid.

bias, they are conflating impartiality with neutrality. The law does not require neutrality; it requires impartiality, and this, in an adjudicator, must be unwavering.[1304]

The assumption that a person with interest, advocacy experience, or expertise in a certain field is incapable of adjudicating impartially on related matters is a potentially problematic one. The logical conclusion of this assumption would be that the only individuals who could judge on matters of sexual misconduct would be those who are uninformed on the topic, or completely indifferent to the plague of such misconduct on higher education campuses.

But those people aren't neutral either. Individuals who have never endeavoured to understand the nuances of sexual misconduct or who simply don't care about its impact may inadvertently lean towards condoning such acts, by virtue of their apathy or ignorance. Such individuals would not be suitable adjudicators of these sensitive cases, as their lack of understanding or indifference can lead to unjust outcomes. GBV specialists are needed in adjudication panels, not despite their active role in combating such violence, but because of it.[1305] Their experiences enrich the understanding of the nuances of these cases and do not inherently compromise impartiality.

7.2.4. Fostering the Full Participation of Lawyers for Victims

The final protective measure I propose in mitigating the potential harm to victims within a predominantly adversarial proceeding, is the full participation of victims' lawyers.

As highlighted in Chapter 6, lawyers for victims play a critical role in empowering victims to voice their experiences.[1306] Not only can they protect victims from aggressive questioning by the respondent or their representative, but they also ensure that the victims' interests are specifically represented during proceedings.[1307] Given that disciplinary proceedings are typically structured in such a way that the evidence leader or prosecutor represents the university—and where the victim is primarily considered a witness to the university's case—the involvement of a lawyer can provide invaluable support to the victim.[1308] While evidence

[1304] Ibid.
[1305] I Shankar & D S Tavcer '"Good People with Good Intentions": Deconstructing a Post-Secondary Institution's Sexual Violence Policy Construction' (2021) *op cit* note 72 at 11.
[1306] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 144.
[1307] Ibid at 158; K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 343-350.
[1308] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 340-343; M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870.

leaders may indeed be well-trained, empathetic, and supportive, they cannot substitute the specific role and representation that a lawyer offers.[1309] Universities need to acknowledge this gap in representation and attempt to remedy it. Incorporating victims' lawyers fully into the process does not only mean their mere presence, but the freedom to actively participate in the proceedings, thereby reducing victims' vulnerability throughout the process.[1310]

Currently, even in universities where victims' lawyers are permitted, their role during proceedings is significantly limited. Take, for instance, the University of Cape Town, where lawyers can work with the evidence leader on preparation but are barred from direct participation in the proceedings themselves.[1311] While victims' lawyers can apply to the panel of adjudicators when a particular interest is thought to be compromised, this right remains restrained within a limited scope.[1312] This limitation undermines the role of a victim's lawyer, reducing them to observers rather than active participants. This does not align with the prime duty of these lawyers - to represent and safeguard the victim's interests.[1313] It is thus essential that victims' lawyers are granted more active roles in the proceedings. Their active participation would allow them to propose motions before the panel or make applications to protect or advance the interests of the victim, going beyond merely objecting to aggressive questioning.[1314]

To foster a more supportive adjudication environment, universities need to rethink the engagement of lawyers for victims.[1315] They should be considered not just as silent spectators but as active participants whose involvement can greatly enhance the adjudication process. The

[1309] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 139-141.
[1310] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 327; M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870.
[1311] University of Cape Town 'Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 4.6.3.d & 5.1.2.2.a.iv; University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 ss 4.9 & 4.10.
[1312] University of Cape Town 'Disciplinary Procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment' (2020) *op cit* note 610 s 4.10.
[1313] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 327; M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870.
[1314] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 327-329; M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 163-170.
[1315] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870; K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 327.

full incorporation and participation of victims' lawyers represents a significant and necessary shift towards a more equitable and supportive disciplinary procedure.[1316]

7.3. Examining the *Audi* Rule: Not an Unfettered Right to Be Heard

In the context of procedural fairness during adjudication, two primary protections of Natural Justice for the respondent are usually considered; *audi alteram partem* (the right to be heard) and *nemo iudex in sua causa* (the rule against bias). While I have demonstrated that the rule against bias can be navigated and upheld, the *audi* rule poses a different challenge. It asserts a respondent's right to be heard, but this does not translate into an unfettered right to voice one's defence however one pleases.[1317] Behre asserts that campus adjudication processes need to have robust formal rules of evidence, and I concur.[1318]

Within the span of giving and testing evidence, I make the case for imposing justifiable limitations on this right during two instances - when the respondent presents their defence and when they challenge the adverse evidence of the university, typically given by the complainant.

7.3.1. The Right to be Heard, Not to Harm: Placing Limits on Respondents' Evidence

The current practice in nine of the thirteen universities analysed in this dissertation gives respondents the latitude to introduce almost any evidence to build their defence.[1319] But this permissiveness can be exploited to the detriment of victims. A procedural fairness adjudication framework necessitates formal rules for evidence presentation.[1320] Here, I argue that there should be rules on both the substance of the evidence that is presented, and the manner in which it is presented. Specifically, concerning the evidence given by the respondent, I tackle character evidence and evidence on a victim's prior sexual history.

Two types of evidence utilised by respondents that need specific restrictions are character evidence and evidence concerning a victim's prior sexual history.[1321] Such evidence can derail

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[1316] M H Weiner 'Legal Counsel for Survivors of Campus Sexual Violence' (2017) *op cit* note 870 at 163-170; K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 327-329.

[1317] Meyer v Law Society, Transvaal *supra* note 519; Chataira v Zimbabwe Electricity Supply Authority *supra* note 464.

[1318] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 351.

[1319] This is all universities except for Nelson Mandela University and the University of Cape Town.

[1320] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 351.

[1321] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 397-398.

the focus of proceedings from the misconduct at hand and turn them instead into an examination of the victim's character or sexual past.[1322]

Character evidence, which may include details about the victim's behaviour, attire, or lifestyle, can contribute to an insidious form of victim-blaming.[1323] By focusing on these aspects, the respondent can shift the blame onto the victim, implying that the victim's conduct or choice of clothing somehow invited or justified the misconduct.[1324] Similarly, introducing evidence regarding a victim's prior sexual history is not only irrelevant to the misconduct in question, but it also attempts to impugn the victim's credibility based on their sexual past.[1325] Such an approach can perpetuate the damaging narrative that a sexually active individual is less likely to be a true victim of sexual misconduct.[1326]

Putting formal rules for evidence in place is imperative because adjudicators and/or evidence leaders do not always know when the line is crossed between what is acceptable and what is not.[1327] As argued by Konradi, student victims before administrative tribunals should receive no less protection when giving evidence than they would in the criminal justice system.[1328] In South Africa, that would mean a ban on both character evidence and evidence on the complainant's prior sexual history, unless there are compelling circumstances under which it should be permitted.[1329] Notably, the Criminal Procedure Act 51 of 1977 is clear in s 227(6) that such evidence is especially inadmissible if its purpose is to attack the credibility of the victim or to infer that she was more likely to have given consent to this sexual act because of her past sexual acts.[1330]

These types of evidence do not enhance the fairness of proceedings or the respondent's right to be heard. On the contrary, they shift the focus from the alleged misconduct to the victim's personal life.[1331] Moreover, the introduction of such evidence can significantly compound the trauma experienced by the victim and serve as a deterrent for reporting. Thus, while respecting

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1322 Ibid at 398.
1323 Ibid.
1324 Ibid.
1325 Ibid.
1326 Ibid.
1327 Ibid.
1328 Ibid.
1329 Criminal Procedure Act 51 of 1977 s 227.
1330 Ibid.
1331 A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 379.

the respondent's right to defend themselves, it is important to establish clear guidelines on what constitutes admissible evidence.[1332] Policies should unequivocally prohibit evidence that is irrelevant to the alleged misconduct and that contributes to the re-traumatisation or stigmatisation of the victim.[1333]

In essence, the aim should be to develop an adjudication process that is fair and unbiased, that focuses on the actual misconduct, and that respects the dignity and psychological well-being of the victim.[1334] This can be achieved through the introduction of formal rules of evidence and procedural protections, which guide the respondent's defence and safeguard the victim's interests and well-being.

7.3.2. Restructuring the Right to Challenge Adverse Allegations

In addition to presenting their own evidence, typically, a respondent challenges adverse evidence through questioning a victim's testimony. This presupposes the fact that the victim does testify at all. Often, the parties to sexual misconduct hearings are the only witnesses, and their testimony is thus of great importance.[1335] Here, the right to be heard should be limited in two ways: the victim should decide how to testify, and the respondent and their representative should not be allowed to directly cross-examine the victim.[1336]

7.3.2.1. Allowing Testimony on Victims' Terms

One of the central principles in developing a victim-supportive adjudication process is to respect and prioritise the victim's comfort and psychological well-being during the process of testifying.[1337] This principle hinges on the notion that victims should be given autonomy to choose the manner in which they testify during proceedings in an effort to reduce the risk of

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[1332] K A Behre 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call of Victims' Attorneys' (2017) *op cit* note 16 at 351.
[1333] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 298.
[1334] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 512.
[1335] W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 366.
[1336] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 533-534 & 539-540; A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 390 & 395; M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.
[1337] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 395.

re-traumatisation that comes with confrontation by the respondent.[1338] In the context of disciplinary hearings, this can mean providing various options for victims to give their testimony. For instance, they may opt to testify in the same room as the respondent or choose to give evidence via video link.[1339] In certain situations, they might prefer being present in the same room but hidden behind a screen or curtain to maintain a degree of separation.[1340]

The arguments against such means of testifying often centre on the premise that these means may restrict the respondent's ability to fully assess their accuser.[1341] For example, that a respondent is unable to fully establish the credibility of a victim testifying behind a screen or via video link with their camera turned off because the respondent cannot observe the victim's demeanour when answering questions. However, this argument overlooks the psychological trauma that direct confrontation could impose on the victim.[1342] Unless there is a compelling reason to suggest that the victim's credibility depends solely on their physical presence during testimony, the respondent's objections should not take precedence. When weighing the potential re-traumatisation of the victim and the duty to create a victim-supportive process against the respondent's ability to determine credibility visually, an adjudication panel must engage in a delicate balancing exercise. Alternative means of testifying might cause the respondent to experience some disadvantage, but that disadvantage is likely significantly outweighed by the potential harm to the victim. The pivotal question isn't whether any disadvantage exists, but to what extent it compromises the respondent's right to a fair trial.

From a broader perspective, the approach of allowing a victim to choose their means of testifying places an emphasis on empathetic and respectful handling of victims during adjudication proceedings.[1343] It aims to reduce the potential re-traumatisation that can occur

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[1338] Ibid at 395.
[1339] Ibid 6 at 390 & 395.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 329.
[1340] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note. 6 at 390 & 395.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 329.
[1341] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note at 387.
[1342] Ibid at 395; M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.
[1343] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 395; M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.

during adjudication, thereby encouraging more victims to come forward and seek justice without fear of intimidation or psychological distress.[1344] In addition, establishing such provisions signals a shift towards recognising the emotional and psychological aspects of sexual misconduct cases. It champions a humane, victim-supportive approach that strives to maintain fairness without compromising the psychological well-being of the complainant.

7.3.2.2. Barring Direct Cross-Examination of Victims

The concept of direct cross-examination, while deeply rooted in the conventional legal tradition, can prove to be problematic in cases of sexual misconduct adjudication at universities.[1345] This form of interrogation is known to be highly adversarial and confrontational.[1346] In the sensitive context of sexual misconduct cases, it can trigger re-traumatisation, inhibit effective testimony, and discourage victims from reporting misconduct in the first place.[1347] The key argument raised in support of direct cross-examination hinges on its supposed effectiveness in revealing the truth.[1348] Proponents argue that it allows for an intensive scrutiny of a witness's testimony and puts the accuser under pressure to maintain their account.[1349] However, this argument fails to consider the unique dynamics of sexual misconduct cases, which often involve intense power imbalances, emotional trauma, and the intricacies of consent.[1350]

Evidence has shown that high-pressure situations induced by direct cross-examination can impair a victim's ability to provide coherent and accurate testimony.[1351] Moreover, the confrontational nature of this process may serve to further victimise an already traumatised individual.[1352] This is the case even though there is little evidence to support the probative value

[1344] M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.
[1345] Ibid.
[1346] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 395.
[1347] M R Triplett 'Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection' (2012) *op cit* note 1072.
[1348] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 533-534.
[1349] Ibid.
[1350] Ibid at 539; A Poyer 'Separate and Unequal: The Genesis of a Gender-Biased Campus Disciplinary System for Sexual Violence Survivors in California' (2021) *op cit* note 1196; W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 370-371.
[1351] W J Migler 'An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings' (2017) *op cit* note 1191 at 369.
[1352] Ibid at 369-370.

of direct cross-examination.[1353] The insistence on maintaining this mode of interrogation in university disciplinary proceedings can act as a barrier for victims, dissuading them from coming forward to report instances of sexual misconduct.[1354]

A more empathetic, trauma-informed approach should be considered. One such alternative could be to allow respondents to submit their list of questions to a neutral third party, such as the panel of adjudicators.[1355] This panel, especially if they are trained in handling cases of GBV, would be better positioned to pose the questions in a way that is respectful and less likely to cause additional trauma to the victim.[1356] They could ensure that all relevant questions are addressed without resorting to aggressive or invasive tactics that may cause further harm.[1357]

This approach should not be seen as undermining the respondent's right to a fair hearing, but as an essential adjustment in the process to accommodate the unique sensitivities surrounding cases of sexual misconduct. The essence of the right to challenge adverse allegations remains intact, but it is the manner of this challenge that must be reformed in the interest of creating a more supportive environment for victims.

7.4. Beyond Retribution: Restorative Justice in Sanctioning

The previous discussion largely focused on the nature of the hearing, developing a fair, procedurally sound, and victim-supportive process, and exploring potential limitations to the respondent's right to be heard. This model uses as its foundation the adversarial model of adjudication and proposes mitigating measures to minimise victim re-traumatisation. Furthermore, I addressed potential implications of these measures on the rule against bias.

Now, the focus shifts to the sanctioning stage of the process.

The sanctioning process typically begins after an adjudication panel has found the respondent guilty.[1358] The university first presents evidence to justify a harsher sanction – this is known as aggravation of sanction.[1359] The respondent then has an opportunity to present evidence in

[1353] Ibid at 368.
[1354] S O'Toole 'Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination' (2017) *op cit* note 14 at 539.
[1355] Ibid.
[1356] Ibid at 539.
[1357] Ibid at 540.
[1358] M Opperman 'A Practical Guide to Disciplinary Hearings' (2011) *op cit* note 1261 at 22.
[1359] Ibid at 22-23.

mitigation; essentially reasons why the panel should consider a more lenient punishment.[1360] The panel then deliberates, decides, and provides written reasons.[1361]

However, an essential third step can enhance this process – the incorporation of restorative justice practices.

Incorporating restorative justice into sanctioning can change the way that universities handle sexual misconduct cases and significantly improve victims' experiences.[1362] Victims do not always seek retribution; often they want their experiences heard, their suffering acknowledged, and the harm done to them recognised by their perpetrator.[1363] A victim-supportive process should allow victims to actively participate in determining sanctions and how their suffering can be remedied.[1364] As such, I propose two recommendations: the inclusion of victim impact statements and the active involvement of victims in designing sanctions.

7.4.1. The Power of Voice: Implementing Victim Impact Statements

A victim impact statement is a written or spoken statement prepared by a victim of a crime to describe the emotional, physical, psychological, and sometimes financial impact of the crime on their life during criminal proceedings.[1365] It is made during the sentencing phase of a trial, giving the victim a voice, and helping the court understand the full extent of the harm caused

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[1360] Ibid at 23.

[1361] Ibid at 23-24.

[1362] M P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) *op cit* note 18 at 246 & 254; A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 394.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 322.; A Bull & E Shannon 'Higher Education After #MeToo: Institutional responses to reports of gender-based violence and harassment.' (2023) *op cit* note 1168 at 28.

[1363] M P Koss et al 'Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance' (2014) *op cit* note 18 at 246-247; S J Kirven 'Isolation to Empowerment: A Review of the Campus Rape Adjudication Process' (2014) *op cit* note 1078.; C Cowan & V E Munro 'Seeking campus justice: challenging the 'criminal justice drift' in United Kingdom university responses to student sexual violence and misconduct.' (2021) *op cit* note 1106 at 322. A Bull & E Shannon 'Higher Education After #MeToo: Institutional responses to reports of gender-based violence and harassment.' (2023) *op cit* note 1168 at 28.; J Goldscheid '#MeToo, Sexual Harassment, and Accountability: Considering the Role of Restorative Approaches' (2021) *op cit* note 1174 at 708 & 712.

[1364] A B Cyphert 'The Devil is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX' (2018) *op cit* note 1175.

[1365] The United States Department of Justice 'Victim Impact Statements' available at *https://www.justice.gov/criminal/criminal-vns/victim-impact-statements*, accessed on 15 December 2023.

by the offender.[1366] The statement can influence the judge's sentencing decision, providing a deeper understanding of the consequences of the offender's actions.[1367]

While victim impact statements are common in US criminal law, their potential significance in this context is immense.[1368] Allowing victims to express the effects of sexual misconduct to the offenders can be a powerful and empowering experience.[1369] These statements provide a platform for victims to voice the harms they have suffered in their own words and gain public recognition for the ways their lives have changed due to these experiences.[1370] This process aligns with Kirven's conception of restorative justice, which emphasises the recognition and repair of the harm caused and the ability of victims to tell their stories in their own way, and in their own words.[1371]

7.4.2. Reimagining Victims as Key Stakeholders in Sanctioning

In addition to victim impact statements, involving victims in the sanctioning process is another empowering step that enhances a victim-supportive approach to adjudication. This could involve giving victims an opportunity to propose their own recommendations and reasons for what the sanction should be, much like the statements given by the parties in aggravation and mitigation. This involvement allows university disciplinary tribunals to diversify the types of sanctions imposed and make room for restorative types of sanctions alongside retributive ones.[1372] Although these recommendations would not be binding on the panel, they would provide adjudication panels with insights into victims' needs when it comes to sanctioning their assailants and crafting victim-centred responses to sexual misconduct on their campuses.[1373]

7.5. Final Thoughts: The Hybrid Model's Contribution to Universities' Adjudication

The hybrid model proposed in this chapter not only pioneers a novel approach to adjudication in cases of sexual misconduct within South African universities, but it also significantly

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[1366] Ibid.
[1367] Ibid.
[1368] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6 at 398.
[1369] Ibid at 398.
[1370] S J Kirven 'Isolation to Empowerment: A Review of the Campus Rape Adjudication Process' (2014) *op cit* note 1078 at 4.
[1371] Ibid at 4.
[1372] A B Cyphert 'The Devil is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX' (2018) *op cit* note 1175.
[1373] Ibid.

impacts the field by providing a reasoned justification that interleaves procedural fairness and Natural Justice with victim-supportiveness. This model is grounded in my conviction that process matters, and the legitimacy of an outcome is rooted in the justice of the process leading to it. It obliges adjudicators to exhibit impartiality and objectivity, underpinned by a rigorous application of consistent rules, and it invokes the robust protections of PAJA[1374] at its very core.

What sets this model apart is its clear recognition of the parallel importance of procedural fairness and victim-supportiveness, presenting them as complementary and not conflicting elements. It addresses the unique challenges associated with sexual misconduct adjudication, blending in elements of flexibility and creativity. The model proposes justifiable limitations on the right to be heard and nuanced understandings of bias, thereby preventing potential re-traumatisation. At the same time, it incorporates restorative justice practices in sanctioning, offering a comprehensive approach that holistically considers the needs of all parties involved. By incorporating victim impact statements and involving victims in the sanctioning process, this approach transcends conventional adversarial methods and produces a process that is more attuned to the realities of victims.

This approach proposes a novel model of adjudication that delivers justice in all its forms: procedural, substantive, and restorative. It is a valuable contribution to the discourse surrounding sexual misconduct within universities, promising more effective, equitable outcomes that can transform the landscape of university adjudication for the better.

[1374] Promotion of Administrative Justice Act 3 of 2000.

CHAPTER 8

CONCLUSION

8.1. A JOURNEY RECOUNTED

In Chapter 1, I set out that this dissertation traverses the journey of moving universities from a place of haphazard and harmful adjudication to a carefully crafted and theoretically grounded approach to the disciplinary process for sexual misconduct. In the subsequent chapters, I set out the theory, tools, and mechanisms that can effectively create this shift.

I began this journey with a sombre backdrop: that universities in South Africa conduct sexual misconduct disciplinary proceedings in a manner that inadvertently inflicts harm upon victims. These processes are deficient in procedural guidelines, sometimes overlooking the fundamental rights of both the accused and the victim. Recognising this gap, I was driven by the conviction that we could establish a more organised and theoretically informed process for adjudicating sexual misconduct, one which would seamlessly integrate a sound decision-making framework with victim-supportive measures.

To realise this vision, I meticulously examined the policies of thirteen South African universities, scrutinising them through the dual lenses of procedural fairness and victim-supportiveness. By harmonising the principles of Natural Justice with inquisitorial practices and restorative justice, I strived to design a hybrid model of adjudication. This model aspires to cater to the intrinsic needs of all involved parties, laying out a blueprint for a unique form of adjudication that minimises re-traumatisation of sexual misconduct victims. The underlying message is paramount: for victims to trust and use the disciplinary process within universities, institutions must put in place meticulously curated procedural rules. These rules, complemented by numerous supportive measures, enable the adjudication of sexual misconduct cases that is just and victim-supportive.

This dissertation does not purport to address every aspect of a multifaceted approach to campus sexual misconduct, but it recognises that the disciplinary process is an important institutional instrument in responding to sexual misconduct, and thus requires careful consideration. With this chapter, I intend to draw together the steps taken, and lessons learnt along the way, which have culminated in a journey that has been as enlightening as it has been transformative.

8.2. Re-tracing the Steps Taken

The research question asked in this dissertation is: do South African universities have policies on sexual misconduct that provide for just and victim-supportive processes, and what measures must be put in place in order for them to do so? Answering this question necessitated a two-pronged approach: first, an analysis of the current landscape to respond to the first half of the question, and second, the development of an innovative, forward-thinking proposition to address the latter half.

I began, in Chapter 2, by delving into the academic discourse surrounding university policies on sexual misconduct. By sifting through meta-analyses of South African institutional approaches and discussing recurrent themes in policy development and implementation, I gauged the scholarly pulse on the issue. As Walker suggests, there's an abundance of opinions on how disciplinary processes should function and the nature of policies governing sexual misconduct in universities.[1375] However, a gap exists in literature on the disciplinary process itself, and how to develop it within a sound decision-making framework so that the process is not only just but also minimally re-traumatising for victims. It is in this gap that my dissertation takes root. This exploration of the current landscape continued into Chapter 3 wherein I canvassed the laws and national policy frameworks that form the legal basis of institutional policy development.

In Chapter 4 I introduced the theory of Natural Justice and procedural fairness as the theoretical framework I would be employing for both the analysis of existing university policies and the development of my own reasoned proposition of what a just process looks like. My choice of this theory lay in the conviction that a truly just system should be anchored in the principles of Natural Justice, epitomised by the twin principles of *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (the rule against bias). I argued that channelling decisions through a procedural fairness lens bolsters trust and ensures that accused students comprehend and feel assured that their rights—to present their case, contest adverse allegations, and be judged impartially—are vigorously safeguarded. Further, I put forth that outcomes derived from such a process garner the respect and acceptance of all involved,[1376] and this not only serves accused

[1375] T Walker 'Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation' (2018) *op cit* note 9.
[1376] A Konradi 'Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland' (2017) *op cit* note 6.

students and victims but fortifies the trust of the entire campus community in the disciplinary procedure, bolstering its credibility as a legal recourse mechanism.[1377]

Employing the lens of procedural fairness and with an eye to determine current victim-supportive practices, I then analysed the current policies of South African public universities in Chapter 5. Several revelations emerged. Encouragingly, almost all universities had a separate policy addressing sexual misconduct. Yet less than half had provisions for specialised tribunals or specialised training for adjudicators. One third outlined comprehensive rules of evidence and procedure, while two-thirds introduced protective measures for victims. Regrettably, only four universities identified the importance of lawyers for victims as a protective measure, integrating them into their policies. Further insights from this chapter touched upon victim support, definitions of misconduct, the model of the proceedings, and the respondent's rights to representation and cross-examination of the victim.

Chapter 5 effectively laid the groundwork for the chapters that would follow. It painted a picture of universities that possess some mechanisms for thorough adjudication, but which, in many cases, still fall short in offering comprehensive victim support and robust procedural protections. Through this analysis, I was able to answer the first half of my research question in the negative – that South African universities do not presently have policies in place that provide for just and victim-supportive processes – enabling me to then embark on the road to proposing measures to be put in place in order for them to do so.

At a pivotal point in Chapter 6, this dissertation introduced a caveat: while procedural fairness is critical, it alone is not sufficient. Unwavering adherence to procedural protections can inadvertently harm victims. This revelation underscored the necessity to devise strategies ensuring that while procedural fairness remains the backbone of the adjudication process, disciplinary proceedings are adapted to contain measures that are victim-supportive.

In this chapter, I argued that such measures are not merely tokenistic concessions in the face of changing social expectations, but rather that they are indispensable. By incorporating them, I stated, we ensure that disciplinary proceedings remain approachable and accessible for victims and stand as inviting avenues for recourse. Such incorporation signals that the system acknowledges and respects the rights of victims: to have their voices heard, to be insulated from re-traumatisation, to find the process of adjudication free of needless complexities, and

[1377] Ibid.

to be provided consistent protection and support. In this chapter, I relied on Konradi's research to assert that victim-supportiveness and procedural fairness do not exist in a zero-sum relationship.[1378] Her findings proved an important point: universities that offer pronounced victim protections often also uphold robust procedural protections for those accused.[1379] This provided further evidence for the need for a model of adjudication that provides both procedural fairness and victim-support – in their duality.

In Chapter 7 I proposed such a model. Grounded in the adversarial system of justice as one that observes strict procedural protections, blended with the more empathetic inquisitorial system, and bolstered still by restorative justice practices, this model proposes a new approach to sexual misconduct adjudication in South African universities.

8.3. The Resolution: What Have I Learnt?

Bondestam and Lundqvist argue that, despite the extensive research on campus sexual misconduct, our understanding remains limited because the same questions have been asked over the past three decades.[1380] This prompted introspection on my part: have I posed a unique question, and crucially, have I answered it?

My research question was set as: do South African universities have policies on sexual misconduct that provide for just and victim-supportive processes, and what must be put in place in order for them to do so? By examining this disciplinary process holistically, I have tackled the intersection of procedural fairness and victim-supportiveness. Using Natural Justice and procedural fairness as a theoretical foundation and combining it with a victim-supportive approach, I have highlighted the gaps in the current state of sexual misconduct adjudication within South African universities and suggested strategies to bridge them.

Within this procedural fairness framework, I have argued for the indispensable role of gender-based violence experts in ensuring nuanced and unbiased adjudication. I have asserted that limiting the right to be heard – by preventing direct cross-examination of victims and introducing formal rules of evidence – is essential. Further, by championing restorative justice practices, from the inclusion of lawyers for victims to the sanctioning process of disciplinary

[1378] Ibid.
[1379] Ibid.
[1380] Fredrik Bondestam & Maja Lundqvist 'Sexual Harassment in Higher Education - A Systematic Review' (2020) 10 *European Journal of HIgher Education*.

hearings, I have crafted a holistic hybrid model. This approach, rooted in adversarial adjudication and committed to protecting both accused rights and victims' interests, is the key to transforming the disciplinary process for sexual misconduct.

This body of work is important. As Wilgus and Lowery state, "adjudicating sexual violence matters … and requires practitioners to navigate the labyrinth morass of legislation, case law and federal guidance … with sophistication and precision rarely required in non-sexual violence matters".[1381] As I have learnt, it requires a degree of finesse that harnesses empathy and legal vigour in equal measure and does not undercut the importance of showing just the right degree of sensitivity to the matter at hand and the people who have experienced it. I have shown that there is ample room to be creative and intentional in policy development and reimagining the disciplinary process for sexual misconduct.

Here my journey ends, one that has been characterised by legal imagination and traipsing into the unknown, and that has taken up the opportunity to return to the proverbial drawing board of sexual misconduct policies and incorporate what we now know. But do we, as institutions of higher learning, have the courage to go there? That is another expedition altogether. It requires sound implementation of the good policies this dissertation is calling for and it is an excellent point of departure for further study in this field.

8.4. My Personal Reflection

When I set out to write this dissertation, I knew that I wanted it to be more than merely an academic exploration of procedure and evidence. For me, it is and has always been a passion project; an opportunity to reclaim voice for survivors and to transform university campuses into safe spaces for (predominantly) young women. What I learnt is that the process of reporting and adjudicating sexual misconduct is an incredibly violent one; one that is marred with procedural uncertainty, an undue burden on complainants, and poor decision-making.

So, I asked myself what we could do differently. How could we change the process so that it is fair, victim-supportive, and just? At the core of this was gaining an understanding of what, really, justice is. As an advocate, justice for me will always be the punishment of perpetrators. However, as a scholar, justice had to be construed more broadly. A just outcome, I have argued,

[1381] J K Wilgus & J W Lowery 'Adjudicating Student Sexual Misconduct: Parameters, Pitfalls, and Promising Practices' (2018) *op cit* note 790 at 83.

is one that is reflective of a zero-tolerance approach to sexual misconduct and is born of a process that is both procedurally fair and victim-supportive.

From re-traumatisation to rightful recourse, the pathway is neither simple nor straightforward. But it's a journey worth embarking upon, for at its core lies the dignity, respect, and well-being of those who entrust their stories and their trauma to the institutions that are meant to support and protect them.

I wanted for this dissertation to transform lives and perspectives, and to lay a foundation for what I hope will be a long career in implementing law reform. If perhaps, I thought, we could rethink just this one aspect of institutional responses to sexual misconduct, we could open up room for an entirely different survivor experience and, hopefully, for eliminating this violence altogether.

I hope that I have done that.

If this dissertation has been more than an academic exploration, if it has dared to push the boundaries of legal thinking and forced us to imagine the state of our universities as more than just what they are, but also what they can and should be, then it has achieved its purpose: a restoration of dignity, power, and agency; and a reclamation of my voice.

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