



Sexual Offences on Campus: Challenges in the Disciplinary System

by

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DECLARATION

I, the undersigned, Chyanne Isaac, hereby declare that:

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ABSTRACT

Gender Based Violence (GBV) is not just an institutional problem but a global one. Higher education institutions have come under fire for inadequate policies and processes to address sexual violations on campus. Despite progressive policy revisions and advocacy at South African universities over the years, there is no indication of either a reduction in the number of cases or an increase in confidence in institutional responses to sexual offences. This dissertation reviews the sexual offences policies and procedures at six South African universities and highlights the challenges in the university student disciplinary process. Drawing the distinction between a criminal trial process and administrative hearing process, I make recommendations for procedural changes to the university disciplinary process that protects the complainant in a sexual offences case from unnecessary trauma during hearings.

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Dedication

This dissertation is dedicated to the one who is so young and yet so wise, who sets the bar for excellence so high, with a compassionate heart and indomitable spirit, my biggest fan and most honest critic, my beloved only child, Zander Skye Isaac.

If you are ever in doubt, choose integrity and justice every single time!

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I 1: INTRODUCTION

Introduction Tracking the voices on university sexual violence

Empowering women and being cognisant of gender equity are imperatives at higher education establishments.¹ A significant percentage of women in South Africa have suffered sexual abuse or violence. South African rape reports were noted to be the highest in the world by 2001,² and these figures were consistent over the next 10 years at between 63 818 and 70 514.³ South African women had, and continue, to contend with pervasive patriarchal attitudes in their communities, as well as fighting against an apartheid system of government. This contributed to violence against women then and now.⁴

Women between the ages of 16 and 25 are identified as more likely to experience a rape violation.⁵ Because many cases are never reported to the State or to family members, the true extent of sexual violence is difficult to determine.⁶ South African Higher Education Institutions (HEIs) register students who come from different cultural and socio-economic backgrounds, many of whom come from poorer families.⁷ For many, the high school experience of gender relationships is more regimented and controlled than at a university.⁸ For both young men and women, there is sometimes a lack of knowledge and experience of how to engage respectfully and safely with the opposite sex.⁹ Even though most South African universities address gender-based violence (GBV) and sexual harassment at a policy level, several factors play a role in perpetuating sexual offences and other forms of GBV. Poorly regulated student

¹ Christine Dranzoa 'Sexual Harassment at African Higher Education Institutions' (2018) *International Higher Education* 94 at 4.

² Dee Smythe, *Rape Unresolved* (2015) 17.

³ Ibid.

⁴ Ibid.

⁵ Patience Mpani & Nondumiso Nsibande 'Understanding Gender Policy and Gender-Based Violence in South Africa: A Literature' available at: <https://www.soulcity.org.za/campaigns/gbv/resources/understanding-gender-policy-and-gender-based-violence-in-south-africa-a-literature-review>, accessed on 8 February 2020.

⁶ Ibid at 5.

⁷ Rachel Jewkes 'Gender-based violence in South African higher education: Best practice in prevention and responses?' *South African Medical Research Council* at 1, available at <http://www.headsconference.co.za/site/Presentations/FRIDAY%20PDF/Prof%20Rachel%20Jewkes%20GBV%20in%20SA%20Higher%20Education%20Best%20practices.pdf> [accessed November 2018]

⁸ Ibid.

⁹ Ibid.

housing, traditional patriarchal attitudes, and substance abuse are some of the contributing factors to sexual offences.¹⁰

The prevalence of sexual violations at HEIs has far reaching socio-economic and political ramifications for students. Anxiety, depression and poor health, as a result of sexual abuse, affects a student's ability to perform academically.¹¹ While most sexual offences occur between parties who are known to each other, the further consequence of these offences occurring within the university context is a sense of institutional betrayal insofar as inadequate institutional responses are concerned.¹² This increases the trauma experienced by a student.¹³

This dissertation addresses challenges in the disciplinary system for sexual offences at university campuses in South Africa. It aims to make recommendations on disciplinary processes for sexual offences that favour minimal secondary victimisation to complainants, by proposing procedural and policy changes to university disciplinary practices. In this dissertation I describe the challenges associated with prosecuting rape complaints on campus and review the sexual harassment and sexual offences policies at six national universities. This is to determine whether the procedural directives in the policies provide a safe environment for the complainant, whilst ensuring a fair and equitable process to the respondent in such proceedings.

This is important because sexual offences at South African campuses are a widespread and pervasive issue. Although the recent protests and activism on GBV at campuses have been widely broadcast in the media, sexual offences have been a problem at campuses for decades.¹⁴ Young women entering university for the first time are especially vulnerable to sexual harassment and sexual violence. Restrictions that may have been placed on them at home are no longer in place and the lack of protection makes them even more susceptible to sexual violence.¹⁵ Preventing sexual violence at universities is of paramount importance and it has been suggested that

¹⁰ Jewkes op cit note 7 at 7.

¹¹ Astrid Teffrey-Goatley et al 'What does it mean to be a young African woman on a university campus in times of sexual violence? A new moment, a new conversation' (2018) 8(8) *Behavioural Sciences* at 1.

¹² Ibid.

¹³ Ibid.

¹⁴ Giselle Warton & Gerald Moore 'Gender-Based Violence at Higher Education Institutions in South Africa' available at <https://www.saferspaces.org.za/understand/entry/gender-based-violence-at-higher-education-institutions-in-south-africa1>, accessed on 8 February 2020.

¹⁵ Ibid at 14.

universities practice a zero-tolerance policy.¹⁶ It is vital that HEIs mitigate the risk to staff and students and respond in a proactive manner to victimisation. The university community should be empowered to take precautions in preventing incidences of GBV and be able to find immediate assistance when sexual offences occur. Further, as Jewkes et al argue, universities have an obligation to educate men on campus.¹⁷

Policy Development

South Africa is a signatory to several international conventions on gender equality and violence against women.¹⁸ The Department of Higher Education and Training (DHET) is responsible for ensuring legislative and policy compliance with directives on GBV interventions.¹⁹

Policy development at HEIs in South Africa began to evolve more visibly over the last few years, especially at universities that were committed to gender parity. Universities that did not appear to take cognisance of the need to develop policies had no choice but to begin policy-making on sexual harassment and GBV as a result of activism, both internally and in the broader society context.²⁰ Changes in university leadership who were more sympathetic to gender issues and the passage of national legislation on sexual offences were also contributing factors to policy development.²¹ Between 1997 and 2007, institutions were concerned about the negative impact of certain prominent court decisions regarding labour law and sexual harassment,²² resulting in most universities in South Africa establishing sexual harassment policies and procedures to handle complaints. The early 1990s saw the introduction of policies and complaints processes at both the University of Cape Town (UCT) and Stellenbosch University (SU).²³ These universities enacted policies and procedures in generally unreceptive university environments. Policies were enacted to correct the

¹⁶Jewkes op cit note 7 at 7.

¹⁷ Ibid.

¹⁸ Ibid at 6.

¹⁹ Ibid.

²⁰ Amanda Gouws & Andrietta 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* 1 at 68.

²¹ Ibid.

²² Warton & Moore op cit note 14 at 1.

²³ Warton & Moore op cit note 14 at 1.

injustice of GBV at a time when the applicable laws were unclear.²⁴ Each of the 6 reviewed universities now has their own institutional rules and policies that govern GBV, with no single document or policy that guides all universities on this issue.

From the beginning there was doubt as to whether the new policies were reaching those impacted by sexual offences.²⁵ Low reporting numbers gave rise to questions about the effectiveness of the policies and whether implementation was taking place at universities. Minimal support was evident, as universities appeared to be more concerned with their reputations and were reluctant to engage with sexual harassment for fear of public disdain.²⁶ The lack of adequate disciplinary measures to address rape accusations resulted in a lack of trust in the university. The complaints procedures were viewed with scepticism. It became apparent that there was a gap between the policy enactment and the implementation of the policy.²⁷

Strong policy frameworks are an important aspect of institutional responses to GBV.²⁸ In September 2019, after the death of a university student,²⁹ Professor Ahmed Bawa, CEO at Universities South Africa (USAf), was quoted in a media report stating that South African universities must not just acknowledge GBV but should become the drivers of change in the institutional culture that perpetrates such heinous violence. He suggested that universities must act collaboratively in raising the standard of expectations in this regard and become the instigators of morality, reflecting that morality back to society.³⁰

In June 2019, a ministerial task team was constituted by the DHET to develop a policy framework for addressing GBV at universities, after academics published an open letter stressing the need for urgent intervention.³¹ The objective of a policy framework is to serve as a basis for effective policies and practices addressing the

²⁴ Carrie A. Moylan and McKenzie Javorka 'Widening the lens: An ecological review of campus sexual assault' (2018) 21(1) *Trauma, Violence, & Abuse* 179.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid* at 72.

²⁸ *Ibid.*

²⁹ Jan Gerber 'Universities must be catalyst for change to fight violence against women – USAf' *News24*, 3 September 2019 available at <https://www.news24.com/SouthAfrica/News/universities-must-be-catalyst-for-change-to-fight-violence-against-women-usaf-20190903>, accessed on 8 February 2020.

³⁰ *Ibid* at 29.

³¹ 'Ministerial task team on gender-based violence at universities set up' *GoLegal*, 9 June 2019 available at <https://www.golegal.co.za/gender-based-violence-universities/>, accessed on 8 February 2020.

multifaceted challenge at HEIs, including providing advice to the DHET on defining GBV; setting up mechanisms to support complainants; ensuring educative processes are extended to the campus environment; and establishing supportive mechanisms for HEIs in implementing best practices around GBV.³² The draft policy was set to include guidelines on national and international imperatives that direct responses to GBV, including prevailing legislation and policies.³³ The relevant laws and policy directives covering this area include the South African Constitution,³⁴ the Criminal Law (Sexual Offences and Related Matters) Amendment Act,³⁵ Domestic Violence Act,³⁶ the DHET policy on addressing GBV, and the Promotion of Equality and Prevention of Unfair Discrimination Act,³⁷ which are all vital legal instruments that guide HEIs in their obligation to effectively respond to GBV on campus.³⁸

A National Policy Framework for the Management of Sexual Offences Matters (NPF) was formulated in 2012 after years of collaborative engagement between the public and the South African government, with a view to providing a harmonised response to sexual violence in South Africa.³⁹ The DHET is a named stakeholder in the NPF.⁴⁰ The key responsibilities for HEIs under the NPF are to develop standards, guidelines and policies on how to manage sexual offences.⁴¹ Educators at HEIs are required to be trained in the supervision of how sexual offences are handled.⁴² Staff that are assigned to handle sexual offences are required to be provided with the necessary support.⁴³

The 2012 NPF is a guiding document for the intersectoral management of sexual offences. However, there is no specific guiding document for HEIs to follow. The DHET, working together with Higher Education and Training HIV/AIDS

³² Ibid.

³³ Ibid.

³⁴ Constitution of the Republic of South Africa, 1996.

³⁵ 32 of 2007.

³⁶ 116 of 1998.

³⁷ 4 of 2000.

³⁸ "Of concern is that whilst most universities have policies governing GBV, most vocational education and training (TVET) colleges do not." Lindsay Clowes, Tamara Shefer & Elron Fouten et al 'Coercive sexual practices and gender-based violence on a university campus' (2009) 23 *Agenda* 80 at 11-12.

³⁹ Department of Justice and Constitutional Development *National Policy Framework-Management of Sexual Offences Matters* (June 2012) at 7, 9, 35.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

Programme (HEAIDS) and in collaboration with other role-players, are creating an overarching framework for universities and Technical and Vocational Education and Training Colleges (TVETs). This is a vital move in assisting HEIs to effectively respond to and address GBV.⁴⁴ Minister for Higher Education, Science and Technology, Dr Blade Nzimande, confirmed in a media announcement that a policy framework to guide the Post School and Education Training (PSET) institutions on effective management of GBV was underway and finalisation of the policy was envisaged for early 2020.⁴⁵ The Policy Framework to Address Gender-Based Violence In the Post- School Education and Training System was published in July 2020.

The focus on the developments in policies at HEIs has largely centred on the directives in the policy, and reporting and support of survivors, with little attention to improving disciplinary procedures.

Student Dissatisfaction

In South Africa there are regular reports of student and staff dissatisfaction with how sexual offences cases are handled by universities. Dr Ruby-Ann Levendal, Director: Transformation (Monitoring and Evaluation) at the Nelson Mandela University is quoted as saying that systemic challenges lead to under-reporting of cases, which is largely attributed to the fact that the burden of proving a case lies with the victim.⁴⁶ She further notes that survivors are reluctant to proceed in lengthy processes that compound their traumatic experiences.⁴⁷ The same article reflects on the 2015 student protests at Rhodes University, which highlighted student outrage at the university's failure to adequately deal with disciplinary cases.

Similarly, and in a step forward, because of a sexual harassment scandal, the University of the Witwatersrand (Wits) engaged a commission of inquiry to evaluate their sexual harassment and other policies. In short, they found the Wits policy was

⁴⁴ DOJ&CD op cit note 40 at 11, 12, and 16.

⁴⁵ 'Post-school education for all' *Bizcommunity*, 15 July 2019, available at <https://www.bizcommunity.com/Article/196/371/193182.html>, accessed on 8 February 2020.

⁴⁶ Ruby-Ann Levendal 'Addressing gender-based violence at NMMU' Nelson Mandela University, available at <https://news.mandela.ac.za/News/Addressing-gender-based-violence-at-NMMU>, accessed on 8 February 2020.

⁴⁷ Levendal op cit note 47.

precise, although nebulous in its implementation.⁴⁸ Executing the policy was challenged by a lack of training of relevant role players who were responsible for implementation of policies, including the disciplinary structures and panels chairing the processes. The inappropriate use of the criminal standard of proof as opposed to the balance of probabilities standard of proof also presented challenges for an effective system. Essential functions of the policy could not be implemented due to a dearth of fiscal and other resources from the University.⁴⁹ A 2013 revision of the Wits Policy was drafted that provided clear guidelines on responding to sexual offences misconduct. A designated office receives, investigates and channels informal and formal cases to the relevant structures.⁵⁰ Panel members are required to be suitably qualified, trained and to have the necessary background to hear these matters. Clear guidelines ensure that disciplinary processes are implemented and support structures for the complainant are made available, both of which are also monitored with directives on accountability measures.⁵¹ The commission of inquiry also directed that the relevant departmental stakeholders be specialists in skills and knowledge relating to sexual harassment. This was especially relevant for those involved in the disciplinary processes of such matters.⁵² This is reflected in the revised policy.

A 2007 article tracked the evolution of policies and practices of Rhodes University regarding sexual violence. Rhodes University was an all-male institution, with its first female learners only entering the institution in the 1940s.⁵³ The culture was male dominated with the appearance of undervaluing women. Referring to the institutional culture at Rhodes, De Klerk, Klazinga and McNeill state, "*the habitus of the dominant tends to pervade the social system, making it difficult for those with an alternative 'habitus' (such as females and racial minorities) to participate as equals*".⁵⁴ There was no reporting office or mechanism for women to report sexual offences. In 1985 the Student Representative Council (SRC) insisted that a Crisis Care facility be

⁴⁸ Ibid.

⁴⁹ Gouws & Kritzinger op cit note 21 at 6-7.

⁵⁰ Ibid.

⁵¹ Wits sexual harassment, sexual assault and rape policy and procedures, HRG/10 S2013/2046 7 April 2014, available at <https://www.wits.ac.za/media/migration/files/cs-38933-fix/migrated-pdf/pdfs-10/Document%2019%20%20Wits%20Sexual%20Harassment%20Policy%20Final%201013.pdf> Accessed July 2018.

⁵² Ibid at 8.

⁵³ Vivian de Klerk, Larissa Klazinga & Amy McNeill 'The habitus of the dominant: addressing rape and sexual assault at Rhodes University' (2007) 21 *Agenda* 74 at 115.

⁵⁴ Ibid.

set up, following evidence of attempted rapes and other attacks on women.⁵⁵ After many reports of assaults on women and an SRC survey that demanded more student support, a Counselling Centre was finally opened in 1986.⁵⁶ Little progress was made after that. The article reflects on two rapes reported by students, in 2004 and 2007. The 2004 and 2007 incidents were different in some ways, but similarities may also be drawn. Both complainants were residence students, but each student had a different degree of support from the residence warden. Both complainants had received psychological counselling, but the presence of the psychologist at the hearing was only evident in the 2007 case. The significant difference is that the response from the university in the first case was reactive, whilst the second case elicited a proactive response from the university.⁵⁷ The Rhodes example of the historical progression on institutional responses to gender and sexual violation matters, coupled with the changes in the policies and practices, is similar to the experiences of most South African universities.

In August 2019 a UCT female student, Uyinene Mrwetyana, was raped and murdered at a local post office by a post office official. The South African President, Mr. Cyril Ramaphosa, is quoted as saying:

“We have just commemorated Women's Month. Sixty-three years after the women of 1956 marched for the right to live in freedom, women in this country live in fear – not of the apartheid police, but of their brothers, sons, fathers and uncles. We should all hang our heads in shame.”⁵⁸

Her death inspired the #AmINext movement against GBV on campuses and across South Africa, with national universities motivated to accelerate campaigns against GBV.⁵⁹

⁵⁵ Ibid at 117-118.

⁵⁶ Ibid at 118.

⁵⁷ Ibid at 123.

⁵⁸ Mpho Raborife 'God is truth' *News24*, September 2019, available at <https://aminext.news24.com/>, accessed on 1 October 2019.

⁵⁹ Ibid.

Mapping the contribution of this dissertation

Investigations into campus violence have generally been focused on protective measures and risk factors that contribute to victimisation of the complainant.⁶⁰ While this is important, I argue that the services that a university provides must be seen to include the university disciplinary processes and the extent to which it might constrain other protective practices on campuses. Recently in the United States, accounts of perpetrators receiving inequitable treatment in disciplinary hearings have led to the suggestion that universities utilising a trial type of disciplinary process offer a greater degree of due process to both the perpetrator and the survivor.⁶¹ In this dissertation I argue against a criminal trial type of disciplinary process and in favour of the prescripts of an administrative process, which will afford the alleged perpetrator a fair and equitable process, whilst maintaining a practice that minimises secondary trauma to the complainant. I argue that this, in turn, encourages reporting and will restore confidence in university responses to sexual offences and GBV.

I approach this question of whether universities follow an administrative process, and if procedures are designed to reduce secondary trauma to survivors. by first reviewing, in the following chapter, the current literature on institutional responses to sexual offences in South Africa. I look at revised policies that deal with reporting and evaluation of cases, hearing panel compositions and whether the disciplinary procedures meet the objectives of such policies. In reviewing both policy and procedure for sexual misconduct I highlight the gaps and challenges in university processes. The chapter discusses policy making versus policy implementation and the lack of a nexus between the two.

⁶⁰ Moylan & Javorka op cit note 25 at 375.

⁶¹ Warton & Moore op cit note 14 at 1.

II PROSECUTING RAPE ON CAMPUS - A HYPOTHETICAL CASE STUDY

a) Introduction

This chapter sets out a hypothetical case study⁶² of the adjudication of rape on campus, to explore the differences between a criminal process and an administrative process. The comparative discussion of the criminal and administrative processes shows how a blurring of the processes affects not only the possible outcomes of cases in the disciplinary system at universities, but the negative effects on complainants who go through the process of initiating cases at university disciplinary hearings. A further discussion on the differences between the standard of proof required by the respective legislation for each process suggests how unnecessary it is for complainants to experience the level of frustration and trauma that they do at institutional hearings.

b) The Case Study

(i) Background

Jen and Ray⁶³ are both students living at separate university residences. They are neither friends nor acquaintances but have seen each other around at university and social events. Ray is dating, but not exclusively. Jen has never been in a relationship and has not had sexual intercourse with anyone. She has openly stated to friends that she intends to remain a virgin until marriage. Whilst she has consumed alcohol on occasion, she is not a regular drinker. The university residence that Jen resides in has several entry points and visitors need to sign a register at reception on entry and exit. On a Friday night, both Jen and Ray attend a social event organised by mutual friends. This party takes place off campus. The next morning Jen wakes up to find blood all over the sheets and soreness of her vagina. She calls her friend, and they go to a public hospital for treatment. At the hospital she agrees to having forensic evidence taken for the purposes of a criminal case. She contacts the relevant university support person and reports a case of rape against Ray. She indicates that she would like an internal hearing and is considering a criminal case as well.

⁶² The case study is a composite of various cases and scenarios that are likely to happen at internal hearings in cases of sexual misconduct and rape as experienced by myself as the evidence leader in several cases.

⁶³ Jen and Ray are fictitious names to protect any identification or possible inference to any actual persons.

(ii) Investigations and trial preparation

The reporting officer directs the case report to the disciplinary officer or evidence leader. The evidence leader leads the investigation and asks the university investigating officer to obtain official statements from the alleged perpetrator and witnesses mentioned by the complainant in her statement to the university reporting officer. The case is one of many already in the disciplinary system. This includes all student infringement cases, such as plagiarism, cheating in exams, together with sexual misconduct cases. Due to the volume of cases already in the queue, this case is delayed insofar as preliminary matters need to be attended to. A pre-trial preparation meeting with the evidence leader is also delayed due to caseloads in the disciplinary system. After a few months the case is set down for a formal disciplinary process before a university disciplinary panel.

The panel, drawn from within the university, is appointed based on the availability of persons to be members of the panel. The Proctor, who chairs the panel, is legally qualified, albeit in an area of law unrelated to sexual offences but has had extensive background knowledge of external and internal litigation matters. The other members of the panel include a staff and student representative. Both have sat as panel members on numerous cases and are experienced in internal disciplinary hearings and the relevant processes. Neither of these two panel members are legally qualified or have a background in issues relating to sexual offences and GBV. The complete panel is comprised of experienced internal disciplinary members. The respondent has been granted the right to legal representation and arrives with two legal representatives, an instructing attorney and a senior advocate. The university representative is legally qualified and has experience with sexual offences cases. That person appears both on behalf of the university and the complainant. The complainant has a lay support person from the university with her at the hearing. The complainant and her witnesses present evidence first. The respondent and his legal representatives sit directly across the conference table from the complainant, her support person and the university representative. The panel members sit at the head of the table.

(iii) *Evidence*

Jen: She met Ray at a party. They did not know each other personally but had seen each other around campus. At the party Ray chatted to her and she drank more than she ordinarily would have. At some point in the evening, she felt Ray touch her vagina. She immediately objected to this. She sent her friend, W, a message telling her how uncomfortable she was with what Ray had done. When leaving the party, she needed a lift as it was late, and she accepted Ray's invitation to be transported back to her residence. Another female friend was also traveling with them. Jen asked to be dropped off first. She felt quite drunk and got into bed without changing her clothes. She has a sketchy memory of what transpired through the night, but she remembers Ray arriving and getting into bed with her. She recalls seeing and feeling him on top of her. She felt panicked and asked him to get off her. The only other thing she remembers is Ray standing at the window. She has no further memory of the night. She wakes up to find blood on the sheets and in the bathroom. She calls W and goes to the hospital. The medical examination indicates tears and bruising of her sexual organs. She called the university reporting number. W gives evidence confirming the message she received from Jen the night of the party. She also confirms the state of distress in which she found Jen the next day. The WhatsApp message is presented to the panel.

Ray: Confirms the background to meeting Jen and that he had lifted her back to her residence. He alleges that she had invited him back to her room after he dropped off the other person in the car. He went back to Jen's room, and they had consensual sex. He admits that he entered via the parking entrance and gained access to the building and up to Jen's room via a friend who resided at the same residence as Jen. He alleges that Jen opened the door to her room and let him in. He admits that the condom found in the room belonged to him. He denies raping Jen.

(iv) *The Process*

Jen is cross-examined by the Advocate representing Ray. He has a loud voice and questions Jen in a slightly sarcastic manner. The Proctor cautions him on his manner of questioning several times. The Advocate is a tall, imposing figure, particularly in this small room, and Jen's voice begins to wither as she loses confidence. On more than one occasion, Ray is observed looking at Jen with a smirk on his face. During an

adjournment the support person and evidence leader prepare Jen for the remainder of the trial. She finalises her evidence but is clearly distressed by having to sit across the table from Ray and his representative. Evidence for both sides is concluded. The panel asks questions for clarity and then requests the medical report from the hospital. The doctor from the hospital will need to come to the hearing to speak to the medical report. The complainant agrees to having the medical details submitted. The hospital, however, refuses to release the medical report and the doctor is not available to attend the hearing. Although the university representative argues that the medical report is not necessary, the panel insists. The matter drags on for more than six months. Finally, the attending nurse submits a note detailing the medical examination. The panel insists that since they are not familiar with the medical terms the doctor will still need to come give evidence. Securing the attendance of a doctor takes another two months. After more than a year the matter is finally concluded with a guilty finding and a sanction of expulsion.

The verdict and sentence are a positive outcome for the complainant. However, the lengthy delays and legalistic process have had a detrimental effect on her. She fails several subjects and is excluded from the university on academic grounds, losing her scholarship.

c) Troubling Questions

The following are some of the questions one might ask based on the case study:

- a) Was the medical evidence necessary in an internal administrative process?
- b) Do HEIs have an obligation to adjudicate upon the criminality of the offence to the extent that it did?
- c) Did the requirements of the standard of proof in this type of hearing necessitate the level of cross-examination that was allowed, and the evidence requested?
- d) Did specialised training in adjudicating cases of sexual misconduct play a role in the challenges with the process?
- e) Was there an opportunity to explore alternative means of leading evidence from the complainant?
- f) Did the legalistic nature of the proceedings contribute to embedding further trauma to the complainant?

The subsequent discussion responds to these questions by setting out the relevant legislation, standard of proof and evidence leading for offences dealt with in both the criminal and civil/administrative processes. Through this analysis I show how particular approaches can constrain truth-finding and reinforce the trauma experienced by victims.

d) Criminal Process

(i) Legislation

Criminal Law (Sexual Offences And Related Matters) Amendment Act

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA)⁶⁴ codifies a range of issues arising from sexual offences in the criminal justice system. The intention was to have one statute to address these issues and to ensure regulation of applicable legal procedures, defences and evidentiary matters with the intention to protect the complainants in sexual offences cases. A national policy framework was to create a unified manner in addressing and dealing with sexual offences regarding administrative and implementation issues to achieve the objectives of the Act.⁶⁵ The key issues relevant to this dissertation are included here.

Section 60 of SORMA directs that the court should not regard evidence from a complainant in a sexual offences matter with caution simply because of the nature of the offence. Section 55A provides for the establishment of designated sexual offences courts to hear matters related to offences under the common law, the Sexual Offences Act⁶⁶ or in terms of SORMA. Designated sexual offences courts may hear any offence in terms of any law that relates to sexual offences.

Section 66 2(a) requires the National Director of Public Prosecutions (NDPP), after consultation with relevant stakeholders, to develop guidelines in respect of complainants for:

⁶⁴ 32 of 2007.

⁶⁵ Ibid.

⁶⁶ 23 of 1957.

1. How sexual offences should be handled by the court proceedings in general and the circumstances under which a matter is to be withdrawn or where the prosecution is to be stopped.
2. Conditions and situations under which the prosecution must make an application to the court for an order directing that evidence be led by means of a closed-circuit television, provided for in terms of section 158 of the Criminal Procedure Act 1977 (CPA), for witnesses, and especially for child witnesses under the age of 16 years where the court has failed to consider this in terms of the applicable sections empowering it to do so under the same Act.
3. Circumstances that warrant the prosecution to apply for a competent intermediary to be appointed, as provided for in terms of s 70A of the CPA. This would be in respect of witnesses and particularly in the case of children below the age of 16 years.
4. In terms of s 153 of the CPA, the prosecution may apply to the court for the court proceedings to be heard in closed court.
5. Information, such as pre-sentence reports, that are relevant for purposes of sentencing to be placed before the court should be decided by the prosecution.
6. The conduct of prosecutors in carrying out their roles and responsibilities.⁶⁷ The NDPP, after consultation with the Chief Justice, must ensure that the required regulations that give effect to designated sexual offences courts must be made⁶⁸

Directives

Section 66(2)(a) and (c) of SORMA requires the NDPP to draw up directives and table these with Parliament for approval. The Directives were tabled at Parliament on 23 September 2010. These directives are currently on the National Prosecuting Authority

⁶⁷ As contemplated in s 55A as regulated by s 67 (b) of SORMA.

⁶⁸ "and to further regulate the issuing of directives to the National Director of Public Prosecutions" (s. 4 of the *Judicial Matters Second Amendment Act 43 of 2013 has substituted S 67 of this Act.*) GG No.37255, vol 583, 22

January 2014.

website.⁶⁹ The sections of the directives relevant to this dissertation are contained under the sub-headings below.

How sexual offences are to be handled

1. Prosecutors with specific skills and interest are to deal with such cases and the recommendation is that the prosecutor who starts a sexual offence case should be the same person to take the matter through to finalisation.
2. The Criminal Justice System (CJS) may present as a traumatic environment for complainants. It is therefore extremely important for prosecutors to act as protectors to complainants by ensuring a victim-centred and caring attitude in order to ease the trauma of complainants.
3. Both investigations and prosecutions should follow a structured, multi-disciplinary method, in collaboration with other role players in civil society in order to enhance the prosecution of cases.
4. If using an expert witness not employed by the government, prior approval is necessary.⁷⁰

Trial

1. Prosecutors have a duty to prioritise and finalise these cases especially where the witness is considered vulnerable.
2. Efforts are to be made to have complainants and witnesses wait in separate, private and conducive locations whilst waiting at court. They should not encounter the accused.
3. Character evidence and past sexual history of the complainant should be strongly opposed by the prosecutor.
4. No negative inference should be drawn from delays in reporting a case from the time of the commission of the offence.

⁶⁹ National Prosecuting Authority 'Prosecution Policy and Policy Directives' (23 September 2010), available at: https://www.npa.gov.za/sites/default/files/Library/Sexual%20Offences%20Directives%20tabled%20in%20Parliament%2023%20September%202010%20final_0.pdf. Accessed November 2018.

⁷⁰ Gerber op cit note 30 at 3-4.

5. Ensure that the outcome of a trial is explained in a manner that is understood by the complainant.⁷¹

Closed circuit television and electronic media

The use of electronic alternatives to lead evidence and the use of closed-circuit televisions for witnesses that may experience trauma are available methods of evidence leading in court. Prosecutors should make an application to the court in all cases involving sexual offences matters. Section 158 of the CPA makes provision for the application and use of such methods. Whilst the court will exercise discretionary powers in granting the application, prosecutors should make the application anyway. Where the complainant indicates that there is no wish for alternative means of leading evidence and wants to be present in court, then that request must be considered, and the complainant should never be forced to choose otherwise. If the equipment and/or intermediaries are not available, careful consideration must be given to whether the unavailability is justified or not, considering the need to protect the complainant from trauma in giving evidence in the presence of the accused. Section 170A of the CPA, provides for the use of intermediaries in cases where the witness does not want to come into any contact with the accused, but specifically for child witnesses. This is also specifically relevant for child witnesses and those who have the mental capacity of someone below the age of 18. Several relevant factors associated with fear, trauma, relationship with the accused and other factors are to be considered in the granting of such an application. There are similarities in the provisions and considerations in respect of s 158 and s 170A of the CPA.⁷²

Section 153 and 154 of the CPA are the relevant sections when making applications for the trial to be held *in camera*.⁷³ Unless the complainant wishes to give evidence in open court the prosecutor should apply to the court to have sexual offences matters heard in closed court. Consideration for such an application must

⁷¹ Gerber op cit note 30 at 5-6.

⁷² Ibid at 7-8.

⁷³ *In Camera*- 'In chambers; in private. A judicial proceeding is said to be heard in camera either when the hearing is had before the judge in his or her private chambers or when all spectators are excluded from the courtroom' 'In camera' *Legal Dictionary* [2003], available at [https://legal-dictionary.thefreedictionary.com/In+camera+\(legal\)](https://legal-dictionary.thefreedictionary.com/In+camera+(legal)), accessed on 8 February 2020.

include the delicate nature of the offence, where it appears that the dignity of the witness would be jeopardised and to protect the specifics of the offence from becoming known to the public. This application may be relevant to other witnesses as well. Medical evidence may need to be protected so that the complainant's dignity is shielded. A person to support the complainant may also be present in terms of this application.⁷⁴

Sentencing

A Victim Impact Statement, with the consent of the accused, should be submitted to the court on sentencing. An expert in the field of trauma and the negative effect on both the complainant and the family should be a consideration for application by the prosecutor. The court must be made aware of aggravating factors and no negative inference is to be drawn where the complainant does not exhibit signs of trauma.⁷⁵

e) Higher Education Institutions: Administrative Process

(i) Relevant Legislation

Higher Education Act⁷⁶ (HEA)

The HEA is the regulating authority for HEIs in South Africa. This legislation empowers and controls governance at SA universities. It prescribes governance mandates for both public and private higher education institutions. Institutional governance structures are regulated by s 26 of the HEA. Section 32 (1)(a) and (b) prescribe that council for universities may formulate institutional statutes to give effect to the relevant laws relating to HEIs. Council is also required to ensure effective governance where any law is unclear in its prescription to HEIs on any specific matter. Council is authorised to also formulate institutional rules that speak to the institutional statute. In terms of Subsection (d), student disciplinary rules and procedures may not be enacted unless both the SRC and Senate of the university have been consulted. In terms of s 36, subject to s 32 (2)(d), students are bound by the disciplinary rules and procedures

⁷⁴ Gerber op cit note 30 at 8-9.

⁷⁵ Ibid at 10.

⁷⁶ 101 of 1997.

as per the institutional statute.⁷⁷ This is amended by s 14 of the Higher Education Amendment Act, 2001 to include ‘institutional rules’.⁷⁸

Promotion of Administrative Justice Act⁷⁹ (PAJA) and the South African Constitution, 1996

The purpose of PAJA is to regulate administrative action that is reasonable, lawful and procedurally fair; and to ensure that a person’s right to written reasons based on any administrative action is provided in terms of legislation, as intended in s 33 of the Constitution.⁸⁰ In terms of this section, the following applies:

“Section 33(3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; impose a duty on the state to give effect to those rights; and promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.”⁸¹

Administrative action must be lawful. This is achieved by complying with the provisions of the Constitution.⁸² Procedure in any administrative action must be reasonable and procedurally fair. In order to comply with the right to a reasonable and fair procedure enshrined in the Constitution, PAJA provides guidelines on how this right should be granted to any person subject to administrative action. A person facing administrative action must be given:

- a) sufficient notice of what the proposed administrative action is;
- b) a reasonable chance to make submissions;
- c) a well-defined account of what the action is about; and
- d) be informed of the right to any appeal or review process and the right to request reasons.⁸³

⁷⁷ Higher Education Act 101 of 1997.

⁷⁸ Higher Education Amendment Act 23 of 2001.

⁷⁹ 3 of 2000.

⁸⁰ Ibid.

⁸¹ Teffrey-Goatley et al op cit note 11 at 2.

⁸² Yeukai Mupangavanhu & Brighton Mupangavanhu ‘Alignment of Student Discipline Design and Administration to Constitutional and National Law Imperatives in South Africa’ (2011) 12 *Potchefstroom Electronic Law Journal* 2 at 126.

⁸³ Teffrey-Goatley et al op cit note 11 at 4.

Both PAJA and the Constitution require a reasonable process to be followed in any administrative action. This can be achieved by ensuring that the objectives of the outcome are balanced with the adverse effect that the outcome will have on an individual. An administrator must apply their mind to the nature of the evidence and all relevant facts that will support a fair and equitable process. There must be a consideration of the opposing interests of the relevant parties to the action. The process will have a negative effect on one party to the proceedings whilst providing a positive outcome for another. PAJA is a vital part of South African administrative law. Although it binds the relevant government bodies and public enterprises there is no clear guidance to administrators.⁸⁴

(ii) *Administrative hearing process*

In alignment with the prescriptions of the legislation discussed above, the process in a disciplinary case held by an HEI should be compliant with the HEA, the relevant Constitutional provisions, and PAJA. Administrative action then should include:

1. A notification of the hearing with clear information of the nature of the offences charged and all relevant information pertaining to it.
2. A reasonable opportunity to respond in writing and/or in person at the hearing.
3. Assistance with a representative, having consideration of the complexity and seriousness of the charge.
4. An opportunity to make submissions and question the allegations.
5. Any other aspect as directed by the administrator that is fair and reasonable.⁸⁵

(iii) *Burden of Proof and Standard of Proof*

In criminal trials and civil proceedings, the burden of proof is on the person/s who brings the charge before the court.⁸⁶ In a criminal trial the prosecutor will lead evidence first in proving the case. In a civil or administrative process, the complainant or the

⁸⁴ Department of Justice and Constitutional Development 'Invitation for Public Comments on Draft Code of Good Administrative Conduct: The Promotion of Administrative Justice Act' [2016] available at <https://www.justice.gov.za/legislation/invitations/201612-draftPAJACode.pdf>. Accessed 8 February 2020.

⁸⁵ Gouws & Kritzinger op cit note 21 at 1-17.

⁸⁶South African Law Reform Commission, Issue Paper 26, (Project 126), *Review of the Law of Evidence*, (2008).

representative of the complainant will bear the onus of proving the case. The standard of proof in a criminal trial is proving the commission of the offence as charged beyond reasonable doubt, whereas the standard of proof in an administrative process is a lower standard, being on a balance of probabilities.⁸⁷ The balance of probabilities is an accepted standard of proof, not only for civil cases, but in disciplinary matters. Proving a case on this standard of proof means that the person presenting evidence before an adjudicator or panel of adjudicators must show that the offence had most likely occurred,⁸⁸ or put differently, the evidence only needs to show that the complainant's version is more probable.⁸⁹ Although this is less burdensome than the criminal standard of proof the presenter of the case must prove the case with adequate evidence.⁹⁰

The probability of an offence having occurred is 50%, which in mathematical logic means proving a case on a balance of probabilities would need to only be 51% more than the likelihood of it not having occurred.⁹¹

Training: Adjudicators

In the guiding principles of the *Sexual Offences Report* drawn up by the South African Law Reform Commission (SALRC), one of the proposals is that all key role players involved in the management of sexual offences must already have the necessary training required as well as undergo continuous training.⁹² The SALRC also recommends mandatory assessment and appraisals prior to being appointed in such roles.⁹³ The training of presiding officers in this document refers to officers in the

⁸⁷ South African Law Reform Commission Issue Paper 26 (126) *Review of the law of evidence* [2008] para 17, available at <https://www.justice.gov.za/salrc/ipapers/IP26.pdf>, at 17.

⁸⁸ *ibid*

⁸⁹ Jan Hendrik de la Rey, *The Fact-Finding Process and Burden of Proof During Litigation* (unpublished LLM/PHDthesis, University of Pretoria,2007) at 41, available at <https://repository.up.ac.za/dspace/bitstream/handle/2263/26346/dissertation.pdf;sequence=1>, accessed on 8 February 2020.

⁹⁰ Andre Rabe 'Assisting initiators with case preparation and presentation at disciplinary hearings' *The Initiator's Role in Disciplinary Hearings*,2018, available at: <http://www.geo.org.za/geonewsletters/Newsletter30Nov18.pdf>, accessed on 8 February 2020.

⁹¹ Allan Bayda 'What does proof on a balance of probabilities mean?' 2020, available at: <https://www.disabilitylaw.ca/disability-lawyer-calgary/proof-on-balance-of-probabilities>, accessed on 8 February 2020.

⁹² South African Law Commission (Project 107) *Sexual Offences Report* (2002) at 10.

⁹³ *Ibid* at 92.

context of a criminal court in cases involving child complainants. However, the proposal for training of adjudicators is relevant for all adjudicators, including those hearing student discipline cases related to sexual misconduct. Two of the contributors to the report were specific about the fact that all stakeholders in the process should have specialised training and that training handbooks should be available, which should guide the relevant persons on their responsibilities.⁹⁴ This report further suggested that the Magistrates' Commission and the Judicial Services Commission ensure that designated judicial officers qualified to handle sexual offences cases should be assigned to these cases.⁹⁵

Sexual violence cases necessitate a specialised understanding of the law applicable to it. Further, adjudicators need to be sensitive to the needs of a victim. Judges and legal personnel must be able to navigate the complex nature of sensitive matters.⁹⁶ They would also need to respond appropriately to the fallacies and assumptions of cases of this nature.⁹⁷ Training for judicial officers handling cases of violence against women should be mandatory. Consistent and established training on gender sensitive cases must be provided.⁹⁸ Understanding legislation on these cases is vital. Training of judicial officers should include a wide range of topics that are not only gender sensitive but on how to navigate the judicial process of GBV cases.⁹⁹ The International Association of Women Judges' Jurisprudence of Equality program is recognized as a successful training program. This training provides the knowledge and skill on how to apply regional, national and international law to cases involving violence against women. This type of training should be provided for both criminal and civil case adjudication.¹⁰⁰

⁹⁴ Ibid at 92.

⁹⁵ Moylan & Javorka op cit note 25 at 343 and 373.

⁹⁶ Rod Vaughan 'Sexual violence reform - change at last' 5 February 2016, available at <https://www.adls.org.nz/for-the-profession/news-and-opinion/2016/2/5/sexual-violence-reform-change-at-last/>, accessed on 8 February 2020.

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ UN Women 'Training for Judges' *Judicial Training*, 23 December 2011, available at <https://www.endvawnow.org/en/articles/146-training-for-judges.html>, accessed on 8 February 2020.

(f) Conclusion

South African legislation and directives on how sexual offences should be prosecuted is adequate in terms of guidelines on the evidentiary process. This includes the use of alternative means of leading evidence and ensuring a safer environment for a complainant in sexual offences matters. Whether these legislative opportunities are adequately enforced may be arguable. However, the existing law and process directives, on both leading evidence and judicial training, support the need for administrative hearings to ensure similar compliance for a fair trial. The chapter following considers how South African university policies deal with sexual offences complaints.

III Chapter 3: POLICY AND PROCEDURE AT SIX SOUTH AFRICAN UNIVERSITIES

a) Introduction

This chapter sets out a review of the sexual harassment, sexual offences and disciplinary procedures for sexual misconduct at six South African universities: Stellenbosch University (SU), Rhodes University (RU), University of the Free State (UFS), University of Kwa-Zulu-Natal (UKZN), University of Witwatersrand (Wits) and the University of Cape Town (UCT). The review includes aspects of disciplinary processes for staff, but the focus of the review is mainly on the student disciplinary processes.

b) Stellenbosch University (SU)¹⁰¹

(i) Disciplinary Hearing: Staff

In respect of single or minor incidences the perpetrator may receive either a written or verbal communication that such behaviour is unwanted and inappropriate. A written record of the details of the event(s) together with all evidentiary information is compiled. Offences that are serious and repeated will be brought to the attention of the Head of Department (HOD) or the Chair of the staff union in writing. This must then come to the attention of the Advice Forum on Sexual Harassment within a time deadline of five working days. Should the complainant not wish to report the matter to the HOD or Union Chair then the complainant may report the incident directly to the Advice Forum on Sexual Harassment. The Chair of the Forum has 10 working days to appoint a committee consisting of three Forum members. The University Rector receives a recommendation from the Forum Chair to authorise a preliminary investigation into the sexual harassment accusations. This process is empowered by the Disciplinary Code in paragraph 4.2, which stipulates that either an internal or

¹⁰¹ Stellenbosch University 'Sexual Harassment: Policy and Procedure for Staff' 2012 at 62, available at <https://www.sun.ac.za/english/policy/Documents/Sexual-Harassment-Policy-and-Procedure-for-Staff.pdf>, accessed on November 2018.

external panel of specialists conduct a preliminary investigation that must result in a feedback report in writing. Any person, including the alleged perpetrator may be consulted. At the conclusion of the examination of facts, the Committee will apply a dispute resolution process of mediation. The Committee has 20 working days to submit a written recommendation to the Rector. Based on the gravity of the misconduct or should the mediation prove to be unsuccessful the matter is then dealtwith in terms of the Disciplinary Code. A disciplinary committee is established to proceed to a hearing for conduct deemed to be of a serious nature. If the Vice Rector or a nominated officer is of the view that the matter is not serious enough to warrant a hearing a reprimand may be issued. Further, the matter may be referred to the line manager if deemed to be less serious.¹⁰²

SU has an Equality Unit (EU) that has a policy on how discrimination and sexual harassment matters are to be processed and supported. The EU may receive an unofficial or official report. An official report goes via an anti-discrimination and harassment officer (ADHO). The case is then referred to four advisors who, after assessing the case, will make recommendations to the head of the EU. The advisors have the option of referring complaints directly to the Legal Services office. This would depend on the seriousness of the complaint and the head of the EU must exercise discretion on the referral route. The options in making a recommendation with the aim of resolving the matter may include:

- referral to the line manager for any suitable intervention;
- human resources process to be followed;
- Mediation, which is the preferred option;
- referral to staff or student advisory panel;
- staff or student disciplinary investigations.¹⁰³

Stellenbosch University has a policy and procedure for staff and a separate policy for unfair discrimination and harassment that applies to staff and students. The student disciplinary code sets out the procedure for all student infringements together with the procedure for sexual misconduct cases. The Equality Unit is responsible for receiving and investigating cases before channelling this to the relevant staff or student disciplinary structure.

¹⁰² SU op cit note 100.

¹⁰³ Stellenbosch University 'Policy on Unfair Discrimination and Harassment' 2016, available at https://www.sun.ac.za/english/Documents/2017_Everlytic/Unfair_Discrimination_and_Harassment_ENG_2016.pdf. Accessed October 2018.

(ii) *Disciplinary Hearing: Students*

Structure

Where the EU head either declines to deal with a case or has chosen to refer the matter to the Central Disciplinary Committee (CDC), the ordinary procedure for a disciplinary hearing is followed. The chairperson of the CDC sits alone and may decide on the following:

- Whether to proceed or not.
- Appropriate channel for the disciplinary matter.
- Decide on applications for those wanting to be parties to a hearing, observers at a hearing, evidence other than oral evidence to be led, legal representation and reviewing cases of suspensions where there is evidence of unnecessary delay in a matter.

In all other disciplinary proceedings, the chairperson sits together with three other university members with at least one being a student nominee. Where there is no consensus a majority vote decides the outcome. Where there is a tie, the deciding vote is in the hands of the chairperson. In a summary proceeding the chairperson may, based on the preliminary record impose sanctions on the accused student. The chairperson is usually a senior academic of the university or a retired senior academic of the university. The other members are drawn from a pool of faculty-nominated senior academics and senior non-academics appointed from each section of the Rector's management team. The SRC appoints ten postgraduate students who can sit on these panels. Any one of them may be selected to sit on any one case. Failure on the part of the SRC to satisfy this obligation results in the Senior Director of Student Affairs nominating a postgraduate student. If these student nominations are not done or the nominated student does not attend the hearing the proceedings continue without a student member. The selection of members from the list of appointees to sit on any hearing comes from a recommendation based on experience, suitability and

availability from the Head of Student Discipline (HSD) to the Director of Legal Services. The committee must reflect racial and gender diversity.¹⁰⁴

The Student Discipline Investigator (SDI) conducts all relevant investigations at the instruction of the HSD. The Evidence Leader (EL) is either a full-time appointed staff member in the legal office or an ad hoc external legal practitioner or retired practitioner. A law degree is essential for this appointment. The EL may also be the HSD. An external panel of suitably qualified and experienced committee members may be constituted to hear disciplinary matters. This external committee may be constituted based on considerations of the volume of evidence, number of students implicated and the need for impartiality and urgent resolution.

Any outcome or decision from a disciplinary case may be appealed. The appeal will be heard by the Discipline Appeal Committee (DAC). The chair of the DAC is usually the Dean of the Law Faculty or a professor of law. The Chair sits with one academic and one student-appointed member. The outcome is dependent on a majority vote. The DAC has extensive decision-making powers. This committee may evaluate any grounds for review found in legislation that requires them to give effect to the appellant's right to administrative justice. A disciplinary matter may be reheard based on any merits that the committee considers appropriate and may direct the proceedings in any manner that they deem fit.¹⁰⁵

Investigations and prosecution

The investigations into reports of sexual misconduct are usually conducted via the EU. The HSD may evaluate the preliminary investigations submitted by the EU and supplement this as necessary. The SDI, under the direction of the HSD, continues the investigation and based on *prima facie* evidence, the HSD will proceed to refer the matter to the CDC. A written response to the charges or allegations from the accused student is included in the preliminary record. If the student admits guilt, then the

¹⁰⁴ Stellenbosch University 'Disciplinary Code for Students of Stellenbosch University' October 2009, available at http://sunrecords.sun.ac.za/controlled/C4%20Policies%20and%20Regulations/C4_SU_Disciplinary_Code_2016_09_26.pdf. (Accessed?)

¹⁰⁵ SU op cit note 103 at 29-30.

chairperson may impose appropriate sanctions. Where the matter is to proceed before a full committee for a hearing, the right to legal representation must be communicated to the student who may then exercise the right to apply for legal representation. This application is only granted under specific considerations that necessitate the presence of a legal representative. Prior to the enquiry, all new evidence, supplementary sworn affidavits, and investigations are produced in preparation of the hearing. The accused is provided with all relevant information.

The CDC may call any witness who had submitted sworn statements to the hearing for questioning on the evidence. The EL acts as the university representative in presenting the case before the CDC. Any party to the proceedings must be given an opportunity to make submissions to the CDC. The committee is entitled to put questions to all parties to the hearing as well as to decide on how the proceeding is to be conducted. If the witnesses are to be cross-examined permission is to be granted by the chair of the committee. If convicted of the misconduct, the CDC may impose any appropriate sanction as it deems fit.

Any appeal is heard by the DAC. The hearing follows a similar process as the initial hearing except that the proceeding's recordings and supplementary information are submitted. Imposition of sentencing is limited to the DAC; however, even where the findings of the CDC are confirmed by the DAC, the sentence may differ.¹⁰⁶

(iii) Monitoring

The relevant Vice Rectors in the Rector's Management team are responsible for the implementation and monitoring of the Unfair Discrimination and Harassment Policies. Training of new and old staff on discrimination and harassment is conducted at SU. Line managers are expected to monitor compliance with the relevant policies. Semester reports on incidences and case management is to be submitted to the Rector's management team. The need for specific monitoring of rape culture at universities cannot be overemphasised.

¹⁰⁶ SU op cit note 103 at 50-54.

SU set up a functional Rape Culture Monitoring Committee. SU also collaborates with the Monitoring and Advisory Committee on Crime and Violence made up of university members, municipality, and Police and Traffic department members.¹⁰⁷

(iv) Police Reporting

SU students or staff may have their matters heard internally through the EU and the disciplinary hearing process. The EU only handles the investigation of a report to them and any alternative dispute resolution. A parallel case at the South African Police Services (SAPS) may be reported. SU's memorandum on management's response to GBV includes a graphic addendum with regards to reporting a sexual assault to the police. Two options insofar as reporting an official case with SAPS or not is highlighted. There is a 24-hour crisis number that students can call to be assisted in reporting a case to the police and to be taken to the hospital. This is for students only. Staff are provided with the number of the local police for similar reports. Detailed information on police reporting is provided.¹⁰⁸ Statistics on police reporting versus internal reports is unclear.

(v) Summary

Stellenbosch University has a separate procedural policy on sexual harassment and discrimination for staff and students. One comprehensive policy, the Unfair Discrimination and Harassment policy, applies to all students and staff. The EU is the first official point of reporting matters. The EU will communicate to the office dealing with student discipline should the matter need to be referred there. The September 2019 memorandum detailing management's commitment to tackling and supporting GBV is comprehensive and well documented in the memorandum. The Disciplinary Code ensures that a witness can make an application to give evidence by alternate means without having to encounter the perpetrator. The support structures in the EU

¹⁰⁷ "'Enough is Enough": Stellenbosch University Takes A Stand Against Gender-Based Violence' [publication name] 18 September 2019., available at <http://www.sun.ac.za/english/Documents/SU-management-response-to-anti-GBV-memo-20190918.pdf>, accessed on 8 February 2020.

¹⁰⁸ Appendix 4: Guidelines for dealing with the rape or sexual assault of students and staff of Stellenbosch University.

and the Student Affairs Department also appear to be engaged and committed to supporting survivors of sexual violence. However, the disciplinary structures, investigation process and the actual hearing process do not indicate a focus on a separate survivor-centred approach. The entire disciplinary composition of panel members and procedural lines are the same for all disciplinary cases. This raises the question as to how efficient the system is for sexual misconduct hearings to be expedited. A further concern is whether survivors are supported adequately through the disciplinary process by officials that are specifically trained to handle sexual offences. The EL must have a legal degree, but nothing explicitly states that the EL must also be trained or have a background in handling sexual offences cases.

c) Rhodes University (RU)¹⁰⁹

(i) Students

RU has reviewed and implemented a new policy on sexual offences, with the next review date in 2022. The Sexual Offences Policy intentionally adopts an approach that addresses both prevention and prosecution. RU has specifically stated that the policy is entrenched in the Bill of Rights, citing sections 9, 10, 12(1) and (2), and s 35(3)(h) of the Constitution as the most relevant to their policy. The Disciplinary Code for Students directs the disciplinary process, read together with this policy. The policy lists several reasons for its implementation. The objectives, relevant to this dissertation, are to create a clear context for prosecuting cases and preventing sexual misconduct and ensuring that distinct systems are in place for both handling cases and reporting of cases of sexual misconduct. The policy is applicable to RU staff, students, service providers and any visiting person affiliated to RU. The wider campus community and staff and students are advised to acquaint themselves with the policy. Other policies related to the Sexual Offences Policy for Students are the Student Disciplinary Code and the Disciplinary Code & Procedure for staff. Definitions relevant to sexual offences are defined in the policy.

The policy is governed by the following principles:

¹⁰⁹ Rhodes University has a Sexual Offences Policy for Students, a Staff Disciplinary Code and Procedure and Protocols for Reporting Sexual Offences by students and staff, 2019, accessed October 2019.

- efficiency;
- accountability;
- rights-based;
- complainant-centred;
- confidentiality.¹¹⁰

RU hopes to achieve its objectives by educating campus staff and students with information and training related to sexual and GBV. A positive cultural transformation in this regard is intended with educational sessions.

Medical attention is vital and the Manager: Anti-harassment and Discrimination is tasked with ensuring all complainants are provided with care given via medical services. If the complainant reports a case with the police, then the process for medical care will be channelled through a different process, since forensic evidence would need to be collected for a criminal trial. The policy directs that any complainant arriving at the Health Care Centre must be treated with dignity and any report of rape or sexual assault must be accepted as a truthful version of the complainant's experience. Psychosocial care and mechanisms for safety are to be implemented.

Alternate Dispute Resolution (ADR) is a resolution option if both parties agree to enter a mediation process. RU's sexual offences policy clearly states that ADR is not an option to be canvassed or entered in cases of rape and sexual assault.

There are no limits to timelines for reporting of cases but delays in reporting could negatively affect the prosecution of a case especially if a police case is to be reported, as DNA is only viable for collection within 72 hours after a rape or sexual assault. A complainant may choose to report a case both internally and with the police. If a complainant chooses the internal route, she/he must be informed that they still retain the right to a subsequent external report.¹¹¹

¹¹⁰ Rhodes University 'Sexual Offences Policy for Students' 2019, available at https://www.ru.ac.za/media/rhodesuniversity/content/institutionalplanning/documents/Sexual_Offences_Policy_for_students.pdf Accessed October 2019.]

¹¹¹ RU op cit note 109.

(ii) *Disciplinary Structure*

RU has several different authorities under the disciplinary code procedure:

- The Vice Chancellor has the highest powers of authority at the university. S/he has jurisdiction over all disciplinary matters and may suspend any student accused of misconduct pending finalisation of a case. The VC's powers in respect of the disciplinary code may be delegated to a Deputy Vice Chancellor or any other appropriate person. The VC has the authority to preside over any disciplinary matter together with two appropriately competent assessors and may impose the same sanctions as any other disciplinary authority. S/he has the power to grant clemency but only at the conclusion of all internal remedies. The VC's powers may be delegated to an Acting VC or The Deputy Vice Chancellor for Academic and Student Affairs.
- The Proctor has jurisdiction over all students and all disciplinary offences are within the authority of the Proctor. If a proctor is unable to continue with a case and an unreasonable delay is anticipated for resumption of his/her duties, then the matter starts afresh before another appointed proctor. At the conclusion of matter the proctor may decide to refer the case for a 'no contact' order process as deemed fit. This may be directed regardless of whether a finding of not guilty or guilty finding has been arrived at.
- The Disciplinary Board (DB) comprises of three members on the panel appointed by the VC. One of the members acts as chairperson of the board. The DB has authority over all disciplinary matters including sexual misconduct.
- A Disciplinary Appeal Board (DAB) is appointed by the VC and has jurisdiction to hear cases on appeal. Students convicted and sanctioned by either a proctor or DB may appeal this decision. A decision by the DAB may include confirmation of the original findings and sanction, an amendment to the ruling or a dismissal of the verdict and sentence.¹¹²

(iii) *Investigations and Process*

¹¹² Rhodes University 'Disciplinary Code' 2015, available at https://www.ru.ac.za/media/rhodesuniversity/content/registrar/documents/Student_Disciplinary_Code_-_Approved_by_Council_30_November_2017.pdf. Accessed October 2018.

The prosecutor is appointed by the VC. Assistant prosecutors may be appointed by the VC after discussions with the prosecutor. Investigations into any matter that has been reported or referred will be conducted by the prosecutor or assistant prosecutors. Prosecutors also have the power to conduct investigations into misconduct matters of which they become aware. During investigations any university official may be requested to assist the prosecutors with such investigation. The discretion as to whether a disciplinary case is to be heard lies with the prosecutor. An allegation prior to charges being put may be communicated to the accused student. The student is under no obligation to respond but if s/he submits a written statement then this may be added to the evidence for submission to the proctor or DB. The prosecutor has a further discretion to enter into any appropriate plea bargain agreement prior to a formal hearing.¹¹³

Any student charged may appear before a proctor or DB in person, with a university staff or student or with a legal representative. The cost of an external lawyer is for the student's account. Once a *prima facie* case has been determined by the prosecutor the details of the charge and hearing must be communicated to the student. The prosecutor may charge and convene a hearing for offences committed outside of the university, but subject to the disciplinary code. The charges, plea to the charges and all evidence are electronically recorded. Where a student admits guilt the Chair of the DB or Proctor may put questions to the student in order to determine whether the admission is sincere and correct on both fact and law. Where a student pleads not guilty to the charges, oral evidence is led by the prosecutor. Written statements, where the facts are undisputed and allowed by the Chair/Proctor, may be admitted into evidence. Witnesses are subjected to examination, cross-examination and re-examination. Only one person at a time may conduct this procedure. Different parties to the process may conduct examination, cross-examination and re-examination of different witnesses. The accused student also has the right to make an oral statement led by a representative and is subject to cross-examination by the prosecutor. All witnesses, including the student accused of the misconduct may be questioned by the proctor or DB during the leading of evidence. The adjudicating person or Board has the discretion and authority to conduct the hearing in either an adversarial or

¹¹³ Ibid.

inquisitorial manner. They may decide to conduct a hybrid method of both adversarial and inquisitorial.¹¹⁴

Decisions on internal policy procedure, the questions on law and whether evidence is admissible or not is within the authority of the adjudicating proctor or panel. In making these decisions the disciplinary body is not bound by legislation on procedure and evidence applicable in criminal law. Relevance, fairness, and rules of natural justice prevail. At the conclusion of all evidence and submissions in argument by both the prosecutor and accused student or the legal representative, a finding of guilt or not is delivered. If the student is found guilty, an appropriate sentence is passed. Both sides are given an opportunity to make submissions on sentence. At the conclusion of a hearing, whether the student is found guilty or not, the DB or proctor may direct that a hearing for the imposition of a 'no contact' order be conducted in terms of the disciplinary code. A student convicted and sentenced may exercise the right to appeal the matter before the DAB. Evidence before the DAB is based on a transcript of recordings from the initial hearing together with written submissions from the prosecutor and the student. No other evidence is allowed unless the appeal body requests such evidence.¹¹⁵

(iv) Monitoring

A Sexual Violence Task Team (SVTT) has been established by RU, which will ensure that the nature and degree of GBV is monitored. The Manager: Anti-Harassment & Discrimination will record all reports of cases, including those that are reported anonymously. These reports are collected as an indication of whether the complainant sought advice, simply wanted a record of the incident or whether the option of a prosecution of the case was pursued. The SVTT receives bi-annual reports on the statistics recorded on cases. Consistent surveys are also conducted in order to establish the extent of GBV and sexual offences on campus. Gaps in the implementation are to be identified by the task team, and consultation with the relevant student bodies and other role-players are held before changes to the policy are made

¹¹⁴ Rhodes University op cit note 111 at 10-11.

¹¹⁵ Rhodes University op cit note 111 at 10-11.

in a draft document to be submitted to Senate and Council, The Senior Executive and the Student Disciplinary Committee. Every three years, a task team is to be established by the Chair of the Disciplinary Committee with the intention to review the current policy.

(v) *Police Reporting*

A complainant in a sexual violence case is to be encouraged to report the matter to the police. If the complainant chooses to report an external case with the police, the designated university authority will ensure that the complainant is accompanied to Settlers Hospital for the collection of forensic evidence and to be medically examined and treated. The complainant is to be assisted by a Rape Survivor Support Group member in providing a written statement to a police officer. A follow-up statement may be provided by the complainant at a later stage. Details of the external process is embodied in the Sexual Offences Policy for Students. If the complainant wishes to have her case prosecuted by the university disciplinary board and at the criminal court these processes run parallel to each and do not restrict the complainant's right to choose one or the other.¹¹⁶

(vi) *Summary*

RU has revised and implemented policy that appears to be clear and comprehensive in detail with regards to the support, prosecutions, and monitoring of sexual offences and GBV. Advocacy around sexual violence is proactive and visible. The policy is well written and is easy to understand. The policy is driven by an approach that is survivor-centred and addresses the various needs of a survivor. Implementation and monitoring appear to be well intended. Whether the practicalities and complexities of sexual violence can be adequately addressed remains to be seen; however, the policy itself has clear guidelines on how to achieve this. Although the policy has been reviewed recently the Disciplinary Code for Students has not changed. The disciplinary code does not include very specific guidelines on how sexual offences are to be prosecuted

¹¹⁶ Rhodes University op cit note 111 at 7.

or adjudicated upon. The procedures are the same for all offences. It merely indicates that the prosecutor has the discretion to decide on a hearing for sexual misconduct. The Code also specifies that the proctor has jurisdiction over all disciplinary matters and the DB has the same jurisdiction but has a specific note that includes jurisdiction for sexual offences. It is unclear as to whether sexual offences are then only applicable to the jurisdiction of the DB and not the proctor. Evidentiary and other aspects of the process follow the same guidelines in the Code. The entire disciplinary code is formalistic and mirrors a criminal process, aside from the DB not being bound by criminal or other legal instruments. A further note is that the DB has the discretion to follow an adversarial or inquisitorial process or a combination of both processes. There is no separation of how sexual offences cases are to be handled, despite the need for a more survivor-centred approach. The Code speaks only of oral evidence and written statements that are not in dispute. The strides towards a survivor-centred policy does not translate into a survivor-centred disciplinary process.

d) University of Kwa-Zulu Natal (UKZN)¹¹⁷

(i) Policy for Staff and Students

UKZN approved a GBV Policy on 18 September 2017, which went into effect on 1 October 2017. The review date for the policy is September 2020. Responsibility for implementation of the policy is held by Human Resources and Student Services. The objectives of the policy are to ensure that cases are handled with expediency and fairness, to promote a culture free of GBV, to ensure that the institutional responses to GBV are effectively accomplished and to provide a comprehensive structure that eliminates GBV misconduct. The UKZN Disciplinary Rules and Code of Conduct, Staff Disciplinary Code, relevant legislation, and the Sexual Harassment policy must be read together with the GBV policy. This policy provides the university with guidance on jurisdiction to investigate occurrences of GBV. These incidences could come from

¹¹⁷ The University of Kwa-Zulu Natal has a Gender-based Violence Policy for both staff and students and a separate disciplinary code and procedure for staff and students, October 2017, see <https://aessupport.ukzn.ac.za/wp-content/uploads/2018/07/Policy-on-Gender-based-violence.pdf> UKZN also has a separate Sexual Harassment Policy for both staff and students, July 2018,] see <https://aessupport.ukzn.ac.za/wp-content/uploads/2018/07/Sexual-harassment-policy.pdf>. Accessed October 2018.

reports made to the university, incidents that take place on the university property, incidences that arose outside of the university but have impacted the university creating a hostile environment, and any incident that takes place during a university authorised programme even if the programme is outside of the location of the university. Investigations into allegations of GBV and sexual misconduct committed by students, staff and third-party contractors is sanctioned by this policy. Any complainant, regardless of whether s/he is a student, staff or third-party contractor, can report an offence, which the university has jurisdiction to act on.¹¹⁸

The UKZN policy undertakes to have zero-tolerance on any societal, religious and cultural customs and systems that lead to GBV. This includes patriarchal attitudes that contribute to GBV. Confidentiality and protection of rights are assured to the complainant. Counselling and health care services must be provided to a complainant. The UKZN policy is included in all contracts entered with third-party contractors and their agents who render services to the university.¹¹⁹ In addition to this policy, UKZN has a very basic Sexual Offences policy that should be read together with the more comprehensive GBV policy. The sexual offences policy provides definitions of sexual harassment conduct with commitments to ensuring confidentiality and protection from victimisation. This policy states that all staff and students must take responsibility to support this policy. However, line managers are specifically accountable in ensuring a work environment free of sexual harassment.¹²⁰

(ii) *Disciplinary Structure: Students*

The Vice Chancellor and Principal are referred to as ‘the Principal’ in the rules for students. Jurisdiction and management over student discipline are vested in the Principal. The Registrar, acting through the Director of Legal Services retains administration powers unless the Principal directs otherwise. Any student may be found guilty of any offence that breaches the laws of the country and in breach of

¹¹⁸ University of KwaZulu Natal ‘Gender Based Policy’ 2017 available at <https://aessupport.ukzn.ac.za/wp-content/uploads/2018/07/Policy-on-Gender-based-violence.pdf>. Accessed October 2018

¹¹⁹ Ibid.

¹²⁰ University of KwaZulu Natal ‘Sexual Harassment Policy’ July 2018 available at <https://aessupport.ukzn.ac.za/wp-content/uploads/2018/07/Sexual-harassment-policy.pdf>. Accessed October 2018.

internal university policies and rules of conduct. The rules of conduct explicitly set out definitions of physical injury that include acts of a sexual nature as contained in the SORMA and in the Protection from Harassment Act.¹²¹

Infringements of any conduct listed under s 9 of the disciplinary code, which includes sexual and harassment misconduct may be heard before a Student Discipline Court (SDC) or before a Residence Tribunal as directed by a Proctor. If a student also holds a position as a staff member the case is heard by the SDC. The Student Discipline Office has administrative oversight of all cases reported by the Risk Management Team (RMT). A Proctor is appointed by the Registrar. The Proctor advises the Registrar on student discipline matters and has administrative responsibility for student discipline. The Proctor also represents the University at all disciplinary hearings. When the Proctor receives a complaint from the SDO s/he has the discretion to either investigate the matter or decline to prosecute the case. The Proctor can send the parties for counselling or mediation, alternatively deal with the case before the Discipline Court. If a student pleads guilty to the allegations the Proctor may issue a warning or any other appropriate sentence depending on the gravity of the offence.¹²²

The Student Discipline Court (SDC) is comprised of a President, selected by the Registrar, and must be a lawyer or have a suitable repute and knowledge. The other members include a student council representative, a Professor from the department that the accused student is registered, but this is for academic matters only, and an assessor or two assessors as the Registrar deems fit. Where there is no consensus, the President has the final vote. The Proctor acts as prosecutor who represents the University in cases before the SDC and other disciplinary cases. The Registrar, after consultation with the Dean of Law, appoints a member from the law faculty to act as a representative to the accused student. A few permanent academic staff from the law faculty and post-graduate law students are appointed to perform this function. The student may choose to appear before the court in person but may not be

¹²¹ Act 17 of 2011.

¹²² University of KwaZulu Natal 'Student Disciplinary Rules' (2018) available at http://saa.ukzn.ac.za/Libraries/Hand_Books_2018/2019_Rules_for_Students.sflb.ashx. Accessed February 2019.

represented by any other legal representative. The inquiry is usually conducted in public unless an application from the prosecutor for only the parties to the proceedings to be present is granted. Evidence is presented by the Prosecutor and the accused is given an opportunity to defend his case. The panel members may ask questions of any witness before deciding guilt or not. A decision is made on a balance of probabilities. Non-compliance with external legal court rules do not prejudice a student. The requirement is for all parties to comply with the relevant internal disciplinary rules. Notwithstanding the SDC's discretion on sentencing, if a student is found guilty of rape/compelled rape the SDC is obliged to expel the student. Sexual assault, compelled sexual assault, and any sexual misconduct defined in the SORMA must lead to expulsion unless the SDC finds exceptional grounds not to expel the student.¹²³

Any appeal on the verdict and sentence may be made to the Appeal Committee of Council. Three members constitute the Appeal Committee. The President must be a lawyer. The Appeal Committee may dismiss, confirm or amend the original findings. Students' names and the misconduct must be published unless otherwise directed by the SDC.¹²⁴

Staff disciplinarys follow an HR process in compliance with labour law and internal policies and procedures for staff. However, the policies on GBV and Sexual Offences will guide the way the process for sexual misconduct is conducted.¹²⁵

(iii) Monitoring and Police Reporting

The university has undertaken to change the necessary disciplinary rules in order to ensure sanctions for convictions of sexual offences cases follow the objectives of responding appropriately to GBV. The GBV policy states that even if a complainant initiates an internal disciplinary case they will be supported and advised of the external criminal and civil remedies that the complainant can utilise to bring a case against the

¹²³ UKZN op cit note 122.

¹²⁴ UKZN op cit note 122 at 31-33.

¹²⁵ University KwaZulu Natal 'Employee and Labour Relations' available at <http://labourrelations.ukzn.ac.za/EmployeeRelations/Misconduct.aspx>. Accessed December 2019.

perpetrator. Senate will constitute a GBV Committee (GBVC). This committee will include suitably experienced members and will reflect diversity from all interest groups. All reported cases will be documented, and statistics are to be provided to Senate each year. The policy undertakes to monitor how GBV is addressed and dealt with in terms of the policy.¹²⁶

(iv) *Summary*

UKZN has both a GBV policy and a Sexual Offences policy that is read together with the Student Disciplinary Rules. The GBV policy is recent and clear in its intention to not only support the survivor through an incident of sexual misconduct but has an explicit response in terms of sentencing for sexual offences. The rules also make it clear that the inquiry is based on a standard of proof that is appropriate for an administrative hearing, which is on a balance of probabilities. The rules do not appear to be overburdened with criminal or other external legislation except for taking cognisance of how legal procedures supersede internal rules in terms of a person's rights enshrined in the Constitution. What is absent from the rules of procedure is specific obligations in terms of specialised training in sexual offences for the adjudicating members. In addition to this there are no alternative evidence leading or other processes that are specifically set up for sexual offences. In order to give legitimacy to the policies related to GBV and sexual offences the disciplinary procedures ought to be survivor-centred and explicit in the rules.

e) *University of the Free State (UFS)*¹²⁷

(i) *Policy*

UFS has a policy on sexual harassment, sexual misconduct and sexual violence. Both formal and informal complaints of sexual misconduct are covered in this policy, which applies to both staff and students. This includes both on-campus and off-campus

¹²⁶ UKZN op cit note 125.

¹²⁷ University of Free State 'Sexual Harassment, Sexual Misconduct And Sexual Violence Policy' 2018, available at [https://www.ufs.ac.za/docs/default-source/all-documents/sexual-harassment-sexual-misconduct-sexual-violence-policy_council-approved_15-06-2018-\(1\).pdf?sfvrsn=dc3d8e21_0](https://www.ufs.ac.za/docs/default-source/all-documents/sexual-harassment-sexual-misconduct-sexual-violence-policy_council-approved_15-06-2018-(1).pdf?sfvrsn=dc3d8e21_0), Accessed on September 2018.

violations. The policy is applicable to any UFS invitee. 'Invitee' is used to describe any guest, professor, associate, staff and visitor. Any person invited to an event or makes use of UFS services including applicants for registration and admission are bound by this policy. The objectives of the policy are to create a safe environment for the UFS campus community. The policy aims to provide clarity on what constitutes sexual violence, sexual harassment and sexual misconduct. Educating staff and students on the relevant procedures on resolving these cases is vital to the purpose of this policy. Victim support, institutional accountability and effective implementation of this policy is undertaken by UFS. Although the university does not have a right to initiate disciplinary proceedings against a person who is neither an employee nor a student, the university can take appropriate action that could result in the termination of any relationship by that person and the university. The Human Resources Department acts as the administrator and enforcer of the policy in relation to UFS staff. The directorate for student discipline and mediation act as admin and will enforce the policy in relation to students. ¹²⁸

(ii) *Investigations*

A complainant may report a matter to any one of eight offices, namely: The Office of Gender and Sexual Equity; Student Affairs; The Centre for Human Rights; Residents Heads; Protection Services; Human Resources; Sexual Harassment Hotline; and/or the Directorate for Student Discipline and Mediation. Reports to these offices must be in writing. Incidents will be investigated in a way that preserves the dignity of everyone involved, and confidentiality is vital to all parties to the proceedings. A nominated investigator will investigate a reported complaint and where the person accused of the misconduct is a student, the matter must be reported immediately to the Protection Services duty room as well as to the Directorate for Student Discipline and Mediation (DSDM). Both parties to an incident are given an opportunity to submit a written statement and any other evidence that may be relevant to the case. An investigation report with all evidence is then submitted to the relevant offices for staff or students respectively. Support is offered to both the victim and the perpetrator. Where a complainant wants to follow an internal disciplinary process, the investigating officer

¹²⁸ Ibid.

will proceed in terms of the internal rules. Where there are issues relating to anonymity and/or confidentiality, an advisory panel will be consulted. This panel will advise on the route the investigation should take.¹²⁹

(iii) Disciplinary process: Structure and procedure

The DSDM ensures a disciplinary hearing is conducted within 10 working days after all relevant investigations and documentation is submitted. The university student disciplinary rules and codes give effect to all disciplinary cases, including sexual offences. All misconduct cases are reported to the Disciplinary Officer (DO) who is nominated by the Rector. The DO has the discretion to appoint other appropriate authorities to investigate the case and provide feedback. The DO then has discretion to refer the matter to the appropriate disciplinary person or body that handles such cases, to not take the case any further, or refer it to the faculty for consideration. The DO also makes decisions on any interim measures to be taken against the perpetrator. Referring a case, based on the type of misconduct, to the appropriate disciplinary body is also decided by the DO.

The Director: Student Affairs may hear cases referred by the DO. A Vice Rector hears appeals against findings by the Director: Student Affairs and may hear any misconduct case referred to it, where there is an admission of guilt and consented to by the student. The Vice Rector may also impose sentences within the jurisdiction of the Hearing Committee.

After a matter is referred for hearing, a Hearing Committee is designated by the Rector and has three members as well as alternate members. The Chairperson of this committee must be a legally qualified person. Evidence to be led at the hearing may be designated by the Rector to either a DO or a jurist. Students charged with misconduct may be assisted by a legally qualified person, a guardian or parent. Hearings may continue to proceed regardless of whether the accused student is present. This Committee may hear appeals against the ruling of a Vice Rector and cases that the DO refers as appropriate. Sentences may range from a warning to an expulsion from the university. All disciplinary proceedings must observe the

¹²⁹ UFS op cit note 127.

requirements of natural justice. Where a student indicates that s/he is legally represented the matter is sent to the Hearing Committee.¹³⁰

Appeals from all disciplinary findings must be lodged in writing within five working days after having received the sanction imposed by the disciplinary body or person. The Rector establishes the Appeal Committee. This committee is comprised of a member from the Rectorate and one from the Council. There are alternate members available who must represent any selected member if such member was present and on the panel at the initial hearing. An appeal is heard on papers but the appellant, a parent or legal representative may make submissions to the Committee. The Appeal Committee's decision is final and reasons for any finding is not necessary. The Appeal Committee may dismiss the appeal, amend or uphold the appeal. Pending any disciplinary hearing the Rector or a nominated person, together with the Dean of the Law Faculty or his or her designated person may direct interim actions against the accused student. This could include total or partial limitation on academic and/or other university activities, including a prohibition on residence accommodation; and a prohibition on making any contact with the complainant until finalisation of the case.¹³¹

(iv) Monitoring and Police reporting

Human Resources is responsible for all aspects related to the policy imperatives in relation to staff. The DSDM is responsible for the implementation, administration and monitoring the policy about students. The Dean: Student Affairs is tasked with educating students on the policy as well as monitoring observance of the policy by students.

Heads of department and line managers are to regularly oversee compliance of the policy. At the outset of the first semester, the reporting officers will arrange a programme on the compliance of the policy for the Vice-Rector or his/her nominee and a report on implementation and case management related to the policy is submitted

¹³⁰ University of the Free State 'Rules on Student Discipline' April 2018, available at <https://www.ufs.ac.za/docs/default-source/admission-requirements-and-general-regulations-documents/ufs-rules-on-student-discipline.pdf?sfvrsn=2>. Accessed November 2018.

¹³¹ Ibid.

at the end of the second semester. The Vice-Rector: Institutional Change, Student Affairs & Community Engagement (Vice-Rector: ICSACE) or his/her nominee has responsibility to oversee and monitor the implementation of the policy. The reports submitted by the reporting officers and investigating officers are evaluated by the advisory panel members and where necessary proposals for amendments to the policy is made to the Vice-Rector: Institutional Affairs. These recommendations are then submitted to the appropriate University structures for approval by the Vice-Rector: ICSACE.

The policy specifically states that a victim of all forms of sexual offences retain their right to initiate criminal charges to the South African Police Services and/or civil claims in their personal capacity at any time. Counselling and support in this regard is provided to both the victim and the perpetrator.¹³²

(v) *Summary*

UFS has a Sexual Offences Policy that is intended to address the blight of sexual offences on campus and ensure a fair and cogent response to reported cases. The policy itself appears to include numerous structures and individuals responsible for both implementation and monitoring of the policy. A challenge in this policy is the numerous reporting entry points. There are eight reporting offices, which may act as a deterrent to reporting if education on how the reporting lines work is not adequately understood by the campus community. Further, the policy refers to the Student Disciplinary rules as the formal procedure for reported sexual offences cases. However, the procedural rules encompass all student infringements and there is very little to ascertain on how the formal process will specifically handle cases of sexual offences, which is what appears to be intended in the policy itself.

f) *University of Cape Town (UCT)*¹³³

¹³² UFS op cit note 132.

¹³³ University of Cape Town 'Sexual Offences Policy' 2008, available at https://www.uct.ac.za/sites/default/files/image_tool/images/328/about/policies/Policy_Sexual_Offences_2008.pdf Accessed February 2017. UCT has a separate HR policy for staff see

(i) *Sexual Harassment Policy*

UCT has a Sexual Harassment Policy (SHP) and a Sexual Offences Policy (SOP). The SHP deals specifically with sexual harassment whilst the SOP deals with rape and sexual assault. Both policies clearly set out the relevant definitions and implementation and monitoring structures. The SHP stipulates that all managers are responsible for understanding the policy and ensuring that staff and students are informed of the policy. They are to report cases of harassment to the Reporting Officer (RO). The Dean is responsible for communication regarding the policy to staff and students as well as filtering all relevant actions arising from the policy to their Heads of Departments (HODs). The Executive Director of Student Affairs is responsible for both oral and written communication of the policy to all relevant parties within the university residences. The RO provides the Communication and Marketing Department with the policy information for circulation within the campus community, annual emails to staff and students and third parties, and an annual report to the Vice Chancellor (VC). The policy specifies timelines for training of staff and Student Harassment Advisors (SHAs). Workshops conducted by the RO is available to all staff, Campus Protection Services and the SRC. The policy acknowledges the lack of jurisdiction over third parties, but expects all those who work, visit or participate in UCT activities to comply with both policies. Reports of any breach by these third parties will be recorded and submitted to the procurement offices for consideration to discontinue services. The RO provides support to the complainant by way of counselling, medical and protective measures. Students accused of any sexual offence may seek advice from the RO on the policy imperatives and the processes they may face. The SHAs are to provide support to complainants and assist by engaging with the case officer (legal officer representing the complainant in a formal disciplinary case). The SHAs also assist the RO in educating the campus community on the policies.¹³⁴

http://www.hr.uct.ac.za/hr/policies/UCT_policies; and a Student Discipline Procedure see http://www.students.uct.ac.za/sites/default/files/image_tool/images/434/study/handbooks/2020/UCT_Handbook_3_2020.pdf.

¹³⁴ University of Cape Town 'Sexual Harassment Policy' 2008, available at http://www.uct.ac.za/sites/default/files/image_tool/images/328/about/policies/Policy_Sexual_Harassment_2008.pdf. Accessed February 2017.

The SHP allows for a RO to appoint an Advisory Panel to provide input on any case that requires recommendations and specific expertise. The Advisory Panel may consist of a SHA who is representing the complainant, the Case Officer, a representative from the Office of the Dean: Student Affairs if the perpetrator is a student and if the perpetrator is a staff member, then a representative from Human Resources and a person with the necessary expertise in the field, regardless of whether this person is a campus community member. No decision or recommendation from the Advisory Panel shall be considered binding or influence the complainant in any way. In responding to a complaint, the RO must record this in writing and assign a SHA to the case. The case officer must inform the complainant of all informal and formal processes and deciding on either process will not have any adverse consequences for the complainant. The complainant must be made aware that the outcome of an informal process is not binding and the right to appeal to the VC is retained. Late reporting does not affect the credibility of a complainant. The complainant must also be advised of their right to report a case to the South African Police Services (SAPS). Where the matter is considered serious and the complainant does not wish to proceed with the case, the Advisory Panel is consulted on how to proceed with the case based on the following considerations: a) the potential danger to other University members, b) previous cases and complaints against the perpetrator and c) the seriousness of the offence. The case officer may then be advised to proceed with a formal case. A written recommendation to the VC is submitted. An informal process must adhere to confidentiality and may not be used as evidence in any pursuant formal process. Regardless of whether the matter is resolved at the informal process or proceeds to a formal process the complainant must be fully supported by the RO with regards to counselling and any other support required.¹³⁵

(ii) *Sexual Offences Policy*

UCT is committed to creating a space that is free from the dangers of unwelcome sexual conduct envisioned in this policy. The policy stipulates that sexual assault and rape is a serious breach of conduct and a disciplinary process will follow such offences. Zero tolerance of sexual offences is advanced by this policy. The university

¹³⁵ UCT op cit note 134.

community, together with third party service providers and other agents, are bound by the policy imperatives. Where there is a lack of university jurisdiction for the third-party breach of this policy, future contracts may not be entered into. The policy aims to support complainants in reporting cases, discourage offences of rape and sexual assault, create a response system that is complainant-centred, procedures for cases are regulated and create campus-wide education regarding all forms of sexual violations.¹³⁶

General Provisions, Response and Reporting

Any rape or sexual assault offence committed by a staff member or student is considered a contravention of this policy. A complainant may choose to report the case to both the university and to SAPS or report to either the university or to SAPS only. Any university process may run parallel to any criminal action. The university process is independent of any external process. UCT undertakes to respond timeously to any sexual offences report. Comprehensive and detailed records of all cases will be maintained. Complainants are assured of support from the RO. Any retaliation against a complainant who reports a case of rape is regarded as a violation of the policy and rules of conduct. Rape or sexual assault may also include sexual harassment. However, no rape or sexual assault case will be dealt with exclusively in terms of the SHP. Suitable training on how to respond to reports of rape will be conducted. The policy will be circulated throughout the campus community on a regular basis. Any complaint of rape should be directed to the RO as soon as is possible. This report may be done directly by the complainant, a third party or anonymously. Complainants in a rape case must be informed of the need for medical attention especially related to any treatment for HIV exposure, sexually transmitted disease and pregnancy. The RO must ensure that transportation to Groote Schuur hospital or any other medical institution is provided for the complainant. Despite the medical treatment and assessment there is no obligation on the complainant to report a case to the police. The RO is tasked with supporting a complainant with any report to SAPS. A delay in reporting a case to the university will not hinder an investigation and possible disciplinary proceedings.¹³⁷

¹³⁶ UCT op cit note 133.

¹³⁷ UCT op cit note 133 at 5-6.

Once a case has been reported, the complainant must be advised of all internal and external remedies available, related to the offence. The RO is obliged to assist and advise on counselling services, medical support and legal or other representation at disciplinary hearings and criminal processes. Regular meetings and contact in person or via email correspondence must be maintained with the complainant. The complainant must be made aware of the fact that the RO and/or any other support person is not entitled to give evidence at the disciplinary process. The complainant has the option to choose whether to give evidence or not at any disciplinary hearing. However, she/he must be advised that the decision to proceed with an internal hearing against an alleged perpetrator is within the university's discretion, regardless of whether the complainant testifies at the hearing or not.¹³⁸

The intention of the policy is to ensure that complainants in cases of rape and sexual assault receive adequate assistance from the university. The policy includes assistance to the alleged perpetrator in that the RO may be approached by the accused student in order to be assisted in understanding and interpreting the policy. The RO should also explain the disciplinary process to the accused student and advise him/her on rights to legal representation. The process and mandate in terms of an advisory panel is the same as mentioned under the SHP.

Formal process: Disciplinary Structure

The RO will initiate all formal processes for both staff and students. Pending any informal or formal process, the VC or VC's nominee may apply for interim protective measures, such as a 'no contact' order (maximum period of six months) prohibiting any contact by the perpetrator with the complainant. The formal process for students is followed in terms of the Disciplinary Jurisdictional Procedures (DJP) read together with the Rules of Conduct for Students (RCS) contained in the *General Rules and Procedures: Handbook 3*. The Senior Proctor (legally qualified staff member usually from the Faculty of Law) will guarantee that any proctor sitting as presiding officer at a hearing will have had sexual offences training.¹³⁹

¹³⁸ Ibid at 6-7.

¹³⁹ UCT op cit note 133 at 10.

In terms of the DJP rules any person who reports allegations of rape, sexual harassment or sexual assault is referred to as 'complainant'. Allegations in breach of the student disciplinary code, other than those allegations within the jurisdiction of the housing unit, must be directed to the VC or the VC's nominee (this is usually the Legal Counsellor in Legal Services under the management of the Registrar's office of the university). The VC has the discretion to appoint an appropriate tribunal for purposes of an investigation into a breach of the student code and must decide on the terms of reference, membership and the extent of the powers assigned to the tribunal. The VC's discretionary powers extend to directing a case to SAPS, reassigning a case to another tribunal or deciding not to continue with a pending case. Rules of procedure must be decided by a tribunal hearing a case within the applicable guidelines set down in the rules of procedure as prescribed by the Tribunal of Appeal. These rules set down as guidelines by the Tribunal of Appeal are binding on all tribunals. The University bears the onus of proof in all university tribunals and the standard of proof requirement is on a balance of probabilities.¹⁴⁰

UCT cases related to sexual offences are heard before the University Student Discipline Tribunal (USDT). A proctor presides over cases before this tribunal. A proctor is a legally qualified, appropriately experienced person who may be drawn from UCT staff or an appointed appropriate external person. A proctor may hear cases sitting alone or with two assessors, one of which must be a student appointed or approved by the SRC, the other from a list of staff-appointed members. Where a case is serious enough to warrant an expulsion, a suspension beyond 12 months, and community service in excess of 100 hours, a proctor is obliged to sit with assessors. If an assessor is unable to start or continue with the case the proctor adopts the vote for the unavailable assessor. The ordinary rule on deciding guilt or not is a two-third majority decision of proctor and assessors.

¹⁴⁰ University of Cape Town 'General Rules and Policies' (2019) available at http://www.students.uct.ac.za/sites/default/files/image_tool/images/434/study/handbooks/2020/UCT_Handbook_3_2020.pdf. Accessed September 2019.

A student who has been convicted and sentenced by the USDT may appeal the verdict and/or the sanction to the Tribunal of Appeal.¹⁴¹ The Tribunal of Appeal will be quorate with three panel members. Ordinarily the panel is comprised of a presiding officer referred to as the president of the Appeal Tribunal; a member appointed by Senate; a person appointed by the president of the appeal tribunal from a list of not less than six names forwarded by the SRC at the start of each year; and one other person appointed by the SRC. The president is appointed by UCT Council and must be legally qualified. The president of the tribunal has both a casting vote and a deliberate vote if there is a tie in deciding on a verdict or sanction. There is an automatic entitlement to legal representation at an appeal hearing. The Tribunal of Appeal may confirm the decision of the USDT or amend the sanction. The Tribunal may dismiss the appeal entirely.¹⁴²

Procedure

In order to maintain fairness and expediency, tribunal presiding officers are authorised to call witnesses that they consider as relevant and appropriate. This may be at their own consideration or at the request of either the university or the defendant. The absence of the defendant, without good cause, may not stop or hinder the matter from proceeding. Hearings are conducted before tribunals, campus community members and members of Council. However, should an application be granted for a matter to be heard in camera or with only certain individuals then the matter will proceed as per the ruling of the tribunal. Where there has been a criminal conviction of a student on a case related to the same facts or allegations then the tribunal may take the facts to have been proven, hear evidence or submissions on sentence and proceed to pass an appropriate university sanction against the student. Any criminal offence that is committed by a student that prejudices staff, students or the University shall be subjected to a disciplinary hearing. If a student is convicted in a criminal court the tribunal shall find the student guilty in terms of the institutional rules. Any allegation in breach of the sexual harassment and sexual offences policy will be subject to disciplinary action.¹⁴³

¹⁴¹ UCT op cit note 140.

¹⁴² Ibid at 56-57.

¹⁴³ UCT op cit note 140 at 60-61.

The DJP rules and the Rules of Conduct for Students contained in *Handbook 3* must be read together with the University Student Discipline Tribunal Procedures and Guidelines. This procedural guide is set by the Tribunal of Appeal. The DJP rules in *Handbook 3* empowers the Tribunal of Appeal to prescribe such procedural guidelines.¹⁴⁴ A student may be assisted by a UCT staff member or student or may be represented by a legal representative. At any stage during the hearing the accused student may adjourn to consult with his/her assistant or representative. The student may allow his/her legal representative to conduct the proceedings on their behalf. The proctor determines the rules of procedure at a hearing, but he/she must be compliant with a process that is fair and practical read together with the procedural guidelines for such a hearing. If a student pleads guilty without a written plea submission, then the proctor may put questions to the student in order to ascertain if the student is guilty and understands why he/she is pleading guilty. Where a student pleads not guilty to a charge the proctor may also ask questions in order to limit the issues that are in dispute between the university and the defendant. At the plea stage, only the defendant is present before the panel or the proctor. The University representative leads evidence on behalf the complainant. The respondent may put questions to any witness led by the university in cross-examination. The proctor and/or assessors may also question witnesses for clarity on any issue raised. The respondent is not obliged to give evidence in his/her defence but if she/he does then the university may cross-examine the student and any witnesses that are led in the respondent's defence. The proctor administers an oath to any witness giving evidence before the tribunal. The procedural rules provide specific guidelines for evidence, citing inadmissible evidence rules, hearsay evidence rules and opinion evidence rules. If at the end of the case for the university, there is no reasonable case for conviction the student may apply to have the matter discharged. Should the matter not be discharged the option to give evidence and the implications of an adverse inference to be drawn should he not give evidence, must be brought to his attention.¹⁴⁵

¹⁴⁴ University of Cape Town 'University Student Discipline Tribunal Procedures and Guidelines' 2015, available at http://www.students.uct.ac.za/sites/default/files/image_tool/images/431/services/legal/downloads/UniversityProceduralRules.pdf. Accessed February 2018.

¹⁴⁵ UCT op cit note 144.

At the conclusion of all evidence, both parties to the hearing make submissions on whether a guilty finding or not should be delivered. If the student is found guilty then aggravating and mitigating factors are respectively submitted, and an appropriate sanction is passed. The proctor may consult with assessors on sentence but the ultimate decision on sanction is in the discretion of the proctor. The student is entitled to lodge an appeal within seven days from verdict and sentence. The Tribunal of Appeal hears matters largely on paper, with a maximum of 30 minutes of oral submissions from each side. The procedural booklet sets out guidelines for applications to lead new evidence. The papers are comprised of a transcript of the recordings from the USDT together with the charge sheet and all documents related to evidence and the hearing at the USDT. The VC or VC's nominee may refer a matter to the Senior Proctor where the sentence is regarded to be inappropriate. The Senior Proctor invites submissions from the convicted student before deciding whether to grant the university leave to appeal the sentence or not.¹⁴⁶

(iii) OIC and Special Tribunal

UCT's Sexual Harassment Policy and Sexual Misconduct Disciplinary Procedures were revised and formally approved and adopted by the relevant institutional authorities in December 2020.¹⁴⁷ These procedures are innovative in that it allows for jurisdiction of both student and staff cases to be heard by the Special Tribunal. The procedure is clear on the specialisation and training required of panel members.¹⁴⁸ The above policies and procedures have significant changes on how evidence is led in ensuring a survivor centred approach that minimises secondary trauma. A significant change is the inclusion of the right to legal representation to the complainant.¹⁴⁹ Some of the new proposed practices have already been under way, especially in terms of reporting cases related to sexual harassment, sexual assault, rape and discrimination. Through the Office for Inclusivity and Change (OIC), under the relevant Deputy Vice Chancellor's Office, an online reporting tool is available to

¹⁴⁶ Ibid.

¹⁴⁷ 'UCT approves sexual misconduct policy', 18 February 2021, available at <https://www.news.uct.ac.za/article/-2021-02-18-uct-approves-sexual-misconduct-policy> (accessed 20 February 2021).

¹⁴⁸ op cit note 147.

¹⁴⁹ Ibid.

complainants. A complainant may report a case online with the intention to have the matter investigated and proceed to disciplinary proceedings, report a case to alert the university of an offence but may choose not to proceed further, choose the option of resolving a matter by an informal process, choose to initiate an internal process and report the matter to SAPS. A further option is to report a case anonymously. Designated staff members who have relevant delegated positions in handling reported cases, investigations and prosecution of cases access the online system in order to assist complainants. Complainants retain the right to visit the OIC office to obtain support from a survivor support officer.¹⁵⁰

The OIC is developing innovative ways to assist all staff and students who experience violations of sexual offences. In addition to the online reporting system, tribunals handling sexual offences and discrimination cases are being upskilled with presiding officers and other panel members who will either come with the necessary specialised knowledge and skill to hear such matters or be trained to handle sexual offences misconduct cases. Campus community members can access the OIC website that provides information and contact details for both immediate support and ongoing advice and assistance to both the survivor and the respondent student in reported cases. A 24-hour emergency service is available for immediate assistance to anyone requiring trauma support and assistance with going to Victoria Hospital to receive medical care and counselling for trauma. The option of undergoing a forensic examination is provided for the survivor. The OIC and other stakeholders are working towards implementing a strategy to respond and deal with sexual offences on campus.¹⁵¹

UCT also aids alleged respondents in sexual offences matters. A Relations Strategist has been appointed within the OIC to advise and guide the respondent on the university policies, in understanding both the informal and formal processes that they may find themselves involved in. Line managers, transformation committees and student leaders are trained through information sessions on the university policies

¹⁵⁰ University of Cape Town Office for Inclusivity and Change 'Discrimination, harassment and violence' 2008 available at https://www.uct.ac.za/main/exploreuct/transformation/discrimination_harassment Accessed February 2019.

¹⁵¹ Ibid.

relating to sexual offences. This is done by using case studies and identifying what are best practises by filling the gaps in problem areas in policies and practices. Interventions by way of policy revisions and the setting up of a specialised sexual offences court is currently proceeding. Workshops and sensitive engagements with staff and students are part of the OIC's interventions related to advocacy and awareness around sexual offences and discrimination experiences. This includes an online video workshop and survey on how to respond to GBV as a bystander.¹⁵²

Since August 2019, UCT has set up a special tribunal that handles sexual offences. This is a pilot project that will develop interventions and proposals for a process that affords the respondent a fair trial but ensures that the actual hearing is supportive of a survivor-centred approach.¹⁵³ Proctors and assessors are drawn from faculty members who have had training or those who come with an extensive background in sexual offences and GBV matters.¹⁵⁴ External, appropriately qualified proctors have also been appointed to handle sexual offences disciplinary matters. An Evidence Leader has been appointed to present cases before the special tribunal.¹⁵⁵ The use of audio and video links in allowing survivors to give evidence remotely is also utilised. This is only where the complainant indicates a desire to give evidence via alternate means.¹⁵⁶ The special tribunal will work closely with the OIC in working towards a process that supports the survivor and assists the respondents in going through a fair and equitable process.¹⁵⁷

(iv) Summary

UCT's current policies are comprehensive and clearly aim to address sexual offences in a supportive and fair manner. Similarly, to other SA university policies, the gap would appear to be the synergy between the policies and the actual procedural guidelines for disciplinary proceedings for GBV cases. The current DJP and RCS rules empower

¹⁵² UCT op cit note 147.

¹⁵³ Carla Bernardo 'UCT's specialised sexual offences tribunal' UCT News [1 October 2019] available at: <https://www.news.uct.ac.za/article/-2019-10-01-ucts-specialised-sexual-offences-tribunal>, accessed on 8 February 2020.

¹⁵⁴ Bernardo op cit note 153.

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ Ibid.

the USDT and Tribunal of Appeal in relation to all cases that are in breach of the student code of conduct. The DJP and RCS rules do, however, speak to how a criminal offence is to be dealt with but not specifically in terms of the actual procedural aspects that may be relevant to sexual offences as opposed to other forms of misconduct. In line with the current OIC and Special Tribunal, UCT has made visible efforts in addressing these existing gaps in the process. A much clearer picture on how the sexual offences, sexual harassment and disciplinary processes will evolve may be determined once the revised policies and procedures are approved and made available to staff and students.

g) University of Witwatersrand (Wits)

The Wits Sexual Harassment, Sexual Assault and Rape Policy and Procedures was adopted in 2013. This policy is available and appears on the university website in terms of the policy mandates. The procedural aspects for a disciplinary process are replaced by the March 2015 Disciplinary Procedure for Gender-Related Misconduct, Staff and Students. The Sexual Harassment and Safety Office (SHSO) is now the Gender Equity Office (GEO). For purposes of including the policy imperatives the use of the former office title is used interchangeably with GEO as appropriate, until the current procedures are highlighted.¹⁵⁸

(i) Policy

Wits' Sexual Harassment, Sexual Assault and Rape Policy and Procedures focuses on the prevention of sexual offences, effective responses to reports of sexual offences and the provision of adequate support to victims. The policy is to be read together with other relevant institutional policies and procedures, including the disciplinary procedures for students and staff. The purpose of the policy is to ensure a campus environment that is safe and free of sexual violence. Staff and students are to be educated on the policies and procedures and to guarantee appropriate support to any

¹⁵⁸ University of the Witwatersrand 'Sexual Harassment, Sexual Assault and Rape Policy and Procedures' (2013) available at <https://www.wits.ac.za/media/wits-university/students/gender-equity-and-tolerance/documents/HRG.10%207%20Apr%202014%20Wits%20Sexual%20Harassment%20Policy.pdf> Accessed November 2018.

person who experiences any form of sexual harassment and sexual violence. The policy also intends for appropriate disciplinary measures to be followed for reported cases of sexual offences. Clear accountability for the execution and management of the policy is included. Confidentiality is to be maintained in all cases. The meaning of sexual harassment and definitions related to sexual misconduct is embodied in the policy.¹⁵⁹

The responsibility for procedures for cases of sexual offences lies with the SHSO. Psychological and social support is to be provided to all complainants. This office must raise awareness across campus by engaging in community talks and programmes that advocate a safer campus and understanding of sexual offences and related matters. The SHSO must ensure records are kept that show statistics and trends in all types of sexual offences that are reported. The office must be responsible for the case from inception to finalisation, which includes the investigations, communicating with the complainant throughout the process, and ensuring that cases are investigated even where the complainant does not wish to proceed with a formal case and where allegations are raised without an actual complaint reported. Where the complainant does not wish to proceed with a formal case, or chooses to remain anonymous, the SHSO is tasked with evaluating the seriousness of the allegations and if the incident is deemed to be serious a discussion with the Sexual Harassment Advisory Committee (SHAC) ensues and a determination is made as to whether the University should proceed with the case or not. This decision must be made in consideration of the potential for any risk to the complainant, the likelihood of risk to other campus staff and students, the severity of the offence and if there is a historical record of allegations and/or complaints of any sexual nature against the accused.¹⁶⁰

General provisions

If the SHSO or the SHAC is of the view that the allegations are of a serious nature with potential risk to others, then a written recommendation is made to the Vice Chancellor (VC) for a decision as to whether to proceed with a formal process or not. This must include a motivation that describes the offence that took place, the complainant's

¹⁵⁹ Wits op cit note 151.

¹⁶⁰ Ibid at 8-10.

motives for not wanting to pursue the case and why the recommendation for a formal procedure is sought. If the university goes ahead with a formal process, the identity of the complainant must be kept confidential. The complainant must be told of the decision, and ongoing support and counselling is to be offered to him/her. Where the perpetrator is a student, the SHSO may conduct a discussion with the accused student regarding the unwelcome conduct and that this creates a negative space for staff and students. If the perpetrator is a staff member, then a similar discussion must be conducted between the perpetrator, the line manager, the Director of Employment Relations and the SHSO. The identity of the complainant must remain confidential, and a record of the case is kept at the SHSO. The legal office is responsible for student cases and the Employee Relations office is responsible for disciplinary processes.¹⁶¹ This separate process for staff and students in this policy differs from the procedures since the adoption of the 2015 disciplinary procedure for staff and students.¹⁶²

The SHAC is comprised of academics and support staff who have expertise in issues of sexual harassment and other gender-related dynamics. Staff and student representatives are included in this committee. Senate will need to confirm the proposal for this committee by the VC at the outset of setting up the committee. The Disciplinary Hearing Panel (Panel) hears formal cases and presides over matters presented by the SHSO on behalf of the complainant and perpetrator. This panel must have representatives that are well versed in not only the law but have sound knowledge of employee relations and sexual offences. Internal or external members may make up the panel. Interim protective measures such as 'no contact' orders, residence reallocation, academic concessions, and leave must be accommodated. Medical care and transport to a hospital or the Campus Health office must be arranged for the victim. If the victim wants to report the matter to the police, arrangements for transport to the police station must be made. Two other chosen individuals may accompany the victim to the police station. The university delegated staff must support the victim by corresponding with the hospital and the police station. Ensuring that adequate forensic evidence is taken, is essential in supporting the victim. Mediation is

¹⁶¹ Wits op cit note 151.

¹⁶² University of Witwatersrand 'Disciplinary Procedure for Gender Related Misconduct' (2015) available at: <https://www.wits.ac.za/media/wits-university/students/gender-equity-and-tolerance/documents/Disciplinary%20Process%20for%20Gender-Related%20Misconduct.pdf>. Accessed November 2018

available to complainants and if this route is chosen the complainant retains the right to pursue a formal process. If there is a complaint against the VC, Council will appoint an impartial ombudsperson to handle the matter.¹⁶³

(ii) Monitoring and Implementation

Managers and Deans of students must ensure communication and implementation of the policy to staff and students respectively. Deans are to include information on the policy to students at orientation, maintain email correspondence on the seriousness of the issues around sexual violence and the need to be mindful of the policy. The SRC must receive a written communication on the policy mandate. University residence staff and third-party contractors are to be appraised of the policy and the consequences of any breach of the policy. Managers are expected to attend training and understand the policy in order to ensure all reasonable steps are taken to have a work environment that is free of sexual harassment. The Transformation and Employment Equity Office is also expected to compile training courses and arrange campaigns that promote advocacy regarding sexual offences. It is the function and responsibility of the SHSO to ensure regular rollouts of training courses and workshops to staff and students to support both managers and Deans of students in both education and implementation of the policy.¹⁶⁴

(iii) Discipline Procedure

The GEO was instituted in February 2014. This was previously the SHSO. An Independent Inquiry into Allegations of Sexual Harassment at the University of the Witwatersrand submitted a formal report that the university operations around sexual offences were too dispersed and disjointed to effectively handle gender-related and sexual offences with effective accountability. The recommendation was that a single office, within the Office of the Vice Chancellor, retain all functions related to misconduct arising from sexual offences and gender-related cases. The suggestion was that right from advocacy through to the disciplinary processes a single office should ideally be responsible for the diverse functions. The GEO now holds the

¹⁶³ Ibid at 11-16.

¹⁶⁴ Wits op cit note 155 at 11-16.

responsibility for all aspects of gender-related misconduct. The report further stated that the disciplinary processes were too legalistic in nature and resembled the criminal process for hearings. This was isolating for complainants and prevents more reporting of cases. The recommendation was for one disciplinary panel for all cases of sexual misconduct. This differs from the two separate processes for staff and students in the Sexual Offences Policy. This new procedure will still function within the relevant disciplinary rules and applicable policies. The VC or appointed DVC is authorised, on good reason, to depart from this procedure.¹⁶⁵

Complaints of gender-related misconduct are to be submitted to the GEO in writing with the understanding that the case is proceeding to a disciplinary process. If a complainant withdraws prior to the setting up of a panel, the GEO will ascertain if the withdrawal is voluntary and the implications of risk to the university. If the GEO decides to accede to the request to withdraw, the matter will have to proceed without the complainant and other evidence will be relied on. If the case is already underway before a panel the Chair of the disciplinary panel will decide whether to grant this request or not. If granted, the complainant does not have to be part of the proceedings and the GEO will continue with any other evidence that is available. If any interim protective measure is granted, where there is potential risk to either the complainant or both complainant and respondent, this may only run for 45 days or until the notification of a disciplinary hearing. The respondent has an opportunity to rebut the allegations prior to a decision is made in respect of the suspension order.¹⁶⁶

The composition of the panel includes a legally qualified Chair, a person from the SHAC, or any person with the appropriate knowledge and experience. If the respondent is a staff member, then a member of Senate must be on the panel and if the respondent is a student, then a member of the SRC will be present. Due to the complex and serious type of offences, all members of the panel must be suitably experienced. If there is a lack of availability of members or there are any other reasonable grounds, the VC may direct that only two members comprise the hearing panel. An investigator appointed by the GEO must compile a comprehensive

¹⁶⁵ Wits op cit note 155.

¹⁶⁶ Ibid at 2-3.

investigation report which must be done within 30 days from the initial investigation. Expeditious scheduling of hearings should be done as soon as the investigations are complete. The Chair and panel members, as well as the respondent, must receive the investigation report 15 days prior to the actual hearing. Should the respondent fail to appear at the proceedings, without submitting reasonable grounds for his non-attendance in writing, the matter proceeds in his/her absence. Any postponement granted by the Chair, on written request from the respondent, must be compelling and substantive.¹⁶⁷

The investigating officer attends all hearings and ensures that records are maintained. Any party to the proceedings may request the recordings at a later stage. The GEO must include a witness that has skill and background in gender issues in the list of witnesses that are called to give evidence on behalf of the university. Both the complainant and the respondent may bring a support person with them to the hearing. In keeping with the idea of a hearing that is not legalistic in nature, neither party may have a practising advocate or attorney as a representative. The Chair may, on application by either party five days prior to the hearing, based on compelling reasons, grant the right to bring a legally qualified representative to the hearing. Neither party meets in the hearing room. The panel sits in a meeting room and the parties sit elsewhere in separate rooms. The complainant and witnesses for the complainant are called as needed into the room with the panel. The discussion between the witnesses and the panel is heard by the respondent via an audio link. The respondent is subsequently called to discuss the case with the panel. The panel uses the investigation report to interview the parties around the issues related to the merits of the case. Other evidence such as photos and social media evidence may be allowed by the Chair, unless one of the parties disputes the evidence on reasonable grounds. The discretion in terms of procedure and admissible evidence is with the Chair. The hearing must only comply with the precepts of justice, fairness and relevance rather than rules of evidence and criminal procedure. The panel consults with witnesses and both parties to the hearing for purposes of clarity. Questions and cross-examination of

¹⁶⁷ Wits op cit note 155 at 3-4.

evidence may be done through the panel. The panel will decide whether questions are admissible or not.¹⁶⁸

Once all discussions have taken place and evidence submitted the panel must decide, on a balance of probabilities, as to whether the respondent is guilty or not. A majority vote by way of a secret ballot decides the verdict. The GEO makes submissions on a recommended course of action. The respondent is given an opportunity to make submissions towards leniency and the complainant may submit aggravating factors. An appropriate course of action is again decided by a secret vote. The GEO will communicate the outcome in writing to all parties. Wits has both a review and appeal process internal to the institution.¹⁶⁹

(iv) Summary

Wits policy on sexual harassment and sexual offences is comprehensive and clear. The aims of the policy are aligned to the advocacy around GBV and seeks to prevent and respond to sexual offences appropriately. The challenge in understanding the procedural processes for disciplinary hearings is that the procedural mandates in the policy and the procedure for gender-related misconduct differ and yet both policies and the new procedure are part of the institutional policies and procedures available on the website controlled by the GEO. This may lead to some misunderstanding of the processes. However, the Disciplinary Procedure for Gender-Related Misconduct, Staff and Students is a very good example of a fair process that is also survivor-centred. The explicit imperatives for a non-legalistic approach to internal hearings at universities may prove to be one of the better systems in place for disciplinaries of sexual misconduct.

h) Conclusion

¹⁶⁸ Ibid at 4-5.

¹⁶⁹ Wits op cit note 155 at 6.

All six universities have well-intended policies that seek to address sexual misconduct in a meaningful way. However, most of the universities lack clear guidelines in the disciplinary processes on how sexual misconduct should be dealt with from a procedural aspect. All misconduct appears to be heard by the same constituted panels, which does not separate out a process for offences related to gender and sexual violence. All the universities provide for interim protective measures to complainants and have an appeal process that is fair and reasonable, but disciplinary codes and processes should be clearly distinguished for academic infringements and those for sexual misconduct. UCT and Wits are two institutions that seem to be leading the process in making changes to the actual disciplinary procedures and processes that protect the complainant whilst ensuring a fair trial for the accused. It may be of use to consider a hybrid of the procedures of both UCT and Wits in prescribing a reviewed process that encourages reporting of cases and maintains effective responses and sanctions for sexual misconduct.

The South African university policies also indicate the need and recognition that adjudicators and presenters involved in sexual offences disciplinary cases should be adequately trained in both procedure and understanding the trauma of complainants.

IV Chapter 4: DISCUSSION AND ANALYSIS

a) Introduction

Sexual Offences have been a serious problem on campuses across the world and have consistently gained attention and advocacy. HEIs should provide a safe environment for students.¹⁷⁰ University sexual offences policies have come under severe scrutiny, with calls for survivor-centred reforms over several years.¹⁷¹ Some of the issues that are challenging for universities are the reporting of cases, survivor support within the process, both internally and externally, and the actual disciplinary processes, which are argued to severely compromise the wellbeing of a sexual offences survivor.¹⁷² The reporting and support aspects of the process appear, on my reading, to have drawn most attention from scholars and activists. The university disciplinary processes, whilst often mentioned, appear to have had less attention or revision. The literature on sexual violence on campuses shows how advocacy has consistently called for changes to policies and practices over time. University policies have been revised to address reporting and support services to the complainant, but there has been a lack of progressive changes to the disciplinary procedures that are necessary to uphold the purposes of these university policies.

Some South African HEIs have been improving sexual offences policies from the latter part of the 1980s. Inadequate policies and/or inconsistent implementation of policies continue to be problematic at universities.¹⁷³ The DHET has been developing a Policy and Strategy Framework that addresses GBV, which could assist universities in tackling institutional GBV.¹⁷⁴ It has been suggested that rape culture is embedded at universities by core patriarchal attitudes and implementation of existing policies are undermined by how universities respond to reports of rape and sexual violence.¹⁷⁵

Whilst systems within the universities have been established to deal with sexual offences, the inadequate administration of these systems contributes to continued

¹⁷⁰ Gerber op cit note 30.

¹⁷¹ Ibid at 47.

¹⁷² Ibid at 47.

¹⁷³ Teffrey-Goatley op cit note 11 at 1.

¹⁷⁴ Ibid at 31.

¹⁷⁵ Jewkes op cit note 7 at 7.

issues relating to sexual offences.¹⁷⁶ In a review of literature related to GBV in South Africa more generally, the Centre for the Study of Violence and Reconciliation (CSVr) argues that the State's failure to implement legislation and policies on GBV is a contributing factor to the prevalence of GBV.¹⁷⁷ The report quotes UN Special Rapporteur on Violence Against Women, Dubravka Šimonović, as stating that the lack of implementation of existing regulations and policies is the reason for the pervasiveness of GBV in South Africa.¹⁷⁸ The CSVr argues that legislation on GBV cannot function on its own and that, in order to achieve the purpose of the legislation, monitoring the implementation thereof is of vital importance.¹⁷⁹ In this way, interventions based on evaluation and evidence related to implementation can be actioned. Even though South Africa has made significant progress in addressing issues that affect women, the prevalence of GBV is still significantly high.

b) Policy Development

(i) Policy-Development and Implementation

During 2005 and 2006 the African Gender Institute (AGI) conducted research in three Southern African universities to assess the success of university sexual harassment policies. One was the University of the Western Cape (UWC) that had adopted a sexual harassment policy in the 1990s. The other two universities, both of which had new policies, were the University of Botswana and Stellenbosch University. The AGI argued that there was little indication to show that these policies had been incorporated into university discussions around democracy and gender equality but were rather located in the realm of feminist activism.¹⁸⁰

¹⁷⁶ GoLegal op cit note 32 at 1-3.

¹⁷⁷ The Centre for the Study of Violence and Reconciliation 'Gender Based Violence (GBV) in South Africa: A Brief Review', April 2016. available at <http://www.csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf>, accessed on 8 February 2020.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Jane Bennett, Amanda Gouws & Andrietta Kritzing et al "'Gender is Over'": Researching the Implementation of Sexual Harassment Policies in Southern African Higher Education' (2011) 8 *Feminist Africa* 5 at 83, 84.

The AGI identified less than a quarter of the 18 participating establishments, as having any policies in this regard in place.¹⁸¹ It was agreed by participants that, in the absence of relevant policies, institutions were particularly powerless to deal with serial sex offenders. It was further noted that vulnerable groups viewed the institutions as a threat.¹⁸²

The aim of the research conducted by the AGI was to provide a narrative and evaluation on the impact of institutional sexual offences policies at institutions of higher education in the Southern African region. A further objective was to promote respect, discussion about, and the advancement of human rights by improving the nexus between policy enactment and the implementation thereof, together with advancement of democratic values within Southern African higher education institutions.¹⁸³ The research group was mindful of the need for each institution to develop practices that were unique to their institutional context, but also for the policies to be accessible to survivors.¹⁸⁴

The institutions under evaluation by the AGI had set up prescribed procedures to channel complaints of sexual offences. They found, however, that little attention was given to the diverse associations of the campus community to the institution.¹⁸⁵ Looking at formal and informal disciplinary procedures, the AGI found that application was dependent on the perceived level of severity of the offence and that this also impacted on the survivor's choice of process.¹⁸⁶ Practically, these reporting channels and separate processes were found to be confusing. An additional issue was that in some cases it would be human resources officers that would decide on the appropriate route based on severity and complexity. These officers did not have the appropriate experience or knowledge to make such decisions.¹⁸⁷ They argued that survivors would be less likely to report cases or have confidence in the institution in such cases. Over time, the success of the sexual offences policies became questionable due to the multiple entry points for reporting, which were both confusing and disjointed.¹⁸⁸

¹⁸¹ Ibid.

¹⁸² Bennet et al at 84.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Bennett, Gouws and Kritzinger op cit note 174 at 84.

Based on the AGI report, HEIs were operating from one of two positions on the administration of justice. One was to deal with disciplinary cases in a more ‘criminal’ way, which led to expulsions and other disciplinary sanctions and the other was a more ‘restorative’ approach that led to forgiveness and healing, minus any punitive action against the perpetrator.¹⁸⁹ Anyone with insight into GBV will identify problems with both types of processes. Treating the harm as a criminal offence does reinforce the seriousness of sexual harassment and sexual violence. However, a criminal type of disciplinary process also contributes to trauma to a complainant as the perpetrator’s focus is inevitably on the credibility of the complainant. The research showed that complainants did not want to endure the traumatic effects of such a process.¹⁹⁰ It may be concluded that a process that is in the best interests of the health and wellbeing of a survivor, together with humanising the perpetrator, is more useful to policy making than one which is criminalised.¹⁹¹

(ii) *Diverging Policies*

The purpose of university policies is to educate the campus community, increase university community consciousness around relevant issues, and provide guidance and background to the university actions around sexual harassment and sexual violence. Another important objective is to conceptualise institutional accountability and processes that will create a safer university environment. There is inevitably a disparity between crafting policies, and the enactment and implementation of such policies.¹⁹² Research for this dissertation revealed inadequate or unfinished policies. Excluding UKZN and Rhodes University (RU), the other institutions all had a designated forum or person to handle sexual harassment complaints. All the other institutions’ policies directed complainants to the prevailing disciplinary rules, which would be used to effect disciplinary action for sexual offences. UKZN (in the 2004 policy), similarly to SU, did not have a policy that provided guidance on sexual assault matters but rather focused on a specific Sexual Harassment Policy.¹⁹³ The SU policy

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Teffrey-Goatley et al op cit note 11 at 118.

¹⁹³ Teffrey-Goatley op cit note 11 at 113.

was absent of any mention of rape and the term sexual assault was cited once.¹⁹⁴ The definition for sexual harassment stated ‘unwelcome, unsolicited and unreciprocated’ actions that had a sexual element.¹⁹⁵ The 2004 policy was replaced by a 2016 policy that contained far less information and omitted the previously mentioned stages for processes to handle sexual offences reports. The 2004 version referred to specific institutional staff such as Discrimination Advisors and Diversity Managers as the relevant role-players in handling complaints. The new policy merely mentioned Division Managers as being responsible for dealing with sexual harassment complaints.¹⁹⁶

c) Recent Advocacy Efforts

In 2014, a report on GBV in higher education was compiled by the South African Ford Foundation (Ford) at a workshop in Johannesburg.¹⁹⁷ The purpose of the workshop was to gather feminist scholars, students, society campaigners and the Ford Program Officers to investigate possibilities of supporting and effecting studies that would influence GBV policy and processes at HEIs.¹⁹⁸ The three main aims of the workshop were to review the obstacles that universities face in addressing GBV and to recommend a way forward to the Transformation Oversight Committee, review proposals arising from research that were given to the DHET and evaluate whether these proposals could be perfected, unified and presented to Ford, DHET and other prospective collaborators.¹⁹⁹ The third objective was to set out short- to long-term aims for HEIs to address GBV. Prof. Jane Bennett (UCT, African Gender Institute) raised salient points with regards to the management of GBV at HEIs. She noted that universities appeared to be responding after years of a sexual violence crisis. And when they did it was as if the issue of GBV had to be redesigned. There was no lack of research on the continent, including South Africa. This research included both good

¹⁹⁴ Ibid at 96.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Geyer, Yvette ‘Time To Move Ahead? A Report on GBV In Higher Education Workshop’ (28 May 2014) Ford Foundation, Johannesburg. Available at <https://www.saferspaces.org.za/understand/entry/gender-based-violence-at-higher-education-institutions-in-south-africa1>, Accessed February 2019.

and negative aspects.²⁰⁰ Bennett contended that further relevant research should be considered. This should include research done at schools on HIV, equality, as well as PhD and Masters theses on GBV. In order to rectify the problems within universities, GBV should be addressed with a decolonial view and not just in relation to plans that relate to economic and reputational aspects.²⁰¹ Participants pointed out that GBV at universities reflected the challenges in society at large and whilst it is not the responsibility of universities to eradicate GBV, transformative changes can represent the ideal standard for society to follow. An important consideration is whether university disciplinary processes are effective or not. If the process is too legalistic, the editing of the complainant's language in expressing their experience is diluted and not supportive of dealing with sexual offences.²⁰² They concluded that a transformed process would be less retributive and protect both parties to a disciplinary process. Moreover, for HEIs to transform normalisation of GBV and effectively manage it, there should be a clear national policy strategy that encourages collective processes at universities.²⁰³

Understanding the context of university life and the lived experiences of students in relation to gender and transactional sex underpins the need for universities to have effective policies and procedures. Female students who challenge the traditional gendered roles are often castigated.²⁰⁴ Nearly all HEIs have sexual harassment policies, but there is little evidence that the effectiveness of these policies have been evaluated.²⁰⁵

d) Institutional and other Risk Factors

Despite activism around GBV since the early 1980s consistent advocacy and activism has continued to impact on revisions of policies and institutional responses. In 2016 student protests exploded at all SA universities on several issues. This included advocacy and an outcry against GBV and sexual violence at universities. The South African community and the media were made aware of the high rates of sexual

²⁰⁰ Ibid.

²⁰¹ Ibid at 8-9.

²⁰² Ibid.

²⁰³ Ibid at 14, 15 and 25.

²⁰⁴ Clowes et al op cit note 39 at 30.

²⁰⁵ Joubert, Van Wyk & Rothmann op cit note 99 at 6.

violence at HEIs. It is suggested that although awareness around GBV has increased, national research inquiries into GBV at HEIs is unclear. Under-reporting of cases also impacts on the perception that the issue is not as serious or widespread.²⁰⁶ Several factors influence the aspects of risk in GBV at HEIs. Organisational and societal patterns are relevant features in understanding the issues around this. South African universities are not identical and whilst there may be similarities in factors that influence GBV there may be unique patterns of behaviour at each institution. Under-reporting is not only influenced by a lack of clarity on the definitions of GBV and victimisation, but even where this is clear in an institution's policy, a lack of faith in the positive responses from a university may also affect reports of cases that occur. Universities that are explicit in educating the campus community on gender equality and GBV are more likely to reduce sexual violations and, at the same time, restore confidence in complainants to report cases.²⁰⁷

Efficient policies and practices that not only prevent GBV but effectively respond to GBV, reduce risk patterns to an institution. Not all South African universities have specific sexual harassment and sexual violence policies. Policies that do exist at HEIs are not consistent with one another and the absence of a single predominant policy that directs institutional responses to GBV is problematic.²⁰⁸ Institutional policies are not always abreast of current laws and best practices. Some policies are not broad enough or are seen to be ineffective in its implementation. Several universities do not have adequate support measures in place and there are those that lack clarity in the reporting procedures. The idea is to increase reporting of offences and decrease sexual violations. One way of achieving this is for universities to have detailed policies on reporting mechanisms, support structures, effective procedures to respond to violations and to effectively educate staff and students on GBV policies and practices.²⁰⁹ The effect of sexual violence, including sexual harassment, on survivors has far reaching effects psychologically, emotionally and physically. This in turn hinders a student from achieving academic success and staff from performing well in their job functions. This negatively affects the university and society in that the true capability of a student or staff member is lost. Follow-up support to survivors of GBV

²⁰⁶ Warton & Moore op cit note 14 at 1.

²⁰⁷ Clowes et al op cit note 39 at 7-8.

²⁰⁸ Clowes et al op cit note 39 at 8.

²⁰⁹ Ibid at 9-10.

is important. HEIs need to remain mindful and vigilant about the after-effects of sexual violence and trauma. The scarcity of long-term engagement and follow-up with a survivor is a general problem.²¹⁰

²¹⁰ Ibid at 11.

V CONCLUSION

a) Introduction

Regardless of the existence of sexual harassment policies that are viewed as effective, the execution of the policies remains ineffective. Academic staff members who participated in the study indicated that they had no training or guidance on how to utilise the available policies.

The case study in Chapter 2 of this dissertation outlined the human cost of challenges that arise in terms of procedure and training in sexual offences cases on campus. Disciplinary hearings at universities are guided by institutional rules formulated by university councils as provided for in the relevant legislation and more specifically PAJA. The review of the university policies in chapter 3 indicated that policy and procedures are unique in some ways to each university, while similar policy guidelines on sexual offences exist. PAJA sets out what a fair administrative process should include and SORMA has clearly defined laws on the court management of sexual offences cases.

In disciplinary matters, the standard of proof is lower. The requirements for a disciplinary case are that it should comply with fairness, reasonableness and procedural fairness. This mandatory requirement is for the benefit of the respondent facing allegations of an offence. The case study suggested that the process was conducted within the prescripts of both the Constitutional rights of the accused as well as those of PAJA.

b) Case analysis review

The accused was represented by two legally skilled representatives. Although the outcome was not in his favour, the process afforded him an opportunity to be represented and to present his argument against the charge of rape. Had there been any procedural flaws, his lawyer would have been able to argue on any relevant issues.

The process for the complainant in the case study, although a conviction was sustained, was not in her best interest. This is not due to any bias against her but rather a process that may not have adequately utilised the legislative and administrative opportunities available to a disciplinary process. The delay in the matter was due to the numerous adjournments for both the medical evidence and the medical practitioner. Forensic or medical evidence is not necessary for an internal administrative hearing such as this. Universities are not equipped to deal with forensic and or medical evidence. This is apparent in the further adjournment for the doctor to come to the hearing to explain the contents of the medical note. Initially the medical note to verify physical injuries was requested. Subsequently the panel indicated that the contents of the medical note was unclear to them and therefore the doctor would need to attend the hearing to explain the note to the panel.

This challenge then leads to the next issue of contention around the standard of proof. If the standard of proof in institutional disciplinary matters is based on a balance of probabilities, which is a much lower test than that of a criminal trial (beyond reasonable doubt) then surely there is no need to have the medical evidence. Further, the respondent did not dispute that he had sexual intercourse with the complainant - he contended that this was consensual. The evidence provided by the complainant is that she was sore and bleeding. The amount of blood in the bed and in the bathroom, together with the evidence that she had texted her friend to say she was upset about the respondent touching her at the party would have been enough for consideration of a ruling based on the appropriate standard of proof. The respondent failed to explain why he entered the building covertly rather than signing in. The complainant was intoxicated and clearly unable to consent to the act. Any person who is intoxicated and/or unconscious or partially conscious cannot consent.²¹¹ These are several key issues that would have been enough for the applicable standard of proof. Even if the evidence did not convict the respondent, the issue is whether the level of evidence required was necessary or not.

The most vital aspect of the process is that the complainant suffered immense trauma due to several factors. No alternative means of leading evidence was explored.

²¹¹ Promotion of Administrative Justice Act Section 3(d) (iii).

She sat across from two intimidating legal professionals in addition to the person who violated her. She faced hours of cross-examination and subsequently had to wait for more than a year for finalisation.

The case study indicates that the disciplinary process attempted to have the case proved beyond reasonable doubt. The evidentiary test for disciplinary matters is so much lower than that of the criminal court standard. In fact, not even the criminal court requires evidence that proves a case beyond all doubt. Reasonable doubt surely cannot be interpreted as beyond all doubt. As was said in *Miller v Minister of Pensions*²¹² by Denning J: 'Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice.'²¹³

SORMA makes specific provisions for a victim-centred approach in the trial and evidentiary court processes. The directives in terms of the management of sexual offences also provides for the protection of complainants and attempts at reducing secondary trauma. If Council of HEIs are authorised to formulate rules and procedures to give effect to laws, and national directives clearly support a system that promotes the wellbeing of a complainant in legal and other processes, then university procedures will need to be consistent with the intention of legislation and advocacy in this regard. Legal representation for a respondent should be restricted to only one appointed person. University procedures should be explicit in conforming with standards of evidence in line with the requirements of the standard of proof on a balance of probabilities.

c) Policy and Legislation

HEIs were male-dominated spaces with little sensitivity to the vulnerability of women in campus spaces. Progress towards policy growth and enactment was slow and reluctantly provided. It seems as if activism, national legal changes, and reputational damage were the driving forces at the outset of change. Over the years, leadership changes with a greater sensitivity to GBV and proactive advocacy and student protests

²¹² [1947] 2 All ER 372 (King's Bench).

²¹³ *Syster & another v The State* (126/2014) [2014] ZASCA 215 (01 December 2014) at para 18.

ignited revisions and further developments in policy. UCT and SU were pioneers in policy and process advances, but this was primarily due to committed policy makers who were determined to address the scourge of sexual harassment, sexual violence and other issues related to women and sexuality. It took decades to enact support measures and policies around these concerns, although the implementation of processes for complaints appears to have had less positive movement than policy making. Studies by several authors, and policy making, echo concerns about implementation and the nature of formal disciplinary proceedings. This concern is repeated in some studies. However, the focus on the developments in policies at HEIs have largely focused on the directives in the policy, reporting and support of survivors. The extent of the inquiry into improving disciplinary procedures is insufficient.

This dissertation reviews the sexual offences policies of six South African universities, finding that each institution has their own policy and procedures for sexual offences cases. The procedures for sexual misconduct are often found in the general disciplinary procedures. This minimises justice for complainants, since procedural rules for academic infringements do not address correct procedures that effectively minimise trauma to complainants of sexual offences. Through a hypothetical case study, which is a composite of several cases heard at South African universities, I highlight some of the practical difficulties experienced in the prosecution of rape cases.

Analysis

A policy review of six SA universities in chapter three identified effective policies for sexual offences, but inadequate procedures that should meet the objectives of those policies. A comparative study of criminal trials versus administrative hearings followed in chapter four. This included a case study, which is a composite of various cases as experienced at a South African university. Chapter five concluded with a summary of the previous chapters and a discussion on any identifying characteristics that are evident in the intention of policies but absent in the procedural practices. The most important response from a university would be the practice of ensuring fair outcomes in disciplinary cases. In this way the objectives of university policies, as evidenced in Chapter 3, will synergise with effective procedural aspects of disciplinary cases.

Should universities make intentional changes to the disciplinary procedures for sexual offences, the protection of the complainant from trauma must be central to the process. This can be achieved by revising the disciplinary procedures by drafting and enacting a separate procedure for the inquiry into sexual offences. This procedure should remove the kind of language that encourages an adversarial system. It should not include any reference to cross-examination but should rather couch this 'cross-examination' as questions. Further, these questions should be directed to the adjudicating panel or Chair rather than directly to the complainant. Removing such adversarial language does not preclude the respondent from rebutting evidence, asking questions or presenting his or her case. It merely assists the disciplinary panels in reinforcing an administrative process that is reflective of an inquisitorial inquiry rather than an adversarial process. Options for alternate means of leading evidence should be mandatory in all university policies and procedures for sexual offences cases. This allows the complainant to give evidence and respond to questions without having to come face to face with the person who is responsible for the violation against her. Some complainants may choose to face their aggressor and the procedure should empower her to make those choices.

Concluding recommendations

It is imperative that university procedures ensure that the Chair and panel members are suitably qualified and have had training or experience in dealing with sexual offences. This adds appropriate understanding and skills to the disciplinary inquiry especially around controlling the process should it start resembling an adversarial process. This also equips such a panel in arriving at a correct decision as to whether there has been a breach of the disciplinary code. Appropriate sanctions are more likely to be handed down by properly trained panel members. The disciplinary procedure must clearly exclude testimony or questions that relate to previous sexual history. Revised policies without the correct and appropriate procedural rules render the policy itself incapable of achieving its purpose.

The following are concluding recommendations:

- That the respondent be allowed only one legal representative.

- That complainants be provided with the opportunity to give evidence via closed circuit television or any other method that eliminates a face-to-face encounter during proceedings.
- That the word 'cross-examination' be eliminated from university policy and procedure.
- That questions to the complainant be conducted in a more inquisitorial manner, preferably with questions put through the panel.
- That delays are minimised by increasing resources within sections handling sexual misconduct to expedite cases.
- That the complainant be allowed legal representation over and above any institutional representative.
- That the balance of probabilities standard of proof be embedded in all sexual misconduct policy and procedures.
- Policy revisions must include procedural revisions that meet the objectives of the policy.
- Trained panel members must be mandatory.
- Complainant support throughout the process must be mandatory.
- That sexual misconduct disciplinary processes maintain an inquisitorial nature.

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