Sexual harassment in Australian Universities: Procedures to make the Personal Public

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I INTRODUCTION - WHAT IS SEXUAL HARASSMENT?

In an institution such as a University where there is often an immense imbalance of personal power between the service deliverer and service user, the opportunity to use and abuse that imbalance must be acknowledged and controlled by strict protocols. Australian Universities are facing increased pressure to protect both themselves and the individual members that make up the University community from legal liability arising from misuses of power. Such power abuse underlies the manifold allegations of sexual harassment which occur in Universities.

The act of sexual harassment is ageless. However, the concept of sexual harassment as a separate and definable behaviour is less than twenty-five years old.[1] As the term is only relatively new, there is very little agreement in the relevant literature as to what it actually means. It is usually described, rather than defined. There are numerous behaviours that can be included under the general rubric of sexual harassment and any attempt at definitions usually results in lists of examples or descriptions. However, there is a commonality to all of these behaviours, which can be simplified as requiring the following elements:

- The behaviour must be "unwelcome", "unwanted" or "non-consenting".
- It is not necessary to show the offender's intent or motivation to prove the harassment occurred.
- There need be no understanding by the offender as to how the behaviour will be received.
- There does not have to be a series of incidents -- one incident of behaviour that fulfils the above criteria will suffice.

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1 M Paludi (ed.) *Sexual Harassment on College Campuses: Abusing the Ivory Power* (State University of New York Press, Albany, 1996) 25.

- A person can be sexually harassed without reference to a specific incidence of harassment -- a hostile work environment (for example, where pornography is posted on walls, or used as computer screen savers) can amount to unlawful sex discrimination.[2]

In order to satisfy the basic requirement that the offender knew the difference between right and wrong at the time of the incident or incidents, often a "reasonable person" test will be assumed as a prerequisite. That is, the behaviour of the offender must be such that a reasonable person would know, or ought to have known, that the victim would not welcome it.

In Victoria, we can look to two different Acts for definitions of sexual harassment. The Commonwealth Sex Discrimination Act, 1984, for example, defines sexual harassment in the following terms:

" A person sexually harasses another person (the "person harassed") if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated." [3]

This definition relies on the "reasonable person" test and, as such, requires an investigation of what could have or must have been in the perpetrator's mind at the time of the harassment, having regard to all the circumstances. Section 28F of the same Act specifically provides that it is unlawful for a member of staff of an educational institution (defined to include a university) to sexually harass a student of that institution.

The Victorian Equal Opportunity Act 1995 has a definition which, except for a few words, is an exact replica of the Commonwealth legislation. Section 91 of the Victorian legislation also specifically refers to educational institutions and makes staff:student and student:student harassment unlawful.

Sexual harassment policies are in place in virtually all university campuses across Australia. As expected, the definitions of such behaviour differ between universities. For example, the definition of sexual harassment adopted by Monash University mirrors exactly the wording of the Sex

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2 *Hall v Sheiban* (1989) 85 ALR 503, 564.

3 Section 28A *Sex Discrimination Act* 1984 (Cth).

Discrimination Act, 1984.[4] An interesting variant is the wording of the definition adopted by the Australian National University, which requires "circumstances in which the other person [that is, the aggrieved party] reasonably feels offended, humiliated or intimidated."[5] This removes the onus of establishing what may have been (or must have been) in the perpetrator's mind when the harassment occurred. It requires only an investigation of the circumstances of the harassment and a decision whether, in these particular circumstances, it was reasonable for the aggrieved party to feel offended, humiliated or intimidated. The state of mind of the perpetrator (or what must have been the state of mind) is not relevant in any way.

The American Psychological Association has attempted a specific definition of sexual harassment, based on the following sub-types of behaviour[6]:-

- Gender harassment (General sexist behaviour that conveys degrading attitudes to a person on the basis of gender)
- Seductive behaviour (unwanted, inappropriate and offensive sexual advances)
- Sexual bribery (solicitation of sex-linked behaviour by promise of reward)
- Sexual coercion (coercion of sex-linked behaviour by threat of punishment)
- Sexual imposition (forceful touching, feeling or sexual assault)

This writer's opinion, however, is that it is unnecessary, and potentially hazardous to attempt an exhaustive definition of sexual harassment, based either on the above sub-types or any other definitive listing. There can be no exhaustive definition of sexual harassment. This type of behaviour must be defined on a case by case basis. Definitions are dangerous because perpetrators rely on them and mould their behaviour in order not to fall foul of them -- while at the same time exhibiting totally inappropriate behaviour. This rigidity leaves victims without redress.

This paper focuses on sexual harassment at tertiary education institutions, specifically universities in Australia. Whilst acknowledging that sexual harassment occurs between students and between co-workers, its focus will

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4 Monash University Discrimination and Harassment Grievance Procedures (1997) 2.2.3.

5 The Australian National University Sexual Harassment Procedures (1997).

6 American Psychological Society Media Information Internet site - at http://www.apa.org/pubinfo/harass.html

be on staff:student harassment. It will discuss the type of behaviour that constitutes sexual or sex-based harassment and attempt to set out practical suggestions for information, education and training of university staff and students. It will also investigate the issue of convening and running a panel established to investigate an allegation of harassment. Finally, it will explore the legal issues surrounding the operation of such a panel and propose ways of working through the associated legal minefield.

II STANDARDS OF CONDUCT

In discussing these issues, this author's view is predicated on the basis that a university, as an institution of higher learning, should attempt to take a hortatory approach to the behaviour of its members, be they service deliverers (staff) or service users (students). When a staff member or a student enters the university environment they, in effect, become a member of a closed community. By joining such a community, they also surrender themselves to certain expected codes of conduct. The university has the power to demand certain standards of conduct from its members because its members are a self-selected (and privileged) group in society. Accordingly, the university has the unique ability to create its own microcosmic society and, as such, can regulate it along its own self determined "best practice" codes of behaviour. Such behaviour includes the right to a safe, non-threatening environment where a person can work and learn, regardless of gender or sexual orientation. Each member of the university community has the right to expect such an environment and the corresponding duty to assist in maintaining and promoting such an environment.

Institutions of higher learning must be more than just mere trade schools with the aim of producing workers armed with certain skills. Universities have the ability to be the "brains-trust" of society. As such, they have a responsibility to produce well-rounded members of society who are free from prejudices and biases. It is accordingly a university's right to demand a standard of behaviour from its members which does not condone discrimination of any form, including sexual harassment. It is to be hoped that graduates of the university will also receive an education in appropriate forms of behaviour in addition to their "pure" education in their chosen discipline. If so, there may be a "ripple effect" in the passing on of these attitudes as such graduates lead society by personal example.

For these reasons, the issue of sexual harassment on university campuses is important. It affects the practical day-to-day practices involved in operating university society. It also has ongoing consequences for the future of society in general.

Accordingly, what standard of behaviour should we expect from our university staff and students? More importantly, what behaviour falls outside acceptable standards, and where do we draw the line if we are attempting to create a sociable and informal learning environment?

Consider the following scenarios:

1. A male lecturer tells a "dirty" or off-colour joke about a prostitute during a lecture.
2. A female technician makes it difficult for a male student to obtain supplies of appropriate materials after their consensual sexual relationship ends.
3. A female member of secretarial staff comments on a male academic's body to others, but in his hearing.
4. A gay male professor tells a male student he will fail unless he consents to sex with him.
5. A male student tells others not to vote for a female political rival in student elections because "she's just a stupid girl and doesn't know anything about politics".
6. A male tutor sends a female student a Christmas card that indicates he will miss her during the summer break.
7. A male member of grounds staff constantly stands close to, and brushes up against, various female students.
8. A female lecturer asks a male colleague to dinner, after he has declined twice before.
9. A male lecturer tells a group of students (both male and female) a humorous story about his sexual exploits when he was younger.
10. A male member of secretarial staff asks a female colleague about her weekend and questions her on who she went out with and what she did.

Which of these behaviours is sexual harassment? Of course, often it will depend on the individual circumstances. How was a comment made, and what body language accompanied it? Who else was present when the conversation or behaviour took place? What was the nature of the ongoing relationship between the protagonists? This then is the difficulty of both defining and dealing with matters of sexual harassment. It is virtually never facile or obvious, and there are various circumstances in which it is difficult to decide whether a certain behaviour or comment has crossed the line. Unfortunately, there are members of the university community who know how difficult it is to decide whether sexual harassment has occurred

and thus tailor their behaviour accordingly -- that is, they often display behaviour which may be interpreted ambiguously by both the recipient of their behaviour or a disciplinary body.

If one argues that all the above behaviours are inappropriate, then it must also be accepted that the university community would have to accept a certain level of formality and "political correctness" between its members. If it is to be argued that, for example, telling a dirty joke to a class, or exchanging a comment at the lunch counter about a colleague's body, is acceptable behaviour, then we would have a less formal culture, but one that has inherent complication and ambiguities about how we are meant to behave to one another.

III INFORMATION, EDUCATION AND TRAINING

Creating and enforcing policies

The ultimate objective of a sexual harassment policy is to reduce the number of incidents of harassment on campus. In this regard, polices should aim to be preventative, rather than curative, but need to have elements of both. The primary issue is the development of a workable policy which is not limited to vague statements of the university's good intentions. Accordingly, the policy must contain both ideological and practical statements which are aimed at implementing that ideology. It is useless to state that the university campus should be a safe working environment for both genders without being able to describe the procedures and processes for bringing this about. Thus, ideally, a workable sexual harassment policy should contain a number of objectives and ways of implementing them. It should also describe the penalties that may apply if the policy is not adhered to.

Difficulties often occur in relation to the promulgation and dissemination of a sexual harassment policy. The university may have good intentions in its formulation of a policy, but if it is not read and not known, then it is a futile exercise. It can also be dangerous for the university to believe that it has legally covered itself as an employer, if it has simply written a sexual harassment policy and made it generally available. For example, in the case of *AWU-FIME Amalgamated Union v ACL Bearing Company*[7] a male employee harassed a female colleague and was subsequently dismissed as he was found to have previously acted in a similar way to another female. His dismissal was later found to be unlawful, because it was found that his

7 IRCA No. 254 of 1996, Farrell JR.

employer had not made him sufficiently aware of its sexual harassment policy.[8]

Thus, energy should be put into both advertising the policy and educating staff and students as to its existence and contents. This means making the policy available to all new employees, and also may require the use of funds from university budgets to ensure that multiple copies of the policy are available to all departments and faculties and for all students, in both hard copy (that is, brochures and pamphlets) and via electronic media, such as web sites. Staff and students alike should be regularly encouraged to attend training sessions which are aimed to educate them in identifying inappropriate and harassing behaviour. Arguably, attendance at a minimum threshold number of training sessions and equal opportunity workshops on a yearly basis should be compulsory for all employees in order to protect the university. In the case of *Andrew and Transport Workers Union v Linfox Transport (Aust) Pty. Ltd.*[9] a female complainant was harassed by an employee making a delivery to a video shop who was subsequently dismissed by his employer. It was later found to be an unjust and unreasonable dismissal for various reasons, one of them being that the employee had been provided no training or education by his employer in matters of sexual harassment.[10]

Currently, it appears that many Universities have equal opportunity units that provide training for staff mediators and those dealing with grievance procedures. However, there appears to be very little in the way of coordinated methodologies in place to deal with the sheer ignorance of students and staff alike of issues of sexual harassment. Thus, Universities need to aim for maximum "saturation" of their sexual harassment policies amongst their members. No perpetrator of inappropriate behaviour should be allowed the excuse that s/he "didn't know" what sexual harassment was, or that the university had a policy about it. Similarly, victims of sexual harassment should be in a position of knowing the appropriate grievance procedures.

Recruitment of trainers

The vanguard in any successful implementation of a sexual harassment policy must be the trainers. As in any position requiring leadership, there

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8 S Rey "Sexual Harassment in Unfair Dismissal Cases", unpublished paper delivered at LAAMS Seminar "Sexual Harassment: Unlawful Conduct or 'Borderline' Behaviour (Victoria)", 2 April 1998, at 8.

9 IRCA No. 148 of 1995, Murphy JR.

10 Supra n. 8 at 12.

are a number of personal characteristics required of those who would be the custodians and "enforcers" of sexual harassment policies. In summary, a good trainer should have the following qualities:

1. First and foremost, s/he must have a thorough knowledge and understanding of the university's sexual harassment policies and procedures.
2. S/he must have credibility. This is achieved by showing neutrality in dealing with gender issues, (that is, not appearing partisan to either gender) while at the same time, displaying commitment to and sincerity in his/her belief in the ideology inherent in the university sexual harassment policy. [11]
3. S/he must be an excellent communicator and be able to deal with people on a variety of levels, especially considering the wide variety of egos present in academic institutions. S/he must show patience and sensitivity in dealing with queries and attitudes that often show great ignorance or insensitivity to these issues.
4. S/he must be prepared to work in a team. It is sensible for trainers to perform presentations in teams of two in order to incorporate a gender mix, so that members of the audience can relate to one of the presenters. This requires the trainers to be "team players" in the preparation and presentation of information.
5. S/he must lead by personal example and be seen as having a personal commitment to gender equality and the elimination of all forms of harassment or discrimination.

Universities need to appoint and train their trainers very carefully. If a sexual harassment "officer" lacks credibility, is incompetent or simply cannot relate to people, any policy regarding harassment will be seriously undermined. A policy or set of procedures which does not have suitable "follow through" by way of appropriate personnel will be purposeless and ineffectual.

IV THE ESTABLISHMENT OF PROCEDURES

Informal or formal procedures: When is mediation or conciliation not appropriate?

In creating procedures to deal with allegations of sexual harassment, it is prudent to provide more than one avenue. As it is not appropriate for all matters to go to a formal investigation, a less formal avenue must be

[11] Supra n. 1 at 244.

available. This is often referred to as conciliation or mediation. A prerequisite of successful dispute resolution utilising these methodologies is that all parties involved in the matter must be willing to submit themselves to this process. In conciliation, the conciliator may be a university appointed person who assists the parties to reach an agreed solution to the problem.[12]

The process of conciliation relies on the concepts inherent in "principled negotiation". This is also known as "co-operative negotiation", and simply attempts to work towards an outcome that benefits both parties. This technique is characterised by a flexible approach in which each party is prepared to listen and take into account the other party's objectives and desired outcomes, and accommodate them to some degree. There are four basic steps to this model:

1. It requires a separation of the negotiators from the problem. The conciliator should not get emotional about the issue; as one of the reasons the parties have gone to a conciliator is that s/he is uninvolved and can attempt to resolve the problem objectively. The conciliator tries to see him/herself as working *with* parties to solve the problem, not *against* either party.

2. The conciliator must focus on the parties' interests, not on taking a position.

3. The conciliator should try to generate a number of possible solutions to the problem prior to committing either party to only one outcome. If the conciliator approaches the negotiation with a number of possible ways of solving the dispute, this will increase the possibility of a settlement that may satisfy both parties.

4. It is often useful for the conciliator to select an outcome by reference to an external and objective standard. If both parties are determined that the objective they each want is the only "fair" outcome, reference to an outside standard might get them to see that neither of their positions may be fair.

Similarly, mediation is described as:

> "A process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs."[13]

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12 Supra n. 4 at 4.2

13 J. Folberg, and A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (Jossey-Bass, San Francisco, 1984), 7-8.

Mediation is a different process from negotiation or conciliation, but successful participation in mediation requires an understanding of the fundamentals of negotiation.

In essence, mediation is principled negotiation conducted by a third party, the mediator. That is, in mediation, a mediator will help the parties to co-operatively negotiate an outcome that will satisfy both of their interests.

The main features of the mediation process are as follows:

- Mediation is conducted by an independent and impartial third party.
- The mediator facilitates communication and principled negotiation between the parties.
- The mediator does not determine the outcome of the dispute, nor does the mediator give an opinion on the desired outcome of the dispute.
- The disputants are free to withdraw from mediation at any time.

The role of the mediator is to explain to the parties that s/he is simply facilitating the parties' negotiations. S/he may distinguish their role from that of other third party interveners, such as an arbitrator, by stating that mediators do not decide disputes or make recommendations for settlement. Instead, the mediator remains impartial to both the parties and the substantive issues in dispute. The mediator's primary duty is to ensure that the mediation process is fair - for example, each party has the chance to present their views and things told in confidence remain confidential.

There is, however, a major difficulty with both these forms of dispute resolution. It is widely accepted that both mediation and conciliation are inappropriate in situations where there may be a strong power imbalance between the participants.

Unfortunately, there is much evidence to support the assertion that mediation, despite enjoying current popularity as a private or non-litigious dispute settlement method, is inherently disadvantageous for women. It is now becoming recognised that in situations where there are power imbalances between the parties, mediation may not be appropriate. Women who are victims of harassment often experience reduction in their self-esteem. A low self-esteem will inhibit bargaining power.[14]

Mediation tactics, such as allowing both parties to speak in turn, clarifying statements and providing legal information, may not alter power

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[14] Bryan, "Killing us Softly: Divorce, Mediation and the Politics of Power" (1992) 40 *Buffalo Law Review* 441, 452.

imbalances or ensure a fair outcome.[15] Finally, there is an inherent difficulty in finding a mediator who is completely impartial. Because of social conditioning, it is likely that any given mediator (despite professional training) may be biased towards one party or another. Because mediation is private, such bias is not open to public inspection.[16] Accordingly, it must be recognised that informal procedures for dealing with sexual harassment may often not be appropriate. It is important that equal opportunity officers and advisers understand and are sensitive to the deficiencies in informal dispute resolution procedures and can therefore choose the appropriate avenue of dealing with each complaint, depending on the particular circumstances.

The composition of investigating panels (credibility & autonomy)

When it is decided that it is appropriate for a complaint of sexual harassment to go to a formal investigation, the university must have procedures for the establishment of a panel whose duty it is to investigate the allegations and make a determination as to their veracity. There are numerous issues relating to procedures of such a panel both before during and after the investigation which will be dealt with later in this paper. However, a primary issue is how the panel is to be constituted. It is essential that the panel has credibility with both the complainant and the respondent and is not seen as biased in favour of either party. In this regard, it is essential that the panel have full autonomy to investigate the complaint. Thus, no panel members should be employed within the same faculty or department as either the complainant or the respondent. If possible, and if the university has more than one campus, panel members should be drawn from a campus other than that where the allegations occurred. In order to be seen as being impartial, the panel should only have the power to investigate, make findings and make recommendations on those findings. The panel itself should not have the power to put those recommendations into effect. This means that the ultimate decision as to whether the findings and recommendations are accepted should be left to a separate party who is not involved in the investigation itself.[17]

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15 Ibid 505

16 Czapanskiy, "Domestic Violence, The Family and the Lawyering Process: Lessons from studies on gender bias in the Courts" (1993) 27 *Family Law Quarterly* 247, 273.

17 For example, at Monash University the panel makes recommendations to the Vice-Chancellor who then has the discretion whether to accept or reject them.

Obviously, it is also essential for the panel to have a gender balance, and if any member of the panel expresses an opinion as to findings prior to the investigation taking place, that person should be excluded from participating in the investigation. It is this writer's belief that it is essential for the panel to be "internal" in the sense that its members are part of the university community, be they academics, general staff or a mixture of both. This is because it is essential that the members of the panel understand the university environment. It also will help to ensure confidentiality with regard to the investigation if "outsiders" are not involved.

Disciplinary action and counseling

It is essential to question the "raison d'être" of a panel to investigate complaints of sexual harassment. University sexual harassment procedures need to set out the objectives of the panel and the range of appropriate and possible recommendations that it may make. To a certain extent the question of the panel's powers is one of ideology. Is its job to discipline the offender? To compensate the complainant? To counsel and re-educate the offender so that further occurrences will not take place? Or is it a mixture of all these objectives? The ideology and philosophy of such a panel need to be well thought out prior to the establishment of procedures. The philosophy must be set out with clarity and detail in the university's Sexual Harassment Policy and it must be known and understood by the panel members when they are appointed.

In this writer's opinion, a panel's main objective should not be disciplinary. Mere discipline does not go to the core of the problem. The panel's work should be both curative and preventative. Accordingly, its powers should include the ability to recommend counseling for the respondent and put in place recommendations that enforce the respondent to undergo extensive "re-education" as a pre-condition of returning to employment. In this way, the panel will be empowered to change the culture of harassment within the university. Its work would not then be limited to a case-by-case approach. It may actually make a positive impact on the university environment in a more general way. As Harold Bacchi and Jim Jose state:

> "Confronting men with responsibility for their actions and indicating that harassment of women is unethical behaviour may have some effect. But emphasis must be placed on the reasons for this; specifically that it is not because women require particular

respect but because sexual harassment contributes to the oppression of women."[18]

V CONVENING AND RUNNING A PANEL -- THE ISSUES

File Notes: confidentiality, negligence and defamation

All persons involved with a sexual harassment complaint should approach their dealings with the matter with a healthy dose of self-protection. That is, certain procedures should be adopted which will ensure due process for the complaint and which can be subject to the strongest scrutiny from outside bodies. This means that all dealings with all complaints must be consistent, unbiased and thoroughly professional at all times. In order to achieve this, all equal opportunity workers, sexual harassment advisers and members of investigating Panels should be encouraged to adopt formal (yet simple) procedures to ensure consistency when dealing with complaints. The first and most obvious of these is the taking of thorough file notes in all dealings with a complaint. This means notes must be taken of all face-to-face and telephone discussions. A file note of a telephone conversation, for example, should include the following items:

- date and time
- who was spoken to, that person's position and direct line telephone number, if relevant
- A sufficiently detailed and legible record of the conversation. It does not have to be of verbatim record of all that was discussed -- however, it should be sufficiently comprehensive to allow a person unfamiliar with the matter to understand the substance of the call.

Whatever structure is adopted, it should always be consistent. Records should also be kept of attempted calls when leaving messages, or when the line is engaged or unanswered. This will assist if an accusation is ever leveled that the matter has not been followed up with due diligence. These notes should be kept in chronological order and in a secure place where they are inaccessible to outsiders.

Obviously, these notes and the substance of all conversations relating to a sexual harassment claim are confidential. They must not be discussed with friends, loved ones or work companions. This is essential, as mere "gossip" can completely undermine the work of sexual harassment advisers or bias panel members prior to an investigation taking place.

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18 J Bacchi and J Jose "Dealing with Sexual Harassment: Persuade, Discipline or Punish?" (1994) *Australian Journal of Law in Society* 1, 11.

There are great dangers here. Arguably, any person involved with the investigation of a sexual harassment complaint places themselves in a unique relationship with the complainant. This means they have certain responsibilities to the complainant and an improper use of that relationship would subject them to legal proceedings. The maintenance of thorough file notes will reduce the risk of successful allegations being made that this fiduciary responsibility is being breached if the complainant is not satisfied with the work being done by investigators. Further, if confidentiality is breached, this may give rise to allegations of defamation. If comments are made by anyone investigating the matter to another person, these may be deemed as slanderous of either party. Some categories of defamation are actionable per se -- that is, the person who is defamed does not need to prove they have suffered any loss.[19]

The obvious way to avoid allegations of breach of fiduciary relationship or defamation is *not* talk about the matters that are under investigation and to make thorough and professional file notes of all conversations that relate to the investigation.

The writing of a formal complaint

It is important that a complaint is written in the most thorough fashion for purposes of investigation by the panel. Investigative work is hampered by vague or rambling allegations that make no reference to dates or times, or give no accurate description of the incidents. Accordingly, it is essential at the early stages of the process that the complainant is requested to write down the entire story in his or her own words as early as possible after the incidents occurred. The longer the complainant waits to note the accusations down, the more vague they will become. A sexual harassment adviser should not be involved in prompting the complainant as to what is written but should simply ask the complainant to sit down quietly by him or herself and write down all allegations without assistance from anyone else. Dates, places and times are all essential to the work of an investigative panel. Further, the allegations should be set out in chronological order. Incidents should be described in detail and not referred to vaguely. For example, it is no use to a panel for the complainant to state "In March 1998 the respondent harassed me and made me feel uncomfortable in our work place." This provides nothing for the panel to investigate and it is also unfair to the respondent as it provides nothing specific to respond to.

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19 J G Fleming *The Law of Torts* (LBC, North Ryde, 1983) 518.

It is also essential that any comments made by the respondent (which the complainant alleges amount to harassment) are written down in the complaint verbatim and not referred to obliquely. For example, the complainant should not write "He then asked me if I would have sex with him". The actual words that the respondent used should be written down to the best of the complainant's recollection. This information may be essential later to the panel in order to determine whether sexual harassment has, in fact, taken place.

Procedure before investigation

In order to satisfy the requirement of procedural fairness, the respondent must be given ample warning of the complaint and enough time to prepare a response. This means that all involved in the investigation must be kept thoroughly up to date with the progress of the investigation and given an opportunity to be involved in setting a date for the panel to convene. It is usual therefore to set a time period in the university sexual harassment policy in which the respondent is able to consider the allegations, prepare a response and deliver it to the complainant and the members of the investigating panel. A minimum period of 30 days seems to be adequate to cover this process.[20] The complainant's written complaint should be forwarded to the respondent with a letter setting out the following information:

a) The time period in which to respond.

b) An explanation of the work of an investigative panel and a copy of the procedures.

c) A number of suggested investigation days so that arrangements may be made for when the investigative panel will meet.

d) A list of witnesses who will be assisting the panel and an invitation to provide the panel with a further list of witnesses the respondent may wish to call when the panel convenes.

e) Information as to where assistance may be sought for the preparation of a response and for appropriate representation at the investigation.

It is essential that confidentiality is maintained. There should be no discussions as to the veracity of the complaint either formally or informally between panel members prior to the investigation taking place and certainly not prior to the respondent preparing a response. This is the

[20] This is the time period allowed in the Monash University procedures.

time when good file notes are essential for all members of the panel as it is likely that prior to the investigation, witnesses, the complainant and respondent will all seek to discuss the matter with panel members. These sorts of discussions are to be studiously avoided as they may bias panel members and the credibility of the panel may be undermined to such an extent that its work cannot go ahead. If any panel members are approached by people involved in the complaint, they should explain that these matters cannot properly be discussed prior to the investigation and that everyone involved in the complaint will have a fair opportunity to have their say at the investigation. A file note of this conversation should be made by the panel member.

Role of representatives

Representatives (sometimes called "next friends") are persons who are appointed to, or chosen by the parties to assist them in the lead up to and at the formal investigation. It is important that the ability to utilise a representative is entrenched in the guidelines that relate to the panel's procedure. A representative may be a colleague of either party, or an officer of the relevant staff or student association of either party. Their job is to assist at the investigation. As such, their role need not be more specifically defined and their attendance at the investigation may be to speak for the party throughout the duration of the investigation or for just part of it -- or, indeed, just to sit next to the complainant or respondent and provide moral support. It is recommended that the panel seek to exclude representatives who are practising lawyers as this may provide unfair advantage to either party. It also unnecessarily complicates the proceedings and introduces the issue of legal costs into the procedure. The benefit of involving representatives is that they often provide impartiality and thus redress any power imbalances that may occur if one party is more emotional than the other. A person who has acted as a representative before an investigating panel should never sit as a panel member on any subsequent panel for obvious reasons of potential bias.

Witnesses

As previously indicated, witness can be called by both the complainant and the respondent. Furthermore, the panel should reserve the right to call its own witnesses if neither the complainant nor respondent has indicated a willingness to do so. In this regard, the panel's work is very different from that of a court. Its work is investigative and its aim is to try to ascertain the truth. As such it should have the ability to call any and all witnesses it deems necessary to further that aim.

Witnesses should be given as much notice as possible prior to being called to give evidence. If a witness cannot attend on a given day, the panel may have to reconvene to hear that particular person's evidence. As witnesses may not understand the necessity for confidentiality or the seriousness of the allegations, they should be told at the time that they are called to give evidence that they may not discuss their evidence with any person prior to the time the panel convenes as this may subject them to allegations of defamation. Unfortunately, the panel has no legal ability to force witnesses to attend and must rely on their willingness to assist the panel. Thus if a witness refuses to attend there is nothing the panel can do except attempt to cajole that person to attend as moral obligation to either the complainant or the respondent or both. Witnesses should provide their evidence orally in front of both parties. The panel should have the power to ask the witnesses direct questions in relation to the incidents being alleged, and both the complainant and the respondent should have the ability to ask questions of the witnesses in relation to their recollections of the events. However, there should be no cross-examination allowed by either party. Attempts to intimidate a witness into changing their evidence by way of cross examination is simply a veneer for mere bullying and has no place in the investigative procedure. It is possible to require the witnesses to give their evidence on oath in order to introduce more formality into the procedure, however this is not strictly necessary as the panel is not a court of law and merely has investigative and recommendatory powers. On the particular day that the panel is being convened, the witness' evidence should be staggered so that witnesses are not standing around outside the investigation room discussing their evidence with each other. It is important for witnesses to be isolated (perhaps being sat in separate rooms) so they do not have the opportunity to discuss their evidence. Further, witnesses should be advised by the panel that after giving their evidence they are not to discuss what they have said to the panel with anyone else. Full confidentiality must be maintained at all times.

Evidence at investigation

Evidence should be presented at the investigation in accordance with the following procedure:

1. Opening comments should be made by the panel convenor relating to how the investigation is to proceed. Sexual harassment and sex-based harassment should be defined by the panel convenor. It should be explained to both parties that the panel's aim is investigative and that its aim is to ascertain the truth of the

allegations and make recommendations based on that determination.

2. Opening statements should be allowed from both the complainant and the respondent. Both parties should have the opportunity to either read their formal complaint and response to the panel, to summarise allegations or to expand on the formal documents provided to the panel. This, however, is not an opportunity to put new allegations to the panel. This is why the complainant must formulate his or her complaint very carefully (as described above). It is incumbent upon the panel to exclude any new allegations raised at this stage as this does not allow the respondent time to formulate an appropriate response. If the panel does allow these new allegations to be raised, a further investigative hearing will have to take place to make determinations about these allegations once the correct procedure has been followed to allow the respondent time to prepare an adequate response.

3. The panel should have the opportunity to ask questions of both parties. panel members should have no limitation as to which questions they wish to put to either party. This questioning process enables the panel to clarify and refine the issues in dispute, put incidents in chronological order and test the veracity of allegations made and responses given.

4. Witnesses should then be called and give evidence in turn. Each witness should be allowed to give his or her story in full without interruptions from the panel or either party, and then the panel should be able to ask questions. The complainant and respondent should then be allowed to ask questions of the witness for points of clarification only. No cross-examination of witnesses is to take place.

5. Once each witness has provided evidence, the panel should request both the complainant and the respondent to provide a summary of their position. In each summary, no further allegations are to be raised by the complainant and no new responses are to be put forward by the respondent.

6. The panel should then retire in order to provide a determination. Either the panel then returns to provide preliminary advice of findings at this stage or, if matters are complicated, a preliminary advice of findings should be provided in writing as soon as possible (a week at the most) after the completion of the investigation.

7. Written notification of the determinations of the panel should then be made, showing all reasons for the decisions and how the evidence was examined. This is then provided to the appropriate university official for a final determination to be made. It should also be forwarded to both the complainant and the respondent only, but not to witnesses. If the witnesses request notification of the determinations, they should be told to seek this from the complainant or the respondent.

It is imperative that only *viva voce* (that is, oral) evidence be given to the panel. The panel should not accept written evidence (whether this be by statutory declaration or affidavit) from those who are unable to give oral evidence. This is because written evidence does not provide the panel, the complainant or the respondent with an opportunity to ask questions of the person to clarify the evidence. The panel should allow documents to be tendered by way of evidence but, again, only by persons who are going to give evidence orally before the panel. Documents may be important evidence to assist the panel in its investigations. For example, the respondent may provide a time sheet showing that she/he was not at work on the day when an alleged incident occurred.

Finally, there is the vexed question of whether evidence should be allowed of prior complaints made against the respondent. This is known as "similar fact" or "propensity evidence". In this regard, Australian courts have spent over a century grappling with the Makin formula enunciated by Lord Herschell in the Privy Council.[21] Basically, this formula states that propensity evidence is inadmissible as evidence, unless it can be shown to be relevant to an issue which must be decided in the current case.[22] Accordingly, it is submitted that propensity evidence should rarely be admitted in university sexual harassment investigations. If the respondent has had prior complaints made against him or her, then these must affect the recommendations which are made by the panel. They should not, however, affect the determination the panel makes in relation to the particular complaint which is in front of it. This is essential to protect the panel from bias. However, if a current complainant, in a matter which is under investigation, has had previous complaints against the respondent, evidence of this would be relevant to the respondent's state of mind in the matter currently under investigation. In this scenario, propensity evidence could be admitted. There is no simple prescription for resolving this issue, and it is suggested that it may be simpler for investigating Panels to avoid falling foul of accusations of bias by simply resolving that no propensity evidence will be admitted.

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21 *Makin v Attorney-General (N.S.W.)* [1894] AC 57.

22 S McNicol and D Mortimer *Evidence* (Butterworths, Sydney, 1996) 117.

Hearsay

Evidence of matters which were reported to a witness by someone else is inherently unreliable. This is because the person did not experience the actual event, but is simply reporting someone else's words - which may or may not be true. The basic components of hearsay evidence are as follows:

- An assertion made by someone who may or may not be called as a witness.
- The assertion is tendered by someone other than its original maker during proceedings.
- The assertion is tendered for the purpose of establishing a fact which must be proved.[23]

For example, during a panel's investigation, Isaac comes forward to give evidence that another person (Sandra) had told him she saw the respondent make a sexual advance towards the complainant. In this situation, Isaac did not experience anything directly -- he is seeking to tender an assertion made to him by Sandra in order to attempt to prove the fact of harassment. Isaac's evidence is pure hearsay and should not be accepted by the panel. Sandra's evidence is not hearsay and would be of direct relevance to the panel's investigation.

The panel should formulate strict rules relating to non-acceptance of hearsay evidence. Unfortunately, sexual harassment is an area in which hearsay is endemic, as gossip spreads around universities like wild-fire and allegations of sexual harassment are often the most talked about topics during coffee and lunch breaks. Thus it is only witnesses who have direct experiences relating to the incidents under investigation who can be of use to the panel. If, for example, a witness gives evidence that she "saw the complainant visibly upset and crying and after questioning the complainant was told by her that the respondent had touched her inappropriately", this evidence will be useful to the panel only in as much as the witness can provide information as to the outward appearance of the complainant during this incident. The fact that the complainant *told* the witness that the respondent had touched her inappropriately is not evidence. This was something simply told to the witness. The evidential value of this incident as far as this witness is concerned is, however, the demeanour of complainant that the witness saw and heard for him or herself. Thus it may provide additional weight to the evidence the complainant gives about the respondent inappropriately touching her but it does *not* independently

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23 Ibid 160.

prove this allegation. Hearsay is a complicated area of the law of evidence and its acceptance at a formal investigation should not happen lightly.

Standard of proof

How "convinced" do members of a panel need to be before deciding whether an allegation is substantiated? Sometimes the complainant and respondent give two very different interpretations of the facts, and witnesses' stories do not necessarily accord with either of them. Instead of making a guess as to whose story is to be believed, the panel must decide what standard of proof is appropriate - how strongly must they believe evidence before accepting it as truth?

In Australia, a jury in a criminal trial must be convinced of an accused's guilt "beyond reasonable doubt". This phrase has purposely never been defined in Australia -- the High Court has maintained that judges should not try to define its meaning and its interpretation should be left to the jury.[24] Accordingly, if a reasonable doubt exists in a criminal proceedings, the accused is entitled to an acquittal. It is submitted that this burden is too stringent and inappropriate for sexual harassment investigations. In a panel investigation, the standard of proof required need not be the criminal standard as the respondent is not being subjected to criminal proceedings and the possible stigma resulting from a finding of guilt. This may be appropriate in certain serious harassment matters, but the correct venue is a court of law where the strict standard will be applied.

In civil matters, where a finding against one party or another does not carry the same social stigma of criminal proceedings, the standard of proof has been set as "the balance of probabilities" - that is, is it more likely than not that the facts which are alleged by either party actually took place? Which story is more probable? To this writer, this standard of proof is more relevant and appropriate in matters of sexual harassment. It is founded on balancing the logic and credibility of evidence presented to the panel. It does not require panel members to be utterly convinced of the truth of the evidence, but to perform the task of weighing evidence and making a decision based on whose evidence is more probable in the circumstances.

It is essential that the issue of the standard of proof be discussed and decided upon by panel members prior to an investigation taking place or included in the panel's formal procedures, so that all members evaluate the evidence in a similar way.

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24 *Dawson v. R.* (1961) 106 CLR 1, 18.

Bias

It is inherent in the concepts of due process and natural justice that bias be excluded in an investigation. Any panel member showing any obvious bias or prejudgment of the issues prior to hearing evidence should immediately be excluded and a new person installed. Any bias shown towards either party by a witness by reason of gender, race, colour or sexual preference should immediately exclude that witness' evidence. Exception, however, must be made in situations where the respondent has received warnings in relation to his or her behaviour in the past. Although such information may have a tendency to bias the panel against the respondent, it is essential information for the panel to know at the determination stage, as it is relevant to the respondent's understanding of how his or her behaviour may be seen as inappropriate by others. Knowledge of previous communication of this information to the respondent is also valuable to the panel's decision making. Evidence of previous complaints made against the respondent (whether substantiated or not) should not be put before the panel (as indicated above) as this is only relevant at the penalty stage once a determination is made.

Evidence after investigation

It has been this writer's personal experience that sometimes a party will approach members of the panel once the investigation has been completed in order to provide more evidence that was not raised during the panel's investigation. Obviously, such material must not be accepted as it should have been provided to the panel prior to the investigation being completed. Any letters or documents purporting to provide evidence after an investigation is completed should be returned to parties with a note of explanation as to why this information cannot be utilised. Similarly, any telephone conversation that either party wishes to have with panel members after the investigation has been completed (and indeed during the investigation) should be firmly but politely terminated with an explanation as to why it is inappropriate for matters to be discussed directly with panel members. At all times, the panel must follow the formal processes in order to provide a fair and equitable investigation for both parties.

Where to in the future?

A furore erupted in 1992 when the Master of Melbourne University's Ormond College faced allegations of sexual assault against two women. The allegations arose out of incidents which occurred at a valedictory dinner which was held at Ormond College on 16 October 1991. The

incidents and the subsequent prosecutions for indecent assault were much publicised at the time. Ultimately, the prosecutions did not succeed and a later application to the Equal Opportunity Commission was settled between the parties. These incidents became the subject of a book by author Helen Garner called *The First Stone* which was published in 1995. Garner herself supports the Master. Her view appears to be that the consequences which the Master faced as a result of any misbehaviour (which included loss of his employment and negative consequences to his personal reputation) far outweighed any hurt suffered by the victims of his alleged harassment.

Garner dismisses the Master's harassment as "a nerdish pass"[25] and appears to believe that the victims used the incident to further some political or feminist agenda. In being so dismissive of the Master's behaviour, Garner fails to recognise the essential element inherent in matters of university sexual harassment -- the power imbalance between offender and victim. When a member of academic staff makes any form of sexual advance towards a member of the student body, there will *always* be an issue of power. One of the prime objectives of a sexual harassment policy and its attendant procedures is that it seeks to redress the power imbalance. One of the problems facing the two aggrieved students in the Ormond College incident was the lack of support for their allegations and the lack of university procedures to adequately follow up the incidents. One of the student advisers to the victims described the situation as follows:

> "It was so traumatic. It was sad that there was no structure -- no one to go to, to tell us what to do."[26]

Helen Garner's reaction to the incidents at Ormond College may be seen as an indicator that the pendulum of sexual harassment has swung as far as it is going to swing and has begun to arc back. Garner describes herself as a feminist and yet she appears to believe that her feminist colleagues have gone too far in attempting to regulate behaviour, both male and female. However, this writer believes that, as in many things, society has not yet reached a comfortable balance. There are those that believe that "political correctness" is already passé and that the time has come for us to re-establish "normal" relationships between the sexes in the workplace. For others, however, current sexual harassment policy and procedures do not go far enough to protect innocent victims from the politics of power

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25 S M Crennan "Book Review: *The First Stone*" 70 *Australian Law Journal* (1996) 145.

26 S Grover "The First Stone in Retrospect: An Outsiders Observations on the Book and its Critics" 70:12 (1996) *Law Institute Journal* 32, 36.

inherent in university relationships. A problem with the issue of sexual harassment within the university context is that, for some, it is extremely difficult to know what may or may not constitute harassment when the milieu of a university is often very informal and academic:student relationships are not confined to the classroom or the laboratory. This is why a published and known policy is so essential for all members of the university population. This is also why clear, coherent and logical procedures must exist in order to investigate and make determinations regarding sexual harassment allegations.

In the United States there are worrying indications that the issue of sexual harassment is being removed from the social agenda. The recent unsuccessful case of Paula Jones against President Bill Clinton raises concerns that many victims of harassment will see Jones' failure as indicative that such allegations are doomed to fail. The following comment from Freada Klein of Klein and Associates, a U.S. workplace bias consulting firm, suggests how many women might be feeling in light of Jones' downfall:

> "There is a lot of misunderstanding and misinformation out there but the one message that is clear is that if you are powerful enough to do a good job, you can get away with a lot of things. That will foster cynicism...A lot of women will figure it's not worth it and the risk of being dragged through the mud."[27]

Perhaps the Paula Jones case and Garner's views are both indicative of a conservative backlash of two Western societies already fed up with "political correctness". If so, this has serious implications for Australian Universities and the ways we need to tackle the potential abuse of the power imbalance inherent in the staff/student relationship. It means that sexual harassment policies and procedures must be rigorous and unambiguous in order to combat indolent or conservative attitudes to issues of gender equality. Finally, it shows us that the issues relating to allegations of sexual harassment must be tackled, discussed and ultimately solved by Australian Universities in order to protect the university as an institution and its individual members -- staff and students alike.

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27 J Hewett "Why Paula Jones was no flash in the pan" *The Age* 15 April 1998.