

Student safety and pastoral care – legal obligations of universities and residential colleges

Webinar for Unimutual members

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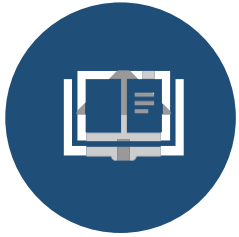


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A quick “about us”

1. Thompson Cooper Lawyers has acted for Unimutual members for many years, including acting in civil claims brought by students
2. Our firm has 20+ years acting for educational institutions in abuse and harassment claims.
3. Clients include Unimutual members, insurers, universities and colleges directly, schools, Commonwealth Government agencies, community organisations.

Overview



FOCUS ON STUDENT
SAFETY



LEGAL FRAMEWORK



UNIVERSITIES AND
COLLEGES RESPOND



CIVIL LIABILITY



CONCLUSIONS

- Acknowledgement and thanks to Saachi Brajkovic, Paralegal of TCL (and university student!) for assistance in the research and preparation of this presentation
- Content warning – topics to be covered include sexual harassment and assault.

1. STUDENT SAFETY

Increasing focus on student safety



Australian Government

Tertiary Education Quality and Standards Agency

Report to the Minister for Education
Higher education sector response
the issue of sexual assault and sexual
harassment

Universities to be subject to national code of
conduct under reforms aimed at reducing
sexual assault on campus

change the
course:

NATIONAL REPORT ON SEXUAL ASSAULT AND SEXUAL
HARASSMENT AT AUSTRALIAN UNIVERSITIES • 2017

University of Sydney vice-chancellor Mark Scott apologises
to Jewish students over Students for Palestine encampment

ponses

Recent campus attacks show universities need to do more to
protect international students

After a series of attacks targeting international students, questions

Calls to update university student safety survey
after fears true extent of assaults on campus
remains unknown

By political reporter Claudia Long

Federal Government

Wed 9 Aug 2023



Education Ministers
Meeting

Action Plan
Addressing
Gender-based
Violence in
Higher Education

Report on the prevalence of sexual
harassment and sexual assault among
university students in 2021.



Social
Research
Centre

NATIONAL
STUDENT
SAFETY
SURVEY

Racism
@Uni

A national study for
change



Australian Human
Rights Commission



Personal safety, sexual assault/harassment

- 2009, Senate Inquiry on welfare of international students
 - International students vulnerable for many reasons including unfamiliarity, accommodation issues, work and travel restrictions
 - Instances of violence, robberies, etc
 - Recommendation of further supports, familiarisation
- AHRC *Change the Course* report 2017
 - Hazing/initiation, inappropriate sexualised behavior, sexual assaults, alcohol abuse in some College settings
 - Widely reported at time
- The *Red Zone Report* 2018, mainly College settings, revealing:
 - High proportion of assaults occurred during orientation week.
 - Prevalence of grooming behaviours regarding first-year students

Alarming findings

2017 National Report on Sexual Assault and Sexual Harassment at Australian Universities

- Women by far more likely to be victims of sexual harassment or assault.
- By far the majority made no formal complaint

2021 National Student Safety Survey*

- One in six students have been sexually harassed
- One in 20 students have been sexually assaulted
- One in two have felt like they weren't heard when they made a complaint

*43,819 participants, figures released 2022

2. WHAT DOES THE LAW SAY?

Higher Education Standards Framework (Threshold Standards) 2021

- Made under the *Tertiary Education Quality and Standards Agency Act 2011* (**TEQSA Act**)
- Registered providers must comply with the Threshold Standards; s 26.
- Threshold Standards were updated in 2021, previous update in 2015.
- Deal with many aspects of quality assurance in higher education. Key aspects are:
 - Part A, Section 2 (Learning Environment)
 - Part A, Section 3 (Teaching). Mainly concerns adequate resourcing, but includes a requirement for adequate student support and maintaining contact with students (section 3.3)
 - Part A, Section 6 (Governance) – must “*develop and maintain an institutional environment in which freedom of speech and academic freedom are upheld and protected*” (section 6.1(4))



Wellbeing and Safety

Part A, section 2.3 *Threshold Standards*

- Higher education providers to take measures for **student wellbeing and safety**.
- It specifically outlines the need for providers to **foster a “safe environment”** and offer a range of **support services** to students.
- Support services to be available for anything in student’s personal life that might adversely affect their education. Not just “on campus” issues.
- In other words, a requirement to be prepared to assist with off-campus risks that can impact student wellbeing.
- Extends to emergency, medical, legal, counselling, advocacy, accommodation (section 2.3(2))

Student Grievances and Complaints

Part A, section 2.4 *Threshold Standards*

- Must provide students access to mechanisms that are capable of “*resolving grievances about any aspect of their experience with the education provider or its agents*”.
- Systems need to allow for “*timely resolution of formal complaints and appeals against academic and administrative decisions which are applied consistently, fairly and without reprisal*”.
- Systems to allow for confidentiality of complainant, avenues for independent review, avenues for appeals

NOTE: that an incident might have involved criminal conduct is not a reason not to investigate or sanction. These are separate processes for separate purposes, confirmed by a 2020 ruling of the Queensland Court of Appeal.



Latest reform

2024: Australian Universities Accord final report, including Action Plan Addressing Gender-based Violence in Higher Education

- Foreshadowed a new **National Higher Education Code to Prevent and Respond to Gender-based Violence**. [Draft](#) was released earlier this year. Significant, 30 page document – universities, colleges, accommodation.
- Defines “Gender-based violence” as *“any form of physical or non-physical violence, harassment, abuse or threats, based on gender, that results in, or is likely to result in, harm, coercion, control, fear or deprivation of liberty or autonomy”*
- Requirement for a detailed Whole-of-Organisation Prevention and Response Plan, including identification of factors within the provider’s own context that might contribute to gender based violence.
- Staff to be screened for any *“allegation of Gender Based Violence”* previously – assessment as to suitability.
- Obligation for staff to declare any past or present intimate relationships with subordinates, students (over whom they have control) or residents.
- Policies, education, training on how to manage disclosures of harassment or violence.
- Clear requirements for data gathering, reporting, including demographic information
- Very specific requirements for how disclosures and reports are to be investigated, assessed, responded to. In college setting, victim can choose whether investigated by college or university.
- Limitations on use of confidentiality and non-disparagement clauses in settlements.

Latest reform, continued

- 2024 Universities Accord final report proposed a study into antisemitism, Islamophobia, racism, experience of First Nations people on campuses
- February 2025: Jason Clare, Federal Minister for Education
“Young people and all students on campus deserve to feel safe and I’m so pleased our Government is taking action”
- February 2025: new legislation* to establish National Student Ombudsman
- Intended to be an *“effective, trauma-informed complaints mechanism”*
“It has the powers of a Royal Commission to investigate complaints made against a university ...”
Requirement to *“provide evidence-based prevention education and training to staff and students and consider any history of gender-based violence in the recruitment and promotion of staff”*.

*via amendments to *Ombudsman Act 1976*

New National Student Ombudsman



- Independent national complaints resolution service.
- Empowered to handle complaints about registered higher education providers relating to studies or student life more generally (but NOT ones involving academic judgments).
- Can accept complaints made on behalf of another person with their consent, anonymous complaints, group complaints and historical complaints.
- Can investigate on its own motion, make preliminary enquiries, require a person to supply information or documents relevant to an investigation, enter premises for the purpose of an investigation and require a person to attend a specific place and answer questions.
- Can make recommendations, report to Minister/TEQSA

Work Health and Safety laws

- State/Territory based, but generally harmonised across jurisdictions.
- As persons conducting business or undertaking (PCBUs), universities and colleges have a primary duty of care, as far as reasonably practical, to ensure the health and safety of:
 - workers (employees and subcontractors); and
 - other persons, that they are not put at risk by the activities of the entity.
- Legal obligation under WHS law to manage risks including psychosocial, psychological hazards. E.g. *Work Health and Safety Regulation 2017* (NSW) s 55A.
- These include bullying, harassment, stress, fatigue, violence.
- Most if not all universities and colleges would have WHS policies to clarify the plans, actions and procedures aimed at preventing those hazards. Also see Safe Work Australia, Fact Sheet on preventing psychological injury.
- Entities that fail to adequately manage psycho-social risks can be prosecuted under WHS law.

Other laws

- *Sex Discrimination Act 1984* (Cth)
 - AHRC “Respect@Work” inquiry in 2020.
 - 2022 amendments to Act to create positive duty to eliminate sex discrimination, sexual harassment, hostile work environment
 - Sections 28F, 28H – prohibit sexual harassment in educational institutions and accommodation providers, including by staff toward students and by students toward others
- *Higher Education Support Act 2003* (Cth) – provisions link eligibility for CSPs to accreditation and compliance with TEQSA.
- *Education Services for Overseas Students Act 2000* (Cth) and its associated *National Code of Practice for Providers of Education and Training to Overseas Students 2018*. Mandatory, sufficient support services, culturally-appropriate orientation, designated contact person, etc.

3.

RESPONSES OF HIGHER EDUCATION SECTOR

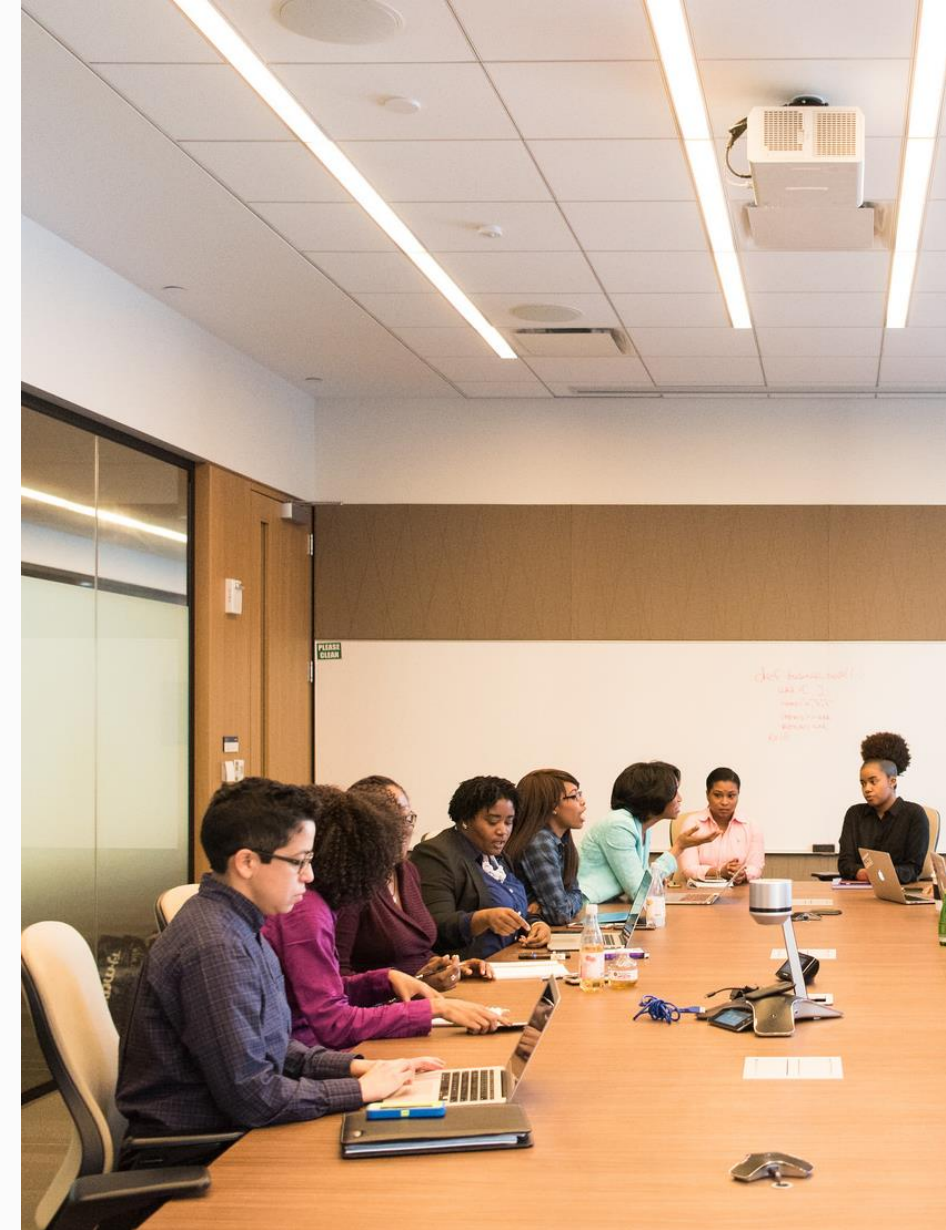


Steps taken

- 2017, Universities Australia / AHRC published *Change the Course* report (national survey)
- After the 2017 report, Minister for Education requested that all providers inform TEQSA of their approach to addressing the issues raised in the report.
- Since then, Australian universities and colleges have implemented more measures to respond to student safety issues, including:
 - internal advisory bodies or working groups to lead efforts;
 - reviewing existing university policies;
 - more availability and visibility of support services;
 - reviewing the management of sexual assault complaints.

Responses by higher education sector, continued

- 2019 – TEQSA report to Minister for Education
 - 95% of universities had adopted recommendations from Change the Course report (2017).
 - 39% of universities had a formal policy on sexual harassment and assault.
 - 69% of universities had reviewed counselling, student support, accommodation
 - Commended universities for initiatives such as 24/7 security, more lighting/CCTV, shuttle buses
 - Further work ongoing
- 2019 – National Student Survey launched (discussed earlier)
- ...and more



4. CIVIL LIABILITY

Civil liability



- Traditional legal position was that outside of special situations (e.g. school/student, employer/worker) there is no duty to protect a person from unlawful acts of another person (*Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61).
- This has been changing.
- The proposed Code on gendered violence (2025) claims not to give rise to any civil cause of action, but refers throughout to protective measures being taken “consistently with ... the duty of care”
- There are more formal complaints and civil claims arising out of student safety, sexual harassment or violence.
- Global issue – not just Australia

Case Study 1 – on-campus event

- Dinner/dance function on University campus, 1AM finish, alcohol, no physical entry barriers
- “Gatecrashers” arrived, physical assault of a student.
- Student brought a civil claim, seeking damages for physical injuries.
- Student alleged that University and College were negligent – no security staff on duty.
- 1998 ruling of NSW Court of Appeal – while the University and College owed a duty of care toward students, there was no negligence in not hiring security guards. Mainly because it was a closed function. The University and College could not have foreseen that strangers would arrive and assault a student.

Case Study 2 – residential college

FACTS

- Male resident sexually assaulted a female resident in 2015.
- The assault took place off-campus, behind a pub, after a “*pub golf event*” at the College where “*residents were incredibly drunk*” with lots of mess at the College. A staff member had directed the students to leave College premises.
- After the allegations were raised, the College investigated (Head of College).
 - First meeting: supportive, caring.
 - Second meeting: after alleged perpetrator had been interviewed, comments by Head including:
 - “*We don’t want a situation whereby a girl were to make a false accusation ... I’m not really sure that anything did actually happen ... My other concern is how you managed to get that drunk ... My main concern is you; there is help available and counselling*”.
 - Head appears to have attempted to handle all/many aspects personally, including interviewing, investigating, making findings, supporting.

Case Study 2 continued

CLAIM

- The plaintiff's claim was that the College breached its duty of care in three ways:
 - a) Allowing the Pub Golf event to proceed
 - b) Directing the intoxicated students to leave the College
 - c) Inappropriate management of the plaintiff's subsequent complaint.
- At trial, the Judge found that the College had breached its duty of care on two occasions: directing the students to leave the premises and in the poor handling of SMA's complaint.
- The College appealed the primary judgment, disputing that :
 - It *knew* about or *condoned* the Pub Golf event
 - It breached its duty of care by *directing students to leave the premises* while intoxicated
 - It had any duty to investigate the complaint competently and breached this duty in its handling of the complaint

Case Study 2 continued

FINDINGS ON APPEAL

- On appeal, the Court had regard to:
 - The College's published pastoral care offerings and alcohol policies (i.e. not just a provider of accommodation)
 - A *"drinking culture ... endemic to the College"*
 - The College's knowledge of prior reported instances of sexual assault
- The College's legal duty *"...extended to implementing the policies it had in place for controlling the behaviour of the residents [and] should have ... directed the residents ... that whatever event was occurring must cease immediately as it was in clear breach of the College's Alcohol Policy"*. So by kicking the students out, the College breached its duty of care.
- BUT these breaches did not cause the assault, because the students would have gone out anyway.
- HOWEVER, the College was negligent afterwards, because *"Instead of taking an independent role and ensuring that the appropriate procedures as set out in the Handbook occurred, the Head of College became investigator, adjudicator, and the support person for [the perpetrator]"*.
- Claimant awarded \$267,500.

Case Study 2 continued

LESSONS

It is not straightforward to interpret what, according to the Court, the College SHOULD have done. However, trial and appeal judgments suggest:

- The College was not under a duty to believe one side or the other, but investigation must be COMPETENT (follow policy).
- Pastoral care is a DUTY in that context, irrespective of facts or outcome of investigation.
- Provide support INDEPENDENTLY of the investigative function.
- New policy materials and guidelines are available to help navigate complex issues around whether to formally investigate or report to Police, internal disciplinary matters, policies etc. E.g. *Universities Australia 2023 Guidelines for University Responses to Sexual Harm*.



Case study 3 – staff vs student assault

FACTS

“Law Ball” event put on by affiliated Law Society (i.e. not by University itself).

Male lecturer allegedly became intoxicated, made inappropriate comments, then groped female student.

Afterwards, student suffered mental injury, lost all motivation and dropped out.

Civil claim against University, alleging negligence as follows:

- Allowing the lecturer to mix with students, where he had been subject to prior complaints.
- Failure (by other staff invitees) to detect lecturer’s intoxication and inappropriate behaviour.
- Inadequate support and care post-disclosure of incident.

Case Study 3, continued

OUTCOME

Confidential settlement reached at mediation.

Outcome reflected that the University was able to demonstrate a strong position.

- While there were prior concerns about the lecturer's conduct, we were able to show that these had been concealed from the University, which had no way of knowing about them.
- The other staff at the event denied witnessing any inappropriate behaviour by the lecturer.
- The University's post-disclosure pastoral care response was first-rate. It offered professional counselling, as well as a range of practical academic supports such as a withdrawal without penalty, special consideration for assessments, a staff member to act as an "advocate" and support figure for academic matters.



Case study 4 – political unrest

- Increased political tensions on some campuses in connection with conflict in the Middle East. Safety and welfare fears for some students.
- August 2024, TEQSA issued a reminder to higher education service providers of their obligations under the *HES Threshold Standards*, particularly.
 - **Standard 2.3** whereby universities must ensure wellbeing and safety; and
 - **Standard 6.1.4** which obligates governing bodies to maintain an institutional environment where the wellbeing of students and staff is fostered and freedom of speech and academic freedom are upheld (introduced in 2021)
- Some tension between those concepts, in this context.
- TEQSA took a dim view of protests or announcements that were disruptive or intimidating. Reiterated need for campus to be a “safe space for all”.
- 2025, TEQSA wrote to universities with concerns about “*disturbing increase of incidents*” of racism and tension in the community and on campuses.

Case study 4 – campus political unrest, continued

In light of this, TEQSA reminded higher education service providers of the need to:

- *clarify the tension between safety policies and the bounds of academic freedom and how safety concerns may partially delimit academic freedom where politically-sensitive issues are involved;*
- *educate students about acceptable engagement and expression and training staff to respond to such disruptions or safety concerns;*
- *promptly remove or respond to any breaches of Australian law or conflicts with institutional policies, including hate speech and symbols;*
- *ensure that effective critical incident management structures and security measures are in place to identify and act upon any identified risk to student and staff safety; and*
- *meaningfully engage with student groups to ensure that protests and advocacy are respectful, compliance with university policies and do not pose a threat to safety.*

5. CONCLUSIONS

Conclusions

- Good quality pastoral care is a legal obligation.
- There is a duty on universities and colleges to prevent harmful behaviours and experiences. This is now linked to TEQSA registration.
- Look out for the National Higher Education Code to Prevent and Respond to Gender-based Violence
- New Ombudsman with oversight over how the sector deals with this and other quality-related issues.
- Scope for civil liability, if an institution fails to:
 - adequately mitigate psycho-social hazards (events, behaviours, culture, practices, etc)
 - competently respond to alleged instances of sexual harassment or assault.
 - provide quality support and care to students in need.
- A civil claim might follow a complaint (years later). The complaint file will become evidence in the civil claim.
- Global trend. UK and NZ have also increased regulation and duties on pastoral care and safety following recent incidents and inquiries in their higher education sectors.



Thank you !

Case names and institution names have been anonymised in case studies.

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