Submission No 28

INQUIRY INTO FUTURE DEVELOPMENT OF THE NSW TERTIARY EDUCATION SECTOR

Organisation: Campus Justice

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Submission

To	The NSW Legislative Council Inquiry into the future development of the NSW tertiary education sector
From	Campus Justice A group of concerned lawyers and alumni who believe courts not universities must adjudicate sexual assault Contact details: separately provided
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1. Introduction

Thank you for the opportunity to make this submission to the NSW Legislative Council Inquiry into the future development of the NSW tertiary education sector.

This submission is made by Campus Justice. Campus Justice is a group of lawyers and university alumni who are concerned that universities, including most NSW tertiary institutions, have established disciplinary codes to investigate and adjudicate the crime of sexual assault, using procedures which lack many of the safeguards that ensure fairness in the criminal justice system.

We regard these "kangaroo courts" as not only unfair but they are arguably unlawful, according to a recent Queensland Supreme Court decision.

Key issues and Terms of Reference

This Submission concerns the manner in which NSW universities are dealing with allegations of sexual assault. Research conducted by Campus Justice has identified that the majority of universities are using their own disciplinary processes to investigate and adjudicate allegations of sexual assault.

This results in a process that:

(a) denies students their basic legal and human rights by adopting a process for considering allegations of sexual assault without the usual procedural safeguards. Procedures typically adopted by universities limit the access students have to the evidence against them, make no effort to ensure the reliability of that evidence, deny a right to legal representation, provide no presumption of innocence and provide no right of appeal.

(b) makes findings about a serious criminal offence using the lowest possible (civil) standard, the “balance of probabilities” rather than the appropriate l criminal standard which is “beyond reasonable doubt”.

(c) is determined by committees comprised of persons who are not qualified in law or fact findings, and whose decisions are not transparent, made public, nor subject to proper scrutiny.

(d) can result in adverse findings which lead to penalties including suspension or expulsion from the university. This forfeiture of the time and money invested in study falls outside prescribed penalties for sexual assault.

(e) subjects accused students to a highly politicized process developed and driven by those with their own agenda that is typically out of step with community views.

(f) usurps the well-established role of the courts as the institutions which society and the Constitution has entrusted to adjudicate alleged criminal conduct, including allegations of sexual assault.

(g) is a costly exercise that involves establishing a separate and unnecessary administrative process; and

(h) exposes the universities to additional financial risk by way of exposure to potential lawsuits seeking economic damages, and orders restoring loss of reputation as a result of the failure to protect fundamental legal rights of the accused.

These issues are directly relevant to the Terms of Reference of the Inquiry including, in particular:

(i) “the financial sustainability and risk management strategies of NSW tertiary education institutions”, given the unnecessary costs and exposure to financial risk, referred to in paragraphs (g) and (h), above.

(ii) “the quality of campus life and student freedom of expression”, given the denial of students’ basic rights and their exposure to a politicized process devoid of the usual protections for accused persons that are a core aspect of the judicial system, referred to in paragraphs (a), (b), (c), (d) and (e), above;

(iii) “the appropriateness of current NSW legislation regulating, oversighting and enabling tertiary education”, given that it is the role of the NSW Parliament to protect the basic rights and the fair treatment of NSW citizens and to ensure that NSW universities are conducting themselves in a proper and financially stable manner.

2. Supporting information

The financial impact on NSW universities from the loss of international students is expected to be very substantial. Given the potential massive job losses and reduced research budgets, universities should be focusing on their core business which is providing sound higher education and conducting quality research.

However, the evidence shows that a number of NSW universities are trespassing into unlawful territory that could leave them open to expensive law suits by developing their own

disciplinary processes to investigate and adjudicate allegations of sexual assault in a way that seeks to usurp the role of the criminal law system. This is not only a costly exercise, running these separate administrative processes, but also exposes the universities to potential lawsuits over failure to protect basic legal rights of the accused.

Late last year the Queensland Supreme Court (in *Y v University of Queensland* [2019] QSC 282) ruled in a matter involving a medical student at the University of Queensland that it was not appropriate for universities to investigate and determine such crimes. Justice Ann Lyons commented: "It would indeed be a startling result if a committee comprised of academics and students who are not required to have any legal training could decide allegations of a most serious kind without any of the protections of the criminal law."

Following the judgement, Federal Education Minister Dan Tehan instructed the universities through the university regulator, TEQSA, that the criminal justice system, not a university discipline process, is the right place to deal with alleged campus crimes. "Universities have a duty of care to their students and that includes ensuring processes around the enforcement of any codes of conduct are legal, fair and transparent. If a student alleges, they are the victim of a crime then our criminal justice system is the appropriate authority to deal with it."

Since then Campus Justice, through its volunteer lawyers and alumni, have been canvassing universities across Australia, including those in NSW, to ascertain whether they plan to comply with this instruction from Tehan and leave criminal matters to the courts. Disappointingly most universities seem to be determined to ignore this advice, with many claiming they are awaiting the outcome of an appeal of the UQ case. In justifying this decision, many institutions mention a High Court case involving ACMA which found it was appropriate for that body to investigate criminal allegations – yet that case was specifically addressed in the Queensland Supreme Court case and found not to be relevant.

In Senate Estimates last November, Senator Amanda Stoker questioned TEQSA bureaucrats about the one-sided regulations universities have in place to administer this system, highlighting the lack of access to legal representation as one of many failures to provide fair treatment for the accused. Our team has examined the regulations of the twenty universities which have campuses in NSW and found only two, UNSW and ACU, which clearly allow students access to legal representation during the investigation process conducted by university administrators. Newcastle's regulations are unclear and all the rest refuse to allow accused students legal help during the proceedings.

Most universities have regulations in place which permit further investigation by the administrators, using that lower standard of proof, after criminal proceeding are determined. In fact, official guidelines from University Australia suggest it is appropriate for universities to pursue their own investigations concurrently with criminal procedures, unless specifically advised by police not to do so. This amounts to double jeopardy for the accused.

Within the NSW university sector, the disdain shown by universities for traditional legal rules determining fair treatment for accused is starkly illustrated by the University of New England's Behavioural Misconduct Investigation and Penalty Guidelines which include the following advice to staff conducting sexual misconduct investigations. "The process is not a trial in legal form and not subject to courtroom 'rules of evidence'. Your role is to decide whether the case is proven on the balance of probabilities. Do not engage in legal or quasi-legal debate about due process, rules of evidence, cross examination, etc." This constitutes an explicit

acknowledgment that students will be denied the protections given to accused persons before the criminal courts.

We are aware of current cases at Australian universities where, in the absence of any proper investigation, accused students are being denied access to university facilities, some have had their degrees withheld for a year or more, education derailed, and reputations destroyed.

Similar flaws exist in the American Title IX system of campus tribunals judging sexual misconduct, where, for some years now, students have been filing lawsuits against colleges arguing lack of due process at the rate of twice a week, according to Professor KC Johnson at Brooklyn College, who monitors these legal changes. In all, there have been over 650 such lawsuits, with the majority finding against the institutions. Education Secretary Betsy DeVos recently introduced changes to regulations which govern the adjudication of such matters, aimed at achieving fairer treatment.

Failed regulation and oversight of NSW Tertiary Education

Correspondence with the universities over this issue has revealed that the current unsatisfactory system was established in response to a guidance note from TEQSA, advising universities to provide evidence about how they respond to sexual assault.

It is concerning to find this Federal university regulatory body has clearly fallen victim to an ideologically-driven view of universities being dominated by a "campus rape culture" and is framing its advice to the universities in response to feminist goals. The opening paragraph of TEQSA's January 2019 report on this issue mentions approvingly an alarmist feminist movie called *The Hunting Ground*, which has been denounced by 19 Harvard law professors for promoting "unfair and misleading propaganda".

Both the TEQSA document and resulting university regulations display the same bias, focusing entirely on providing proper care for alleged sexual assault victims with absolutely no mention of protecting legal rights of the accused — who are usually, of course, young men.

Recommendations

Based on the matters referred to above, we submit the following recommendations to the Inquiry.

(a) The Inquiry make a finding and report to the NSW Parliament as follows.

(i) There are significant concerns with the manner in which a number of NSW universities have adopted procedures for dealing with allegations of sexual assault in a manner that deny students their fundamental legal and human rights including providing no right to legal representation, no presumption of innocence and no right of appeal.

(ii) There are significant concerns with the manner in which a number of NSW universities have adopted procedures for dealing with allegations of sexual assault in a manner that seek to usurp the Constitutional role of the criminal court as the institution that democratic societies have entrusted to consider and adjudicate allegations of sexual assault.

(iii) There are significant concerns that most NSW universities have adopted procedures for dealing with allegations of sexual assault in a manner that involves unnecessary costs and which exposes the universities to additional financial risk by way of exposure to potential lawsuits over failure to protect basic legal rights of the accused.

(b) The Inquiry make a finding and report to the NSW Parliament that TEQSA should not seek to have NSW universities take action over sexual assault without TEQSA also directing those universities that they must not usurp the role of the courts in making determinations regarding sexual assault and must also ensure that any procedures they adopt in relation to sexual misconduct are based on a fair and non-politicized process.

(c) The Inquiry make a finding and report to the NSW Parliament that Universities Australia should instruct their NSW member universities to adhere to the instruction from the Federal Education Minister to leave criminal matters to the courts. Universities Australia should encourage their NSW member universities to ensure that any procedures implemented by universities to deal with sexual misconduct are based on a fair and non-politicized process.

(d) The Inquiry should make a finding and report to the NSW Parliament that, given TEQSA's demonstrable failure to provide universities with proper advice as to handling the complex issue of sexual assault, consideration should be given to establishing a NSW body to provide proper regulation and oversight of the state's tertiary education.