

SUPREME COURT OF QUEENSLAND

CITATION: *Y v University of Queensland & Anor* [2019] QSC 282

PARTIES: **Y**
(applicant)
v
UNIVERSITY OF QUEENSLAND
(first respondent)
and
DISCIPLINARY BOARD OF THE UNIVERSITY OF QUEENSLAND
(second respondent)

FILE NO/S: BS No 10347 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 16 October 2019

JUDGE: Lyons SJA

ORDER: **The order of the Court is that:**

- 1. Pursuant to section 43 of the *Judicial Review Act 1991 (Qld)*, the second respondent is restrained from proceeding with the hearing into the matter the subject of the referral to the second respondent described in the Allegation Notice to the applicant dated 2 September 2019.**
- 2. The respondents are to pay the applicant his costs of and incidental to the application on the standard basis.**
- 3. The identity of the Applicant is not be published and only reasons for judgment and orders excluding the Applicant's name be released by the Court to non-parties without further contrary order of the Court.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – DIRECTION TO ACT OR REFRAIN FROM ACTING – where the applicant is a student of the

first respondent – where an Allegation Notice alleged misconduct by the applicant asserting the applicant committed a number of sexual assaults against another student of the first respondent – where the second respondent is a decision-maker under the first respondent’s Student Integrity and Misconduct Policy – where the applicant seeks an order under s 43 of the *Judicial Review Act* 1991 (Qld) or s 9 of the *Civil Proceedings Act* 2011 (Qld) restraining the respondents from holding a hearing into the matter notified to the applicant by the Allegation Notice – whether the second respondent has jurisdiction to hold the hearing – whether the second respondent should be permanently restrained from holding the hearing

Civil Proceedings Act 2011 (Qld), s 9

Criminal Code Act 1899 (Qld), s 349

Judicial Review Act 1991 (Qld), s 43

Police Powers and Responsibilities Act 2000 (Qld)

Summary Offences Act 2005 (Qld)

University of Queensland Act 1998 (Qld), ss 4, 5, 6, 8, 9

Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd [2015] HCA 7

Griffith University v Tang (2005) 221 CLR 99

Hardcastle v The Commissioner of Police (1984) 53 ALR 593

Lee and Anor v NSW Crime Commission (2013) 251 CLR 196; (2013) 302 ALR 363

Lewis v Prosthetists and Orthotists Board [2001] EWCA Civ 837

X v University of Western Sydney (No3) [2013] NSWSC 1329

X v University of Western Sydney [2014] NSWSC 82

X7 v Australian Crime Commission (2013) 248 CLR 92; (2013) 87 ALJR 858

COUNSEL: A D Scott for the applicant
D Kelly QC with D Marckwald for the first respondent

SOLICITORS: Mulcahy Ryan Lawyers for the applicant
Corrs Chambers Westgarth for the first respondent

Factual background

- [1] The applicant is a final year medical student at the University of Queensland (the University) who is due to sit his final exams in November 2019. Subject to registration with the Medical Board the applicant has been offered an intern position at a regional hospital in early 2020. He is unable to register as a medical practitioner with the Medical Board without the award of Doctor of Medicine.

- [2] On 2 September 2019, the Disciplinary Board of the University sent an Allegation Notice¹ to the applicant which stated that there were allegations of sexual assault which were alleged to have occurred against a fellow student during a clinical placement in early 2018. The letter stated that the Chair of the Disciplinary Board had accepted a referral from the Academic Registrar to hear and decide the allegations of sexual assault under the provisions of the Student Integrity and Misconduct Policy as a level 3 general misconduct, and that it would determine outcomes or penalties under that policy.
- [3] The letter also provided that the highest penalty that could be imposed under that section for that category of misconduct was “expulsion”. Whilst that letter referred to several documents being attached to that letter including one entitled “Referral to the Disciplinary Board” and one entitled “Preliminary Investigation documentation”, those documents have not been provided for the purposes of this application. If there is a formal Referral to the Disciplinary Board and/or a Preliminary Investigation report I am unaware of their contents.
- [4] That letter of 2 September 2019 stated that there would be a hearing on 19 September 2019 and that the applicant could bring a support person who was “not legally qualified” and that he also had the opportunity to “invite witnesses to attend the hearing to support your case”.² He was also advised it would be “helpful” to advise the Disciplinary Board in advance how he wished to plead and that the hearing might also proceed in his absence should he not appear. He was also invited to provide a written statement in response to the allegations. Attached to that letter was a “tick a box” document on which he could indicate his pleas to the Allegations.³
- [5] The Allegation Notice as set out in the letter of 2 September 2019 was in the following terms:⁴

“Allegation Notice

Pursuant to section 6.2 of The University of Queensland’s *PPL 3.60.04 Student Integrity and Misconduct – Policy*, it is alleged that you have engaged in the following conduct:

Allegation 1 - Contravening any provision of the *University of Queensland Act 1998*, statutes or policies (specifically s1.1 of the Student Charger); and

Allegation 2 - Harassing, vilifying, bullying, abusing, threatening, assaulting or endangering staff, students or other members of the University’s community directly or by other means of communication.

Details of the alleged conduct are that while enrolled as a student and undertaking a clinical placement in [town] between February 2018 to April 2018, you sexually assaulted [name removed “Z”] on 20 April 2018 by subjecting her to unsolicited acts of physical intimacy.” (my emphasis)

¹ Exhibit D to the Affidavit of Wendy Mulcahy sworn 23 September 2019.

² Exhibit D, p 18 of the Affidavit of Wendy Mulcahy sworn 23 September 2019.

³ Exhibit D, p 19 of the Affidavit of Wendy Mulcahy sworn 23 September 2019.

⁴ Exhibit D to the Affidavit of Wendy Mulcahy sworn 23 September 2019.

- [6] As result of correspondence from the applicant’s solicitors on 10 and 13 September 2019 the University acknowledged, in a letter dated 20 September 2019, that the particulars which had been provided were not sufficient. Further particulars of the allegations were then provided under cover of that letter of 20 September 2019 as follows:⁵

“ ...

Allegation 1 is an allegation of general misconduct as defined in section 6.2.2(a) of the Student Integrity and Misconduct – Policy. It is an allegation that the University’s policies were contravened in that section 1.1 of the Student Charter, which forms part of the Student Charter – Policy, was not complied with. Section 4.1 of the Student Integrity and Misconduct – Policy provides that:

“Students must conduct themselves in a manner consistent with the standards of behaviour set out in the student charter...”

The relevant paragraph of section 1.1 of the Student Charter appears under the heading “We expect you to” and is as follows:

“not engage in conduct which might reasonably be perceived as discrimination, harassment or bullying or which is otherwise intimidating PPL1.70.2 Prevention of Sexual Harassment...”

The relevant sections of the *Prevention of Sexual Harassment – Policy* (PPL1.70.2) are as follows:

Section “2.1 Sexual harassment happens if a person:

- (a) subjects another person to an unsolicited act of physical intimacy;
or
...
 - (b) engages in any other unwelcome conduct of a sexual nature in relation to the other person;
and
...
 - (f) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.”

Section “2.2.1 Examples of sexual harassment – The following actions may constitute sexual harassment. (Please note that this is not an exhaustive list and other actions or activities may also constitute sexual harassment).

- Physical contact such as ... touching in a sexual way
- ...”

⁵ Exhibit P to the Affidavit of Wendy Mulcahy sworn 23 September 2019.

Section “5.1 All Staff and students are responsible for maintaining an environment free from sexual harassment.”

Apart from the particulars of your alleged conduct, which are addressed below, the above constitutes the parameters of Allegation 1.

Allegation 2 is an allegation of general misconduct as provided for in section 6.2.2(h) of the *Student Integrity and Misconduct – Policy*. Relevantly, it is an allegation that by the alleged conduct a student was directly harassed, abused, assaulted or endangered.

Apart from the particulars of your alleged conduct, which are addressed below, this constitutes the parameters of Allegation 2.

Attached are copies of the following policies as in place at the time of the alleged conduct:

1. Student Integrity and Misconduct – Policy
2. Student Charter – Policy
3. Prevention of Sexual Harassment – Policy

...

The Decision Making Process

The decision-makers will be considering allegations concerning whether you have breached the University’s policies as specified in this letter and not whether a criminal offence has been committed. (my emphasis)

.....”

- [7] The particulars of the alleged conduct relevant to allegations 1 and 2 were then set out in a document which was attached:⁶

“Particulars of the Alleged Conduct Relevant to Allegations 1 and 2. Allegations 1 and 2 are referred to in the Allegation Notice of 2 September 2019 addressed to Y.

- The alleged conduct occurred while [Y] and [Z] were enrolled as students of University of Queensland and were undertaking clinical placements in [town] between February 2018 and April 2018 as part of their courses.
- At the time of the alleged incident, [Y] and [Z] were residing in student accommodation which is attached to the Rural Clinical School [town]. Both the student accommodation and the [town] Rural Clinical School are owned and occupied by the University of Queensland.
- It is alleged that the conduct occurred on the evening of 20 April 2018 in [Z]’s bedroom. The alleged conduct occurred whilst [Z] and [Y] were in [Z]’s bed. [Z] lay on the left side of the bed and

⁶ Exhibit P, p 80 of the Affidavit of Wendy Mulcahy sworn 23 September 2019.

[Y] on the right. [Z] placed some pillows between herself and [Y]. [Y] removed the pillows and shortly thereafter rolled onto his side and put his arm around [Z]. [Z] pushed [Y] away and moved herself further away from [Y]. [Y] and [Z] kissed and [Z] told [Y] good night.

- Without [Z]’s permission, [Y] pulled [Z] towards himself and [Y] inserted his fingers into [Z]’s anus. [Z] told [Y] to stop. [Y] withdrew his fingers from [Z]’s anus. A short time later [Y] reinstated his fingers into [Z]’s anus. [Z] pushed [Y] away and told him to leave the room. [Y] stood up and removed his clothes.
- [Y] re-entered the bed and without [Z]’s permission removed [Z]’s pyjamas. Without [Z]’s consent [Y] then lay on top of [Z] and bit her body and inserted his fingers into her vagina. [Z] told [Y] on several occasions to stop his actions, that he was hurting her, and told him to leave the room. [Y] did not comply and continued to touch [Z]’s vagina. [Y] then started to force [Z]’s legs apart. [Z] tried to push him away.
- [Z] cried and asked [Y] to leave. [Y] tried to hold [Z], but [Z] pushed [Y] away. [Z] asked [Y] again to leave the room however [Y] remained in the bed until the morning.”

[8] The letter of 20 September 2019 stated that the date for the hearing had been extended until 24 October 2019. Counsel for the applicant indicated that there was no updated referral to the Disciplinary Board after the further particulars of the allegations were provided.⁷ In this regard I note that the statement that “the decision-makers will be considering allegations concerning whether you have breached the University’s policies as specified in this letter and not whether a criminal offence has been committed” is in the second letter outlining the further particulars dated 20 September 2019 and not the original letter of 2 September 2019.

[9] As I have not been provided with a copy of the original Referral (if any) to the Disciplinary Board and as there is no updated Referral, I do not know the precise terms of the actual Referral to the Board other than to note that the 2 September 2019 letter states that the Chair had accepted a “referral from the Academic Registrar to hear and decide these allegations under the provisions of section 8.2 as a level 3 general misconduct, and determine outcomes or penalties under section 8.9 of PPL3.60.04”⁸. Those allegations were of sexual assault on 20 April 2018 which involved a number of acts of “unsolicited physical intimacy”⁹. I infer therefore that if there was a Referral document it would have been in the terms of the letter of 2 September 2019.

[10] On 23 September 2019 the applicant filed this application for relief under the *Judicial Review Act 1991 (Qld) (JR Act)* or the Court’s general jurisdiction under the *Civil Proceedings Act 2011 (Qld) (CP Act)*, to restrain the respondents from holding a hearing

⁷ Email from the Counsel for the applicant dated 13 November 2019.

⁸ Exhibit D to the Affidavit of Wendy Mulcahy sworn 23 September 2019.

⁹ Exhibit D to the Affidavit of Wendy Mulcahy sworn 23 September 2019.

into the matter. The applicant contends that the proposed inquiry by the University Disciplinary Board is unlawful and beyond power because:¹⁰

- (i) It is an enquiry into an allegation of a criminal offence of a sexual nature, namely rape contrary to s 349 of the *Criminal Code*;
- (ii) The Disciplinary Board does not have jurisdiction to decide allegations of criminal offences of a sexual nature; and
- (iii) The purported inquiry is without jurisdiction.

- [11] The application was listed in the Applications list on 16 October 2019. At the hearing, Counsel agreed that the issues were confined and that there were no broader issues such as the relationship between universities and students, such as those discussed in *Griffith University v Tang*.¹¹ There is also no dispute about the Court's jurisdiction to hear the application either under the *JR Act* or the *CP Act*, neither is there any issue in relation to a breach or apprehended breach of procedural fairness alleged in this application such as were highlighted in *X v University of Western Sydney (No3)*.¹²
- [12] There was some contest as to whether the second respondent should be a party to these proceedings given it is not a body provided for by statute and is not a legal entity capable of being sued. Whilst I accept that the Board is not a body created under the *University of Queensland Act 1998 (Qld) (UQ Act)* and has no legal status separate to the University, it is fairly standard practice to name the board involved in proceedings of this nature. In any event Counsel for the first respondent indicated that the University would abide by any orders made.
- [13] The essential dispute in this application is whether the second respondent has jurisdiction to undertake a hearing and a determination in relation to the allegations made against the applicant which are formulated as allegations of sexual assault. Judgment was reserved on 16 October 2019. Counsel for the first respondent indicated that the University undertook not to proceed with the disciplinary hearing until two clear business days after judgment was delivered.

The relevant Policies of the University

- [14] The first respondent is a body corporate established by s 4 of the *UQ Act*. The functions of the University are set out in s 5 and include the function to provide courses of study or instruction and to confer high education awards. The powers of the first respondent are set out in s 6, and s 6(1)(f) specifically provides that the first respondent has “the power to do anything necessary or convenient to be done for, or in connection with its functions”.
- [15] The *UQ Act* then establishes the Senate of the University as the governing body and it has the power to manage and control the University's affairs and property and includes the

¹⁰ Applicant's Outline of Submissions, CFI 11 at [5].

¹¹ (2005) 221 CLR 99.

¹² [2013] NSWSC 1329.

power to expel a particular student and the power to refuse to confer an award on a student.¹³ Pursuant to the Senate's management power, the Senate has promulgated various standards of student conduct in the form of policies.

[16] The relevant policies for the purpose of this application are:

- (i) Student Integrity and Misconduct - Policy (PPL 3.60.04a).¹⁴ That Policy defines various categories and levels of misconduct as well as the process for deciding allegations of misconduct and the process for determining the consequences if those allegations are found to be proven.
- (ii) Student Charter - Policy.¹⁵ That Policy states the University's commitment to students, the University's expectations and the responsibilities of all members in relation to conduct as well as providing guidelines.
- (iii) Prevention of Sexual Harassment - Policy (PPL 1.70.02a).¹⁶ The Policy defines what constitutes sexual harassment, outline the measures to prevent sexual harassment and provide links to staff and student grievance resolution policies and procedures for the resolution of sexual harassment complaints. The Policy also notes that sexual harassment is unlawful under State and Federal legislation.
- (iv) Sexual Misconduct - Policy (PPL 1.50.13a).¹⁷ The Policy outlines the overarching principles governing the University's approach to preventing, addressing and responding to Sexual Misconduct, which is behaviour which is inconsistent with the University's values. The Policy provides that it must be read in accordance with the Sexual Misconduct - Procedures document.¹⁸ Section s 4.4 of that Policy provides:

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

- (v) Sexual Misconduct - Procedures (PPL 1.50.13b).¹⁹ The document contains key definitions and states that the procedures have been

¹³ *UQ Act*, ss 8 and 9.

¹⁴ Exhibit G to the Affidavit of Wendy Mulcahy sworn 23 September 2019.

¹⁵ Exhibit F to the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

¹⁶ Exhibit I to the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

¹⁷ Exhibit G to the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

¹⁸ Exhibit SW-1 to Affidavit of S Webster filed by leave on 16 October 2019.

¹⁹ Exhibit SW-1 to Affidavit of S Webster filed by leave on 16 October 2019.

developed in accordance with guidelines for best practice in relation to Sexual Misconduct prevention, management and response. Section 3 is devoted to prevention and education and s 4 sets out the procedure for making a Disclosure or a Formal Report “if a person would like UQ to take further steps in relation to Sexual Misconduct”. A Disclosure is a less formal option which provides access to support and reasonable measures whereas a Formal Report may also initiate further action by the University or a Disciplinary Process. Section 4.6.3 provides that a Disclosure does not initiate further action and if the person making the Disclosure wishes further action then they may elect to make a Formal Report.

Nothing precludes a person from making a report to the police and s 4.7.1 provides that a report to police or external agency is considered to be a Formal Report. The person who receives the Formal Report is then required to take reasonable steps to comply with certain obligations about informing the complainant about steps the complainant may wish to take.

Section 5 sets out the Further Action which can be taken by UQ in response to a Formal Report if it involves UQ related conduct and the respondent is a member of the UQ community.

Section 5.2 provides that any further action taken by the University in response to a Formal Report, including any investigation or Disciplinary Process, is separate from and not related to any criminal proceedings or investigations conducted by the police or other external agency.

Section 5.3 provides that a Formal Report is to be provided to the relevant officer of the University, which in the case of a student is the Academic Registrar where the Formal Report will be considered and may be progressed pursuant to the Student Integrity and Misconduct Policy.

The Disciplinary Board and its powers

- [17] Section 8.2 of the Student Integrity and Misconduct Policy provides that the Disciplinary Board is the decision-maker for an allegation of level 3 misconduct such as has been made in this case. Section 10 of that policy provides that the Disciplinary Board is comprised of a chair who is a senior member of academic staff, two members of academic staff of the first respondent, and two members who are students of the first respondent.
- [18] That Student Integrity and Misconduct Policy provides for three levels of misconduct: level 1 - minimal; level 2 - moderate; and level 3 - serious. The Student Integrity and Misconduct Policy distinguishes between “academic misconduct” and “general misconduct”.

[19] General misconduct is defined broadly in s 6.2.1 and includes conduct that:²⁰

- (a) Impairs the reasonable freedom of others to pursue their studies, research, duties and other lawful activities in the University or on University land or sites or to participate in the life of the University; or
- (b) Amounts to improper use of University facilities.

[20] Instances of general misconduct are then set out in s 6.2.2. The examples that are given include:²¹

- (c) Engaging in unlawful or criminal activity on University land or sites;
- and
- (f) Misusing University facilities, systems and equipment, to engage in illegal activity or activity prohibited by the University's rules and policies (e.g. computer hacking or infringing copyright).

[21] Section 6.2.3 under the heading "General Misconduct" provides:²²

“level 3 will be deemed to have been committed by any student found guilty of any offence of a sexual nature under criminal law in relation to conduct that is connected to UQ, including conduct that: occurs during or connected with any UQ related function activity or event; and occurs (e) on or in connection with any property owned, leased or occupied by UQ (or any entities it controls) or any lands or roads occupied or used in connection with UQ.” (my emphasis)

[22] Section 6.4.2 provides that the levels of misconduct determine which decision-maker decides an allegation of student misconduct and the available penalties. Section 7 outlines the procedure for reporting and referral of allegations of misconduct and s 8 sets out the process for decision-making.

[23] Section 8.7A then provides as follows:²³

“8.7A Decision in relation to general misconduct arising from offence of a sexual nature under criminal law

There is no requirement for the steps contemplated in section 7 and 8.3 to 8.7 (inclusive) of this policy to be complied with in relation to any

²⁰ Exhibit G, p 34 of the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

²¹ Exhibit G, p 34 of the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

²² Exhibit G, p 34 of the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

²³ Exhibit G, p 41 of the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

student deemed to have committed general misconduct – level 3 in accordance with section 2.3 of this document.”

- [24] In relation to the penalties available for general misconduct, s 8.9 provides:²⁴
- “level 3 general misconduct - a decision-maker may impose one or more of the following penalties for level 3 general misconduct:
- i. Any level 1 or 2 penalty;
 - ii. If the decision-maker is the Disciplinary Board -
 - A. Suspension of up to 5 years from the University of part of it; or
 - B. Expulsion from the University.”
- [25] The procedure for the conduct of hearings is set out in s 8.5 which provides that the decision-maker must conduct a hearing for the allegation in the manner that the decision-maker considers appropriate in accordance with the requirements of procedural fairness. That includes a specific entitlement in s 8.2 to be accompanied by a support person who is not legally qualified or subject to the discretion of the decision-maker in the presence of a legally qualified support person.
- [26] Pursuant to s 8.5.3 the decision-maker must, at the hearing, give the student a copy or an opportunity to inspect all substantive material evidence associated with the allegation and give the student a reasonable opportunity to appear before the decision-maker to answer the allegations and to comment on the substantive material. The decision-maker is then required to consider any written role or statements made by the student.
- [27] Pursuant to s 8.6, the section provides that in considering a case of alleged misconduct, a decision-maker must make a decision based on “findings of fact that are established on sound reasoning and relevant evidence”²⁵. The standard of proof required is the balance of probabilities of the hearing, because its purpose is to hear and make findings about whether the applicant engaged in a criminal offence.
- [28] The applicant contends that the proposed inquiry is unlawful and is beyond power because it is an inquiry into the allegation of a criminal offence of a sexual nature, namely rape, contrary to s 349 of the *Criminal Code Act 1899* (Qld) and the second respondent does not have jurisdiction to decide allegations of criminal offences of a sexual nature. Accordingly, the purported inquiry is without jurisdiction.

The University’s submissions about the jurisdiction of the second respondent

- [29] The first respondent argues that the Disciplinary Board hearing is not an inquiry into an allegation of a criminal offence but rather the hearing is to determine whether policies have been contravened and not whether a criminal offence has been committed. It is argued that the Board is not making any finding about whether a criminal offence under the code has

²⁴ Exhibit G, p 42 of the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

²⁵ Exhibit G, p 40 of the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

been committed. Furthermore, it is submitted that even if the particulars letter specifies conduct which could, if proved in a criminal proceeding, be a criminal offence that does not mean that the University does not have jurisdiction to determine whether the same conduct contravened the University's policies.

- [30] The first respondent argues that the University's policies, read as a whole, support a finding that the Board does have jurisdiction. It is argued that s 4.4 of the Sexual Misconduct Policy must mean that the University does not have jurisdiction over criminal offences which are exclusively the jurisdiction of the courts but "can take action in respect of breaches of its rules, policies and procedures". It is argued that to give those words meaning, the correct interpretation of that section is that whilst allegations of sexual misconduct might include conduct which amounts to criminal acts, the University does have jurisdiction to find the same conduct amounted to a breach of its rules, policies and procedures.
- [31] Counsel for the University argues that this is supported by a consideration of the Sexual Misconduct Policy read as a whole. In particular, it is argued that sexual harassment is defined to specifically include conduct that could amount to a criminal offence and that if it had been intended that the University did not have jurisdiction in relation to such conduct, then the definitions could have excluded such conduct.
- [32] Counsel for the University contends that even if the Sexual Misconduct Policy could be construed in the way contended for by the applicant, there is no allegation that the applicant has contravened the Sexual Misconduct Policy. It is argued that the Sexual Misconduct Policy is a separate policy to the Student Integrity and Misconduct Policy and Student Charter which is what the applicant is alleged to have breached. Accordingly, it is argued that s 4.4 is not determinative of whether the University has jurisdiction in respect of the specific allegations made against the applicant.
- [33] In this regard, the second respondent argues that s 6.2.3 which provides that level 3 General Misconduct will be "deemed" to have been committed by a student found guilty of a sexual offence under the criminal law, is simply an example of one type of conduct that constitutes misconduct and that this is not an exhaustive list and as such does not support an interpretation that the University has no jurisdiction to hear the allegations that could be a criminal offence. In this regard, the University relies on the fact that the Student Integrity and Misconduct Policy specifically lists an example of general misconduct in s 6.2.2(c) as "engaging in an unlawful or criminal activity on University land or sites". Accordingly, it is argued that there must have been intended that the University can under the Student Integrity and Misconduct Policy hear allegations about conduct that could also be a criminal offence.
- [34] The University also relies on a body of authority that a disciplinary body does have jurisdiction to hear allegations that could otherwise amount to a criminal offence. In this regard, in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*,²⁶ the High Court held that a body responsible for commercial radio broadcast licences could investigate criminal allegations. The High Court held that the provisions of the relevant Act empowered the body to investigate the breach of a licence condition and take

²⁶ [2015] HCA 7.

administrative enforcement action and as such did not require that any such action be deferred until after a court exercising criminal jurisdiction had found that the offence was proven.

- [35] Similarly, reliance was placed on *Hardcastle v The Commissioner of Police*,²⁷ where the Full Federal Court considered the disciplinary regulations in relation to a federal police officer charged with breaches of the regulations. The Disciplinary Tribunal found that the officer had breached the regulations by knowingly being concerned in assaults by another officer. It was argued that the Australian Federal Police Tribunal did not have jurisdiction to hear allegations that could be a criminal offence. The Full Federal Court found that the object of disciplinary proceedings under those regulations was to protect the public, and considered that the expression in the regulations, namely “disgraceful or improper conduct” was of wide import and there was therefore no warrant for construing the words otherwise than according to their ordinary or natural meaning. In that case it was held that:²⁸

“There is no room for the application of what is sometimes misleadingly called the principle of double jeopardy in this case. If the appellant were charged with, and convicted of, same unlawful assaults as are the subject of the disciplinary offences he would not face double jeopardy or be punished twice for the same offence. He would be convicted of an offence against the criminal law and be guilty of a breach of the disciplinary code of the Australian Federal Police. The two proceedings are essentially different in character and result.”

- [36] A similar issue was raised in *Lewis v Prosthetists and Orthotists Board*.²⁹ In that decision, the applicant was advised the board would hold an inquiry into allegations he had had sexual intercourse with a patient without a consent and was therefore guilty of infamous conduct under the relevant act. There were no criminal proceedings in relation to the allegations on foot. It was argued that the disciplinary committee had no jurisdiction to consider allegations that would amount to a criminal offence, even if the conduct were never the subject of criminal proceedings as the appropriate forum was a criminal court. A second submission was made that the allegations that could amount to a criminal charge could only be dealt with where a conviction had been recorded. That argument was rejected with Waller LJ holding:³⁰

“I see no warrant for the submission that, if conduct could amount to criminal conduct a disciplinary committee would have no jurisdiction to consider that conduct. There clearly may be many occasions where something might technically be a criminal offence, but a decision is made not to prosecute. It would be absurd if that position deprived a disciplinary committee of the jurisdiction to look into the matter.”

- [37] It is therefore argued that the same considerations apply here in relation to the conduct of hearings by the Disciplinary Board under the University’s Student Integrity and Misconduct Policy. It is argued that the term “general misconduct” under the Student

²⁷ (1984) 53 ALR 593.

²⁸ (1984) 53 ALR 593 at 597, ll 32-40.

²⁹ [2001] EWCA Civ 837.

³⁰ [2001] EWCA Civ 837 at [19].

Integrity and Misconduct Policy is of wide import and is of a different character and result to a criminal proceeding. It is argued that the Student Integrity and Misconduct Policy must be construed such that the University has jurisdiction to hear allegations of breaches of its policies including where that same conduct could amount to a criminal offence.

- [38] Counsel for the University argues that the disciplinary proceedings are very different to criminal proceedings and are unique. Counsel for the University stated that it was accepted that it would be a startling result if the Disciplinary Board consisting of academics and students, could decide serious allegations without any of the protections of the criminal law. It is argued that the Board simply determines contraventions of the University's Student Integrity and Misconduct Policy and that the applicant's submission ignores the differences between disciplinary hearings and criminal proceedings.
- [39] In particular it is argued that the purpose of criminal proceedings is to punish those who disobey the law whereas the purpose of disciplinary proceedings is to protect the public and maintain standards of conduct of a profession. Furthermore it is argued that there are a number of decisions which establish that a person found to have committed a breach of discipline can later be charged with a criminal offence,³¹ and that a failed prosecution is no bar to disciplinary action.³² In addition, it is submitted that there is a body of authority which establishes that there is no obligation to stay or adjourn tribunal proceedings merely because there may be a criminal proceeding about the same issue in the future.³³ Indeed any evidence obtained during that disciplinary proceeding can be objected to in a criminal trial and could be excluded if it was unfairly prejudicial to an accused.
- [40] Counsel for the University also argues that there are significant procedural differences between a disciplinary proceeding and a criminal proceeding including the fact that the proceedings are not only inquisitorial but confidential and the standard of proof is only on the balance of probabilities
- [41] The University argues that the construction argued for by the applicant places the University in an untenable position because it could breach its duty of care to its students and staff and its legislative obligations. It is also argued that a referral to the Disciplinary Board allows the University to maintain the reputation of the University and the standards expected of students. In this regard I note that there appear to be no issues of public safety involved given the applicant has continued in the medical faculty of the University for the last 19 months which included clinical placements. In the later decision of *X v University of Western Sydney*,³⁴ similar issues were raised in relation to the University's reputation and duty of care and the conclusion that such an interest was:³⁵

³¹ *R v NG* [2007] Qd R 37, particularly [31]-[50] (de Jersey CJ, Keane JA and Mackenzie J agreeing). In that case, the court found that a pupil expelled from a government school, under a statutory code of discipline, for rape of a fellow student, could later be charged with that offence.

³² *Re Seidler* [1986] 1 Qd R 486 (Carter J); *Stirling v Legal Services Commissioner* [2013] VSCA 374, [67] (Warren CJ, Neave JA and Dixon AJA).

³³ *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, 33 (Gibb, Stephen, Mason Aickin and Wilson JJ); *ML v Australian Securities and Investment Commission (ASIC)* (2013) 276 FLR 1 (Rothman J).

³⁴ [2014] NSWSC 82.

³⁵ [2014] NSWSC 82 at [284].

“not only to introduce an extraneous issue, but in doing so there was thereby introduced a potential conflict of interests - the interests of the University in its reputation, or perception of its reputation, as against the interests of the plaintiff - a party whose interest had to be considered in an impartial and objective manner.”

[42] I shall therefore disregard this aspect of the submissions of the University.

What is the true nature of the allegations and the particulars?

[43] As has already been noted, the two allegations against the applicant are not formulated as a breach of the Sexual Misconduct Policy as outlined above in paragraph [16](iv) but rather as a breach of the Student Integrity and Misconduct Policy as outlined in paragraph [16](i), above. In my view, all of the relevant policies and procedures of the University are interlinked and need to be considered together in order to provide a context and an understanding of the approach of the University with respect to sexual misconduct as a whole. I also note that whilst the Sexual Misconduct - Procedures document sets out best practice in relation to allegations of sexual misconduct, s 2.3 provides that nothing in the procedures prevents a member of the University community from accessing external procedures available to them or relying on other University policies.

[44] The Allegation Notice of 2 September 2019 categorised the alleged misconduct by the applicant as level 3, which is conduct of the most serious kind. I note that the Allegation Notice specifically identified that the allegations were that the applicant had “sexually assaulted [Z] on 20 April 2018 by subjecting her to unsolicited acts of physical intimacy”. That letter also specifically stated that they were the “allegations” that had been referred to the Disciplinary Board.

[45] Furthermore the particulars provided in the letter of 20 September 2019 made it clear that the allegations were specific allegations of sexual assault including what could be categorised as at least three counts of rape and a number of counts of sexual assault. The Allegation Notice did not state for example, that the Board had been constituted simply to hear allegations of sexual harassment on the basis of acts that were different from the allegations of sexual assault such as allegations that, whilst on a clinical placement, the applicant had entered a fellow student’s room and bed and remained there when asked to leave. It was clear and explicit that the allegations were of the sexual assaults, as particularised, and that the Board was to “hear and decide these allegations”.

[46] I accept that Allegation 1, as drawn, is an allegation about sexual harassment and the breaching of a relevant policy namely s 1.1 of the University’s Student Charter which is an expectation that a student is expected to treat other students with courtesy and respect and not to engage in conduct “which might reasonably be perceived as ...harassment or bullying or which is otherwise intimidating”.³⁶ Section 1.1 of the Student Charter also provides that the University would “facilitate investigation and resolution of alleged harassment or discrimination PPL 1.70.2”.³⁷ The procedure referred to was a reference to the Prevention of Sexual Harassment Policy (PPL1.70.02) which stated that the resolution

³⁶ Exhibit F to the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

³⁷ Exhibit F to the Affidavit of Affidavit of Wendy Mulcahy sworn 23 September 2019.

of complaints of sexual harassment was through a Grievance Resolution Process or by direct application to an external agency such as the Qld Anti-Discrimination Commission.

- [47] The particulars provided however are specifically stated to relate to both Allegations 1 and 2. Those particulars make it clear therefore that they relate to both allegations and that this is not in fact a mere allegation of harassment or bullying but an allegation of rape and sexual assaults. Allegation 2 makes it clear that both the allegations were in truth allegations of sexual assaults. These allegations are at the very least allegations of sexual misconduct. In this regard, I note the finding by Beech-Jones J in *X v University of Western Sydney (No 3)*,³⁸ where he stated “It is sufficient to state that if the sexual contact Ms Y described as having occurred was non-consensual, as Ms Y states it was, then it was clearly very serious misconduct and potentially a criminal offence”. I also note that in that case a complaint to police had been made and the police had asked the University not to investigate the matter or to even go into “the nature of the allegations”³⁹.
- [48] I consider that this is clearly a case of serious sexual misconduct and not sexual harassment or bullying.
- [49] I consider that this conclusion is reinforced by the fact that the categorisation of the misconduct as level 3 misconduct is the very same categorisation which is deemed when a student has in fact been found guilty of a sexual offence under the criminal law. It would not seem to me that allegations of sexual harassment would attract a level 3 characterisation of misconduct given that the usual resolution of such behaviours is a grievance resolution process.
- [50] In my view the Board was clearly constituted to hear and decide allegations of sexual assaults despite the letter of 20 September 2019 to the applicant which attempted to recast the nature of the hearing as a determination of whether the University’s policies had been breached and not whether a criminal offence had been committed. There could be no determination of that issue without a determination as to whether the acts had occurred as alleged, without consent. The determination of whether the particular policies had been breached, as particularised, was inextricably linked to the determination of the issue of consent. In fact, as particularised, it would seem to me to be allegations of about five separate criminal acts of a sexual nature.
- [51] I consider therefore that any determination of whether the policies of the University had been breached as particularised and as referred to the Board could only be determined after there had been a determination as to whether a criminal offence of sexual nature has been committed.
- [52] Accordingly, the essential question in this application is whether the Disciplinary Board has jurisdiction to determine the Referral made to it to determine, what in fact are, allegations of criminal offences of a sexual nature?

³⁸ [2013] NSWSC 1329 at [10].

³⁹ [2013] NSWSC 1329 at [12].

What powers has the Senate given to the Disciplinary Boards in relation to allegations of sexual misconduct?

- [53] The University is a body corporate established under the *UQ Act* and pursuant to its powers under s 6 and s 8 of that Act the Senate has promulgated various policies and procedures. The Disciplinary Board has been established by s 10 of the Misconduct Policy to exercise the powers conferred on it. Clearly then the Disciplinary Board only has jurisdiction in accordance with the specific powers conferred on it. In order to determine these powers it is necessary to also consider the other policies and procedures that the University has promulgated in relation to responses to allegations of sexual misconduct.
- [54] In this regard I make the preliminary observation that the Student Charter provides that where there are complaints of sexual harassment and the student does not wish to go to an external agency, the University will, pursuant to its policy on Sexual Harassment, generally deal with the allegation through a resolution and grievance process. Accordingly, I do not consider that the Student Charter is a pivotal document in relation to the processes to be engaged for allegations of criminal offences of a sexual nature and characterising them as sexual harassment does not change that reality.
- [55] As I have already indicated, in truth, these particularised allegations are not allegations of sexual harassment but of serious sexual assault which must by definition be sexual misconduct. As already noted, it is clear that a consideration of the relevant policies as already outlined in paragraph [16] indicates that the Sexual Misconduct Policy (PPL 1.50.13a) and the Sexual Misconduct Procedures document (PPL 1.50.13b) set out the relevant policies and procedure in relation to Sexual Misconduct. It would seem to me that those two documents set out the overarching policy and procedure in relation to allegations of sexual misconduct and in fact recites that the procedures have been developed having regard to best practice in relation to not only sexual misconduct prevention but its “management and response”.
- [56] I therefore make following observations about the processes and procedures put in place by those two documents. Firstly, there are two main options for a complainant in relation to Sexual Misconduct, either making a Disclosure or making a Formal Report. The less formal Disclosure option is aimed at support and reasonable measures which would facilitate such things as counselling and assistance in making a report to the police or an external agency. Reasonable measures includes such things as housing relocation, class timetable changes and safety measures. Furthermore, s 8.5 of the Procedures document provides under the heading ‘Reasonable Measures’ that any Reasonable Measures implemented as a result of a Disclosure or a Formal Report is “not a determination as to whether Sexual Misconduct has occurred.” Section 8.6.5 of the same Procedures document also specifies that in implementing any Reasonable Measure, the University will take into account any external requirements as a result of Sexual Misconduct potentially amounting to a criminal offence.
- [57] It is significant in my view that s 4.6.3 then provides that a Disclosure does not initiate further action and if the person making the Disclosure wishes further action then they may elect to make a Formal Report but that nothing precludes a person from making a report to the police or external agency. If such a report is made to an external agency then it is considered to be a Formal Report. Accordingly, it would seem that the making of a Formal

Report initiates the University process about sexual misconduct and the person who receives the Formal Report is then required to take reasonable steps to comply with certain obligations about informing the complainant about steps the complainant may wish to take and ask the person whether they wish to proceed with a report to the police or external agency.⁴⁰

[58] The Procedures document makes it clear that Further Action can only be taken by the University in response to a Formal Report if it involves UQ related conduct and the respondent is a member of the UQ community.⁴¹ There is no doubt that is the case here and that the allegations are about UQ related conduct as defined. Accordingly the pivotal document would appear to be the Formal Report.

[59] In this regard I note that there has been no reference to a Formal Report in any of the material before me. Whilst there has been a reference to a Preliminary Investigation Report, I do not know who prepared that Report or what it contains. I do not know whether it is considered by the University to be a Formal Report given the definition of Formal Report in the policy document. The Formal Report is simply defined in the Sexual Misconduct Policy as the provision of a formal statement regarding sexual misconduct to a person or unit specified in the Procedures document or a formal statement given to police or an external agency.

[60] It would seem to me to be significant that after a Formal Report is made the only steps that the person receiving the Formal Report is required to do is to take “reasonable steps” as follows:⁴²

- (i) informing the complainant of the Support available to them and the Reasonable Measure which can be implemented;
- (ii) outlining the options available to help them determine any next steps;
- (iii) asking if they wish to proceed with a report to police or an external agency;
- (iv) offering assistance in any other appropriate way.

[61] It would seem to me therefore that all of those steps are aimed at support, the implementation of reasonable measures to assist a complainant and assistance with a report to police or external agency. The Further Action section of the Procedures document specifies that any further action taken by the University in response to a Formal Report, including any investigation or Disciplinary Process, is separate from and not related to any criminal proceedings or investigations conducted by the police or other external agency. The Further Action section however does not specify in clear terms what the University is required to do after the provision of a Formal Report.⁴³ Section 5.5 provides that the

⁴⁰ Section 4.7.2 Sexual Misconduct - Procedures; Exhibit SW-1 to the Affidavit of S Webster filed by leave on 16 October 2019.

⁴¹ Section 5.1 Sexual Misconduct - Procedures; Exhibit SW-1 to the Affidavit of S Webster filed by leave on 16 October 2019.

⁴² Section 4.7.2 Sexual Misconduct - Procedures; Exhibit SW-1 to the Affidavit of S Webster filed by leave on 16 October 2019.

⁴³ Section 5.2 Sexual Misconduct - Procedures; Exhibit SW-1 to the Affidavit of S Webster filed by leave on 16 October 2019.

outcome of any investigation or Disciplinary Process will be communicated to the complainant after the conclusion of any such process.

- [62] Whilst the Formal Report is to be provided to the relevant officer of the University, which in the case of a student, is the Academic Registrar, the Procedures document simply provides that the Formal Report will be considered and may be progressed pursuant to the Student Integrity and Misconduct Policy.⁴⁴
- [63] The document is itself silent as to when, how and in what circumstances the Formal Report is to be progressed. This is no doubt because the type of conduct which is defined as Sexual Misconduct in the Sexual Misconduct Policy covers a wide range of behaviours, some of which are criminal and some of which are not as it provides that it “includes behaviour which could amount to a Sexual Offence and/or Sexual Harassment”. Not all sexual harassment is a criminal offence. A Sexual Offence is defined in the policy as “any criminal offence of a sexual nature under the criminal law” which specifically includes the *Criminal Code Act 1899* (Qld) and the *Summary Offences Act 2005* (Qld).
- [64] Section 4.4 of the Sexual Misconduct Policy however clearly provides that as sexual misconduct may include criminal behaviours and be unlawful, it does not have jurisdiction over criminal acts. I consider that this section removes the jurisdiction of the University in relation to allegations of a criminal offence of a sexual nature.
- [65] No doubt this is because of the significant protections afforded by the law to persons who are alleged to have committed criminal offences such as those contained in the *Police Powers and Responsibilities Act 2000* (Qld) including certain specified rights and warnings. The important common law protections which are afforded to persons charged or liable to be charged with a criminal offence were discussed by the High Court in *X7 v Australian Crime Commission*,⁴⁵ and *Lee and Anor v NSW Crime Commission*.⁴⁶
- [66] The difficult intersection between University Disciplinary Boards and allegations of criminal acts of a sexual nature have also been discussed in a number of cases, particularly the series of decisions in 2013 and 2014 by the New South Wales Supreme Court in litigation involving *X v the University of Western Sydney*.⁴⁷ Those decision outlined very real concerns about the disciplinary processes of the University and the lack of procedural fairness afforded to a student against whom allegations were made of sexual misconduct.
- [67] It would seem to me therefore that the referral to the Academic Registrar is a process which must occur after the Formal Report process and if the allegations involve criminal acts of a sexual nature, there is no jurisdiction unless a student has pleaded guilty or been found guilty of a criminal offence. This conclusion is supported in my view by s 6.2.3 of the Student Integrity and Misconduct Policy, which provides that general misconduct level 3 will be deemed to have been committed by any student found guilty of any offences of a

⁴⁴ Section 5.3 Sexual Misconduct - Procedures; Exhibit SW-1 to the Affidavit of S Webster filed by leave on 16 October 2019.

⁴⁵ (2013) 248 CLR 92; (2013) 87 ALJR 858.

⁴⁶ (2013) 251 CLR 196; (2013) 302 ALR 363.

⁴⁷ [2013] NSWSC 1280, (No 2) [2013] NSWSC 1318, (No 3) [2013] NSWSC 1329, (No 4) [2013] NSWSC 1334, [2014] NSWSC 82.

sexual nature under criminal law in relation to conduct that is connected to UQ. Whilst the Allegations in the letter of 2 September 2019 were couched in terms of a breach of University policies and a sexual harassment, they were not. The allegations were in fact allegations of criminal offences of a sexual nature.

- [68] I consider that when read together, the University policy and procedures documents make it clear that the University *only* has jurisdiction in relation to criminal acts of a sexual nature where the alleged offence is proven. In my view that jurisdiction is limited to determining what penalty is to be imposed as a consequence of a finding that the alleged offence is proven.
- [69] Whilst I have considered the decisions which I have been referred to by Counsel for the University, some of which have been referred to above, there can be no doubt that each particular decision turns on the specific powers given to the relevant decision making body. In this case there has been a specific restriction on the Disciplinary Board's power pursuant to s 4.4 of the Sexual Misconduct Policy. Accordingly, whilst I consider that s 8.2 of the Student Integrity and Misconduct Policy confers upon the Disciplinary Board authority to exercise the University's power under the *UQ Act* to expel a student, the Senate has indeed imposed a limit on that authority. Accordingly, a purported decision by the Disciplinary Board in breach of that limit would mean that the decision of the second respondent was unlawful. As already articulated in these reasons this is not just an action by the University about breaches of its rules, policies and procedures. Irrespective of how the University seeks to categorise the allegations, there is no escaping the fact that the very nature of the allegations are allegations of a number of sexual assaults and the Disciplinary Board has been asked to determine those allegations.
- [70] I also accept the applicant's submission that the construction argued for is reinforced by the context and it would indeed be a startling result if a committee comprised of academics and students who are not required to have any legal training could decide allegations of a most serious kind without any of the protections of the criminal law. I consider that s 4.4 of the Sexual Misconduct Policy is aimed at ensuring there is no such outcome.
- [71] Accordingly the applicant should have the Orders sought that pursuant to s 43 of the *Judicial Review Act 1991* (Qld) the Disciplinary Board should be restrained from holding a hearing into the allegations notified to the applicant by Allegation Notice dated 2 September 2019.
- [72] I will hear from the parties as to the form of the Orders, given Counsel for the University's submissions as to the legal status of the second respondent, and as to Costs.
- [73] I will also hear from the parties in relation to the requirements of s 10 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) and whether the name of the applicant should be de-identified as it is a particular which could or is likely to lead to the identification of the complainant in the circumstances of this case.