

The Hidden Sexual Offence: The (Mis)Information of Fraudulent Sex Criminalisation in Australian Universities

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Abstract

In response to sexual assault on campus, most Australian universities have websites that educate the university community on sexual consent and policies that deal with sexual misconduct. This article systematically examines the websites and policies of 42 Australian universities to catalogue the prevalence and manifestation of legal errors regarding fraudulent sex criminalisation. In finding that problematic legal errors are the norm, the article discusses possible reforms to university governance. The findings are also situated within feminist legal literature on the persistence of rape myths. Regrettably, the findings are yet another example of how societal attitudes towards sexual assault remain frustratingly disconnected with progressive legislative changes.

I Introduction

Consider this scenario:

A statutory provision states: ‘A person who engages in conduct X, Y or Z commits the crime A’.

A university website that is meant to educate the university community on crime A states: ‘It is a criminal offence to engage in conduct X and Y.’ Similar omission of conduct Z is found in the university’s policy on the reporting of, and disciplinary procedure for, complaints of crime A.

One would assume that such a scenario is rare. Universities, like any other public and private entities, are obviously not immune to legal errors in the conduct of their activities. However, it would be surprising for universities to make legal errors in the manner and context outlined in the scenario above. The error of omitting conduct Z is readily apparent by a quick reference to the statutory provision. And referring

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For their insightful comments and critiques, special thanks to Inbar Levy, Loveday Liu, Jenny Morgan, Dale Smith, Scott Stephenson, Kai-Ping Su, Samantha Tang and Phapit Triratpan, as well as participants in the faculty research workshop at the Melbourne Law School. This article benefits from the excellent research assistance from the Melbourne Law School Academic Research Service. All errors are mine.

to the relevant statutory provision relating to crime A has to be the bare minimum due diligence that a university should undertake when designing an educative website or formulating a policy on crime A. Such legal errors are also undesirable. Failure to include that conduct Z constitutes crime A will undermine the educative goals of the website and distort the implementation of the policy.¹

This surprising and undesirable state of affairs is, unfortunately, the norm in Australian universities when it comes to sexual assault.

In 2017, the Australian Human Rights Commission released the *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities*.² The Report revealed a disturbingly high level of sexual assault in university settings and low incidence of reporting of those assaults.³ Pursuant to the recommendations in the Report, most Australian universities have set up websites that educate the university community on sexual consent.⁴ In addition, many Australian universities have also enacted specific policies to deal with sexual assault, among other sexual misconduct.⁵

These developments represent a positive step forward. However, many of these websites and policies suffer from glaring legal errors in relation to fraudulent sex (that is, the obtaining of sexual acts through deception). All Australian states and territories have a statutory definition of sexual consent, which expressly stipulates that consent may be vitiated by certain types of fraud. In addition, five states have a provision that criminalises the procurement⁶ of sex through any fraud ('procurement offence') as a distinct sexual offence.⁷ Yet, when the university websites and policies define what constitutes sexual consent and/or sexual assault, they often either fail to include any mention of the criminal nature of fraudulent sex, or only selectively mention the statutorily stipulated consent-vitiating frauds.⁸

This article surveys and comprehensively catalogues the prevalence and nature of legal errors relating to fraudulent sex in the websites and policies of 42 Australian universities. The results are startling. Among websites and policies that had definitions on sexual assault, only 16.7% have presented legally accurate information. Even after excluding legal errors that may be less problematic (for example, minor inaccuracies; defining standards higher than the law requires),

¹ See below Part V(A).

² Australian Human Rights Commission ('AHRC'), *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (Report, 2017) ('*Change the Course Report*').

³ Ibid 3–4.

⁴ AHRC, *Audit of University Responses to the Change the Course Report: Snapshot of Progress* (Report, August 2018) ('*Snapshot of Progress*').

⁵ Tertiary Education Quality and Standards Agency, *Report to the Minister for Education: Higher Education Sector Response to the Issue of Sexual Assault and Sexual Harassment* (2019) 3 ('*TEQSA Report*').

⁶ See *Criminal Code Act 1899* (Qld) sch 1 s 218(4) ('*Criminal Code* (Qld)'): 'procure means knowingly entice or recruit for the purposes of sexual exploitation'. In the English textbooks, 'procure' in this context is understood as producing by endeavour (ie, obtaining or bringing about): see, eg, Richard Card, *Card, Cross & Jones Criminal Law* (Oxford University Press, 20th ed, 2012) 732.

⁷ See below Part II(A).

⁸ See below Part IV(C).

a large number of the websites and policies (48.3%) were nevertheless found to contain serious legal errors similar to that depicted in the scenario above.

Building on these findings, this article highlights a dire reform impetus to correct the serious and unjustifiable legal errors in the offending websites and/or policies. The prevalence of these legal errors also points to the necessity to review university governance processes so as to avoid the recurrence of such legal errors, whether in the context of sexual offences or for other crimes and illegal conduct. This article recommends that there should be mandatory engagement of legal experts when the universities are formulating documents and communications that clearly implicate legal issues.

More broadly, this article situates the case study within feminist legal scholarship on the limits of legislative reform in addressing the injustices of sexual assault. Similar to the well-documented persistence of ‘rape myths’ in courtrooms and law enforcement,⁹ this article argues that the failure of universities’ websites and policies to reflect the explicit statutory language on fraudulent sex is yet another example of law’s weakness in changing underlying society’s attitudes towards sexual assault.

This article is organised into seven parts. Part II outlines, by way of background, fraudulent sex criminalisation and campus sexual assault in Australia. Part III explains the methodology of the case study. Part IV presents the findings. Part V identifies the severe problems in the current state of affairs and addresses implications for reform. Part VI discusses how this case study exemplifies the persistence of rape myths. Part VII concludes.

A quick note on reference. For brevity, the various universities will be referred to by their abbreviations, as set out in Appendix I. Appendix I also serves as a reference list detailing the relevant websites and policies of each university. For example, ‘ANU Website’ refers to the website link of the Australian National University (‘ANU’) that is set out in Appendix I.

II Background

This Part first charts the varied level of fraudulent sex criminalisation across Australia before setting out the context around campus sexual assault and corresponding responses by universities.

A *Fraudulent Sex Criminalisation*

Notwithstanding the limited success of the Model Criminal Code project in achieving a broad consistency of criminal laws in Australia,¹⁰ commentators such as Larcombe have observed that ‘[t]here has been a strong degree of convergence in

⁹ See below Part VI.

¹⁰ Miriam Gani, ‘Codifying the Criminal Law: Implications for Interpretation’ (2005) 29(5) *Criminal Law Journal* 264, 265–6.

the criminal provisions governing sexual offences.¹¹ This echoed the observation by the Model Criminal Code Officers Committee that there are ‘even stronger arguments for a national approach’ with regard to sexual offences.¹²

Nonetheless, there is a divergence in the scope of fraudulent sex criminalisation in Australia. Dyer¹³ and Crowe¹⁴ have carefully documented the different statutory definitions of sexual consent vis-à-vis fraud in Australia. In addition, a majority of states and territories currently criminalises the procurement of sex through fraud as a sexual offence distinct from rape (that is, the procurement offence).¹⁵ In a recent article, I juxtaposed the statutory definitions of sexual consent alongside their respective procurement offences.¹⁶ Using three scenarios based on the facts of actual Australian cases, I demonstrated the stark divergences in criminal liability for fraudulent sex — ranging from rape (or its equivalent), a lesser sexual offence, or no criminal liability altogether.¹⁷ The three scenarios upon which criminal liability was assessed are as follows:

- **Scenario 1** is a fraud as to consideration of a financial nature: woman agreed to have sexual intercourse with man after he told her that he would pay her a sum of money for the sexual service. Man had no intention to pay woman.¹⁸
- **Scenario 2** is a fraud as to consideration of a non-financial nature: woman agreed to have sexual intercourse with man after he told her that he would marry her. Man had no intention to marry woman.¹⁹
- **Scenario 3** is a fraud as to a non-medical purpose: woman, who wanted to join the mafia, agreed to have sexual intercourse with man after he told her that sexual intercourse is part of a mafia initiation ritual. Man was not a mafia member and he was not conducting a mafia initiation ritual.²⁰

¹¹ Wendy Larcombe, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 143, 151. See also Bronitt and McSherry observing how rape, together with murder, are often central in law school curricula given the perceived universality of the offence across legal cultures: Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 578–9.

¹² Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 5: Sexual Offences against the Person* (Report, 1999) 2.

¹³ Andrew Dyer, ‘Mistakes that Negate Apparent Consent’ (2019) 43(3) *Criminal Law Journal* 159, 169–72.

¹⁴ Jonathan Crowe, ‘Fraud and Consent in Australian Rape Law’ (2014) 38(4) *Criminal Law Journal* 236, 239.

¹⁵ *Criminal Code* (Qld) (n 6) s 218; *Criminal Law Consolidation Act 1935* (SA) s 60; *Criminal Code Act 1924* (Tas) sch 1 s 129 (‘*Criminal Code* (Tas)’); *Crimes Act 1958* (Vic) s 45; *Criminal Code Act Compilation Act 1913* (WA) sch s 192 (‘*Criminal Code* (WA)’). For discussion of the procurement offence in other common law jurisdictions, see Jianlin Chen, ‘Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex under Religious False Pretense in Hong Kong’ (2018) 51(3) *Cornell International Law Journal* 553, 564–70.

¹⁶ Jianlin Chen, ‘Fraudulent Sex Criminalisation in Australia: Disparity, Disarray and the Underrated Procurement Offence’ (2020) 43(2) *University of New South Wales (UNSW) Law Journal* 581, 591–7 (‘Fraudulent Sex Criminalisation in Australia’).

¹⁷ *Ibid.*

¹⁸ *R v Livas* [2015] ACTSC 50 (‘*Livas*’); *R v Rajakaruna* (2004) 8 VR 340.

¹⁹ *R v McKelvey* [1914] St R Qd 42.

²⁰ *Macfie v The Queen* [2012] VSCA 314.

Table A (below) sets out the variations on fraudulent sex criminalisation across Australia.²¹ The criminal liability is subject to two complications posed by judicial interpretations. First, courts may choose to adopt a restrictive interpretation that is contrary to the plain wording of the provision. For example, Heenan AJA in *Michael v Western Australia* held that ‘any fraudulent means’ in the Western Australian provision should only be applicable to

those frauds or misrepresentations which deprived the person concerned of a full comprehension of the nature and purpose of the proposed activity or his or her legal status of the person as a spouse, or his or her identity as an acceptable sexual partner.²²

Second, the statutory prescriptions for consent-vitiating circumstances are non-exhaustive and are usually preceded with an overarching definitional requirement that the consent has to be ‘freely’ given (or in some cases, ‘freely’ and ‘voluntarily’).²³ Thus, it is possible that fraud that does not fall within the stipulated consent-vitiating circumstances could still vitiate consent where a court deems that consent has *not* been ‘freely’ given. For example, in the 2011 Queensland case of *R v Winchester*, Muir JA and Fryberg J opined that a false promise of a horse in return for sexual intercourse might vitiate the consent after taking into account factors such as the physical, psychological or emotional state of the victim.²⁴

Part IV(B) will discuss how such judicial interpretation may aggravate or mitigate the legal inaccuracies of the websites and policies.

²¹ Chen, ‘Fraudulent Sex Criminalisation in Australia’ (n 16) 597.

²² *Michael v Western Australia* (2008) 183 A Crim R 348, 433 [376] (‘*Michael*’).

²³ Crowe (n 14) 238.

²⁴ *R v Winchester* [2014] 1 Qd R 44, 68 [86]–[87], 80 [135].

Table A: Fraudulent sex criminalisation in Australia

State/Territory ²⁵	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Rape includes:								
any fraud	*					*		*
fraud as to any purpose (in addition to medical/hygienic purpose)			*	*				
fraud as to identity of any person (in addition to sexual partner)		*	*		*		*	
fraud as to marital status		*						
Maximum penalty (years)	14	14	life	life	life	- ²⁶	25	14
Procurement offence:				*	*	*	*	*
Maximum penalty (years)				14	7	-	5	2
Criminal Liability								
Scenario 1 (sexual service)	rape	property	property	procure	procure	rape or procure	procure	rape ²⁷
Scenario 2 (marriage promise)	rape	nil	nil	procure	procure	rape or procure	procure	rape or procure
Scenario 3 (mafia initiation)	rape	nil	rape	rape or procure	procure	rape or procure	procure	rape or procure

²⁵ State/Territory abbreviations: ACT = Australian Capital Territory; NSW = New South Wales; NT = Northern Territory; Qld = Queensland; SA = South Australia; Tas = Tasmania; Vic = Victoria; WA = Western Australia.

²⁶ A peculiarity of the *Criminal Code* (Tas) is that it does not set out the penalty for each offence. The default maximum penalty for a non-summary offence is 21 years' imprisonment: *Criminal Code* (Tas) (n 15) s 389(3). For discussion of the legislative background behind this reform, see John Blackwood and Kate Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Law Press, 1993) vol 1, 6–7.

²⁷ The procurement offence in WA is not applicable where the defrauded person is a 'common prostitute or of known immoral character': *Criminal Code* (WA) (n 15) s 192(1)(b). This morality requirement is due to the fact that when the prototype procurement offence was first enacted in England in 1885, the underlying legislative objective was to address the exploitation of women and girls for the purposes of prostitution: Peter Allridge, 'Sex, Lies and the Criminal Law' (1993) 44(3) *Northern Ireland Legal Quarterly* 250, 265. This requirement of victim's morality has been abolished in the other states that still have the procurement offence: Chen, 'Fraudulent Sex Criminalisation in Australia' (n 16) 590.

B *Campus Sexual Assault and Universities Responses*

The issue of campus sexual assault has been in the spotlight around the world.²⁸ The real risks and severe harm of sexual assault has prompted various government interventions and universities policies,²⁹ which in turn generated considerable literature examining the efficacy and other normative considerations of these responses.³⁰ Universities have civic and educational responsibilities to prevent sexual assault on campus,³¹ especially when they are uniquely positioned vis-à-vis shaping and regulating students' behaviour.³² Unsurprisingly, a particular area of inquiry is on the various measures that might be undertaken by the university, which range from preventative programs aimed at raising awareness and modifying behaviour, to reporting and adjudicating procedures to provide redress for sexual assaults that have occurred.³³

In Australia, the issue was reinvigorated by the *Change the Course Report* in 2017, which revealed a disturbingly high level of sexual assault in university settings.³⁴ The Report defined sexual assault as 'when a person is forced, coerced or tricked into sexual acts against their will or without their consent, including when they have withdrawn their consent'.³⁵ Under this definition, 6.9% of the surveyed students reported being sexually assaulted on at least one occasion in 2015 or 2016,

²⁸ Melanie A Beres, Gareth J Treharne and Zoran Stojanov, 'A Whole Campus Approach to Sexual Violence: The University of Otago Model' (2019) 41(6) *Journal of Higher Education Policy and Management* 646, 646.

²⁹ See Michele Landis Dauber and Meghan O Warner, 'Legal and Political Responses to Campus Sexual Assault' (2019) 15 *Annual Review of Law and Social Science* 311, 320–5 (discussing the various legal and administrative responses in the United States ('US')).

³⁰ See, eg, Rebecca Ortiz, 'Explicit, Voluntary, and Conscious: Assessment of the Importance of Adopting an Affirmative Consent Definition for Sexual Assault Prevention Programming on College Campuses' (2019) 24(9) *Journal of Health Communication* 728, 734 (finding some preliminary evidence that adoption of an affirmative consent standard in sexual assault prevention programming and initiatives on college campuses has some effect in improving college students' intentions to engage in affirmative sexual consent communication); Shannon Duncan et al, 'Caught in a Web of Confusion: Assessing the Readability of University Webpages for Victims of Sexual Assault' (2019) 15(1) *Journal of Forensic Nursing* 4, 5–7 (analysing the ease of understanding of university webpages on sexual assault); Beres, Treharne and Stojanov (n 28) 652 (questioning whether sexual assault is indeed the result of a lack of understanding of sexual consent).

³¹ Graham Towl, 'Tackling Sexual Violence at UK Universities: A Case Study' (2016) 11(4) *Contemporary Social Science* 432, 433–4. See also Universities Australia, *Guidelines for Universities Responses to Sexual Assault and Sexual Harassment* (2018) 6 <<https://www.universitiesaustralia.edu.au/wp-content/uploads/2018/10/UA-Guidelines-5.pdf>>: 'Universities have a range of legal and regulatory obligations to proactively promote and foster a safe environment for their staff and students, both on campus and online.'

³² Randolph D Hubach et al, "'What Should Sex Look Like?'" Students' Desires for Expanding University Sexual Assault Prevention Programs to Include Comprehensive Sex Education' (2019) 29(13) *Qualitative Health Research* 1967, 1968.

³³ Dauber and Warner (n 29) 320–5.

³⁴ The AHRC, *Change the Course Report* (n 3) 22, 224 defined university setting as incidents which occurred on the university campus, while travelling to or from university, at an off-campus event organised by or endorsed by the university, at university employment, or, for technology-based harassment, where some or all of the perpetrators were students, teachers or other people associated with the university.

³⁵ *Ibid* 57.

with 1.6% reporting that the sexual assault occurred in a university setting.³⁶ The Report included several recommendations to address the issue holistically. The recommendations not only deal with broader institutional governance reform (such as leadership, monitoring and evaluation), but also involve measures that have direct engagement with and impact on the relevant university community.³⁷ These include education initiatives designed to change attitude and behaviour, and victim-centric responses such as supporting measures and reporting procedures.³⁸

There have been some critical queries as to whether the prevalence of sexual assault and sexual harassment was indeed as severe as reported in the 2017 *Change the Course Report*.³⁹ Nonetheless, the Report prompted peak university bodies like Universities Australia to introduce policy guidelines and educational programs to address the issue.⁴⁰ Individual universities also undertook various initiatives, including the commissioning of independent, expert-led reviews on their institutional responses.⁴¹

A 2018 audit of universities' responses conducted by the Australian Human Rights Commission found that 'all 39 universities reported implementing, or a commitment to implementing, training and education in relation to sexual assault, sexual harassment and respectful relationships to some or all of their students'.⁴² The 2019 Tertiary Education Quality and Standards Agency report also found that the various recommendations by the *Change the Course Report* had been largely adopted by the universities, with near universal implementation of a sexual assault and sexual harassment policy, and offering training and education.⁴³

Notably, while the aforementioned 2018 audit and 2019 report provide important quantification as to the state of reform among Australian universities, the audit and report did not delve into the qualitative aspect. As will be demonstrated below, not all policies and websites are created equal, at least with respect to the accuracy of information relating to fraudulent sex criminalisation.

III Methodology

This Part presents the methodology by explaining how the dataset was constructed and the variables used in the analysis.

³⁶ Ibid 49.

³⁷ Ibid 9–16.

³⁸ Ibid 11–12.

³⁹ See discussion on critiques of the Report's methodology, especially whether the survey is empirically representative: Calla Wahlquist, 'Student Sexual Assault and Harassment Survey "Not Representative"', *The Guardian* (online, 7 October 2017) <<https://www.theguardian.com/australia-news/2017/oct/07/student-sexual-assault-harassment-survey-not-representative>>.

⁴⁰ Universities Australia (n 31); Allison Henry, 'Responses to Sexual Violence in Australian Universities' (2019) 28(3) *Human Rights Defender* 29, 30–1.

⁴¹ Ibid.

⁴² AHRC, *Snapshot of Progress* (n 4).

⁴³ *TEQSA Report* (n 5) 3.

A *Dataset*

The study examined the relevant websites and policies of all 42 universities listed on the ‘List of Australian Universities’ by the Australian Government ‘Study in Australia’ website.⁴⁴ The websites and policies were obtained by searching within each of the individual university’s website. The reference date for the search was set at 22 April 2020 (that is, the policy and webpage are archived on that date as far as possible). The search terms used were ‘sexual assault’ and ‘sexual misconduct’.

For websites, the search within each university’s website sometimes returned multiple results. The precise site used for this analysis was selected based on the ‘publicness’ of the targeted audience. Namely, a website aimed at the general university community will be preferred, followed by a website aimed at students, and finally a website aimed at staff. The search yielded 39 results.⁴⁵

For policy, the search yielded 38 results. Twenty-five universities have policies dedicated to sexual assault, whether as a standalone policy or in conjunction with policies dealing with sexual harassment and/or general sexual misconduct. Nine universities have policies dedicated to sexual harassment but not sexual assault, with sexual assault usually briefly mentioned as a type of sexual harassment. Four universities deal with sexual assault as part of the general policy on misconduct. There were no relevant publicly accessible policies from four universities.⁴⁶

Appendix I sets out the specific websites and policies that were selected for this study.

B *Variables*

The central issue is how fraudulent sex is represented. This is usually done through the distinct definition of consent. Where a definition of consent is explicitly provided, it was selected as the primary data point, even if there were a discrepancy vis-à-vis the definition of sexual assault contained in the same document.⁴⁷ Nevertheless, this discrepancy was accounted for when isolating the most normatively problematic websites and policies in Part IV(C). Occasionally, there is

⁴⁴ Australian Government, ‘List of Australian Universities’, *Study in Australia* (Web Page, 2020) <<https://www.studyinaustralia.gov.au/English/Australian-Education/Universities-Higher-Education/list-of-australian-universities>>. The website stated that there are ‘43 universities with at least one university main campus based in each state or territory’. The number 43 is likely due to either double counting of Federation University of Australia (listed with main campuses in both Victoria and Queensland) or failure to update the number since the closure of University College London Australia (which was still listed on the ‘Australian University Campuses Map’ PDF file available from the website as at 30 December 2020).

⁴⁵ Divinity did not have a relevant website. QUT had a student-oriented website, with student login credentials required for access. Torrens has a publicly available sexual assault policy, but no independent website.

⁴⁶ Namely, Canberra, Murdoch, Charles Sturt and Swinburne.

⁴⁷ For example, there is no mention of fraud in ANU’s consent definition, but there is for sexual assault, which is defined as including: ‘any offence of a sexual nature committed on another person where a person is forced, coerced or tricked into sexual acts against their will or without their consent, including when they have withdrawn their consent, or they are unable to give consent’: ANU Policy, Definitions.

no definition of consent, but there is a definition of sexual assault that incorporates the substance of a consent definition. For example, Torrens stated: ‘Sexual assault: when a person is forced, coerced or tricked into sexual acts against their will or without their consent, or if a child or young person under 18 is exposed to sexual activities.’⁴⁸ In such a situation, the definition of sexual assault was selected as the data point.

The various approaches in the universities’ websites and policies can be organised into four categories. These categories are set out below, with an illustrative example in each corresponding footnote.

- (1) ‘**No definition**’, meaning there is no definition of sexual consent and/or sexual assault. For websites, this usually involves a linked reference to the institutional policy or external sources.⁴⁹ For policies, this may involve either a direct reference to the law,⁵⁰ or mentioning that sexual assault is part of sexual harassment, without defining sexual assault (or sexual consent) in that or other policy.⁵¹
- (2) ‘**No fraud**’, meaning sexual consent and/or sexual assault is defined, but there is no mention that fraud may vitiate consent or otherwise constitute a sexual offence.⁵²
- (3) ‘**Fraud (all)**’, meaning that fraud is mentioned as capable of vitiating consent and/or fraudulent sex is a sexual offence, and there are no explicit qualifications as to the type of frauds.⁵³
- (4) ‘**Fraud (qualified)**’, involves mention of fraudulent sex, but with explicit qualifications as to the type of frauds. Most of the explicit qualifications reflect the consent-vitiating fraud explicitly recognised in the statutory definition of consent. For example, the websites or policies may state that there is no consent when the fraud relates to the nature and/or purpose of the act, and/or identity of the person.⁵⁴ Interestingly, some websites or policies qualify that the fraud has to be committed by someone who is in a position of trust or authority.⁵⁵

⁴⁸ Torrens Policy s 2.

⁴⁹ For example: ‘The University takes incidents of sexual violence very seriously. View the University Policy on Sexual Misconduct.’: Western Australia Website.

⁵⁰ For example: ‘The University defines sexual assault, sexual harassment and consent in accordance with the relevant Australian state and federal legislation.’: Newcastle Policy s 5.

⁵¹ For example: ‘Sexual harassment also includes offences and crimes which are associated with unwelcome conduct of a sexual nature such as sexual assault, indecent exposure, stalking, obscene communications etc’: RMIT Policy s 1.4.

⁵² For example: ‘Sexual consent cannot be given by someone who is under the age of 16, forced or coerced, intoxicated, affected by drugs, asleep, unconscious, incapable of saying no or unable to understand what they are consenting to. Engaging in sexual activity with a person in any of these states is sexual assault.’: Sydney Website.

⁵³ For example: ‘If you have been tricked into agreeing, that isn’t consent’: Monash Website.

⁵⁴ For example: ‘Under false or fraudulent representations about the nature or purpose of the act, or Under a mistaken belief that the offender was someone else (for example, their sexual partner)’: James Cook Policy.

⁵⁵ For example: ‘Consent cannot be given by people who are tricked or manipulated due to the person being in a position of trust into providing consent’: Notre Dame Policy s 8.1.1.7.

The variety of substantive manifestations of ‘fraud (qualified)’ has been captured by the analysis as to its accuracy vis-à-vis the applicable law of each university’s main campus. The main campus stipulated on the Australian Government ‘Study in Australia’ website was used for this purpose.⁵⁶

The results for each university are tabulated in Appendix II. There are three columns in the data table to present the analysis on legal accuracy. The first column indicates whether the definition presented on the website is legally accurate: ‘Yes’, ‘No’ or ‘N/A.’ (that is, not applicable where there is no definition). The next two columns respectively set out the extent to which the definitions understate or overstate the impermissible fraudulent sex.

IV Findings

This Part presents the findings, with a particular focus on identifying the prevalence and manifestations of the most problematic legal errors.

A Overview

Beginning with a general overview of the findings, Table B (below) sets out the distribution of the basic variables as described above in Part III(B). Two aspects of Table B are worth noting.

First, Australian universities varied significantly in how they addressed the issue of fraudulent sex on their websites and in their policies. All the variables set out in Part III(B) are well represented across the data points. Even without further detailed breakdowns of the different manifestations of the ‘fraud (qualified)’ category, it is clear that there is no consensus among Australian universities on this issue.

Second, there are noticeably more policies than websites that do not have substantive definitions of sexual consent and/or sexual assault. As noted above in Part III(A), this is largely driven by universities having policies dedicated to sexual harassment but not sexual assault. For these universities, the lack of a definition is not an issue of those sexual harassment policies. Rather, this relates to the separate and broader question of whether universities should have policies that substantially deal with sexual assault or leaving the matter entirely to traditional law enforcement.⁵⁷

⁵⁶ The main campus for Federation is designated as Victoria (as opposed to Queensland), given its founding history: Australian Government (n 44).

⁵⁷ For a snapshot of the debate in the context of US, see Michelle J Anderson, ‘Campus Sexual Assault Adjudication and Resistance to Reform’ (2016) 125(7) *Yale Law Journal* 1969, 1981–97; Sarah L Swan, ‘Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate’ (2016) 64(4) *Kansas Law Review* 963, 966–8. The recommendation by Universities Australia is that university misconduct investigations and criminal investigations are not incompatible, especially with appropriate consultation with the reporting student and the police: Universities Australia (n 31) 17.

Table B: Overview of Australian universities' websites and policies on sexual misconduct involving fraud

	Website	Policy	Website + Policy
Total number	39	38	77
No definition	5 [12.8%]	12 [31.6%]	17 [22.1%]
No fraud	21 [53.8%]	6 [15.8%]	27 [35.1%]
Fraud (all)	6 [15.4%]	8 [21.1%]	14 [18.2%]
Fraud (qualified)	7 [17.9%]	12 [31.6%]	19 [24.7%]

B *Legal Inaccuracies*

At first glance, the lack of consensus among Australian universities on this issue might be explained by how the law on fraudulent sex differs significantly across Australia.⁵⁸ However, this explanation is undermined by the strikingly low proportion of legally correct definitions. As set out in Table C (below), only 16.7% of the relevant data points (that is, those universities whose websites and policies have a definition) contain a legally accurate definition.

What is less surprising is that the proportion of legally accurate definitions is noticeably higher for policies than for websites. Universities' policies are formal documents that have various internal and external legal effects,⁵⁹ and one would expect greater care in their drafting. Nonetheless, the proportion of legally accurate definitions is still far from the majority, at only 26.9%.

Table C: Legal accuracy of Australian universities' websites and policies on sexual misconduct involving fraud

	Website	Policy	Website + Policy
Total number (defined)	34	26	60
Legally accurate	3 [8.8%]	7 [26.9%]	10 [16.7%]

The significance of an erroneous definition differs based on the type of error. An inaccuracy arising from a definition that exceeds the statutorily stipulated consent-vitiating fraud is circumscribed by two features of the law relating to fraudulent sex criminalisation in Australia, as set out in Part II(A). First, the non-exhaustive statutory prescriptions for consent-vitiating circumstances leave open the possibility for courts to find that fraud that otherwise is not within the stipulated consent-vitiating circumstances could still vitiate consent.⁶⁰ Second, among jurisdictions that limit the types of consent-vitiating fraud, there is the procurement

⁵⁸ See above Part II(A).

⁵⁹ Patty Kamvounias and Sally Varnham, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34(1) *Melbourne University Law Review* 140, 156–71.

⁶⁰ See above nn 23–4 and accompanying text.

offence that criminalised all types of fraudulent sex in Queensland, South Australia ('SA'), and Victoria. At worst, any overstatement of fraudulent sex as rape or sexual assault by universities in these three jurisdictions merely aggravates the severity of what is still a non-trivial criminal offence. Indeed, a case may be made that the benchmark for legal accuracy in these three jurisdictions should be the same as the Australian Capital Territory ('ACT'), Tasmania and Western Australia ('WA') (that is, all fraudulent sex is illegal).⁶¹ Notably, these two features only mitigate, but do not necessarily negate, the inaccuracy arising from overstatement. It remains far from certain that courts will use "free" consent to broaden the scope of fraudulent sex criminalisation, whether in individual cases or as a general precedent.⁶² There is no procurement offence in either New South Wales ('NSW') or the Northern Territory ('NT').

On the other hand, the statutorily prescribed categories of consent-vitiating fraud has to be the minimum threshold. The only mitigating factor for understatement is that courts may choose to adopt a restrictive interpretation that is contrary to the plain wording of the provision.⁶³ However, the restrictive interpretation by Heenan AJA does not justify understatement even in WA universities for two reasons. First, such restrictive jurisprudence is far from conclusive. In *Michael*, Heenan AJA was in dissent. The other two judges did not adopt a similarly restrictive interpretation.⁶⁴ In addition, courts in the ACT have consistently resisted the restrictive approach advocated by Heenan AJA.⁶⁵ Second, none of the understatements among the data points corresponded to any existing Australian jurisprudence (including Heenan AJA's dissent in *Michael*). Indeed, many of the understatement legal errors consist of no mention of fraud, which clearly is incorrect.

As set out in Table D (below), the overwhelming type of legal error for websites is understatement (80.6%). It is more evenly distributed for policies, with understatement constituting 52.6% of legal errors.

⁶¹ See below Table G (Part IV(C)).

⁶² Crowe (n 14) 246. In England, the courts have been more willing to use the positive definition of consent (ie, 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice') to punish fraudulent sex. A notable and controversial example is deception as to gender: *R v McNally* [2014] QB 593 (CA); Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *Journal of Criminal Law* 417, 432–4; Aeyal Gross, 'Rape By Deception and the Policing of Gender and Nationality Borders' (2015) 24 *Tulane Journal of Law & Sexuality* 1, 24–33.

⁶³ See above n 23 and accompanying text.

⁶⁴ *Michael* (n 22) 370–71 [88]–[89] (Steytler P), 385 [165]–[166] (Miller JA).

⁶⁵ *R v Tamawiwiy (No 2)* (2015) 11 ACTLR 82, 92 [55] ('*Tamawiwiy (No 2)*'); *Livas* (n 18) [34] (Penfold J). See Jianlin Chen, 'Two Is a Crowd: An Australian Case Study on Legislative Process, Law Reform Commissions and Dealing with Duplicate Offences' (2020) *Statute Law Review* (advance) <<https://doi.org/10.1093/slr/hmz027>> 10–15 (arguing that judicial interpretations in the ACT were facilitated by the repeal of the procurement offence when the statutory definition of sexual consent was expanded to include vitiation by 'a fraudulent misrepresentation of any fact').

Table D: Types of legal errors in Australian universities' websites and policies on sexual misconduct involving fraud

	Website	Policy	Website + Policy
Total number (errors)	31	19	50
Understatement	25 [80.6%]	10 [52.6%]	35 [70.0%]
Overstatement	5 [16.1%]	9 [47.4%]	14 [28.0%]
Understatement and overstatement	1 [3.2%]	0	1 [2.0%]

C Understatements

Table E (below) presents a more focused look at the problem of understatements among universities' websites and policies. Table E starts by noting the disturbing prevalence of understatement legal errors among data points that have a definition of consent (that is, universities' websites and policies without such definition are excluded from the denominator): an overall of 58.3%, and 73.5% and 38.5% respectively for website and policy. Table E then further breaks down these understatement errors into the most problematic cases.

First, a distinction is made between major and minor understatements. The latter might be more excusable. One example of minor understatement is made by Flinders University. In its definition of consent on both its website and policy, two fraud-related grounds are stated as capable of vitiating consent: respectively, 'a mistaken belief about the identity of the other person' and 'mistaken about the nature of the activity'.⁶⁶ This definition technically fails to mention that 'medical/hygienic' purpose is explicitly stated in the SA statutory provision as consent-vitiating. However, one might argue that 'medical/hygienic' purpose is a relatively a narrow set of circumstances that might not be particularly prevalent in a university setting. The removal of such minor understatement alleviates, if only slightly, the extent of understatements. A majority of relevant data points (55.0%) still contain non-minor understatements.

Table E next excludes cases where an understating definition of consent co-exists with a definition of sexual assault that is broader. An example is ANU's policy. There is no mention of fraud in ANU's consent definition, but there is for sexual assault, which is defined as 'any offence of a sexual nature committed on another person where a person is forced, coerced or *tricked* into sexual acts against their will or without their consent'.⁶⁷ As compared to the minor understatement discussed in the preceding paragraph, the normativity of inconsistency is more complicated. The uneasy co-existence suggests a genuine and innocuous oversight in drafting. However, the end product is confusion for the reader. Ultimately, this

⁶⁶ Flinders Policy s 5; Flinders Website.

⁶⁷ ANU Policy 2 (emphasis added).

article excludes these cases from the list of the most problematic offenders because there is at least an acknowledgement of the criminality of fraudulent sex. After the exclusion, the result is still far from ideal: 48.3% overall, and 61.8% and 30.8% respectively for website and policy. All these data points are flagged as ‘serious problems’ in Appendix II. As will be discussed in Part V(B), there is a particularly dire need for reform of these websites and policies.

Table E: Legal errors in Australian universities’ websites and policies on sexual misconduct involving fraud: Different degrees of understatement

	Website	Policy	Website + Policy
Total number (defined)	34	26	60
Understatement (all)	25 [73.5%]	10 [38.5%]	35 [58.3%]
Understatement (major)	24 [70.6%]	9 [34.6%]	33 [55.0%]
Understatement (major + no sexual assault)	21 [61.8%]	8 [30.8%]	29 [48.3%]

Having isolated the least excusable types of legal errors, the question becomes how these understatements manifested. As set out Table F (below), the vast majority of these understatements arose by virtue of a complete omission of fraud. This is especially so for websites, where 85.7% of the ‘serious’ understatements comprised no mention of fraud. The distribution is more even for policies, even if complete omission of a reference to fraud still constitutes the majority of serious understatements (62.5%).

Table F: Legal inaccuracies in Australian universities’ websites and policies on sexual misconduct involving fraud: Types of understatements

	Website	Policy	Website + Policy
Total number (‘serious’ understatement)	21	8	29
No fraud	18 [85.7%]	5 [62.5%]	23 [79.3%]
Fraud (qualified)	3 [14.3]	3 [37.5%]	6 [20.7%]

Normatively speaking, it is difficult to say which type of understatements is more problematic. On one hand, the magnitude of legal inaccuracy is greater for complete omission, with more criminalised activities not represented as being impermissible. On the other hand, understatement appears much more conscious and misleading where only certain types of fraud are reported.

This can be illustrated by the policy of Griffith University (‘Griffith’):

Consent must be freely and voluntarily given by a person with the cognitive capacity to do so. Consent is not freely and voluntarily given if a person is:

- forced to engage in the sexual act;

- unconscious or asleep;
- under the influence of drugs or alcohol;
- threatened or intimidated;
- in fear of bodily harm; or
- under a mistaken belief that the person was their sexual partner.⁶⁸

The relevant Queensland statutory provision expressly states that sexual consent is not only vitiated by mistaken identity of a sexual partner, but also by false representation as to the ‘nature and purpose of the act’.⁶⁹ It is highly curious, to put it mildly, that Griffith’s Policy chose to include a narrow ground⁷⁰ of consent-vitiating fraud to the exclusion of the much broader, and generally applicable, circumstances.

Before moving on to the analytical discussion, Table G (below) highlights how the prevalence of problematic understatements would be significantly increased if the legal benchmarks for Queensland, SA and Victoria were raised to include all forms of fraud on account of the existence of the procurement offence. The prevalence increased to 71.7%, up from 48.3%.

Table G: Legal errors in Australian universities’ websites and policies on sexual misconduct involving fraud: Procurement offence as benchmark

	Website	Policy	Website + Policy
Total number (defined)	34	26	60
Understatement (major + no sexual assault)	21 [61.8%]	8 [30.8%]	29 [48.3%]
Understatement (procurement) (major + no sexual assault)	26 [76.5%]	17 [65.4%]	43 [71.7%]

V Analysis

This Part explains how the current state of affairs is highly problematic, before proposing necessary reforms.

A *Undesirable Errors in Universities’ Websites and Policies*

Universities have an important, non-delegable, duty to ensure the safety of their campuses. A basic measure that can, and should, be undertaken by universities is educating those who attend university and/or university campuses whether as

⁶⁸ Griffith Policy s 3.1.

⁶⁹ *Criminal Code* (Qld) (n 6) s 348.

⁷⁰ It must be acknowledged that such fraudulent sex cases are not unheard of in Australia: see, eg, *R v Doolan* [2009] SADC 115; *R v Pryor* (2001) 124 A Crim R 22; *R v Gallienne* [1964] NSW 919.

students, staff or visitors. As recommended by the *Change the Course Report*, '[u]niversities [should] develop a plan ... [that] provides students and staff with education about: behaviour that constitute sexual assault and sexual harassment, [and] consent and respectful relationships'.⁷¹ It should go without saying that such education initiatives need to be 'present, easy to access, and *correct*'.⁷² There are debates in the United States ('US') as to whether the sexual consent articulated should be premised on the existing legal requirements, or based on more progressive standards. On one hand, a higher standard arguably has the benefit of better protecting sexual autonomy and promoting a more respectful sexual culture.⁷³ On the other hand, a definition of sexual consent that includes both existing legal requirements and non-legal moral ideals may give rise to confusion about the necessity of adherence and thus dilute any overall behaviour-modification effect of university standards and policies.⁷⁴

In the Australian context, there is an additional factor to account for when assessing overstatement of the law. In some universities' policies, the definition of sexual assault is caveated with '[f]or the purposes of this policy'.⁷⁵ This can be contrasted with other universities' policies that mention in the definitional provision that sexual assault is a 'crime' or 'criminal offence'.⁷⁶ Having benchmarked the definition with the legal standard, overstatement of the law in the latter definitions cannot be justified as reflecting a desire for a higher protective or moral standard for the university community. Where the conduct of an accused falls outside the actual legal standard, a finding of sexual assault by a university disciplinary committee under the policy's definitions prejudicially, and arguably illegally,⁷⁷ imputes the accused as committing a crime. Though in this regard, a provision in the university policy that explicitly stipulates the limited nature of a finding of sexual misconduct under university disciplinary proceedings⁷⁸ will help mitigate concerns arising from overstatement of the law.

⁷¹ AHRC, *Change the Course Report* (n 3) 11.

⁷² Catherine A Simmons and Joy A Clay, 'Sexual Assault Information Posted on College and University Websites: Size and Setting Matter' (2019) 25(10) *Violence Against Women* 1191, 1194 (emphasis added).

⁷³ Ortiz (n 30) 734; David DeMatteo et al, 'Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault' (2015) 21(3) *Psychology, Public Policy, and Law* 227, 233–6.

⁷⁴ Melanie Ann Beres, 'The Proliferation of Consent-Focused Rape Prevention Social Marketing Materials' in Catherine Dale and Rosemary Overell (eds), *Orienting Feminism: Media, Activism and Cultural Representation* (Palgrave Macmillan, 2018) 181, 186–9.

⁷⁵ See, eg, Macquarie Policy s 4.4.4; Sydney Policy s 9.

⁷⁶ See, eg, Tasmania Policy s 5.8; Victoria Policy s 17.

⁷⁷ See below nn 97–99 and accompanying text.

⁷⁸ See, eg, Tasmania Policy s 6:

The University is only able to investigate whether a person has engaged in sexual misconduct in breach of this policy. We will not investigate or determine whether a civil wrong in the case of sexual harassment, or a criminal act, in the case of sexual assault, has occurred. These matters can only be determined by an external process.

See also Macquarie Policy s 4.11:

An investigation by the University will assess whether, on the balance of probabilities, the reported sexual harassment or sexual assault is a breach of the Student Discipline Rule. The University's investigation process is not a substitute for criminal processes.

In any event, it should be uncontroversial that the existing legal requirements should always be the minimum standard. The educational goals of universities in relation to sexual misconduct are undermined by existing Australian universities' websites that understate the law on sexual assault and consent. Indeed, the issue is not simply ignorance. The intended recipients are actively exposed to an erroneously narrow understanding of the law by a seemingly credible source of information. Significantly, understating the law may increase the chance of a student running afoul of the law. In the 2015 ACT case of *R v Tamawiwiy (No 2)*, a university student, reportedly from University of Canberra,⁷⁹ was convicted of sexual intercourse without consent.⁸⁰ The defendant (a young man) posed as a fictitious young attractive woman to entice the victim (another young man) with the promise of sexual intercourse with her (the fictitious young woman) and her (fictitious) friend, on condition that the victim first had sex with the defendant. As rightly conceded by the defendant's lawyer during closing statement, the defendant's act was 'despicable'.⁸¹ However, the fraud employed is essentially a fraud as to consideration of a non-financial nature and thus would not constitute rape in the majority of Australian jurisdictions,⁸² or indeed around the world,⁸³ including Indonesia,⁸⁴ where the defendant was from.⁸⁵ Obviously, the defendant in the case could still well have engaged in the fraudulent sex even if he knew that it was a crime. Incidentally, he would not have known that from the University of Canberra's website surveyed in this study, which did not mention fraud when explaining sexual consent.⁸⁶ In any event, having universities correctly inform students about the extent of criminal law would, at least, have some marginal deterrent effect.⁸⁷ This is particularly so for universities in jurisdictions where there are no limitations to

⁷⁹ 'Canberra Uni Student Jailed for Raping Man He Lured through a Fake Female Facebook Account', *News Corp Australia Network* (online, 12 November 2015) <<https://www.news.com.au/national/crime/canberra-uni-student-jailed-for-raping-man-he-lured-through-a-fake-female-facebook-account/news-story/87825c42482f4804e6fcd24b3c335d3>>.

⁸⁰ *Tamawiwiy (No 2)* (n 65) 94 [66]–[67]; *R v Tamawiwiy (No 4)* [2015] ACTSC 371.

⁸¹ Christopher Knaus, 'Elaborate Ploy to Seduce Teenager', *Canberra Times* (25 September 2015) A003.

⁸² See Table A (Part II(A)). It is highly unlikely that the defendant would be convicted under the approach of Muir JA and Fryberg J in *R v Winchester*: see above n 24 and accompanying text. There was no pre-existing relationship — let alone a relationship of trust, dependency and/or power imbalance — between the defendant and the victim. The victim also did not appear to have any physical, intellectual, emotional or psychological vulnerabilities.

⁸³ Michael Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71(5) *Journal of Criminal Law* 412, 420–3.

⁸⁴ Choky R Ramadhan, 'Reforming Indonesian Rape Law: Adopting U.S. Rape Shield Law in Excluding Prejudicial Evidence' (2018) 8(1) *Indonesia Law Review* 63, 71–4. For a discussion of the limited criminalisation of fraudulent sex in another South-east Asia civil law jurisdiction, see Jianlin Chen and Phapit Triratpan, 'Black Magic, Sex Rituals and the Law: A Case Study of Sexual Assault by Religious Fraud in Thailand' (2020) 37(1) *UCLA Pacific Basin Law Journal* 25, 34–46.

⁸⁵ Christopher Knaus, 'Man Who Exploited Facebook Profile for Sex Gets Jail Term', *Canberra Times* (12 November 2015) A005.

⁸⁶ See Appendix II.

⁸⁷ Patricia G Erickson, Mark Van Der Maas and Andrew D Hathaway, 'Revisiting Deterrence: Legal Knowledge, Use Context and Arrest Perception for Cannabis' (2013) 49(3) *Czech Sociological Review* 427, 442–3; Paul H Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) *Oxford Journal of Legal Studies* 173, 175–8. See also Williams and Erickson's research findings that 'individual perceptions of statutory or actual legal sanctions are not a function of knowledge of the "law", but are a function of shared beliefs about what ought to be done to criminal offenders': Kirk R Williams and Maynard L Erickson, 'Potential for Crime and Knowledge of Legal Sanctions' (1981) 2(3) *Deviant Behavior* 287, 301.

consent-vitiating fraud (that is, the ACT, Tasmania and WA). For these universities, the majority of out-of-state students (both domestic and international) are coming from jurisdictions where fraudulent sex criminalisation is more restricted.

Beyond the detriments to education and behaviour modifications, these understatement legal errors impede redress for sexual assaults that have been committed. The *Change the Course Report* identified that 87% of students who were sexually assaulted did not make a report or complaint to their university.⁸⁸ The understatement legal errors would aggravate the already formidable barriers to reporting.⁸⁹ There is now an increased chance that individuals who have an experience legally defined as sexual assault may not perceive their experience as such and thus do not seek redress and justice.⁹⁰ Such misperception may also increase self-blame among survivors of sexual assaults.⁹¹ A victim of fraudulent sex may blame one's naivety⁹² instead of recognising — as the law does — one's sexual autonomy has been impermissibly infringed by the offender's fraud.

The legal errors in policies are more severe considering the formal nature of policy formation. Indeed, Universities Australia's 2018 *Guidelines for University Responses to Sexual Assault and Sexual Harassment* recommended a standalone policy to address sexual assault and sexual harassment.⁹³ Unsurprisingly, a key basic requirement for such a policy is to both 'define sexual assault in alignment with the relevant jurisdictional criminal legislation' and 'explain consent as defined by relevant jurisdictional criminal legislation'.⁹⁴ Unfortunately, only a quarter of the policies meet this standard.⁹⁵

In addition to the adverse educational and practical implications discussed in relation to the websites, legally erroneous definitions may actually compromise the legal integrity of any disciplinary proceedings that flow out of these policies. This is especially so for the 37 public universities where disciplinary decisions are readily subjected to judicial review under accepted administrative law principles.⁹⁶ While most successful litigation by students challenging universities' decisions tends to be

⁸⁸ AHRC, *Change the Course Report* (n 3) 120.

⁸⁹ Common reasons proffered by surveyed students for not reporting include thinking that the incident was not serious enough, thinking that no help was needed, perceived evidential difficulty and lack of knowledge of reporting: *ibid* 129.

⁹⁰ Laurie M Graham, 'Sexual Assault Policies and Consent Definitions: A Nationally Representative Investigation of U.S. Colleges and Universities' (2017) 16(3) *Journal of School Violence* 243, 244.

⁹¹ Sapana D Donde, 'College Women's Attributions of Blame for Experiences of Sexual Assault' (2017) 32(22) *Journal of Interpersonal Violence* 3520, 3530.

⁹² For example, in a Victim Impact Statement submitted to court, the victim of fraudulent sexual assault said that 'she feels guilt that her "trusting nature was abused in such a way": *DPP (Vic) v Deepak Dhankar* [2015] VCC 189, [9] (Judge Patric).

⁹³ Universities Australia (n 31) 4, 10.

⁹⁴ *Ibid* 10.

⁹⁵ See above Table C (Part IV(B)).

⁹⁶ The right to judicial review is more complicated, though not necessarily foreclosed, for private universities: Pnina Levine and Michelle Evans, 'The Legalities of Revoking University Degrees for Misconduct: Recommendations for Australian Universities' (2018) 41(1) *University of New South Wales (UNSW) Law Journal* 185, 190–1. For discussion of the private law remedies that will be available to students of both private and public universities, see Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australia and New Zealand Journal of Law and Education* 7, 10–13.

premised on issues of procedural fairness,⁹⁷ a university's decision that is contrary to law would also be a ground for invalidating a decision.⁹⁸ A university disciplinary hearing that applies a definition that is explicitly benchmarked to the legal standard (that is, stipulating sexual assault is a 'crime' or 'criminal offence'), but that incorrectly states the law may thus be voided for an error of law under a challenge by the complainant student (that is, the understatement of law results in an 'acquittal') or the accused student (that is, the overstatement of law results in a 'conviction'). Legal complication remains likely if the university disciplinary committee chooses to depart from the definition contained in the policy and, instead, applies the actual legal definition. In this instance, the accused student might feel aggrieved by the shifting goalposts and launch a challenge based on procedural unfairness.⁹⁹

B *Reform Proposals*

There is a clear need for reform in many Australian universities in terms of how sexual consent is presented on websites and defined in policies. The reform impetus is particular strong in universities with serious understatements of law. These universities have been flagged 'yes' in the last column ('serious problem') of Appendix II. For these universities, the relevant language in the websites and policies should be immediately amended to reflect at least that of the legal standard. The precise legal standard would naturally be dependent on the jurisdiction in which the university is located.

This does introduce a complication for a university that has campuses across multiple states and jurisdictions. As discussed above in Part II(A), there is significant divergence in fraudulent sex criminalisation across Australian jurisdictions. More critically, the divergence has no relationship to geographical proximity. One of the starkest differences in law is between the ACT and NSW, notwithstanding that the ACT is completely surrounded by NSW. The law in NSW is also significantly different from neighbouring Victoria, Queensland and SA. Which jurisdiction's law should be the benchmark for universities like ACU (campuses in the ACT, NSW, Queensland, Victoria) or CQ (campuses in NSW, Queensland, SA, Victoria and WA)?

There are two possible responses. First, a separate website and policy for each jurisdiction in which that university has campuses. Second, a single website and policy benchmarked to the jurisdiction that has the broadest scope of fraudulent sex criminalisation. On balance, this article argues that the second approach is preferable. It will be unwieldy and difficult to administer multiple websites and policies. University administrations would have to familiarise themselves with the variations across the websites and policies. It is also likely to cause confusion among the university community, especially if there are frequent movements of staff and students across the different campuses. Indeed, university administrations would have to develop a set of doctrine and procedures — akin to the contested doctrines

⁹⁷ Kamvounias and Varnham (n 59) 156–71.

⁹⁸ Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153, 158–9.

⁹⁹ Kamvounias and Varnham (n 59) 167.

relating to choice/conflict of law¹⁰⁰ — simply to resolve the question of applicable policy in situations involving individuals and/or conduct that are not confined within a single state/territory. For example, which policy should be applicable when a student from NSW campus and a student from an ACT campus interacts at a teaching seminar held in the Victoria campus? On the other hand, as discussed above, the legal and normative problems of overstatements are limited, especially if the definition used by the university is decoupled from the legal standard.

Insofar as this means that some universities will have to state that sexual consent would be vitiated by all types of fraud simply because they have a satellite campus in either the ACT, Tasmania or WA (that is, ACU and CQ mentioned above), it will be a positive development overall on account of the existence of the procurement offence. Indeed, save for universities that restrict their operations to within either NSW or the NT, this article recommends that the websites and policies should simply state that sexual consent would be vitiated by all types of fraud. While this language is not correct in the strict legal sense (that is, the correct language would be ‘sexual activity procured by all types of fraud is illegal’), it captures the central message that fraudulent sex is a serious sexual offence, whether as rape or the procurement offence.

Universities that should be making this change on account of the procurement offence are denoted ‘yes (procure)’ in the last column (‘serious problem’) of Appendix II.

Beyond immediate changes to the websites and policies, universities should also look to reform the procedures according to which policies and website content are formulated. This case study indicates a systematic flaw in university governance processes that, if unremedied, may lead to the recurrence of such legal errors, whether in the context of sexual offences or for other crimes and illegal conduct. Thus, university procedures should be amended to provide for mandatory engagement of legal experts when the universities are writing website content and university policies that clearly concern legal issues. The disturbing prevalence of problematic legal errors suggested that there is likely limited input by legal experts during the drafting process.¹⁰¹ This is especially unfortunate given that such legal errors should have been obvious to any criminal lawyer engaged to review the websites or documents. A criminal lawyer would be guilty of professional negligence if s/he did not ensure that any advice relating to sexual offences took into account of the statutory stipulated consent-vitiating fraud and the existence of the procurement offence.

This article is cognisant of the substantial cost and delay that arises from any engagement of legal experts. There is also a line-drawing problem as to what subject

¹⁰⁰ See Graeme Hill, ‘Resolving a True Conflict between State Laws: A Minimalist Approach’ (2005) 29(1) *Melbourne University Law Review* 39; Jeremy Kirk, ‘Conflicts and Choice of Law within the Australian Constitutional Context’ (2003) 31(2) *Federal Law Review* 247. For critical discussion of choice of law issues in the criminal law context, see Matthew Goode, ‘The Tortured Tale of Criminal Jurisdiction’ (1997) 21(2) *Melbourne University Law Review* 411, 437–46, 450–53.

¹⁰¹ This article assumes that the problematic legal errors are primarily due to ignorance and negligence. The rationale of this assumption and the assumption’s relationship with rape myth persistence is addressed in Part VI below: see below nn 122–3 and accompanying text.

matter ‘clearly’ implicates legal issues and thus requires the costly engagement of legal experts. Nonetheless, websites and policies dealing with sexual assault should be uncontroversial examples where professional legal scrutiny is warranted. More generally, websites or policies that include either a representation or definition as to what amounts to impermissible activities should be deemed as clearly concerning legal issues. In these instances, the dire and preventable harm arising from universities’ legal errors should more than justify the time and expense.

VI Persistence of Rape Myths

Hopefully, this article’s findings and reform proposals will remedy the existing problematic websites and policies, and help to avoid the recurrence of such legal errors. Still, the prevalence of understatement of the law among Australian universities must have been frustrating for anyone who hoped to bring about social change through law reform. Despite all the hard work committed to ensuring that the statutory changes survived the legislative process, the new statutory provisions remain ‘hidden’ in so many public and large private institutions. It is worth emphasising again that the legal inaccuracies in question are straightforward inconsistencies vis-a-vis statutory provisions, whose scope had not been authoritatively curtailed by the courts.¹⁰²

Notably, this is not a newly identified phenomenon. A rich literature, often propelled by feminist scholars, has demonstrated how legal changes have failed to bring about meaningful changes to the institutional responses to rape.¹⁰³ In particular, numerous studies globally have revealed the persistence of ‘rape myths’ within the legal system, despite explicit legislative changes to negate it. Culprits abound in this copious body of research. Police officers, prosecutors, judges and

¹⁰² See above nn 64–5 and accompanying text.

¹⁰³ For a concise literature review, see Yvette Russell, ‘Woman’s Voice/Law’s Logos: The Rape Trial and the Limits of Liberal Reform’ (2016) 42(2) *Australian Feminist Law Journal* 273, 277–8.

juries, whether in United Kingdom,¹⁰⁴ US,¹⁰⁵ continental Europe,¹⁰⁶ or Asia,¹⁰⁷ have all been shown continuously to adhere to the legally erroneous notions that ‘real’ rape is only committed by strangers using physical violence on woman who are not sexually promiscuous.¹⁰⁸

Unsurprisingly, similar findings have been made in the Australian context. For example, Powell and others engaged in a discourse analysis of 10 rape trials in Victoria and found that deeply entrenched societal myths about rape continue to pervade the courtrooms.¹⁰⁹ Henning examined all trial transcripts in cases of rape, aggravated sexual assault and indecent assault tried before the Supreme Court of Tasmania over a two-year period. She found that ‘although in theory the presence of physical resistance is not a legal requisite for the crime of rape, in practice it is’.¹¹⁰ Quilter made similar findings from an in-depth analysis of a rape trial in NSW.¹¹¹ Most recently, the thematic analysis of rape trial transcripts in Victoria by Burgin again found that despite the formal adoption of an affirmative consent standard for sexual assault, there remained a persisting narrative of force and resistance.¹¹²

This article’s empirical findings can be conceived and understood as yet another example of the persistence of rape myths. The systemic legal errors of understatements about fraudulent sex criminalisation corresponds to the pattern of

¹⁰⁴ See, eg, Anthony Murphy and Benjamin Hine, ‘Investigating the Demographic and Attitudinal Predictors of Rape Myth Acceptance in U.K. Police Officers: Developing an Evidence-Base for Training and Professional Development’ (2019) 25(1) *Psychology, Crime and Law* 69, 81–2; Sharon Cowan, ‘Sense and Sensibilities: A Feminist Critique of Legal Interventions against Sexual Violence’ (2019) 23(1) *Edinburgh Law Review* 22, 38–50; Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan, 2018) 59–84; Jennifer Temkin, Jacqueline M Gray and Jastine Barrett, ‘Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study’ (2018) 13(2) *Feminist Criminology* 205, 209–21; Kayleigh A Parratt and Afroditë Pina, ‘From “Real Rape” to Real Justice: A Systematic Review of Police Officers’ Rape Myth Beliefs’ (2017) 34 *Aggression and Violent Behavior* 68, 78–9.

¹⁰⁵ See, eg, Alondra D Garza and Cortney A Franklin, ‘The Effect of Rape Myth Endorsement on Police Response to Sexual Assault Survivors’ (April 2020) *Violence Against Women*, 10–13 <<https://doi.org/10.1177%2F1077801220911460>>; Jessica Shaw et al, ‘Beyond Surveys and Scales: How Rape Myths Manifest in Sexual Assault Police Records’ (2017) 7(4) *Psychology of Violence* 602, 605–9.

¹⁰⁶ See, eg, Marisalva Fávero et al, ‘Rape Myth Acceptance of Police Officers in Portugal’ (2020) *Journal of Interpersonal Violence*, <<https://doi.org/10.1177%2F0886260520916282>>; Sokratis Dinos et al, ‘A Systematic Review of Juries’ Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?’ (2015) 43(1) *International Journal of Law Crime and Justice* 36, 46–7; Ivana Radačić, ‘Rape Myths and Gender Stereotypes in Croatian Rape Laws and Judicial Practice’ (2014) 22(1) *Feminist Legal Studies* 67, 72–6.

¹⁰⁷ See, eg, Mally Shechory Bitton and Lea Jaeger, ‘“It Can’t Be Rape”: Female vs. Male Rape Myths among Israeli Police Officers’ (2020) 35(4) *Journal of Police and Criminal Psychology* <<https://doi.org/10.1007/s11896-019-09327-4>>; Chih-Chieh Lin, ‘Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan has been Unsuccessful’ (2010) 18(1) *Duke Journal of Gender Law & Policy* 163, 180–5.

¹⁰⁸ See generally Dinos et al (n 106) 46–7.

¹⁰⁹ Anastasia Powell et al, ‘Meanings of “Sex” and “Consent”’: The Persistence of Rape Myths in Victorian Rape Law’ (2013) 22(2) *Griffith Law Review* 456, 476–7.

¹¹⁰ Terese Henning, ‘Consent in Sexual Offences Cases: The Continuing Construction’ [1997] (3) *Women Against Violence* 4, 6.

¹¹¹ Julia A Quilter, ‘Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform’ (2011) 35(1) *Australian Feminist Law Journal* 23, 32–49.

¹¹² Rachael Burgin, ‘Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform’ (2019) 59(2) *British Journal of Criminology* 296, 302–11.

continued adherence to an outmoded understanding of sexual offending despite statutory reform to the contrary.

In many ways, fraudulent sex is the antithesis to the ‘real’ rape espoused in rape myths. There is neither force nor threat, and the fraudster is, in most cases, not a stranger to the victim. Indeed, that fraudulent sex should not be regarded as rape is precisely the central thrust of Rubenfeld’s controversial article in 2013.¹¹³ Rubenfeld argued for a radical conception of rape that is not based on sexual autonomy protection, but is instead premised on self-possession and which seeks to reintroduce the force requirement.¹¹⁴ He underpinned his argument on a ‘riddle’:¹¹⁵ if rape law is indeed meant to protect sexual autonomy, then why did fraudulent sex remain largely not criminalised in existing law that has otherwise been subjected to decades of progressive law reforms purportedly premised on sexual autonomy protection?¹¹⁶ Rubenfeld’s rejection of sexual autonomy as the basis of rape law has, unsurprisingly, been heavily criticised by US scholars.¹¹⁷

Tellingly, Rubenfeld’s riddle is not in issue in Australia. All forms of fraudulent sex are criminalised — whether as rape, or a distinct sexual offence — in the clear majority of states and territories.¹¹⁸ In this regard, it is also worth noting that the NSW Law Reform Commission includes ‘the person participates in the sexual activity because of a fraudulent inducement’ in the list of consent-vitiating circumstances in its 2020 report on reforming consent relating sexual offences.¹¹⁹ If this addition is successfully enacted, the law relating to fraudulent sex criminalisation in NSW would no longer be the most permissive in Australia.¹²⁰ However, as much as the law in Australia is moving further away from the notion that sexual autonomy is not infringed by ‘mere’ fraud, many universities, apparently, have not yet taken notice or action.

Due to the lack of accessible and verifiable information on how each of these websites and policies came into being, this article did not attempt to meaningfully answer the otherwise important question regarding the reasons for these legal errors. As implied by the proposed reform of legal expert engagement in Part V above, this article assumes that the problematic legal errors are primarily due to ignorance and negligence. This assumption is adopted because there is currently no direct evidence to indicate that the relevant university administration actors are deliberately trying

¹¹³ Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122(6) *Yale Law Journal* 1372, 1423–42.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* 1395.

¹¹⁶ *Ibid* 1392–8.

¹¹⁷ See, eg, Tom Dougherty, ‘No Way Around Consent: A Reply to Rubenfeld on “Rape-by-Deception”’ (2013) 123 *Yale Law Journal Online* 321, 331; Patricia J Falk, ‘Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking about the Riddle-by-Fraud’ (2013) 123 *Yale Law Journal Online* 353, 365–6; Deborah Tuerkheimer, ‘Sex Without Consent’ (2013) 123 *Yale Law Journal Online* 335, 344–6. See also McJunkin arguing that the law’s reluctance to criminalise fraudulent sex reflects an underlying notion of seduction based on normative masculinity where men derive power and social status through sexual conquest: Ben A McJunkin, ‘Deconstructing Rape by Fraud’ (2014) 28(1) *Columbia Journal of Gender and Law* 1, 21–5.

¹¹⁸ See above Part II(A).

¹¹⁹ New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences: Report* (September 2020) 214, in relation to the proposed *Crimes Act 1900* (NSW) s 61HJ(1)(k).

¹²⁰ See above Part II(A).

to mislead the university community or curtail the scope of sexual misconduct policy vis-à-vis fraudulent sex. More importantly, the issue of causation is not critical for the purpose of demonstrating that these legal errors are manifestations of the persistence of rape myths. Obviously that persistence is readily apparent if the legal errors were deliberate, perhaps because the relevant university administration actor perceived fraudulent sex as not really ‘criminal’ when compared to sexual offences involving force, intimidation or abuse of authority.¹²¹ Nonetheless, if one’s words and actions do reflect legally incorrect rape myths, then those myths have persisted even if the words and actions are due to mere ignorance of the law. This focus on the outward manifestation, rather than the subjective intention, is also the standard approach in the literature.¹²² In this regard, it is worth noting that insofar as a legal expert is engaged (perhaps pursuant to this article’s proposal) and the legal expert has identified certain legal errors, then the continued existence of those legal errors will constitute evidence that those legal errors are deliberate.

Thus, this article’s case study of Australian universities contributes to the rape myth literature in two ways. First, it introduces another character to the ever-growing list of state and societal actors that have been canvassed in the existing literature for not fulfilling their obligation to accurately reflect or apply the law.¹²³ As noted above, the empirical dimension of the literature has thus far focused on actors and institutions in the criminal justice system.¹²⁴ However, this article shows that, notwithstanding their legal and civic obligations, universities are as prone to ignoring reformed statutory provisions as police officers, prosecutors, judges and juries. This article provides a concrete empirical basis to spur further research on the persistence of rape myths in universities in other jurisdictions,¹²⁵ or on other aspects of university governance.

¹²¹ For an example of such attitudes, see Neil Morgan, ‘Oppression, Fraud and Consent in Sexual Offences’ (1996) 26(1) *University of Western Australia Law Review* 223, 231–4. In the context of the broad Western Australian provision on sexual consent, Morgan argued, on the one hand, that judges should let the jury decide — as a matter of factual finding — whether consent is negated by the defendant’s oppressive behaviour that may otherwise not amount to threat or intimidation. On the other hand, for fraudulent sex, he argued that judges should adopt legal rules to limit the circumstances in which fraud would vitiate consent.

¹²² See, eg, Burgin (n 112) 302–11; Powell et al (n 109) 476–7; Henning (n 110) 6.

¹²³ There is a large body of literature on rape myth acceptance among students (especially college students); see, eg, Hanif Qureshi et al, ‘Rape Myth Acceptance Among College Students in India: Prevalence and Predictors in a Changing Context’ (2020) *Deviant Behavior* <<https://doi.org/10.1080/01639625.2020.1720935>>; Rita C Seabrook, Sarah McMahon and Julia O’Connor, ‘A Longitudinal Study of Interest and Membership in a Fraternity, Rape Myth Acceptance, and Proclivity to Perpetrate Sexual Assault’ (2018) 66(6) *Journal of American College Health* 510; Marjorie H Carroll et al, ‘Rape Myth Acceptance: A Comparison of Military Service Academy and Civilian Fraternity and Sorority Students’ (2016) 28(5) *Military Psychology* 306. The age and circumstances of students mean that their failure to know and apply the law correctly is more excusable when compared to the government bodies and universities. Cf Holland et al examining rape myths acceptance in undergraduate students who are serving as resident assistants and are thus the ‘first responder’ to resident in crisis: Kathryn J Holland et al, ‘Supporting Survivors: The Roles of Rape Myths and Feminism in University Resident Assistants’ Response to Sexual Assault Disclosure Scenarios’ (2020) 82(3–4) *Sex Roles* 206.

¹²⁴ See above nn 105–8 and accompanying text.

¹²⁵ Similar legal errors have been detected in universities in Singapore: Jianlin Chen, ‘Fraudulent Sex Criminalisation in Singapore: Haphazard Evolution and Accidental Success’ (2020) *Singapore Journal of Legal Studies* (forthcoming).

The second contribution relates to how the rape myths manifest. Existing literature has engaged in sophisticated discourse and thematic analysis to tease out the underlying rape myths that, notwithstanding being contrary to the law, remain embedded in the language and decisions of the relevant actors.¹²⁶ This article shows that there could be much more open and direct expression of this phenomenon. The problems identified in this article do not require any advanced methodology to detect and establish. They are simply hiding in plain sight, on universities' publicly accessible websites and policies. This is hugely problematic. The public and explicit nature of these legal errors reinforces rape myths more detrimentally than the more subtle manifestations thus far identified in the literature. That these legal errors are found in documents designed to educate or protect only exacerbates the reinforcement of rape myths. Future research should be alert to these otherwise seemingly unthinkable manifestations of rape myth persistence.¹²⁷

VII Conclusion

Universities are large and influential institutions. They are in a unique position to educate and shape the worldview of a significant portion of a society's coming-of-age population. It is imperative that universities do not have legal errors in their communications and policies. The systemic misinformation of fraudulent sex criminalisation documented in this article highlights the acute necessity for many Australian universities to promptly remedy existing errors. Furthermore, general university governance processes should be reformed to ensure there is appropriate engagement with legal experts to detect and prevent future occurrences of such errors. In the final analysis, however, the present case study is a recurring tale of the societal and institutional barriers in actualising legislative changes in the realm of sexual offences. Vigilant awareness and conscientious efforts are required to overcome the persistence of rape myths.

¹²⁶ See above nn 107–10 and accompanying text.

¹²⁷ In the context of Australia, my preliminary research indicates that some law enforcement agencies are committing the same egregious errors as universities. An example is the 'Sexual Assault Information Fact Sheet' prepared by the Western Australian police. The fact sheet states:

Consent is not freely and voluntarily given if you:

- Are under force;
- Are unconscious or asleep;
- Are incapable of giving consent, for example if you are comatose or intoxicated;
- Are under threat or intimidation;
- Are in fear of bodily harm; or
- Have a mistaken belief that the offender was your sexual partner.

Western Australia Police Force, 'Your Safety' (Web Page, 2020) <<https://www.police.wa.gov.au/Your-Safety/Sexual-assault>> (fact sheet on file with author). This fact sheet is, like many universities' policies, a misleadingly selective statement of the law. Another example is the victim services website of the NSW Department of Communities and Justice: NSW Department of Communities and Justice, 'What Is Sexual Assault?', *Victims Services* (Web Page, 2 December 2016) <https://www.victimsservices.justice.nsw.gov.au/sexualassault/Pages/sexual_assault_victims.aspx>.

The definition of consent provided on the webpage does not mention fraud, though the webpage does define sexual assault as occurring 'when a person is forced, coerced or tricked into sexual acts against their will or without their consent'.

Appendix I: Data Points

AUSTRALIAN CAPITAL TERRITORY

- Australian National University ('ANU')

Website: ANU, 'What is Sexual Assault & Sexual Harassment', *Current Students* (Web Page) <<https://www.anu.edu.au/students/health-safety-wellbeing/violence-sexual-assault-support/what-is-sexual-assault-sexual>>.

Policy: ANU, 'Policy: Sexual Misconduct', *Policy Library* (Web Page, 11 March 2020) <https://policies.anu.edu.au/ppl/document/ANUP_6059194>.

- University of Canberra ('Canberra')

Website: Canberra, 'Culture of Consent: Do You Want to?', *Health and Support* (Web Page) <<https://www.canberra.edu.au/on-campus/health-and-support/medical-counselling/consent,-safety-and-respect-on-campus>>.

Policy: Not available.

NEW SOUTH WALES

- Australian Catholic University ('ACU')

Website: ACU, 'Sexual Harassment Assault and Consent', *Staff* (Web Page, 23 January 2020) <https://staff.acu.edu.au/human_resources/working%20here/working%20well%20with%20others/dealing%20with%20discrimination%20harasment%20and%20bullying/sexual_harassment_assault_and_consent>.

Policy: ACU, 'Staff Sexual Misconduct', *Policies* (Web Page, 23 March 2020) <https://policies.acu.edu.au/human-resources/equal_opportunity/staff_sexual_misconduct>.

- Charles Sturt University ('Charles Sturt')

Website: Charles Sturt, 'Sexual Assault and Harassment', *Current Students* (Web Page, 2020) <<https://www.csu.edu.au/current-students/safety-wellbeing/your-safety/sexual-assault-harassment>>.

Policy: Not available

- Macquarie University ('Macquarie')

Website: Macquarie, 'Respect. Now. Always.', *Support* (Web Page) <<https://students.mq.edu.au/support/wellbeing/support>>.

Policy: Macquarie, 'Student Sexual Assault and Sexual Harassment Policy', *University Policies and Procedures* (Web Page, 9 May 2019) <<https://staff.mq.edu.au/work/strategy-planning-and-governance/university-policies-and-procedures/policies/student-sexual-assault-and-sexual-harassment>>.

- Southern Cross University ('Southern Cross')

Website: Southern Cross, 'Sexual Assault and Sexual Harassment', *Current Students* (Web Page) <<https://www.scu.edu.au/current-students/services-and-support/sexual-assault-and-sexual-harassment/>>.

Policy: Southern Cross, 'Harassment, Bullying and Discrimination Prevention', *Policies* (Web Page, 15 August 2017) <<https://policies.scu.edu.au/view.current.php?id=00039>>.

- University of New England ('New England')

Website: New England, 'What is Threatening, Unwanted or Inappropriate Behaviour?', *Respect. Now. Always.* (Web Page) <<https://www.une.edu.au/connect/respect-now-always/what-is-threatening-unwanted-or-inappropriate-behaviour>>.

Policy: New England, 'Sex-Based Harassment Policy', *UNE Policy Register System* (Web Page, 27 July 2015) <<https://policies.une.edu.au/document/view-current.php?id=138&version=1>>.

- University of New South Wales ('UNSW')

Website: UNSW, 'Sexual Assault & Misconduct', *ARC UNSW Student Life* (Web Page) <<https://www.arc.unsw.edu.au/help/legal-information/sexual-assault>>.

Policy: UNSW, 'Sexual Misconduct Prevention and Response Policy', *Policy* (Web Page, 4 October 2018) <<https://www.gs.unsw.edu.au/policy/documents/sexual-misconductpreventionandresponsepolicy.pdf>>.

- University of Newcastle ('Newcastle')

Website: Newcastle, 'Information about Sexual Misconduct', *Support* (Web Page, 2020) <<https://www.newcastle.edu.au/current-students/support/personal/sexual-assault-harrasment/information-about-sexual-misconduct>>.

Policy: Newcastle, 'Sexual Assault and Sexual Harassment Response Policy', *Policies* (Web Page, 4 March 2020) <<https://policies.newcastle.edu.au/document/view-current.php?id=44>>.

- University of Sydney ('Sydney')

Website: Sydney, 'Sexual Health and Consent', *Support and Services* (Web Page, 22 April 2020) <<https://www.sydney.edu.au/students/sexual-health-consent.html>>.

Policy: Sydney, 'Student Sexual Misconduct Policy 2018', *Policies* (Web Page, 11 November 2019) <<http://sydney.edu.au/policies/showdoc.aspx?recnum=PDOC2018/470&RendNum=0>>.

- University of Technology, Sydney ('UTS')

Website: UTS, 'What is Sexual Assault', *Current Students* (Web Page, 14 October 2019) <<https://www.uts.edu.au/current-students/support/when-things-go-wrong/sexual-assault-indecent-assault-and-sexual-harassment/what-sexual-assault>>.

Policy: UTS, 'Student Rules: Section 16 – Student Misconduct and Appeals', *Rules* (Web Page, 29 November 2019) <<https://gsu.uts.edu.au/rules/student/section-16.html>>.

- Western Sydney University ('Western Sydney')

Website: Western Sydney, 'Western's Respect. Now. Always. Campaign', *Respectful Relationships* (Web Page, 31 January 2020) <https://www.westernsydney.edu.au/wellbeing_mentalhealth/wbmh/promoting_health/respectnowalways/westerns_respect_now_always_campaign>.

Policy: Western Sydney, 'Sexual Offences Response Policy and Procedures', *Policies* (Web Page, 19th March 2019) <<https://policies.westernsydney.edu.au/document/view.current.php?id=322>>.

- University of Wollongong ('Wollongong')

Website: Wollongong, 'Sexual Assault & Sexual Harassment Support', *Current Students* (Web Page, 2020) <<https://www.uow.edu.au/student/support-services/counselling/sexual-assault-support/>>.

Policy: Wollongong, 'Improper Sexual Conduct Response Policy', *Policy Directory* (Web Page, 3 April 2020) <<https://documents.uow.edu.au/about/policy/UOW263409.html>>.

NORTHERN TERRITORY

- Charles Darwin University ('Charles Darwin')

Website: Charles Darwin, 'What is Sexual Consent?', *Respect. Now. Always* (Web Page) <<https://www.cdu.edu.au/about-cdu/values-and-culture/respect-now-always/what-sexual-consent>>.

Policy: Charles Darwin, 'Sexual Harassment Prevention Policy', *Governance* (Web Page, 15 December 2017) <<https://www.cdu.edu.au/governance/doclibrary/pol-066.pdf>>.

QUEENSLAND

- Bond University ('Bond')

Website: Bond, 'Response to Sexual Misconduct', *Current Students* (Web Page, 2020) <<https://bond.edu.au/current-students/services-support/university-safety-and-security/response-sexual-misconduct>>.

Policy: Bond, 'Sexual Assault & Sexual Harassment (SASH) Policy', *Policies, Procedures & Guidelines* (Web Page, 24 July 2019) <<https://bond.edu.au/files/4199/COR407.pdf>>.

- CQ University ('CQ')

Website: CQ, 'Respect. Now. Always.', *Community* (Web Page) <<https://www.cqu.edu.au/student-life/new-students/student-support/health-and-welfare/respect-now-always>>.

Policy: CQ, 'Sexual Harassment Policy and Procedure', *Policy* (Web Page, 12 November 2019) <https://www.cqu.edu.au/policy/sharepoint-document-download?file_uri=%7BBE8380F3-F86D-4C55-AC0D-84A81EAFD6A2%7D/Sexual%20Harassment%20Policy%20and%20Procedure.pdf>.

- Federation University of Australia ('Federation')

Website: Federation, 'Discrimination, Harassment, Sexual Assault', *Staff* (Web Page, 22 April 2020) <<https://federation.edu.au/staff/working-at-feduni/equity-and-diversity/discrimination-harassment-sexual-assault>>.

Policy: Federation, 'Discriminatory and Sexual Harassment Complaint Procedure', *Corporate Governance* (Web Page, 16 December 2015) <https://policy.federation.edu.au/corporate_governance/equity/equal_opportunity/ch02.php>.

- Griffith University ('Griffith')

Website: Griffith, 'Definitions and Frequently Asked Questions', *Safe Campuses* (Web Page) <<https://www.griffith.edu.au/safe-campuses/definitions-and-faqs>>.

Policy: Griffith, 'Student Sexual Assault, Harassment, Bullying & Discrimination Policy', *Griffith Policy Library* (Web Page, 29 November 2019) <<https://policies.griffith.edu.au/pdf/Student%20Sexual%20Assault%20Harassment%20Bullying%20and%20Discrimination%20Policy.pdf>>.

- James Cook University ('James Cook')

Website: James Cook, 'Sexual Harassment and Sexual Assault', *Safety and Wellbeing* (Web Page) <<https://www.jcu.edu.au/safety-and-wellbeing/sexual-harassment-and-sexual-assault>>.

Policy: James Cook University Australia, 'Bullying, Discrimination, Harassment, and Sexual Misconduct Policy', *Policy* (Web Page, 4 February 2020) <<https://www.jcu.edu.au/policy/student-services/bullying-discrimination-harassment-and-sexual-misconduct-policy-and-procedure>>.

- Queensland University of Technology ('QUT')

Website: Not available

Policy: QUT, 'Sexual Harassment and Sexual Assault', *Manual of Policies and Procedures* (Web Page, 19 September 2019) <http://www.mopp.qut.edu.au/A/A_08_10.jsp>.

- University of Queensland ('Queensland')

Website: Queensland, 'Consent Matters', *Respect* (Web Page) <<https://respect.uq.edu.au/Consent>>.

Policy: Queensland, 'Sexual Misconduct', *UQ Policy and Procedures Library* (Web Page, 27 October 2017) <<https://ppl.app.uq.edu.au/content/1.50.13-sexual-misconduct>>.

- University of Southern Queensland ('Southern Queensland')

Website: Southern Queensland, 'Sexual Assault', *Respect. Now. Always.* (Web Page, 2020) <<https://www.usq.edu.au/about-usq/values-culture/respect-now-always/sexual-assault>>.

Policy: Southern Queensland, 'Harassment and Discrimination Complaint Resolution for Students Policy and Procedure', *Policy Library* (Web Page, 9 September 2016) <<https://policy.usq.edu.au/documents/13333PL>>.

- University of the Sunshine Coast ('Sunshine Coast')

Website: Sunshine Coast, 'Sexual Assault and Harassment Information', *Current Students* (Web Page) <<https://www.usc.edu.au/current-students/student-support/health-and-wellbeing/healthy-mind/student-wellbeing/sexual-assault-and-harassment-information>>.

Policy: Sunshine Coast, 'Sexual Harassment Prevention (Students) - Governing Policy', *Policies and Procedures* (Web Page, 14 July 2017) <<https://www.usc.edu.au/about/policies-and-procedures/sexual-harassment-prevention-students-governing-policy>>.

SOUTH AUSTRALIA

- Carnegie Mellon University ('Carnegie Mellon')

Website: Carnegie Mellon, 'Student Services', *Student Experience* (Web Page, 2020) <<https://www.australia.cmu.edu/student-experience/student-services>>.

Policy: Carnegie Mellon, 'Sexual Harassment and Sexual Assault', *University Policies* (Web Page, 9 January 2019) <<https://www.cmu.edu/policies/administrative-and-governance/sexual-harassment-and-sexual-assault.html>>.

- Flinders University ('Flinders')

Website: Flinders, 'Safety on Campus', *Feedback, Rights & Policy* (Web Page, 22 April 2020) <<https://students.flinders.edu.au/life-at-flinders/safety-on-campus>>.

Policy: Flinders, 'Sexual Harassment and Sexual Assault Prevention & Response Policy', *Policies* (Web Page, 13 January 2020) <<https://www.flinders.edu.au/content/dam/documents/staff/policies/people-culture/sexual-harassment-sexual-assault-response-procedures.pdf>>.

- Torrens University Australia ('Torrens')

Website: None

Policy: Torrens University Australia, 'Sexual Harassment and Sexual Assault Prevention Policy', *Policies and Forms* (Web Page, 2 October 2018) <https://laureate-au.blackboard.com/bbcswebdav/xid-17703982_1>.

- University of Adelaide ('Adelaide')

Website: Adelaide, 'Sexual Respect', *Safer Campus Community* (Web Page, 24 June 2019) <<https://www.adelaide.edu.au/safer-campus-community/sexual-respect#consent>>.

Policy: Adelaide, 'Student Sexual Assault and Sexual Harassment Prevention and Response Policy', *University Policies and Procedures* (Web Page, 26 November 2019) <<https://www.adelaide.edu.au/policies/4523/?dsn=policy.document;field=data;id=8545;m=view>>.

- University of South Australia ('South Australia')

Website: South Australia, 'Understanding Consent, Sexual Assault and Sexual Harassment', *Respect. Now. Always.* (Web Page) <<https://i.unisa.edu.au/students/student-support-services/wellbeing-at-unisa/respect-now-always/what-is-sexual-assault2/>>.

Policy: South Australia, 'Sexual Assault and Sexual Harassment Policy and Procedures', *Policy and Procedures* (Web Page, 25 October 2018) <<https://i.unisa.edu.au/contentassets/949f8b35ae354e4bad017af3c02752ff/sexual-assault-and-sexual-harassment-policy.pdf>>.

TASMANIA

- University of Tasmania ('Tasmania')

Website: Tasmania, 'Sexual Misconduct', *Current Students* (Web Page, 5 July 2019) <<https://www.utas.edu.au/students/shw/safe-fair-community-unit/sash>>.

Policy: Tasmania, 'University Behaviour Policy', *Policy & Delegations* (Web Page, January 2019) <https://www.utas.edu.au/_data/assets/pdf_file/0006/1181985/University-Behaviour-Policy.pdf>.

VICTORIA

- Deakin University ('Deakin')

Website: Deakin, 'Sexual Harm Disclosure', *Students* (Web Page, 26 March 2020) <<https://www.deakin.edu.au/students/safety-and-security/safer-community/sexual-harm-disclosure>>.

Policy: Deakin, 'Sexual Harm Prevention and Response Policy', *Deakin Policy Library* (Web Page, 6 December 2019) <[https://policy.deakin.edu.au/document/view-current.php?id=225#:~:text=Prevention%20and%20Proactive%20Action,-\(8\)%20The%20University&text=\(9\)%20The%20University%20does%20not,regular%20education%2C%20training%20and%20communication](https://policy.deakin.edu.au/document/view-current.php?id=225#:~:text=Prevention%20and%20Proactive%20Action,-(8)%20The%20University&text=(9)%20The%20University%20does%20not,regular%20education%2C%20training%20and%20communication)>.

- La Trobe University ('La Trobe')

Website: La Trobe, 'Sexual Harm', *Students* (Web Page, 22 April 2020) <<https://www.latrobe.edu.au/students/support/wellbeing/speak-up/sexual-harm>>.

Policy: La Trobe, 'Sexual Assault Prevention and Response Policy', *La Trobe Policy Library* (Web Page, 2017) <<https://policies.latrobe.edu.au/document/view.php?id=337>>.

- Monash University ('Monash')

Website: Monash, 'Respectful Relationships', *Respectful Communities* (Web Page, April 2020) <<https://www.monash.edu/safer-community/resources/respectful-relationships>>.

Policy: Monash, 'Sexual Misconduct Response Procedure', *Safety and Security* (Web Page, 1 December 2019) <https://www.monash.edu/_data/assets/pdf_file/0006/2028678/Sexual-Misconduct-Response-Procedure.pdf>.

- RMIT University ('RMIT')

Website: RMIT, 'Sexual Harassment and Assault', *Students* (Web Page) <<https://www.rmit.edu.au/students/support-and-facilities/student-support/safer-community/sexual-assault>>.

Policy: RMIT, 'Sexual Harassment Policy', *Governance and Management* (Web Page, 24 July 2017) <<https://www.rmit.edu.au/about/governance-and-management/policies/sexual-harassment-policy>>.

- Swinburne University of Technology ('Swinburne')

Website: Swinburne, 'Sexual Assault and Sexual Harassment', *Life at Swinburne* (Web Page, 2020) <<https://www.swinburne.edu.au/about/campuses-facilities/safety-security/sexual-assault-harassment/>>.

Policy: Not available.

- University of Divinity ('Divinity')

Website: Not available

Policy: Divinity, 'Conduct and Misconduct Policy', *Policies and Procedures* (Web Page, 9 October 2019) <<https://divinity.edu.au/wp-content/uploads/2019/12/Conduct-and-Misconduct-Policy.pdf>>.

- University of Melbourne ('Melbourne')

Website: Melbourne, 'Sexual Offences', *Safer Community Program* (Web Page) <<https://safercommunity.unimelb.edu.au/sexual-offences>>.

Policy: Melbourne, 'Appropriate Workplace Behaviour Policy', *Melbourne Policy Library* (Web Page, 8 November 2019) <<https://policy.unimelb.edu.au/MPF1328>>.

- Victoria University ('Victoria')

Website: Victoria, 'Sexual Assault & Harassment', *About VU* (Web Page, 2020) <<https://www.vu.edu.au/about-vu/facilities-services/safer-community/concerning-threatening-or-inappropriate-behaviour/sexual-assault-harassment>>.

Policy: Victoria, 'Sexual Assault Response Policy', *Victoria University Policy Library* (Web Page, 4 April 2019) <<https://policy.vu.edu.au/document/view.php?id=413>>.

WESTERN AUSTRALIA

- Curtin University ('Curtin')

Website: Curtin, 'Respectful Relationships', *Personal Support* (Web Page) <<https://students.curtin.edu.au/personal-support/respectful-relationships/>>.

Policy: Curtin, 'Sexual Assault and Sexual Harassment Prevention Policy', *Policies* (Web Page, 17 September 2019) <https://policies.curtin.edu.au/local/docs/policy/Sexual_Assault_and_Sexual_Harassment_Prevention_Policy.pdf>.

- Edith Cowan University ('Edith Cowan')

Website: Edith Cowan, 'Sexual Assault', *Safety and Wellbeing* (Web Page) <<https://www.ecu.edu.au/about-ecu/commitment-to-equality-and-diversity/equity-diversity-and-inclusion/safety-and-wellbeing/be-a-better-human/sexual-assault>>.

Policy: Edith Cowan, 'Prevention of Harassment, Bullying, Discrimination and Violence', *Legislation and Policy Search* (Web Page, 17 July 2017) <<http://policysearch.ecu.edu.au/WebDrawer.PolicySearch/Record/641/file/document>>.

- Murdoch University ('Murdoch')

Website: Murdoch, 'Respect. Now. Always.', *Counselling* (Web Page) <<https://www.murdoch.edu.au/counselling/respect-now-always>>.

Policy: Not available.

- University of Notre Dame Australia ('Notre Dame')

Website: Notre Dame, 'Sexual Assault, Sexual Harassment, and Family & Domestic Violence', *Wellbeing and Support* (Web Page, 2020) <<https://www.notredame.edu.au/community/student-wellbeing-and-support/sexual-assault-and-harassment>>.

Policy: Notre Dame, 'Policy: Sexual Assault and Sexual Harassment', *Wellbeing and Support* (Web Page, 14 October 2019) <https://www.notredame.edu.au/__data/assets/pdf_file/0009/2151/POLICY-Sexual-Assault-and-Sexual-Harassment.pdf>.

- University of Western Australia ('Western Australia')

Website: Western Australia, 'Support for Sexual Harassment and Assault', *Students* (Web Page) <<https://www.uwa.edu.au/students/need-help/sexual-harassment-and-assault>>.

Policy: Western Australia, 'Sexual Misconduct Policy', *UWA Policy Library* (Web Page 31 July 2019) <<https://www.uwa.edu.au/policy/home?query=sexual+misconduct+policy#Code>>.

Appendix II: Data Table¹²⁸

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>ACT</u>	ANU	Website	Yes	no fraud	No	all types of fraud		Yes
		Policy	Yes	no fraud [^]	No	all types of fraud		
	Canberra	Website	Yes	no fraud	No	all types of fraud		Yes
		Policy	No					
<u>NSW</u>	ACU	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	fraud (all) [^]	No		non-medical purposes; considerations	
	Charles Sturt	Website	Yes	fraud (all) [^]	No		non-medical purposes; considerations	
		Policy	No					

¹²⁸ Key: “*” = minor legal inaccuracies; “^” = presence of ‘Sexual assault occurs when a person is forced, coerced or tricked into sexual acts against their will or without their consent’ or similarly worded provision; N/A = not applicable.

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>NSW</u> (cont.)	Macquarie	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	fraud (all)	No		non-medical purposes; considerations	
	Southern Cross	Website	Yes	no definition	N/A			
		Policy	Yes	no definition	N/A			
	New England	Website	Yes	fraud (all)	No		non-medical purposes; considerations	
		Policy	Yes	no definition	N/A			
	UNSW	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	fraud (qualified)	No	medical purpose; marital status		Yes
	Newcastle	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes

		Policy	Yes	no definition	N/A			
	Sydney	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	fraud (all)	No		non-medical purposes; considerations	
	UTS	Website	Yes	no definition	N/A			
		Policy	Yes	no definition	N/A			
	Western Sydney	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	no fraud	No	medical purpose; identity; marital status		Yes
	Wollongong	Website	Yes	no fraud ^	No	medical purpose; identity; marital status		
		Policy	Yes	no fraud	No	medical purpose; identity; marital status		Yes

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>NT</u>	Charles Darwin	Website	Yes	no fraud	No	nature; purpose; identity		Yes
		Policy	Yes	no definition	N/A			
<u>Qld</u>	Bond	Website	Yes	no definition	N/A			
		Policy	Yes	fraud (qualified)	No*		identity (non-sexual partner)	Yes (Procure)
	CQ	Website	Yes	fraud (qualified)	No	nature; purpose		Yes
		Policy	Yes	no definition	N/A			
	Griffith	Website	Yes	fraud (qualified)	No	non-authority	identity (non-sexual partner); considerations	Yes (Procure)
		Policy	Yes	fraud (qualified)	No	nature; purpose		Yes
	James Cook	Website	Yes	fraud (qualified)	Yes			Yes (Procure)
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)

	QUT	Website	No					
		Policy	Yes	fraud (qualified)	No*		identity (non-sexual partner)	Yes (Procure)
	Queensland	Website	Yes	no fraud	No	nature; purpose; identity (sexual partner)		Yes
		Policy	Yes	fraud (qualified)	No*		identity (non-sexual partner)	Yes (Procure)
	Southern Queensland	Website	Yes	no fraud	No	nature; purpose; identity (sexual partner)		Yes
		Policy	Yes	no definition	N/A			
	Sunshine Coast	Website	Yes	fraud (all)	No		identity (non-sexual partner); considerations	Yes (Procure)
		Policy	Yes	no definition	N/A			
<u>SA</u>	Carnegie Mellon	Website	Yes	no definition	N/A			
		Policy	Yes	no fraud	No	nature; medical purpose; identity		Yes

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>SA</u> (cont.)	Flinders	Website	Yes	fraud (qualified)	No*	medical purpose		Yes (Procure)
		Policy	Yes	fraud (qualified)	No*	medical purpose		Yes (Procure)
	Torrens	Website	No					
		Policy	Yes	fraud (all)^	No		non-medical purpose; considerations	
	Adelaide	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)
	South Australia	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)
<u>Tas</u>	Tasmania	Website	Yes	fraud (all)	Yes			
		Policy	Yes	fraud (all)	Yes			

<u>Vic</u>	Deakin	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)
	Federation	Website	Yes	fraud (qualified)	No	nature; medical purpose		Yes
		Policy	Yes	no definition	N/A			
	La Trobe	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	no fraud	No	nature; medical purpose; identity		Yes
	Monash	Website	Yes	fraud (all)	No		non-medical purpose; considerations	
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)
	RMIT	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	no definition	N/A			
	Swinburne	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	No					

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>Vic</u> (cont.)	Divinity	Website	No					
		Policy	Yes	no definition	N/A			
	Melbourne	Website	Yes	fraud (qualified)	Yes			Yes (Procure)
		Policy	Yes	fraud (all)^	No		non-medical purpose; considerations	
	Victoria	Website	Yes	fraud (all)	No		non-medical purpose; considerations	
		Policy	Yes	fraud (all)	No		non-medical purpose; considerations	
<u>WA</u>	Curtin	Website	Yes	no fraud ^	No	all types of fraud		
		Policy	Yes	fraud (all)	Yes			
	Edith Cowan	Website	Yes	no fraud	No	all types of fraud		Yes
		Policy	Yes	no definition	N/A			

	Murdoch	Website	Yes	no fraud ^	No	all types of fraud		
		Policy	No					
	Notre Dame	Website	Yes	fraud (qualified)	No	Non-position-of-trust		Yes
		Policy	Yes	fraud (qualified)	No	Non-position-of-trust		Yes
	Western Australia	Website	Yes	no definition	N/A			
		Policy	Yes	no fraud	No	all types of fraud		Yes

