Sexual Assault Too Serious A Crime For A Campus Verdict

Publish Date:

October 2018

A basic legal right is that if you are accused of something as serious as sexual assault, the case against you must be proved beyond reasonable doubt. Australia's universities are stripping away this basic legal right by determining such cases at the much lower threshold of the "balance of probabilities".

In August, the University of Sydney established a policy that says the standard or proof for "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 of Tasmania has released a draft behaviour policy that similarly emphasises that sexual misconduct will be determined "on the balance of probabilities". This is inconsistent with legal principles.

The new policies follow campaigns by some well-intentioned groups, including End Rape on Campus Australia.

EROC Australia argues that because universities are not adjudicating whether the law has been broken but merely whether a university policy has been breached, the threshold for proof should be “substantially lower”.

This, it says, would make “the university complaints process a more accessible avenue for survivors seeking some form of redress and acknowledgment of their experience”.

The argument does not take into account the seriousness and consequences of a university finding an individual committed sexual assault. It cannot be compared to a university deciding whether a student has plagiarised — this is a university effectively adjudicating a criminal matter. A finding of guilt in a criminal matter such as sexual assault is a tattoo on your forehead from society that we unquestionably, with complete certainty, condemn your actions.

This is why the threshold for proving guilt in such a crime is set so high.

It is far beyond the role and capacity of university administrators to make determinations on allegations of sexual assault. University of Technology Sydney deputy vice-chancellor Shirley Alexander is right when she says “penalties for sexual assault are determined by the criminal justice system, not universities”.

In practical terms, a university is in no way equipped in legal powers or the technical capacity of the police to gather evidence about a crime. Nor does it have the judicial skills to undertake a fair trial on such a serious matter. There are criminal courts under despotic regimes that have a greater capacity to investigate criminal matters than a university administrator.

Universities Australia’s new guidelines on sexual assault and harassment, which encourage the lower threshold, argue that the “understanding of, and responses to, sexual assault and sexual harassment — or any form of violence against women — need to evolve from a purely legal approach to one that prioritises the needs of the person who experiences the violence”.

The assertion that a “legal approach” does not prioritise the rights of a victim is absurd — but our judicial system also respects the right of the accused to a fair trial and the presumption of innocence. Our criminal justice system exists to balance the rights of victims and the accused, which is precisely why it has the capacity to make findings of guilt.

Universities effectively making criminal determinations undermine the basic legal rights that individuals are innocent until proven guilty by a jury of their peers.

As former chief justice Robert French wrote in a 2011 judgment: “The presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt.”

A university finding could prejudice a criminal trial. If a case is highly publicised, it raises questions as to whether a jury can fairly try a person who already has been labelled as guilty by another public institution.

This raises the possibility that a member of the community is found not guilty by the courts through the normal legal process yet is punished secondarily by a university.

The US campus experience has shown how lowering the threshold and expanding the definition of sexual misconduct has disastrous implications for due process.

Emily Yoffe, contributing editor at *The Atlantic*, wrote that the Obama-era Title IX instruction to universities, which included lowering the threshold for guilt to more likely than not, had led to "adjudications that assume guilt, rely on junk science, gut fundamental fairness, engage in racial animus, and disregard the effects of ending men's education and crushing futures".

This is why the Trump administration reversed the requirement that colleges lower the criterion to "more likely than not".

Yoffe, normally a left-wing critic of the Trump administration, welcomed the reform.

A university does have a responsibility to determine whether an individual is a threat to safety on campus following allegations of inappropriate conduct. A determination that an individual is a danger to the university community could be made at a lower threshold of guilt.

Notably, this does not require a university to make a determination as to what in fact happened. This may sound like quibbling over semantics but it is a key distinction between a public institution that takes seriously its duty of care and one pretending to be a court that determines criminal liability.

Every human rights lawyer in Australia should be distressed by this attack on fundamental legal rights. The federal government must not let students and staff be stripped of their legal rights by university administrators.

Originally published in:
The Australian
Original Link:
https://www.theaustralian.com.au/opinion/sexual-assault-too-serious-a-crime-for-a-campus-verdict/news-story/cc4d841cf7797173ec6fd82ab8a1d9d0