SUPREME COURT OF QUEENSLAND

CITATION:	*University of Queensland & Anor v Y* [2020] QCA 216
PARTIES:	**UNIVERSITY OF QUEENSLAND** (first appellant) **DISCIPLINARY BOARD OF THE UNIVERSITY OF QUEENSLAND** (second appellant) **v** **Y** (respondent)
FILE NO/S:	Appeal No 13319 of 2019 SC No 10347 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 282 (Lyons SJA)
DELIVERED ON:	2 October 2020
DELIVERED AT:	Brisbane
HEARING DATE:	12 May 2020
JUDGES:	McMurdo and Mullins JJA and Boddice J
ORDERS:	**1. The appeal against Order 1 made on 21 November 2019 be dismissed.** **2. The appeal against Order 2 made on that date be allowed and that order be set aside.** **3. Within 14 days of the delivery of this judgment, each party file and serve written submissions, not exceeding three pages in length, as to the costs in the Trial Division and of this appeal.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURT UNDER JUDICIAL REVIEW LEGISLATION – DIRECTION TO ACT OR REFRAIN FROM ACTING – where, until last December, the respondent was a student at the first appellant – where, at the time of his graduation, the respondent was subject to an internal disciplinary proceeding – where the disciplinary proceeding arose from a complaint from a fellow student that the respondent had sexually assaulted her – where the respondent challenged the disciplinary proceeding on the sole basis that it could not involve a determination that the respondent had engaged in conduct, if that conduct was not only in breach of the University's rules, but also a criminal offence of a sexual nature – where the

disciplinary proceeding was restrained by a permanent injunction granted in the Trial Division – whether the injunction should have been granted

EDUCATION – INSTITUTIONS – UNIVERSITIES AND OTHER TERTIARY INSTITUTIONS – OTHER MATTERS – where the appellants seek to have the injunction set aside so that the disciplinary process may resume – where the respondent argues that, having now graduated, he is no longer subject to the first appellant's disciplinary regime – whether, on the correct construction of the first appellant's policies, the respondent remains subject to the disciplinary regime

Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 255 CLR 352; [2015] HCA 7, considered
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, cited
Hunter Development Corporation v Save Our Rail NSW Incorporated (No 2) (2016) 93 NSWLR 704; [2016] NSWCA 375, applied

COUNSEL: D Kelly QC, with D Marckwald, for the appellants
A D Scott for the respondent

SOLICITORS: Corrs Chambers Westgarth for the appellants
Mulcahy Ryan Lawyers for the respondent

[1] **McMURDO JA:** Until last December, the respondent to this appeal, whom I will call Y, was a student at the University of Queensland. He graduated on 10 December 2019, and has no intention to enrol for further study with the University. At the time of his graduation, he was subject to an internal disciplinary proceeding, initiated by the University on 2 September 2019, arising from a complaint by a fellow student that in early 2018, Y sexually assaulted her. That proceeding was restrained by a permanent injunction which was granted by Lyons SJA on 20 November 2019.[1] By this appeal, the University seeks to have that injunction set aside, so that the disciplinary process may resume. The appeal had been commenced, but not heard, when Y graduated.

[2] Y's challenge to the disciplinary proceeding was on the sole basis that it could not involve a determination that Y had engaged in conduct, if that conduct was not only in breach of the University's rules, but also a criminal offence of a sexual nature. Y said that the alleged conduct was of that kind, and the primary judge upheld that argument.

[3] The University's case, as argued before the primary judge and in this Court, is that the only matter to be determined by its Disciplinary Board is whether Y contravened certain rules and policies of the University, by which he could be penalised according to its disciplinary regime, and that it did not matter for the Board's powers that the same conduct may have constituted a criminal offence.

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1 *Y v University of Queensland & Anor* [2019] QSC 282 (primary judgment).

[4] However, that is not the only issue in this Court. The other is whether, having now graduated from the University, Y remains subject to this disciplinary regime. For this further reason, Y argues that the appeal should be dismissed, leaving the University restrained by the order of the primary judge. In response, the University argues that Y remains susceptible to the disciplinary process, because the conduct in question occurred when he was one of its students. Further, the University urges this Court to express an opinion on the correctness of her Honour's interpretation of its rules and policies, which was the basis for her judgment.

[5] For the reasons that follow, Y's alternative argument, namely that he is no longer subject to the disciplinary process, should be accepted, and the appeal should be dismissed. However, in my respectful opinion, the primary judge ought to have rejected the sole argument presented by Y in that hearing and should not have ordered the University to pay his costs.

The disciplinary proceeding

[6] On 2 September 2019, the Secretary of the Disciplinary Board wrote to Y, in the terms of an "allegation notice" pursuant to s 6.2 of the University's "Student Integrity and Misconduct – Policy". The letter alleged that:

> "[W]hile enrolled as a student and undertaking a clinical placement in [a certain town] between February 2018 to April 2018, you sexually assaulted [another named student] on 20 April 2018 by subjecting her to unsolicited acts of physical intimacy."

[7] The letter made two allegations about that conduct. The first was that it contravened s 1.1 of the University's Student Charter. The second was that it involved "[h]arassing, vilifying, bullying, abusing, threatening, assaulting or endangering staff, students or other members of the University's community directly or by other means of communication."

[8] The letter informed Y that the highest penalty which might be imposed was expulsion. He was referred to certain documents, attached to the letter, which included the University's published policies entitled the Student Integrity and Misconduct Policy, the "Prevention of Sexual Harassment – Policy" and the "Sexual Misconduct – Policy".

[9] The letter informed Y that there would be a hearing on 19 September 2019, when the allegations would be "heard and decided." He was informed that he could be accompanied by a support person, if that person was not legally qualified, and that he could have witnesses attend to support his case. He was told that if he wished to provide a written statement in response to the allegations, he could do so prior to the hearing. The letter contained a form, by which he could inform the Disciplinary Board ahead of the hearing, if he so wished, whether the allegations would be admitted, and whether he would be attending the hearing or submitting a written response.

[10] On 11 September, Y's solicitors wrote to the Disciplinary Board, saying that the allegation notice did not identify the act which was alleged to have constituted the sexual assault, and that it did not specify the provision of the University's policies which was said to have been contravened by that act.

[11] On 13 September, the University responded that the particulars of the alleged act were provided in the preliminary investigation report which had been attached to the

allegation notice. As to the relevant provisions of the University's policies, the University referred again to s 1.1 of the Student Charter (for the first allegation), and to s 6.2.2(h) of the "Student Integrity and Misconduct – Procedures", quoting from that document the words I have set out above at [7].

[12] On the same day, Y's lawyers wrote to say that those particulars did not satisfy the requirements of procedural fairness, and that they held instructions to file an application in the Trial Division for a permanent injunction to restrain the conduct of the disciplinary hearing. They requested the Disciplinary Board to postpone the scheduled hearing from 19 September, to avoid the necessity for an application for an interim injunction. On 16 September, the University agreed to that postponement.

[13] On 20 September, the Secretary of the Disciplinary Board wrote directly to Y, providing further particulars. It was there said that the first allegation involved a contravention of s 4.1 of the Student Integrity and Misconduct Policy, which provides that:

> "Students must conduct themselves in a manner consistent with the standards of behaviour set out in the student charter …",

and that the relevant paragraph of the Student Charter was s 1.1, which required that a student:

> "not engage in conduct which might reasonably be perceived as discrimination, harassment or bullying or which is otherwise intimidating … ".

[14] The same letter referred to ss 2.1, 2.1.1 and 5.1 of the Prevention of Sexual Harassment Policy. By s 2.1, sexual harassment happens if a person subjects another to "an unsolicited act of physical intimacy" or to engage "in any other unwelcome conduct of a sexual nature in relation to the other person", 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 2.1.1 gives "[e]xamples of sexual harassment" to include "[p]hysical contact such as … touching in a sexual way". Section 5.1 provides that "[a]ll staff and students are responsible for maintaining an environment free from sexual harassment."

[15] Again, the second allegation was said to include an alleged contravention of s 6.2.2(h) of the Student Integrity and Misconduct Policy.

[16] The letter conceded that the particulars provided in the allegation notice dated 2 September 2019 were "not sufficient', and would not be relied upon. Instead, the particulars would be according to this letter and its attachment. That attachment identified the complainant and the place where the conduct allegedly occurred. It described conduct which, absent the complainant's permission, would have involved serious sexual assaults, including an act of digital penetration of the complainant's vagina.

[17] The letter continued as follows:

> "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."

It informed Y that the University would postpone the disciplinary hearing to 24 October 2019.

[18] The proceeding in the Trial Division was commenced on 23 September, naming the University as one respondent and the Disciplinary Board as the other. However the Board is not a distinct legal entity; it is an arm of the University.

[19] The application was heard by Lyons SJA on 16 October 2019, and decided by her judgment delivered on 20 November 2019. On the following day, her Honour ordered, pursuant to s 43 of the *Judicial Review Act* 1991 (Qld), that the Disciplinary Board be restrained from conducting the hearing, and that the University pay Y's costs.

[20] This appeal was instituted on 29 November 2019. By its notice of appeal, the University said that upon the appeal being allowed, it would not seek its costs either in the Trial Division or in this Court.

[21] On 16 December 2019, Y filed a cross-application in this Court, seeking to have the appeal dismissed without a consideration of the merits of the primary judgment, because Y was no longer a student at the University and therefore no longer susceptible to its disciplinary powers. The University's appeal and Y's cross-application were heard together.

The relevant policies and procedures of the University

[22] The University is established under the *University of Queensland Act* 1998 (Qld), with the functions set out in s 5 of that Act. They include the provision of facilities for study and research, and facilities and resources for the well-being of the University's staff, students and other persons undertaking courses at the University. Section 6 of the Act confers powers on the University, which include a power to do anything necessary or convenient to be done for, or in connection with, its functions.

[23] Part 3 of schedule 1 of the Act proscribes certain conduct on the University's land. By s 12 of schedule 1, a person must not be disorderly or create a disturbance on the University's land. By s 13, persons contravening s 12, or suspected of doing so, may be directed to leave the University's land. It also provides a power to direct a person to leave the University's land if that person's presence may pose a threat to the safety of someone else in that place. A failure to comply with a direction under s 13, without a reasonable excuse, constitutes an offence.

[24] Other than the provisions of schedule 1, the Act makes no specific provision for regulating the conduct of persons at any premises of the University. The regulation of student conduct is left to the University's Senate, or persons delegated authority from it, in the exercise of the Senate's power to manage and control the University's affairs.[2] The Senate has formulated and published certain policies and procedures by which a disciplinary regime is established.[3]

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2 s 9 of the Act.

3 Until the repeal of s 52 of the Act by the *University Legislation Amendment Act* 2017 (Qld), the University was empowered to make statutes about, amongst other things, "the disciplining of

[25] The University's disciplinary case against Y, as revised by its particulars provided on 20 September 2019, referred to three such policies, the first of which was the Student Integrity and Misconduct Policy. By s 4.1 of that policy, "[s]tudents must conduct themselves in a manner consistent with the standards of behaviour set out in the student charter and the higher degree by research candidate charter". Section 6 of the policy is headed "Student Misconduct". It contains definitions of "academic misconduct" and "general misconduct". The case against Y is alleged to be conduct of the latter kind. By s 6.2.1, general misconduct is conduct "on the part of a student that … 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". Amongst the description of general misconduct, as set out in s 6.2.2, is the conduct of:

> "(h) 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".

The policy classifies student misconduct according to three levels, described as minimal (level 1), moderate (level 2) and serious (level 3) misconduct.

[26] Section 7.1 of this policy provides that a person may report a complaint of misconduct by a student to the student's Course Coordinator, Deputy Head of School, Head of School, Executive Dean, Dean of the Graduate School, Academic Registrar or the Chair of the Disciplinary Board. By s 7.3, a member of staff who receives such a complaint must refer it to the Academic Registrar, conduct a preliminary investigation and provide a report of the investigation to the Registrar. By s 7.5.4, the Registrar may in their discretion decide to counsel a student if the student's conduct was inadvertent or unintentional and it is appropriate to do so. Otherwise, in a case of serious general misconduct, the Registrar must refer the allegation to the Disciplinary Board or the Senate Discipline Appeals Committee.

[27] By s 8.3, the decision-maker (in this case, the Disciplinary Board) must issue an allegation notice. By s 8.4, the decision-maker must decide the case within 20 business days from the date of the issue of the allegation notice, or within a longer period if the student and the Academic Registrar agree. Section 8.5 requires the decision-maker to conduct a hearing for the allegation in the manner that the decision-maker considers appropriate in accordance with the requirements of procedural fairness. Sections 8.5.3 and 8.5.4 provide as follows:

> "8.5.3 At the hearing, the decision-maker must –
>
> (a) give the student a copy of, or an opportunity to inspect, all substantive material evidence associated with the allegation of misconduct (if not already provided); and
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> (b) give the student a reasonable opportunity to appear before the decision-maker to answer the allegations, and in particular, to comment on the substantive material on which the allegation is based; and

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students and other persons undertaking courses at the university", which constituted subordinate legislation.

(c) consider any written or oral statements made by the student in relation to the allegation of misconduct; and

(d) maintain order in the hearing and, for this purpose, the decision-maker has the power to order the removal of a person, including a student or the person accompanying the student (if any).

8.5.4 If the decision-maker's deliberations indicate that more information about the allegation is required, the decision-maker may recall the student and the person accompanying the student (if any) to provide the information or to hear and comment on it."

[28] Section 8.9 of this policy prescribes the available penalties for general misconduct, as follows:

"8.9 Penalties available for general misconduct

Penalties that may be imposed by a decision-maker are based on the three levels of general misconduct as follows –

(a) level 1 general misconduct – a decision-maker may impose one or more of the following penalties for level 1 general misconduct –

(i) a written warning;

(ii) suspension for a period not exceeding 1 week from school, library or information technology facilities or services; or

(b) level 2 general misconduct – a decision-maker may impose one or more of the following penalties for level 2 general misconduct –

(i) any level 1 general misconduct penalty;

(ii) suspension for a period not exceeding 1 week from faculty facilities or services;

(iii) campus service for a period not exceeding 50 hours, with no employment relationship established or implied;

(iv) if the decision-maker is the Academic Registrar, suspension for a period not exceeding 2 weeks from the University or part of it; or

(c) 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 or part of it; or

(B) expulsion from the University."

[29] Section 8.12.2 of this policy provides that a person who is expelled from the University must not be re-enrolled except by permission of the Vice-Chancellor, whose permission will not be given within the first five years.

[30] Section 8.10 provides that in addition to any penalty imposed under s 8.9, a decision-maker may order a student to pay compensation up to a value of $500.

[31] A student may appeal a decision of a decision-maker as to whether the student committed misconduct or as to the penalty imposed, to the Senate Discipline Appeals Committee (in the case of serious general misconduct).

[32] By s 14.1 of this policy, if a student has been given any allegation notice the University may withhold the student's academic results until the proceedings (including an appeal) are finalised.

[33] By s 14.4, any notice required to be given to a student under this policy, must be given by delivering it to the student personally or posting it or sending it by email to an address recorded in the University's records.

[34] As should appear from that summary, many of the provisions of this policy would appear to apply only to a person who is a student of the University during the disciplinary process. However the University contends that this process may be applied to someone who is no longer a student, because the policy defines a student to mean:

> "[A] person enrolled as a student at the University or undertaking courses or programs at the University at the time of the alleged academic or general misconduct."

I will return to that argument after discussing other relevant policies and procedures.

[35] The letter of 20 September 2019 referred to s 1.1 of the Student Charter, forming part of the "Student Charter – Policy". As noted earlier, the Student Charter includes a list of expectations by the University of its students, of which the relevant one was said to be that a student would "not engage in conduct which might reasonably be perceived as discrimination, harassment or bullying or which is otherwise intimidating". Of that behaviour, the category of particular relevance here was said to be that of sexual harassment.

[36] The University relied upon what was said to be relevant sections of the Prevention of Sexual Harassment Policy, which were extracted in that letter as follows:

> "• 2.1 Sexual harassment happens if a person:
>
> (a) subjects another person to an unsolicited act of physical intimacy; or
>
> …
>
> (d) 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.

…

- [2.1.1] 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

…

- 5.1 All staff and students are responsible for maintaining an environment free from sexual harassment."

[37] As I am about to discuss, the University has another policy which specifically deals with sexual misconduct, together with published "Sexual Misconduct – Procedures". Curiously, the University particularised its case as sexual harassment rather than sexual misconduct under that other policy. In the Prevention of Sexual Harassment Policy, sexual harassment is defined as including "an unsolicited act of physical intimacy". However the examples of sexual harassment, which are given in the document at s 2.1.1, include conduct which might be a sexual assault only within the description "[p]hysical contact such as patting, pinching or touching in a sexual way." Further, the procedures for the resolution of complaints of sexual harassment, as detailed in s 6 of this policy, involve a different process from that under the Student Integrity and Misconduct Policy.

[38] The Sexual Misconduct Policy commences as follows:

> "The University of Queensland is committed to ensuring that the University environment is safe, respectful and free from all forms of Sexual Misconduct. This policy outlines the overarching principles governing the University's approach to preventing, addressing and responding to Sexual Misconduct, which is behaviour inconsistent with the University's values. This policy is to be read in conjunction with the *Sexual Misconduct – Procedures*."

This policy defines sexual misconduct to be:

> "[A] broad term encompassing any unwelcome behaviour of a sexual nature without Consent [including] behaviour that could amount to a Sexual Offence and/or Sexual Harassment."

A "Sexual Offence" is defined to be any "criminal offence of a sexual nature under the criminal caw, including the *Criminal Code* 1899 (Qld) and the *Summary Offences Act* 2005 (Qld)." The term "Sexual Harassment" is defined in relevantly the same terms as it is for the Prevention of Sexual Harassment Policy.

[39] The Sexual Misconduct Policy provides that sexual misconduct, as defined, may amount to "misconduct" or "serious misconduct" for the purposes of the Student Integrity and Misconduct Policy. By s 6.2.3 of the Student Integrity and Misconduct Policy, serious general misconduct will be deemed to have been committed by any student found guilty of any offence of a sexual nature under the

criminal law in relation to conduct that is connected to the University, including conduct that occurs on any property owned or occupied by the University.

[40] Section 4.4 of the Sexual Misconduct Policy, which was of critical importance in the reasoning of the primary judge, provides:

> "4.4 The University acknowledges that Sexual Misconduct may include criminal behaviours and may be unlawful. The University does not have jurisdiction over criminal acts, but can take action in respect of breaches of its rules, policies and procedures."

[41] More relevant to the present question, namely whether the University may proceed with this process now that Y is no longer a student, is s 3 of this policy, which provides:

> "This policy applies to all members of the UQ Community, including all students and staff, whether or not those staff are covered by the Enterprise Agreement, in relation to UQ Related Conduct."

The term "UQ Related Conduct" is defined to mean any conduct that is "connected to UQ" including conduct that "occurs on, or in connection with any property owned, leased or occupied by UQ". The term "UQ Community" is defined to mean:

> "*[c]urrent* UQ students, staff, other workers, volunteers, official visitors, recognised individuals, honorary position holders, adjunct academic and support position holders, suppliers of academic placements or official suppliers of academic related activity, and anyone else contractually bound to comply with this policy."
>
> (Emphasis added.)

[42] As already noted, the Sexual Misconduct Policy is to be read in connection with the document entitled Sexual Misconduct Procedures. Section 1 of this document provides that words or phrases which it uses and which are otherwise undefined shall have the meaning they have in the Sexual Misconduct Policy. By s 2.2, the procedures apply to "all members of *the UQ Community*, including all students and staff, whether or not those staff are covered by the Enterprise Agreement, in relation to UQ Related Conduct." (Emphasis added.)

[43] Section 4 provides two ways for a person to request the University to take steps in relation to sexual misconduct. One is by making a so-called "Disclosure", and the other is by a "Formal Report." Section 4.3 provides that a Disclosure is made to obtain the benefits of support facilities from the University, whereas a Formal Report may do that but also initiate action by the University such as the disciplinary process.

[44] Section 5 of the Procedures provides, in part, as follows:

> "5.1 Further action can only be taken by the University in response to a Formal Report where the Formal Report concerns UQ Related Conduct and the Respondent is a member of the UQ Community.
>
> 5.2 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.

5.3 A Formal Report will be provided to the relevant officer of the University according to the status of the Respondent as set out in sections 5.6, 5.7 and 5.8 below. If the Respondent holds more than one status, the Formal Report will be provided to all relevant officers.

…

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

5.6 Students

5.6.1 Where the Respondent is a student, the relevant officer of the University is the Academic Registrar.

5.6.2 The Formal Report will be considered and may be progressed by the Academic Registrar pursuant to the *Student Integrity and Misconduct Policy*.

5.7 Staff covered by the Enterprise Agreement

5.7.1 Where the Respondent is a member of staff to whom the Enterprise Agreement applies, the Formal Report will be considered and may be progressed under the provisions for misconduct or serious misconduct outlined in the Enterprise Agreement."

[45] Section 8.1 of the Procedures provides that where a Disclosure or a Formal Report has been made, the University may take "Reasonable Measures", which includes steps by the University not involving a disciplinary process. They include, for example, "residential separation arrangements" and "class timetable changes". Section 8.5 provides that "[a]ny Reasonable Measures … [are] not a determination as to whether the Sexual Misconduct has occurred". Section 8.6.5 provides that in implementing any Reasonable Measures, the University will "take into account any relevant external requirements as a result of Sexual Misconduct potentially amounting to a criminal offence."

[46] It will be apparent that the Sexual Misconduct Policy, and the related Sexual Misconduct Procedures, are applicable to Y's case, notwithstanding the University's reluctance to acknowledge their present relevance. They do not provide for a process that is distinct from that which is to be followed under the Student Integrity and Misconduct Policy. Instead, sexual misconduct is general misconduct under that policy. I therefore agree with the view of the primary judge that this was "clearly a case of [alleged] serious sexual misconduct and not sexual harassment or bullying", such that the Sexual Misconduct Policy and the related procedures were directly relevant.

Is a former student subject to discipline?

[47] Before the primary judge, and in this Court, the parties presented their arguments without attempting to define the nature of the relationship between them by which Y became subject to these policies and procedures. In particular, neither side contends that their relationship is or was contractual, and that Y's susceptibility to the disciplinary process was the subject of certain contractual terms.

[48] It may be the case that, for example, Y contractually agreed to be bound by the policies and procedures for the discipline of students which the University might publish. But such a contract was not demonstrated by the evidence. Alternatively, the relationship may have been merely a voluntary association, by which Y's enrolment was subject to terms and conditions which included this disciplinary regime.[4] What is clear is that the relationship in this case, and in particular Y's susceptibility to the disciplinary process, was not prescribed by legislation.

[49] It is common ground that Y was in some way bound by the relevant policies and procedures, whilst he was an enrolled student. However the University's argument, that the regime remained applicable to a former student, is made more difficult by the absence of a demonstrated contractual or statutory provision which might indicate that a former student remains subject to this process.

[50] The most formidable obstacle to the University's argument is that none of the penalties which may be imposed upon a student, under the Student Integrity and Misconduct Policy, could be appropriate for a person who by then was no longer a student. The penalty of "a written warning" would not seem to be appropriate for someone who had left the University. Nor would a period of "campus service" be appropriate, for a person who had left the campus. Otherwise the available penalties are suspension from the University or part of it, or expulsion from the University. However the University seeks support for its argument from the definitions of suspension and expulsion in the same policy.

[51] The term "suspension" is defined to mean that:

> "[A] student is suspended from entering the University's land, sites or part of the land or sites or engaging in an activity as a student of the University for the duration of the suspension."

This definition defines the consequences of a suspension, but it does not negate the essential character of the suspension of a student, which is that a student is precluded from pursuing their studies or other activities at the University which otherwise would be available to them *as a student*.

[52] The term "expulsion" has a defined meaning as follows:

> "[A] student is expelled from the University and is prohibited from enrolling in any courses or programs at the University."

The University's argument appears to accept that only a current student may be "expelled" from the University in the ordinary sense of that word. It is said, however, that a former student may be penalised by an "expulsion" in the nature of an order which prohibits them from enrolling in any courses or programs at the University. That argument cannot be accepted. The penalty of a prohibition from further enrolment is one, according to the definition of "expulsion", which may be

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4 cf *Griffith University v Tang* (2005) 221 CLR 99, 110 [17], 111 [20] (Gleeson CJ); [2005] HCA 7.

imposed only by the student being "expelled from the University", and that could not occur in the case of someone who was not then enrolled.

[53] The University emphasises the definition of "student", in the Student Integrity and Misconduct Policy, as being "a person enrolled as a student … at the time of the alleged … general misconduct." In that definition, it is argued, there is a clear indication to extend the disciplinary regime to former students, as long as they were students at the time of the misconduct. On this point, Y's argument is that such an intention is not evident from the definition, which is intended only to confine misconduct to something which occurs at a time when the person was a student. In my view, Y's argument should be accepted, because it is supported by other provisions of the relevant policies and procedures. They include the available penalties for general misconduct, as I have just discussed.

[54] There is also the term "UQ Community", as defined and used in the Sexual Misconduct Policy and the Sexual Misconduct Procedures. By s 2.2 of the Procedures, they apply to all members of the UQ Community, a term which is defined, by the Sexual Misconduct Policy, to mean "*current* UQ students, staff, other workers, volunteers, official visitors [and others]". The clear intention is that former students, like former staff, should not be subject to that policy and those procedures.

[55] The possibility that a student might be counselled for their conduct[5] would not seem to be relevant for a former student. The same may be said of s 14.1 and s 14.4 of that policy.

[56] Section 8.10 provides a power to order a student to pay compensation (up to a value of $500). But this is a power which is exercisable "in addition to any penalty imposed under s 8.9", rather than, say, "in lieu of or in addition to any penalty …".

[57] A further consideration is that if a former student remains susceptible to this process, there is no limitation period, and nor is there any allowance for the possibility that a former student's location and circumstances might make the process unworkable in their case.

[58] The University argues that it is significant that any findings made and penalties imposed must be kept "as part of the University's records including records about the student's disciplinary record." This requirement does not support the University's argument. It is a requirement to keep records of the outcome of a process where it applies. It does not evidence an intention to have that process apply to a person for whom it could have no consequence by the imposition of a penalty.

[59] The University seeks support for its argument from a number of cases which have considered disciplinary procedures against members of professions, the armed forces, the public service and (in two cases) university students, which I will now discuss.

[60] In *R v Wilson; Ex parte Robinson*,[6] the Full Court held that the disciplinary process of the Queensland Chapter of the Royal Australian Institute of Architects continued to apply to an architect who had resigned from the Institute before the conclusion of

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5 By s 7.5.4 of the Student Integrity and Misconduct Policy.

6 [1982] Qd R 642.

proceedings against him. That conclusion was as a result of the Court's interpretation of the contract between the architect and the Institute.[7]

[61] In *Reay v Attorney-General*,[8] the New Zealand Court of Appeal interpreted the rules of the Institute of Professional Engineers as extending to a former member. The Court was influenced by the relevance, in that case, of the protection of the public interest and of the standing and reputation of that body. The same cannot be said of the present process, which is intended to be, with some qualifications, a private one. Further, in that case the relevant disciplinary powers were not limited to suspension and expulsion, but included the imposition of a fine.

[62] In *R v General Council of Medical Education and Registration of the United Kingdom*,[9] a medical practitioner sought to have his name removed from the medical register in the face of allegations that he had been guilty of infamous conduct. The case involved the interpretation of the statute governing complaints against medical practitioners. There was no provision of the statute which permitted a practitioner to have his name removed on merely his request. The statue was interpreted "to enable the General Medical Council to strike a man's name off the register, not at his request but at their discretion, either because he has been convicted of felony or misdemeanour or because he has been guilty of infamous conduct in a professional respect."[10] Clearly that reasoning cannot be applied to a former student under this regime.

[63] It is submitted that the University's argument is consistent with authority that a University has the power to revoke a degree. That submission cites *Re La Trobe University; Ex parte Hazan*,[11] in which the Visitor of that University held that the *La Trobe University Act* 1964 (Vic) empowered the revocation of a degree, in the case of proven fraud by a graduate claiming that he had held a diploma from another institution, in order to gain credit towards his degree. The case turned upon the terms of that statute and the nature of the power in question, neither of which is relevant to the present case.

[64] It is submitted that the University's argument is supported by cases in which universities have exercised jurisdiction in disciplining students who have been expelled. One of those cases is *Tadros v Charles Sturt University*.[12] That student had submitted material to the university which falsely represented her completion of her practical work experience, constituting academic misconduct under the university's relevant policy. She complained of decisions made within the university, by which it was determined that she be failed in the relevant subject and be excluded from the university for a period of two years. The Court declared that the decisions to that effect were void. Significantly, that was a suit by a person who remained an enrolled student and who claimed to be entitled to remain enrolled at the university during this process, notwithstanding its outcome.

[65] The other case involving a university is *Lam v University of Sydney*,[13] in which the appellant was found guilty of misconduct by a disciplinary board which ordered that

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7 [1982] Qd R 642 at 646-7.
8 [2019] NZCA 475.
9 [1930] 1 KB 562.
10 [1930] 1 KB 562 at 569.
11 [1993] 1 VR 7.
12 [2008] NSWSC 1140.
13 [1997] NSWCA 184.

he be expelled and not reapply for readmission within four years. He unsuccessfully appealed to the Appeals Committee of the university's Senate, in accordance with its by-laws. His claim in the New South Wales Supreme Court was that he had been denied natural justice and that errors of law had occurred in the process. It appears that reliance is placed upon this case because it is an instance in which a university exercised a disciplinary jurisdiction over a student who had been expelled. However, in that case, the only disciplinary proceeding after the student's expulsion was his appeal against it.

[66] The University cites the judgment of the High Court in *R v Cox*; *Ex parte Smith*.[14] In that case, a soldier was found guilty of being absent without leave, for which he was required to serve a period of detention and was discharged from the army. During that period of detention, he was alleged to have committed an offence of mutiny. He objected to the jurisdiction of the court martial, on the ground that he was no longer a soldier. The relevant provision of the *Army Act*[15] plainly provided that during the term of his sentence, notwithstanding his discharge or dismissal from the army, he could be punished as if he continued to be subject to military law. It was held that although the *Army Act* continued to apply to him, as a former soldier, he could not be guilty of mutiny because he was at the time a civilian. The case provides no assistance to the University here.

[67] The University also cites *Ex parte Cupit; Re Cupit*.[16] In that case, a serving soldier, while in Korea, was tried by a court martial on a charge of murder, and found to have committed the offence but to have been insane at the time. He was brought back to Australia in custody and ordered to be held in jail during the Governor-General's pleasure. Subsequently, he was discharged from the army, and it was contended on his behalf that as a result, the Governor-General ceased to have authority to make orders for his future detention. The court held that although he was no longer subject to the *Army Act*, that fact did not "put an end to the consequences which occurred to him while he was subject to it".[17] The case provides no support for the University's argument.

[68] Lastly, the University relies upon a judgment of the Supreme Court of Victoria in *Paterson v Public Service Disciplinary Appeals Tribunal & Anor*.[18] In that case, a person was found guilty of an offence and penalised under the *Public Service Act* 1974 (Vic) by a reduction of his salary. Subsequently, on the same day, that person signed a notice of resignation from the public service and his solicitors appealed against the disciplinary decision which had been made against him. According to the letter of resignation, he was to leave the public service eight days later. It was held that the person had a continuing right of appeal although he was no longer an officer of the public service at the time of the hearing of his appeal. This was another case in which, according to the relevant legislation or disciplinary rules, a person retained their right to appeal against a disciplinary decision which had been made when that person belonged to the class which was subject to it.

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14 (1945) 71 CLR 1.
15 s 158(2) of the *Army Act* 1881 (Imp).
16 (1955) 72 WN (NSW) 186; 55 SR (NSW) 184.
17 (1955) 55 SR (NSW) 184 at 188.
18 [1994] 1 VR 229.

[69] It follows that none of the authorities which are cited is one which supports the University's argument that its disciplinary process can be imposed upon someone who is not an enrolled student.

[70] The present question must be determined according to the particular terms of the relevant policies and procedures of the University. They provide several indications that the process cannot be imposed upon someone who is no longer an enrolled student, and there are no terms of the policies and procedures which indicate otherwise. The result is unremarkable, when the stated purpose and objectives of the policies are considered. This case has the unusual feature of the process being commenced at a time when the person was an enrolled student, who then graduated whilst the University was enjoined from pursuing the case against him. But there was no argument that it mattered that he was a student when the process began.

[71] Consequently, there is a demonstrated basis for enjoining the University from proceeding further against Y. For this reason at least, the injunction should remain in place and the appeal against that order should be dismissed.

Should the primary judgment be reviewed?

[72] The University argues that there is utility in considering the correctness of the judgment of the primary judge, firstly because the University was ordered to pay Y's costs of the proceeding at first instance. It is further submitted that the correctness of the judgment has a significance that goes beyond this case, warranting the opinion of this Court being given.

[73] Given my conclusion on the first question, the University's appeal against the injunction should be dismissed, regardless of the correctness of the decision of the primary judge. However the correctness of that decision is not an abstract question of law without any consequence for the present parties. That is because of its relevance to the existing costs order against the University, and consequently, there is a discretion to determine the question: see *Hunter Development Corporation v Save Our Rail NSW Incorporated (No 2)*.[19] It was suggested, in the written submissions for Y, that this applied only where the costs in question were "substantial". This was said to be supported by the same passage from *Hunter Development Corporation* to which I have just referred. In my view, that is not the case. In any event, it may be readily inferred that the costs of the proceeding in the Trial Division were substantial rather than minimal.

[74] The question raised by the University's appeal was fully argued and it has a potential importance for cases beyond the present one. For those reasons, the question should be considered.

The reasoning of the primary judge

[75] The primary judge noted that ultimately the allegations against Y had not been formulated as a breach of the Sexual Misconduct Policy. However, she considered that "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."[20] I agree with that analysis.

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19 [2016] NSWCA 375; (2016) 93 NSWLR 704 at 713-715 [38]-[46].

20 Judgment [43].

[76] I also agree with her Honour's characterisation of the allegations, namely that they were specific allegations of sexual assault that could be categorised as a number of counts of sexual assaults,[21] rather than merely allegations of harassment or bullying.[22] Consequently, as her Honour said, there could be no determination of these allegations without a determination of whether the acts had occurred as alleged, without consent.[23]

[77] Her Honour considered 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 [a] sexual nature has been committed."[24] With one qualification, I agree. Whether a criminal offence had been committed in this case could involve the operation of s 24 of the *Criminal Code* on a question of consent, whereas the University's policies and procedures contain no similar provision.

[78] The question, as the primary judge saw it, was "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".[25] Her Honour answered that question in the negative, for the following reasons.

[79] Her Honour saw significance in s 4.7.2 of the Sexual Misconduct Procedures document. It provides that the person receiving a Formal Report must take reasonable steps to inform the person reporting the matter of the support available to them and of the "Reasonable Measures" that may be implemented, and that the person receiving that Report must ask the person making it whether they "wish to proceed with a report to the police or other external agency". Her Honour referred to other provisions of the Procedures document, before summarising their effect as follows:

> "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."

[80] Her Honour noted that Sexual Misconduct, as defined in the Sexual Misconduct Policy, "covers a wide range of behaviours, some of which are criminal and some of which are not" in that it includes any instance of sexual harassment.[26]

[81] Her Honour then turned to the relevance of s 4.4 of the Sexual Misconduct Policy, which she said:

> "clearly provides that as sexual misconduct may include criminal behaviours and be unlawful, it does not have jurisdiction over criminal acts."

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21 Judgment [45].
22 Judgment [47], [48].
23 Judgment [50].
24 Judgment [51].
25 Judgment [52].
26 Judgment [63].

Her Honour then said that she considered "that this section removes the jurisdiction of the University in relation to allegations of a criminal offence of a sexual nature."[27]

[82] She continued:

> "[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*, and *Lee and Anor v NSW Crime Commission*.
>
> [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 [T]he University of Western Sydney*. Those decision[s] 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.
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> [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 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.
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> [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."

Her Honour added:

> "[70] I also accept the applicant's submission that the construction argued for is reinforced by the context and it would indeed be

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27 Judgment [64].

> 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."

[83] The submissions for the University criticise the reasoning of the primary judge as being inconsistent with the judgment of the High Court in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*.[28] That case considered the power of the appellant Authority to determine whether the respondent had breached the condition of its broadcasting licence, as prescribed by the *Broadcasting Services Act* 1992 (Cth), that it not use a commercial radio broadcasting service in the commission of an offence. A breach of a licence condition could itself be prosecuted as an offence, made the subject of civil penalty proceedings, or found administrative action including the suspension or cancellation of the licence. After an investigation, the Authority had found that the respondent had breached the condition, by committing an offence against the law of New South Wales which prohibited a person from publishing a private conversation that had come to the person's knowledge as a result of the use of a listening device. The Full Court of the Federal Court held that absent clear language, the legislature was not to be taken to have intended to confer upon the Authority the power to make an administrative determination or finding of the commission of a criminal offence. The Full Court said that "as a matter of general principle it is not normally to be expected that an administrative body such as the [Authority] will determine whether or not particular conduct constitutes the commission of a relevant offence," and that "under our legal system the determination of whether or not a person has committed a criminal offence can generally only be determined by a court exercising criminal jurisdiction." However the High Court held that this "general principle" had been expressed too widely. The High Court said:

> "More generally, and contrary to the 'normal expectation' stated by the Full Court, it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action."[29]

[84] In my view, however, the primary judge did not apply the "general principle" which was rejected by the High Court in that case. Her Honour did refer to this judgment, in the course of her summary of the University's submissions. Her Honour interpreted the relevant policies and procedures, without starting from a "normal expectation" of the kind which was disapproved by the High Court.

[85] However, respectfully, I am unable to agree with her conclusion. Critical to her Honour's reasoning was her interpretation of s 4.4 of the Sexual Misconduct Policy, which it is convenient to repeat here:

> "4.4 The University acknowledges that Sexual Misconduct may include criminal behaviours and may be unlawful. The University does not have jurisdiction over criminal acts, but can take action in respect of breaches of its rules, policies and procedures."

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28 (2015) 255 CLR 352.

29 (2015) 255 CLR 352 at 371 [33].

[86] Her Honour interpreted this clause as one which "removes the jurisdiction of the University" in a certain respect, namely that it removed a jurisdiction to determine whether acts occurred, if the commission of those acts would constitute a criminal offence of a sexual nature. In my opinion, this is not a provision which removes any jurisdiction. Rather, it is an acknowledgment by the University that it has no jurisdiction to determine criminal responsibility, and that it would not make findings in the terms of criminal responsibility in the course of deciding whether there had been certain breaches of its rules, policies and procedures. In my view therefore, s 4.4 does not confine the disciplinary powers of the University as her Honour concluded.

[87] The definition of Sexual Misconduct is important. Significantly it does not exclude conduct amounting to a sexual offence; rather, it specifically includes such conduct. The same appears from the first sentence of s 4.4. Consequently, conduct which involved the commission of a criminal offence might constitute "misconduct" or "serious misconduct" under the Student Integrity and Misconduct Policy.[30] As misconduct, or serious misconduct, it would then be within the jurisdiction of the Disciplinary Board.

[88] Her Honour was rightly concerned by the prospect that such a serious finding might be made as the outcome of a process which, in many respects, seems unsuited to a factual inquiry of this kind. Except with the leave of the Disciplinary Board, Y was not to have a lawyer present during this hearing. It is far from clear that he was to be given an opportunity to cross-examine the complainant, at least by asking her questions directly, rather than "through the decision-maker" as is suggested by s 5.7.1 of the "Student and Integrity and Misconduct – Guidelines". Hearings are to follow "an inquisitorial model".[31] And I agree with her Honour that one particular cause for concern is that the Disciplinary Board would be comprised of persons, none of whom need have any legal training, especially as Y would not have legal representation. But all of that is to say that it was far from certain that Y would have received procedural fairness in this hearing had it proceeded as was apparently proposed by the Disciplinary Board. However, the only ground advanced by Y for the relief which he was given was that the University lacked the power to investigate whether this conduct occurred. Y's case was that in any case of a complaint of Sexual Misconduct, which would constitute a criminal offence of a sexual nature, there is no power for a student's conduct to be investigated through the University's disciplinary process. I am unable to accept that in no such case could a hearing of an allegation of this kind be conducted with procedural fairness to the student.

[89] The primary judge also saw significance in s 6.2.3 of the Student Integrity and Misconduct Policy, which provides that level 3 (or serious) general misconduct will be deemed to have been committed by any student found guilty of any offence of a sexual nature under the criminal law in relation to conduct that is connected to UQ. That is a provision which facilitates the proof of serious misconduct, but it does not indicate that where sexual misconduct is alleged, and it has not been the subject of a criminal conviction, it is outside the scope of the disciplinary process.

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30 As stated in s 2 of the Sexual Misconduct Policy (definition of Sexual Misconduct).

31 Section 5.7 of the Student Integrity and Misconduct Guidelines.

[90] For these reasons, in my respectful opinion the primary judge ought not to have concluded that, according to the terms of the relevant policies and procedures, this disciplinary proceeding was beyond the University's power. The originating application, on the facts and circumstances which then existed, should have been dismissed and the University should not have been ordered to pay Y's costs.

Conclusion and orders

[91] I would order as follows:

1. The appeal against Order 1 made on 21 November 2019 be dismissed.
2. The appeal against Order 2 made on that date be allowed and that order be set aside.
3. Within 14 days of the delivery of this judgment, each party file and serve written submissions, not exceeding three pages in length, as to the costs in the Trial Division and of this appeal.

[92] **MULLINS JA:** I agree with McMurdo JA.

[93] **BODDICE J:** I agree with McMurdo JA.