

Australian universities introduce regulations for adjudicating rape cases

Here's the article from *The Australian* last year which shows some of our universities are now introducing regulations to adjudicate rape cases using lower standards of proof and minimal legal protection for the accused.

<https://www.theaustralian.com.au/higher-education/university-rape-cases-decided-on-probabilities/news-story/84a01dc7b68695487d4c4570660ab2af>

University rape cases decided on probabilities

REBECCA URBAN

University students accused of sexual assault, including rape, are having their culpability determined according to a civil law-style balance-of-probabilities threshold.

A raft of new university policies have emerged in response to concerns about the prevalence of sexual misconduct on campuses. Many of the policies — including the University of Sydney's Student Sexual Assault and Sexual Harassment Policy and a draft Behaviour Policy developed by the University of Tasmania — have been criticised for potentially undermining legal rights of those accused of serious crimes.

This year, 15 complaints of sexual assault, indecent assault and sexual harassment have come to the attention of the University of Sydney's student affairs unit, which applies a civil burden of proof, rather than a criminal one, in its investigations.

Courts, when hearing criminal matters, typically require a determination of guilt "beyond reasonable doubt", which is a higher evidentiary standard of proof.

Penalties at the university range from fines to suspension, rescission of an academic award and expulsion. Concerns have been raised that a person found not guilty of a sexual offence by a court could still be punished by the university.

The move has echoes of an Obama-era policy to permit US universities to apply civil-style standards when dealing with sexual violence complaints. The Trump administration rescinded the policy amid concerns it lacked rigour and did not strike the right balance in protecting the rights of the victim and the accused.

Sydney's updated policy, released this year, stipulates that the standard of proof to be satisfied in university investigations of sexual assault and sexual harassment be "on the balance of probabilities", which requires "satisfaction on the evidence that the matter found to have occurred is more likely to have occurred than not".

"The University will take into account the nature and seriousness of the alleged conduct when deciding whether the standard of proof is met," the policy says.

It stresses that it is required by law to report serious indictable offences to police.

The University of Tasmania has proposed a new process for handling complaints of sexual misconduct, including sexual assault, under which it will determine cases on the balance of probabilities.

IN THE BALANCE

What is required for action in sexual misconduct cases

UNIVERSITY OF TASMANIA

The university will determine whether on the balance of probabilities, the community member has breached this policy, that is, it is more likely than not that the event did occur.



UNIVERSITY OF SYDNEY

The standard of proof to be satisfied in university investigations of

sexual assault and sexual harassment is 'on the balance of probabilities', which requires satisfaction on the evidence that the matter found to have occurred is more likely to have occurred than not.

Although the university's existing policy deals with bullying, harassment and sexual harassment, it does not specifically reference sexual assault, which was a criticism raised in an independent review into the university's handling and response of such claims.

In July, Universities Australia released guidelines for universities' responses to sexual assault and sexual harassment, noting that their investigations are conducted at a lower burden of proof.

However, it cautioned that both parties should be advised that a university cannot determine whether a crime or a civil wrong had occurred; rather, it could only determine whether someone had, on the balance of probabilities, breached the university's code of conduct or other relevant policy or agreement.

The guidance, which comes in the wake of an Australian Human Rights Commission report claiming significant levels of sexual misconduct at universities, has been criticised by critics, lawyers and policy experts.

In a submission to the University of Tasmania, Institute of Public Affairs research fellow Matthew Lesh accused the policy of being in "clear contradiction of the legal rights of someone accused of a serious criminal matter such as sexual assault".

Mr Lesh said the higher threshold in criminal justice was required because the consequences, in terms of punishment and for an individual's reputation, were severe. "It is improper for a university to be making determinations about sexual assault using such a low threshold of guilt," he said. "This raises the possibility that a member of the community is found not guilty by the courts in normal legal process and yet be punished secondarily by the university."

Criminal defence barrister Patrick Casey, who has provided pro-bono advice to an Adelaide student accused of sexual assault by another student, said serious sexual assault complaints should be dealt with by police.

“We should not be turning our universities into a police force to deal with such serious matters, which clearly require a higher standard of proof than a balance of probabilities,” Mr Casey said. “They are making findings that have enormous implications.”

Commentator Bettina Arndt, who believes claims of a rape crisis at Australian universities are exaggerated, said she had observed universities increasingly “caving in” to pressure to take on the role of investigating and determining sexual assault cases, using “victim-centred” investigative practices. “It’s not appropriate,” Dr Arndt said. “These sorts of policies have proven to be a disaster in the US, sparking a huge number of cases where students accused of sexual assault later sued their colleges.”

Universities Australia chief executive Catriona Jackson defended the guidelines, which she said were developed with legal advice. “Most universities already use the balance of probabilities in their misconduct investigations — including in cases of sexual misconduct — and have done so for many years,” she said.

“This is an entirely appropriate civil standard for university misconduct investigations.”

Sydney University confirmed that the standard of proof adopted in all university investigations, was “on the balance of probabilities”.

A spokeswoman said there had been 15 complaints of a sexual nature so far this year — some of which had been reported to police. “We’re committed to reporting on the number of incidents and complaints we receive regarding sexual assault and harassment annually,” she said.

Here are details of some of the university regulations mentioned in The Australian article:

University of Tasmania

UTAS http://www.utas.edu.au/_data/assets/pdf_file/0010/1155457/DRAFT-University-Behaviour-Policy-1-October2018.pdf

Page 13: Making a complaint It is the choice of the victim/survivor of sexual misconduct whether or not they make a complaint to the University about sexual misconduct. Complaints can be made to the Safe and Fair Community Unit. The University Behaviour Procedure sets out the process that applies to complaints of sexual misconduct. Allegations of sexual misconduct against a university community member will be investigated and action taken in accordance with the University Behaviour Procedure, University Staff Agreement or Ordinance 9 Student Behaviour and Conduct, as may be relevant. However, this is not a substitute for any criminal process. The University will determine whether on the **balance of probabilities**, the community member has breached this policy, that is, it is more likely than not that the event did occur.

University of Sydney

USYD: <http://sydney.edu.au/policies/showdoc.aspx?recnum=PDOC2018/470&RendNum=0>

Page 11: The standard of proof to be satisfied in University investigations of sexual assault and sexual harassment is 'on the balance of probabilities', which requires satisfaction on the evidence that the matter found to have occurred is more likely to have occurred than not. The University will take into account the nature and seriousness of the alleged conduct when deciding whether the standard of proof is met. The standard of proof used in criminal investigations and trials is 'beyond reasonable doubt', which is a higher evidentiary standard of proof.

University of Adelaide.

The University of Adelaide also uses a "balance of probabilities" standard of proof, as we discovered when I helped a young PhD student off a university committee investigating him for rape in 2017.

See my video about his ordeal. <https://www.youtube.com/watch?v=oDmYW8TW6nl>

<https://www.adelaide.edu.au/student/affairs/behaviour-conduct-procedure/>

and <https://www.adelaide.edu.au/policies/33/?dsn=policy.document;field=data;id=50;m=view>

University of Western Australia

Also, UWA has an investigations process for allegations of sexual assault/rape.

<http://www.hr.uwa.edu.au/policies/policies/conduct/sexual-harassment>

There may be other universities with similar policies – these examples emerged from a cursory investigation of some key university websites.