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Sexual Harassment and Disciplinary Procedures: Never the Twain Shall Meet

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ABSTRACT: Notwithstanding extensive theoretical discourse on sexual harassment and how and why it occurs, sexual harassment abounds. In contrast, accountability is rare. Impunity continues notwithstanding the impact of hashtag movements against sexual harassment. This article discusses the reasons why sexual harassment continues to be so rarely addressed in the workplace, despite the unprecedented universal openness and anger about sexual harassment, *and* about the impunity that follows.

At the core of this impunity is a profound dissonance between the harm of sexual harassment, on the one hand, and traditional workplace disciplinary procedures, on the other. The procedural deficiencies have been identified and critiqued by theorists for decades. For the first time, however, details of these deficiencies are mainstream. They have come to the attention of the public consciousness through the mass coverage of the poignant, at times, devastating, stories of sexual harassment.

While these movements have turned organisations' attention to the fact that they need to take sexual harassment seriously, there has been a dearth of real and effective reimagining of the disciplinary procedures themselves. The status quo, therefore, is that we know there is a staggering level of harm caused as a result of sexual harassment; we know that workplace disciplinary procedures tend to fail persons who experience sexual harassment; but we have almost no attempt to modify and reconceptualise the structures of disciplinary procedures. It is the paucity of recommendations for technical adjustments to the disciplinary procedures which is the focus of this article.

KEYWORDS: discrimination, gender, hashtag movements, violence

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1 SEXUAL HARASSMENT AND PROCEDURAL DEFICIENCIES

A Sexual harassment and the hashtag movements

Since the 1970s, a litany of thoughts, articles and theories regarding sexual harassment in the workplace have emerged.[1] This literature has covered the definitions of sexual harassment; the social and economic structures that allow sexual harassment to proliferate in the workplace; and the misalignment between workplace disciplinary procedures, and the harm of sexual harassment. This volume of commentary notwithstanding, sexual harassment abounds and, importantly for this analysis, accountability is still rare.[2]

Impunity continues notwithstanding the impact of hashtag movements against sexual harassment. These movements include, for example, #MeToo; #RUReferenceList; #EndRapeCulture; and #AmINext.[3] In this article, I discuss the reasons why sexual harassment continues to be so rarely addressed in the workplace, despite the unprecedented universal openness and anger about sexual harassment, *and* about the impunity that follows.

At the core of this impunity is a profound dissonance between the harm of sexual harassment, on the one hand, and traditional workplace disciplinary procedures, on the other. The procedural deficiencies have been identified and critiqued by theorists for decades.[4] For the first time, however, details of these deficiencies are mainstream. They have come to the attention of the public consciousness through the mass coverage of the poignant, at times, devastating, stories of sexual harassment.

While these movements have turned the attention of organisations to the fact that they need to take sexual harassment seriously, there has been a dearth of a real and effective re-imagining of the disciplinary procedures themselves.[5] The status quo, therefore, is that we know there is a staggering level of harm caused as a result of sexual harassment; we know that workplace disciplinary procedures tend to fail persons who experience sexual harassment; but there is almost no attempt to modify and reconceptualise the structures of disciplinary procedures. It

[1] The conceptualisation of sexual harassment and its categorisation of gender discrimination is attributed to C Backhouse & L Cohen *The Secret Oppression: Sexual Harassment of Working Women* (1978); and C MacKinnon *The Sexual Harassment of Working Women* (1979). See also V Schultz 'Reconceptualizing Sexual Harassment' (1998) 107 *Yale Law Journal* 1683.

[2] For example, EC Potter 'When Women's Silence Is Reasonable: Reforming the Faragher/Ellerth Defense in the #MeToo Era' (2020) 85 *Brooklyn Law Review* 603–629. According to the ABC News-Washington Post poll, among the women who have personally experienced sexual harassment at work, 95 per cent stated that their male harassers went unpunished: G Langer 'Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story, Poll Finds' (17 October 2017) ABC News, available at https://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721. C Houseman 'A #MeToo Moment: Third Circuit Gives Hope to Victims of Workplace Sexual Harassment' (2019) 92 *Temple Law Review* 265, 283.

[3] Gouws' discussion of #EndRapeCulture in the context of the many hashtag campaigns in South Africa at the time: A Gouws '#EndRapeCulture Campaign in South Africa: Resisting Sexual Violence Through Protest and the Politics of Experience' (2018) 45 *Politikon* 1.

[4] MacKinnon (note 1 above). See also Schultz (note 1 above). V De Klerk, L Klazinga & A McNeill 'The Habitus of the Dominant: Addressing Rape and Sexual Assault at Rhodes University' (2007) 74 *Agenda: Empowering Women for Gender Equity* 115, 120. JL Grossman 'The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law' (2003) 26 *Harvard Women's Law Journal* 35. C Sheppard 'Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment' (1994–1995) 3 *Canadian Labour & Employment Law Journal* 286, 281. TM Beiner 'Using Evidence of Women's Stories in Sexual Harassment Cases' (2001) 24 *University of Arkansas at Little Rock Law Review* 117, 140.

[5] EC Tippett 'The Legal Implications of the MeToo Movement' (2018) 103 *Minnesota Law Review* 229.

is the paucity of recommendations for technical adjustments to the disciplinary procedures on which I focus in this article.

I use the stories and theories that emanate from the #movements to demonstrate how the current workplace disciplinary procedures in South Africa dissolve as soon as they touch the reality of sexual harassment cases; and how these procedures might be readjusted. The subtle, insidious and private nature of workplace sexual harassment means that the procedural mechanisms designed to address it bypass the harm completely. The law and the harm operate on two different sides of a proverbial highway. The occurrence of sexual harassment moves in one direction, while the legal and disciplinary processes move in the other.

The inability of the current structures of law and procedure to prevent and punish this harm requires feminist-based adjustments to disciplinary procedures. Such adjustments, I argue, are consistent with the principles of procedural fairness and do not catastrophise the structures of due process and fair adjudication.

B Language

Before proceeding with my arguments, it is necessary to explain the language I use. I do so, not only for effective and considered communication but also, because the language is a 'definer of reality'.[6] The language we use to describe acts of sexual harassment, the people against whom they are perpetrated, the people who perpetrate the acts, and where the acts occur, will have an impact on how organisations can discipline perpetrators effectively.

1 *The workplace*

I refer throughout this article to the 'workplace'. By 'workplace' I mean the institutions or organisations in which people work. I include in this concept universities. While students, of course, are not working for remuneration, they are in a workplace system, in which sexual harassment occurs at a staggering rate and in which the disciplinary procedures mirror those in typical business organisations. I also include non-profit organisations in this concept. While non-profits do not operate to make a profit, they still carry on a business and the same harm and procedural deficiencies arise.

2 *Male/Female*

I resort to the male/female binary in analysing sexual harassment (the person who experiences it is female; the perpetrator is male). It is simplistic and elides the many other ways in which people are othered and excluded from the workplace. This binary itself is exclusionary and does not engage harassment between people of the same sex and harassment against LGBTI+ persons. My analysis is narrow because the full engagement with the multiplicity of ways in which people are excluded from and violated in the workplace exceeds the ambit of this article. It is hoped that some of the points I make in this article, and recommendations regarding workplace sexual harassment procedures, will be applicable, albeit only in part, to the experience of sexual harassment by persons who do not identify according to this binary.

[6] L Kelly, S Burton & L Regan 'Beyond Victim or Survivor: Sexual Violence, Identity and Feminist Theory and Practice' in L Adkins & V Merchant (eds) *Sexualizing the Social. Explorations in Sociology* (1996) 77. See also D Cameron *Feminism and Linguistic Theory* (1985).

3 *The person*

There is a perennial difficulty regarding the language we use to label the person who experiences sexual harassment. The dominant terms are 'victim', 'survivor' or 'complainant'.

The 'victim'/'survivor' dichotomy has raised contestation that far exceeds the ambit of any simple analysis. For my argument, which focuses on procedural responses to sexual harassment, the terms 'victim' and 'survivor' are both equally deficient, and both have an impact on the way a person is perceived.[7] 'Victim' is a label that some argue imports a perception of weakness and brokenness about the person who experiences sexual harassment.

'Survivor' elides the emotional and physical progression and regression that often characterises women's experience following the act(s) of sexual harassment.[8] The experience is not necessarily linear, moving from victim to survivor. This understanding is essential for developing effective workplace procedures. The harm is not a singular moment but a continuum. Sexual harassment can 'induce an ongoing environment of fear and control'.[9] 'Survivor' also imputes a notion of strength. From a social science and feminist theory point of view, the invocation of the power of a person who has experienced sexual harassment is important. However, from the point of view disciplinary procedures and policies, the workplace response to sexual harassment must cater for women who are able to denounce the perpetrator *and* for women who are unable, for a host of reasons, to challenge the behaviour.[10] It is important, therefore, that the connotation of strength and recovery be imported into the sexual harassment procedures.

The term 'complainant' is also improper.[11] Some women who experience sexual harassment do not complain, formally or informally. Moreover, as will become clear below, I argue that there should be a distinction between the person who experiences the harassment and the person who brings the complaint. The person who experiences the sexual harassment may be the complainant; but the complainant is not always necessarily the person who experienced the sexual harassment.

The truth is that the terms we use are superimposed on people who experience sexual harassment and deprive that person of choosing identifying language that emanates from her experience.[12] Talking about a victim or harassed woman imposes subconscious associations that may impact the efficacy of workplace responses to sexual harassment. In light of this, I refer to the person who experiences sexual harassment as 'the person'. The person who perpetrates harassment is the 'perpetrator' or 'harasser'.

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7 M Papendick & G Bohner '"Passive Victim — Strong Survivor"? Perceived Meaning of Labels Applied to Women Who Were Raped' (2017) 12 *PLOS ONE* 5.

8 J Jordan 'From Victim to Survivor — and From Survivor to Victim: Reconceptualising the Survivor Journey' (2013) 5 *Sexual Abuse in Australia and New Zealand* 48.

9 B Meyersfeld *Domestic Violence and International Law* (2010) 118.

10 These reasons will be discussed below.

11 The term 'complainant' is used in the report by the Sexual Violence Task Team at Rhodes University: Sexual Violence Task Team *"We Will not be Silenced": A Three–Pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University* University Currently Known as Rhodes (UCKAR) Critical Studies in Sexualities and Reproduction (2016).

12 T Spry 'In the Absence of Word and Body: Hegemonic Implications of "Victim" and "Survivor" in Women's Narratives of Sexual Violence' (1995) 18 *Women and Language*.

II THE IMPORTANCE OF ADJUSTING DISCIPLINARY PROCEDURES FOR SEXUAL HARASSMENT

A Two realities

There are two realities which stand in stark contradistinction to one another. The first reality is that *all* women run the risk of experiencing sexual harassment in the workplace and, depending on which set of statistics you choose, a third to a half of women in the workplace experience sexual harassment.[13] On the other hand, men are rarely held to account for acts of sexual harassment.[14] In other words, the extent of accountability is radically disproportionate to the extent of the harm.

Of course, there is no shortage of legal standards regarding sexual harassment. Section 6(1) of the Employment Equity Act 5 of 1998 (the EEA) prohibits unfair discrimination on the grounds that include gender, sexual orientation and birth. Section 6(3) provides that 'Harassment of an employee is a form of unfair discrimination and is prohibited'. Incorporated in the EEA is the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (the EEA Code of Good Practice). Section 4 of the EEA Code of Good Practice provides a 'test for sexual harassment' which includes:

> 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
> 4.2 whether the sexual conduct was unwelcome;
> 4.3 the nature and extent of the sexual conduct; and
> 4.4 the impact of the sexual conduct of the employee.

There is also the 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace ('the amended code'), issued by the Minister of Labour in terms of s 54(1)(b) of the EEA.

The courts have also been clear about the seriousness of sexual harassment and its diminution of equality and dignity. In *Campbell Scientific Africa (Pty) Ltd v Simmers*,[15] Savage AJA said:

> By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this court has characterised it as 'the most heinous misconduct that plagues a workplace.[16]

[13] Statistics should always be used with caution, especially in cases of gender-based harm, which is characterised by underreporting. See: International Labour Organisation *When Work Becomes A Sexual Battleground* (2013), available at https://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_205996/lang--en/index.htm; International Labour Office *Sexual Harassment at Work Factsheet*, available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf, noting that in the European Union, 40–50% of women reported some form of sexual harassment in the workplace; A Akhtar '1 in 3 women say they've been sexually harassed at work, but they're not reporting it' (21 June 2019) *Business Insider South Africa*, available at https://www.businessinsider.com/professional-women-have-experienced-sexual-harassment-2019-6?IR=T, which maintains that one in three women in the workplace experience sexual harassment but very few women report it.

[14] Gouws (note 3 above) at 4.

[15] *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* [2015] ZALAC 51, (2016) 37 *Industrial Law Journal* (*ILJ*) 116 (LAC).

[16] Ibid at para 20. See too *Department of Labour v General Public Service Sectoral Bargaining Council & Others* [2010] ZALAC 1, (2010) 31 *ILJ* 1313 (LAC) at para 37.

In June 2019, the International Labor Organisation adopted ILO Convention Concerning the Elimination of violence and harassment in the world of work (the ILO Convention).[17] The Preamble to the ILO Convention states that violence and harassment prevents women from 'accessing, and remaining and advancing in the labour market' and that violence and harassment are 'incompatible with the promotion of sustainable enterprises and impacts negatively on the organisation of work, workplace relations, worker engagement, enterprise reputation, and productivity'.[18] The ILO Convention also contains several provisions regarding procedures that states should ensure are adopted in the workplace to address sexual harassment.

This legal imperative, coupled with the hashtag movements, have led to the adoption by most workplaces of sexual harassment policies and procedures. These processes, however, have not paid attention to whether employer interventions actually prevent or effectively punish sexual harassment.[19] Legal and procedural responses to sexual harassment develop —

> with reference to the moral blameworthiness of isolated individual perpetrators, to rely solely on existing legal categories even if they fail to resonate with women's lived experience of harassment, and to leave the larger systemic context of sexual harassment unquestioned.[20]

The truth is that the 'law sets itself above other knowledges like psychology, sociology, or common sense. It claims to have the method to establish the truth of events.'[21]

B Procedural fairness

The misalignment between the psycho-social causes and effects of sexual harassment, and currently constructed disciplinary procedures, demands reform.[22] One of the key challenges in adjusting disciplinary procedures is the imperative of procedural fairness. The right to a fair process has been one of the most common defences that perpetrators raise. This has become more pronounced in the face of the naming and shaming that comprised part of the hashtag movements. The naming and shaming methodology has led to a backlash regarding the question of due process.

While many have welcomed this cultural, legal, and structural reckoning, serious concerns have also dominated the recent public conversation. Those sceptical of #MeToo have emphasised the lack of due process in the naming and shaming campaign. In particular, sceptics emphasise the lack of a clear path and procedures by which an accused can successfully contest allegations, judgement by the public rather than by a jury or other independent decision-maker, 'the risk of false positives, and the potential for disproportionate consequences that are often framed as punishments.'[23] Due and fair process, therefore, is once again at the forefront of those who resist institutional change in disciplinary procedures.

[17] *C 190 — Violence and Harassment Convention, 2019* adopted by the General Conference of the International Labour Organisation at its 108th Centenary session, Geneva, 21 June 2019.

[18] Ibid 190.

[19] Grossman (note 4 above) at 4.

[20] Sheppard (note 4 above) at 259.

[21] C Smart *Feminism and the Power of Law* (1989) 10.

[22] Grossman (note 4 above) at 4.

[23] JK Robbennolt & C Murphy '#MeToo, Time's up, and Theories of Justice' (2019) 1 *University of Illinois Law Review* 45, 65.

C Three proposals for procedural reform

I propose that there are procedurally sound ways of attenuating the misalignment between the proliferation of sexual harassment, and the scarcity of accountability.[24] I argue that we should reimagine three concepts: the first is about who may be a complainant in sexual harassment disciplinary procedures; the second is about what constitutes evidence of sexual harassment; and the third concerns who the person is who investigates, prosecutes and adjudicates sexual harassment cases.

The complainant or witness is not necessarily the individual who experienced sexual harassment but the management who is aware of the complaints of sexual harassment. The evidence is not only the act/s of sexual harassment but also managers' and other third-party employees' knowledge of the perpetrator's predatory behaviour. All parties involved in the hearing, including the investigators, prosecutors, and adjudicators, must have specialised knowledge of gender-based violence.[25]

There are many other recommendations for structural reform of sexual harassment disciplinary procedures. These include reforming the rules of evidence; redefining consent; and establishing definitive and objective rules about interpersonal behaviour and relationships in the workplace (including, for example, a no-hugging policy). Each proposal demands an extensive analysis that exceeds the scope of this article. I therefore focus on the three recommendations mentioned above, which I believe are easily implementable. Their success, however, depends on a much wider and more multifaceted overhauling of sexual harassment disciplinary procedures. I delve into the details of these recommendations below.

III SUBSTANTIATING MY PROPOSED REFORMS WITH REFERENCE TO THE HASHTAG MOVEMENTS

One of the most informative aspects of the #movements is that they demonstrate the spectrum of harm that constitutes sexual harassment. Knowing what sexual harassment is — and what it is not — is one of the first stumbling blocks in successful disciplinary procedures. Academics, theorists and activists certainly know the various ways in which sexual harassment occurs. However, there is a staggering lack of knowledge about sexual harassment on the part of employees in the workplace and officials who are responsible for undertaking disciplinary procedures.

While organisations may have specialists to deal with, for example, fraud or theft, they seldom have experts who deal with sexual harassment.[26] Moreover, expertise is necessary: sexual harassment is often amorphous and intangible. Even the victim herself may not identify the harm she has experienced as an infraction committed by the perpetrator.[27] She may feel violated, hurt, insecure and afraid as a result of the conduct. However, she may not immediately identify the abuser's conduct itself as a violation.

This amorphousness is linked to the failure of organisations to hold perpetrators to account. The hashtag movements demonstrate how sexual harassment occurs and how the system of

[24] The importance of re-imagining sexual harassment procedures is discussed by D Tuerkheimer 'Beyond #MeToo' (2019) 94 *New York University Law Review* 1146, 1151.

[25] K Calitz 'Sexual Harassment: Why Do Victims So Often Resign: *E v Ikwezi Municipality* 2016 37 ILJ 1799 (ECG)' (2019) 22 *Potchefstroom Electronic Law Journal* 1, 3.

[26] Grossman (note 4 above) at 60.

[27] EL Dey, JS Korn & LJ Sax 'Betrayed by the Academy: The Sexual Harassment of Women College Faculty' (1996) 67 *The Journal of Higher Education* 149, 150.

accountability breaks down.[28] While these movements are different in many respects, they all have one unifying characteristic: perpetrators of sexual harassment are not punished. The movements highlight that there are men who —

> were well-known for their sexual violation of women students, but that no action was taken against them. They sat in their classes, walked the streets with them and kept on harassing them.[29]

In the following analysis, I refer to various movements and high-profile sexual harassment cases to demonstrate the ways in which disciplinary procedures break down.

A The fallacy of bringing a complaint

Sexual harassment is radically under-reported.[30] The problem with under-reporting is that the current model of sexual harassment disciplinary procedures is predicated on a person reporting sexual harassment.[31] If the person does not report, the organisation becomes paralysed. The reasons for under-reporting are extensive but at the heart of under-reporting is the fact that bringing a complaint is extraordinarily difficult.

In 2018 in the United States case of *Sheri Minarsky v Susquehanna County*,[32] an appalling tale of persistent sexual harassment emerged. Minarsky's manager would hug and kiss her, massage her shoulders, call her house, send her sexually explicit emails and ask overly personal questions. At first Minarsky ignored the behaviour and tried to protest the touching in a jocular manner. Nevertheless, the harassment continued. When she rejected his advances, he became 'nasty' and promised that she would lose her job if she reported him.[33] Minarsky later found out that the manager had harassed other women and that he had been reprimanded for a prior incident. Yet she still did not report the matter for fear of retaliation. For Minarsky, the stakes were high: she had taken the job to pay for her daughter's cancer treatment.[34] She was trapped.[35]

Many persons will resist reporting sexual harassment because they have seen how previous cases have been mishandled. In many instances, the person simply wants the harassment to

[28] The movements have also triggered important considerations of transitional justice. Robbennolt & Murphy (note 23 above). See also S Welsh, M Dawson & A Nierobisz 'Legal Factors, Extra-Legal Factors, or Changes in the Law? Using Criminal Justice Research to Understand the Resolution of Sexual Harassment Complaints' (2002) 49 *Social Problems* 605.

[29] Gouws (note 3 above) at 4.

[30] CA Mackinnon 'In Their Hands: Restoring Institutional Liability for Sexual Harassment' (2016) 125 *The Yale Law Journal* 2038, 2046: 'Many students recount similarly callous treatment by their schools, making the major trauma that marks their education not even when they are raped, but when they report being raped.' R Klein 'Sexual Violence on US College Campuses: History and Challenges' in A Sundari & L Ruth (eds) *Gender Based Violence in University Communities: Policy, Prevention and Educational Initiatives* (2018) 70. Beiner (note 4 above) at 135–139. Dey, Korn & Sax (note 27 above) at 150. LH Krieger 'Employer Liability for Sexual Harassment — Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp' (2001) 24 *University of Arkansas at Little Rock Law Review* 169, 175–176. M Gardiner 'Why Women Don't Report Sexual Harassment' (21 July 2016) *Huffington Post*, available at http://www.huffingtonpost.com/margaret-gardiner/why-women-dont-report-sex_b_11112996.html.

[31] A Lawton 'The Bad Apple Theory in Sexual Harassment Law' (2005) 13 *George Mason Law Review* 817, 847.

[32] *Sheri Minarsky v. Susquehanna County* (2018) 895 F.3d 303 (3d Cir. 2018).

[33] Houseman (note 2 above) at 278.

[34] Ibid for a discussion of the case.

[35] Fear of retaliation is discussed by Houseman, ibid at 285.

stop and does not want to incur the burden of securing a perpetrator's dismissal. Persons may believe that —

> nothing can or will be done, and many are reluctant to cause problems for the harasser. The most common reason, however, is fear-fear of retaliation, of not being believed, of hurting one's career, or of being shamed and humiliated.[36]

Where a person does lodge a complaint and pursues a formal investigation, she often emerges more violated, frightened, victimised and ostracised than she was before the process began.[37] In a US study, it was found that 'nearly half of the victims of harassment lost their jobs and an additional 25 per cent quit due to "fear and frustration".'[38]

'Justice' is achieved at the expense of the person. Two cases in which the author was involved demonstrate this. In the first case, the employee had been touched, harassed and pursued by her manager. He was extremely influential and was one of the leading specialists in his area of work in the country. He had a reputation, as a white man, of preying on, pursuing and then ostracising young black women coming into the industry. In this particular case, the person refused his overtures on many occasions. He eventually responded by excluding her from all the work in which she had been involved. Because he was the country's leading expert in this area of work, he held the keys to enable her to access a career in this work. He had clearly locked her out. When she complained about the harassment, the organisation's response was replete with deficiencies. What emerged, however, is that the perpetrator had been known to harass women for about 20 years. Most women left the organisation and the industry to pursue entirely different careers. It was hardly surprising that there were (and are) very few black women in this specialised area of work today. The organisation tried, with limited knowledge and expertise, to address the complaint. Ultimately, the perpetrator resigned. But, so did the person whom he had harassed. She maintained a career in the industry but experienced the burden of being responsible for bringing down one of the 'best' in the industry.

In the second case, a black woman was consistently harassed by her manager. She refused his advances, and her promotion was denied. She pursued a formal complaint against him. He resigned during the disciplinary process, which was never concluded. In the last five years, she has not been able to obtain work in her industry, notwithstanding a decade of experience at a senior level and a Harvard master's degree.

Let us take a step back and consider exactly what it is we are asking a person to do through a formal disciplinary procedure. Sexual harassment triggers a sense of alienation within the organisation and causes long-term damage.[39] Perpetrator behaviour that engages work colleagues about their physical appearance, or imports romantic or sexual sentiments into the workplace, confirms the structural gendered hierarchies that a female colleague is *female* before she is a *colleague*. Add to this the fact that, given the high rates of violence against women in South Africa, sexual harassment triggers a host of fears, often subliminally. Sexual harassment confirms that the dominant demographic of the workplace will not allow women an equal

[36] Beiner (note 4 above) at 139.

[37] Grossman (note 4 above) at 51–52.

[38] Beiner (note 4 above) at 140.

[39] *Media 24 Limited & Another v Sonja Grobler* (2005) 3 All SA 297 (SCA), [2005] ZASCA 64 at para 65: 'an employer owes a common law duty to its employees to take reasonable care for their safety... This duty ... must also in appropriate circumstances include a duty to protect them from psychological harm caused, for example, by sexual harassment by co-employees'.

opportunity to work. More worryingly, it confirms that she is not safe in her place of work. Why then, would she ask the very workplace that is the place and space of her fear, to help her?

This power disparity is mirrored in the typically overly-legalistic disciplinary procedures. The legalistic formality of disciplinary procedures — without understanding the imperatives that drive complainants, fear of retribution and the need for a nuanced response — begins to replicate the power of authority that led to the violation. It is easier to remain silent or resign than it is to being a complainant.[40]

B Power and control

Given the fact that men hold most senior positions in the workplace, there is a de facto asymmetry of power, where men are in positions of control over women's professional lives. This power imbalance demands a greater interrogation of the notion of choice women have when facing sexual harassment in the workplace. A person's agency to reject romantic or sexual advances may be curtailed. The process of making and executing choices regarding sexual harassment, including the ability to refuse romantic or sexual overtures, or to vocalise a sense of violation or fear, is not as neat, for example, as consenting to buy or sell a motor vehicle.

The power-control dyad squeezes the contours of true choice. This is not to say that a person is never able to decline the advances. Unless the situation involves physical strength or threats of harm, the person is technically free to decide to rebuff the advances and to lodge a complaint. However, a person's choice and control are in a compression chamber of variables that reduce the person's freedom to reject the advancements and to seek accountability.

The 'power-control' factor means that a person's 'choice' is fettered by the potential of the harasser to exercise his control to the detriment of the person he harasses. Depending on one's circumstances, this may be a factor that obviates choice entirely.

The power-control factor creates an exhausting environment for women who must tap-dance around an array of impossible situations. Reporting this harm is rarely an option. This is so for many reasons: the occurrence of the harm is ethereal and cannot always be linked to a specific moment; if challenged about the exclusion, harassers typically justify their conduct on the basis that the target's work was unsatisfactory; and the very seniority of the harasser usually means that it is most unlikely that the structures of governance (to the extent that such exist) will expel him from the workplace.

C Rape culture

The notion of rape culture is at the heart of sexual harassment impunity. While not all sexual harassment comprises rape, rape culture leads to a normalisation of all sexual violence. It entails the blaming of victims for their harassment and the acquiescence to biases and assumptions of gendered roles that justify violence and discrimination. The result is an entrenched failure to support persons and protect them from sexual harassment.[41]

[40] Calitz (note 25 above).

[41] For a discussion of the meaning of rape culture, see R Bashonga & Z Khuzwayo '"This Thing of the Victim Has to Prove That the Perp Intended To Assault Is Kak!": Social Media Responses to Sexual Violence on South African University Campuses' (2017) 31 *Agenda* 35, 36. For a discussion of the poster campaign and how the protests unfolded, see P Pilane '#RUReferenceList: A Violent Response to a Violent Act' (21 Apr 2016) *Mail & Guardian*, available at https://mg.co.za/article/2016-04-21-rhodes-rapes-a-violent-response-to-a-violent-act/.

The impact of rape culture was highlighted in the 2016 protests at Rhodes University by the student-led Chapter212 campaign to publicise and challenge the University's complicity in rape culture.[42] The #Chapter212 campaign shone a spotlight on the University's failure to address sexual harassment. It maintained that the University management was responsible for perpetuating rape culture at Rhodes by using improper definitions of gender-based violence that did not capture the full array of harm that women experience; that the policies were slanted in favour of the accused; and that the University adopted an approach of victim-shaming and defending the accused.[43]

At the heart of the movement was not only the fact that there was a normalisation of rape on the campus but also that the University as an institution was delinquent in facilitating processes that could successfully lead to the proper punishment of perpetrators. The result was that students and staff who had been raped, attacked, hurt and harassed, were vilified and silenced. On the other hand, students and staff who had raped, attacked, hurt and harassed persons, were protected.

Poignantly, this was not the first time that Rhodes students had tried to bring attention to the twinned phenomena of prolific rape, on the one hand, and general impunity, on the other.[44] For example, in 1999 the Student Advisor and Assistant Dean of Students at Rhodes stated that '[q]uite frankly, women are often at fault, because sometimes when they say no, they mean yes.'[45] A year later, a first-year Rhodes student was gang-raped. The student took all the steps with regards to the criminal justice system, including obtaining a doctor's report and a police report, all of which confirmed that she had been raped. While the University was initially sympathetic, it never took a statement from her or asked her to submit a report. As time passed, the student experienced hostility from the University staff and, eventually, staff questioned whether in fact, the rape had actually taken place.[46] The University's website allegedly described first-year women students as 'seals' that are ripe for 'clubbing' (a euphemism for older male students aggressively pursuing sexual contact with younger women).[47] The University's messaging regarding alcohol abuse also led to victim-blaming.[48] The implicit messaging was that, had the victim been sober, she would not have been raped.[49] It also exculpates the University structures for failing to ensure that the University campus is safe for women.[50] This messaging shifts the blame onto the victim, away from the perpetrators and away from the University.

Students were discouraged from reporting rape as prosecuting such cases would not be 'worthwhile … as their evidence is insufficient.'[51] Survivors of sexual assault, as opposed

[42] 'Chapter 2.12' refers to the section of the Constitution that guarantees every person the right to safety and security.

[43] Pilane (note 41 above).

[44] The wheels of change turn slowly — if at all — the world over. See MJ Anderson 'Campus Sexual Assault Adjudication and Resistance to Reform' (2016) 125 *The Yale Law Journal* 1940.

[45] De Klerk, Klazinga & McNeill (note 4 above) at 120.

[46] Ibid.

[47] Founding Affidavit of Dominique McFall in *Dominique McFall v Rhodes University, Sizwe Mabizela NO & Wayne Hutchinson NO* (date unknown. It is not clear whether this application has progressed), available at https://www.seri-sa.org/images/McFall_Founding_Affidavit_final.pdf.

[48] The notion of victim-blaming and its consequences are explored admirably in M Nissim-Sabat *Neither Victim nor Survivor: Thinking Toward a New Humanity: Thinking Towards a New Humanity* (2009).

[49] De Klerk, Klazinga & McNeill (note 4 above) at 122.

[50] Ibid.

[51] C Haith 'Violence, Nakedness and the Discourse of #RUReferenceList' (26 April 2016) *The Journalist*, available at http://www.thejournalist.org.za/spotlight/violence-nakedness-and-the-discourse-of-rureferencelist.

to rape, felt that their cases were not treated seriously 'because (they) did not fit the typical narrative of rape'.[52] There was clearly a staggering lack of knowledge about sexual violence and how it manifests, leading to silencing and excision of victims and their experiences. This is evident in the following example of a student who reported sexual assault:

> She was told that the burden of proof was on her, and because she did not contact the police within 24 hours, it was going to be a problem to prove sexual assault. Management instead suggested a roundtable discussion with her perpetrator (Anonymous, 2017).[53]

The policy itself was also problematic.[54] Journalist Pontsho Pilane explains how the sexual harassment policy would almost always result in a finding of not-guilty:

> The Rhodes University sexual offences policy defines rape as an 'unlawful and intentional act of sexual penetration with another person without that person's consent.' At first glance, this definition seems legitimate. But how do those who have been violated prove this intent? 'How is a victim supposed to know that their (*sic*) rapist intends on raping them when the rapists themselves do not acknowledge their act is rape?' … Because the victim has to prove intent, the onus is on them to make sure that the violation did happen. The victim has to relive the rape for it to be believed. They must concern themselves with the details of times, dates, location and how they found themselves in the situation to begin with.[55]

The combination of an impossible policy and an estranged administration led to the protesters' plea:

> We just want to be able to walk home safely. We just want to be able to have relationships secure in the knowledge that our partners won't rape us. We should not have to avoid university tutorials because the tutor is a known rapist. We should not be afraid to go to lectures because rapists will be there. We just want safety and security of person, as Chapter 2, Section 12 of the Constitution guarantees us.[56]

The messaging of victim-blaming, shaming and silencing, therefore, is historic at Rhodes; and it was this in particular that caused the anger on campus.[57]

In April 2016, members of the Chapter212 movement began a poster campaign highlighting the extent of rape culture at Rhodes.[58] The posters depicted University responses to the issue of sexual violence and included the following indictments:

> 'Girls need to learn how to be firmer when they say no';
> 'You're a foreigner ruining a South African's life';
> Victim: 'I would like to report an assault'. RU Management: 'Sorry, the person who handles that isn't here, would you like to come back next week?'
> 'Are you sure you want to go through with this? You'll ruin his reputation.'
> 'Girls shouldn't get drunk or else they will be raped.' — RU Management[59]

[52] P Pilane 'Campus rape plans favour perpetrators' (28 April 2016) *Mail and Guardian,* available at https://mg.co.za/article/2016-04-28-campus-rape-plans-favour-perpetrators/.

[53] Bashonga & Khuzwayo (note 41 above) at 40.

[54] Ibid.

[55] Pilane (note 41 above).

[56] Haith (note 51 above).

[57] *Ferguson & Others v Rhodes University* [2017] ZACC 39; 2018 (1) BCLR 1 (CC) at para 4.

[58] 'Chapter 2.12' refers to the section of the Constitution that guarantees every person the right to safety and security.

[59] K Kiunguyu 'Rhodes University Loses Miss Varsity Shield 2017, Khensani Maseko To Suicide' (14 August 2018) *This is Africa*, available at https://thisisafrica.me/politics-and-society/rape-culture-rhodes-maseko-suicide/; A Klein 'Anti-Rape Protests Shut Down Rhodes University In Grahamstown, South Africa' (20 April 2016) *Okayafrica*, available at https://www.okayafrica.com/rhodes-university-rureference-list-anti-rape-protests/.

The University took down the posters, reaffirming the silencing of discussions about gender-based violence. The next day they were re-posted.[60] The silencing of the protesters — who were protesting the silencing of persons who experience sexual violence — led to an escalation of tensions and frustrations.

A few days after the poster campaign, the 'RU Reference List' was published anonymously on Facebook.[61] The list contained the names of 11 men. It is important to pause here for a moment to reflect on the way the list was described in the media. It was said that Rhodes students had released a list of 11 men, accusing them of having committed rape. This is, in fact, incorrect. The list certainly named 11 men, but *that was all* it did. It said nothing about sexual violence; no allegations were made. The list was a list of names. When it went viral, however, people connected the dots between the men; all had been accused of, or were known to have committed, rape.[62] The fact that the list did not link the names to allegations of anything, let alone sexual violence, is not the way the narrative has been framed. Rather, the list has become emblematic of the debate about naming and shaming, and accusing people who may be innocent. The authors of the list knew that they did not need to make any allegations precisely because everyone knew about the allegations. This in and of itself confirmed that the University had endorsed rape culture: everyone knew what these men had been accused of doing; nothing had been done about it. But the list itself made no accusations.

The publication of the list and the realisation that it was a list of men accused of rape, led to organised student action. The students entered men's residences to round up the accused to take them to the police station. This continued over a period of several days and nights. Some male students were apparently 'seized by the crowd, assaulted, threatened and humiliated.'[63] In particular, two male students were allegedly held against their will overnight and subjected to assault and abuse.

The University's response was multifaceted and included bringing police onto campus. The University's rationale was that, while it defended the right to protest, it categorically would not tolerate violence and intimidation. This position is not, in itself, contentious. However, it stands as evidence of the University's contradictory approach to violations of its policies that so saddened and angered the protestors. They and hundreds of women before them had experienced violence and intimidation and the University had tolerated it; accepted it and refused, through a combination of sexist attitudes, inertia, ineptitude and reputational protection, to take action. Yet, when men were allegedly attacked or called out for their violence, the University's response was immediate, decisive and effective. The protests were shut down, and the protest leaders punished. There really could be no sadder confirmation of the message of despair and anger that the protestors were trying to impart.

The prioritisation of the accused's interests over those of the victims was re-enacted by the University when commenting on the release of the list:

[60] M Wazar 'Chapter 2.12: The Campaign against Rape Culture (13 April 2016), available at https://www.ru.ac.za/studentlife/latestnews/chapter212thecampaignagainstrapeculture.html.

[61] Gouws (note 3 above) at 4. Pilane (note 41 above).

[62] D Seddon 'We Will Not Be Silenced': Rape Culture, #RUReferencelist, and the University Currently Known as Rhodes' (1 June 2016) *Daily Maverick*, available at https://www.dailymaverick.co.za/opinionista/2016-06-01-we-will-not-be-silenced-rape-culture-rureferencelist-and-the-university-currently-known-as-rhodes/#gsc.tab=0. Gouws (note 3 above) at 4.

[63] *Rhodes University v Student Representative Council of Rhodes University & Others* [2016] ZAECGHC 141; [2017] 1 All SA 617 (ECG).

> The release of this list was labelled by the Rhodes University Vice Chancellor as 'a violation of their [the alleged offenders] rights' (Johnston, 2016:7). This statement, although legally sound, forms part of the basis of why students perceive management as favouring the rights of offenders over those of victims.[64]

The University also obtained an interdict against, inter alia, three protestors who were alleged to have participated in the abduction.[65] The interdict prohibited the students from engaging in the type of protest action in which they had been involved. The focus of the judgment was on the veracity of the claims made by the University, i.e. did the protestors abduct the men and lead the disruption that characterised the movement. Very little was mentioned about the issue of rape and the fact that the protestors had been silenced for so long, and had tried so many avenues to gain the attention of the administration, that they felt they were left with no option.

The court rejected the notion that the student protests and conduct were proportionate to the pain and suffering they had experienced because of rape impunity. It granted the interdict and the students were silenced. The court repeated the very silencing of victims that had led to the protests.

The matter did not end there. Students Yolanda Dyantyi and Dominique McFall were charged and found guilty by the University of kidnapping and insubordination. Yolanda Dyantyi was also found guilty of assault and engaging in offensive/defamatory conduct. The two were excluded from the university for life.[66] As regards Yolanda Dyantyi, no credits from any other university would count towards any qualification issued by the University. Her university transcripts would be endorsed to read 'Conduct Unsatisfactory — Student permanently excluded for: Kidnapping; Assault; Insubordination; Defamation'. She had to vacate the premises by close of business on the date of the order and was not allowed to attend the campus for the duration of the exclusion, i.e., for life. The students were precluded from writing any outstanding examinations.[67] It remains unclear whether or not the excluded students were involved in the 'abduction'; both denied it, and it has never been proven. The result is that 'McFall and Dyantyi, both final year students at Rhodes this year, will never be able to graduate with the degrees that they have been studying toward at the University.'[68]

Contrast this to rape cases in which the accused students were found guilty. In one instance, the perpetrator was excluded for five years, in another, for one year. In 2007, a student found guilty of rape was supposed to be sentenced to permanent exclusion but 'the Proctor felt that students should be given every opportunity to reform, and excluded him from Rhodes for five years, as well as ordering him to pay all medical costs. He was given 24 hours to leave.'[69] In May

[64] Bashonga & Khuzwayo (note 41 above) at 38.

[65] *Rhodes University v Student Representative Council* (note 63 above) at para 1. For an analysis of the case from the point of view of the criminalisation of the right to protest, see SA Karim & C Kruye 'Rhodes University v Student Representative Council of Rhodes University The constitutionality of Interdicting Non-Violent Disruptive Protest' (2017) 62 *SA Crime Quarterly*.

[66] *Rhodes University v Student Representative Council* (note 63 above).

[67] *Dyanti v Rhodes University & Others* [2020] ZAECGHC 34 at para 4.

[68] M Solomon 'Why Rhodes' Heavy Handed Action Against Student Activists Is Misplaced' (16 December 2017) *City Press*, available at https://www.news24.com/citypress/voices/why-rhodes-heavy-handed-action-against-student-activists-is-misplaced-20171216.

[69] De Klerk, Klazinga & McNeill (note 4 above) at 123.

2016, following the initiation of the protests, a student found guilty of rape by the University was excluded for ten years.[70]

The reality is that there is a significant difference between the punishments meted out. Those who rape receive far lower sentences than those who have tried to address impunity for rape. This imbalance in sentencing confirms the very reason why the protests began in the first place. As soon as women exercised force to challenge their rapists and the absent university management, they met a punishment of the most extreme nature. The rapists did not. The messaging is clear: raping a woman is less serious than holding an alleged rapist overnight.

At the end of 2016, a University-established Sexual Violence Task Team released a report proffering a range of recommendations to deal with the past systemic violations and to prevent future harm.[71] Some of these recommendations were adopted; others were not.

Two years later, however, it appeared that little had changed. In August 2018, Khensani Maseko, a student at Rhodes committed suicide after reporting to the University at the end of July that a fellow student had raped her in May.[72] The alleged perpetrator was suspended three days *after* Khensani died.[73] No information is available about the status of the case.

The tragedy of the story of Rhodes is as disempowering as it is infuriating. It reveals starkly how institutional conservatism, lack of courage and lack of empathy have neutered the processes designed to achieve accountability for sexual harassment.

D Fear of identification

Another reason why disciplinary procedures fail persons who experience sexual harassment is that the processes themselves are traumatic. Many targets of sexual harassment do not make formal complaints because they do not want their identity revealed. A recent study of sexual harassment in medical schools in the United States identifies some of these reasons:

> Barriers to reporting sexual harassment include a fear of not being believed, embarrassment if peers learn of the harassment, a lack of trust in those who are in positions of authority, and a belief that these behaviours are a necessary part of becoming a physician. A recent report described female physicians who had been harassed and remained silent because they questioned their self-worth after their experiences and wondered whether they brought it on themselves. They also feared being labelled as troublemakers.[74]

If one appreciates the fact that sexual harassment almost always occurs against the backdrop of asymmetrical power relations, it is clear that a potential complainant may fear the backlash of the organisational structure as a whole. She may be fearful — and correctly so — that she will be vilified and demonised in her workplace. There is every likelihood that she will become a pariah and identified as a troublemaker.

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[70] R Pather & S Smit '#RhodesWar Students' Battle Revealed In Internal Disciplinary Documents' (14 December 2017) *Mail & Guardian*, available at https://mg.co.za/article/2017-12-14-rhodeswar-students-battle-revealed-in-internal-disciplinary-documents/.

[71] Rhodes Sexual Violence Task Team (note 11above).

[72] A Carlisle 'Rhodes University Knew of Khensani Maseko's Rape' (7 August 2018) *Times Live*, available at https://www.timeslive.co.za/news/south-africa/2018-08-07-rhodes-university-knew-of-khensani-masekos-rape/.

[73] T John 'Remembering Khensani Maseko Who Fought South African Campus Rape' (9 August 2018) *BBC News*, available at https://www.bbc.com/news/world-africa-45115344.

[74] R Binder; P Garcia; B Johnson; E Fuentes-Afflick 'Sexual Harassment in Medical Schools: The Challenge of Covert Retaliation as a Barrier to Reporting' (2018) 93 *Academic Medicine* 1770, 1772.

While the hashtag movements have created power in the public narrative, they have not protected persons from retaliation. While 'those who speak up are much safer today than they were before the movements took hold in situations where a decision-maker harbours retaliatory animus,'[75] there remains the fear that, if the complaint is unsuccessful, the harassment will intensify.

The Constitutional Court recognised this in the case of *Levenstein & Others v Estate of the Late Sidney Lewis Frankel & Others*.[76] In this case, the eight applicants were men and women who alleged that they were sexually assaulted by Mr Frankel between 1970 and 1989, when they were between the ages of 6 and 15. Between June 2012 and June 2015 when the applicants fully appreciated the gravity of the criminal acts committed by Mr Frankel they opened a criminal case and instituted a civil claim against Frankel, who was alive at the time. The Director of Public Prosecutions declined to prosecute on the grounds that the crimes Mr Frankel was accused of having committed more than 20 years earlier had prescribed in terms of s 18 of the Criminal Procedure Act 51 of 1977 (the CPA) . In August 2016, the applicants approached the High Court for an order declaring s 18 of the CPA to be invalid. The High Court granted the order. Mr Frankel died in April 2017. Some six months later the matter came before the Constitutional Court for confirmation of the High Court's declaratory order. Inter alia, the Court addressed the reasons why some complainants of rape may wait many years to report their abusers:

> Of pivotal importance to the case before us is this: that the systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator, as the applicants alleged Mr Frankel to have been, is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones — let alone state officials. Combined with this is the frequent impact of deeply-located self-blame, which … disables the victim from appreciating that a crime has been committed against her for which the perpetrator, and not she, is responsible.[77]

For these reasons, it is necessary to consider the need for anonymous complaints. Anonymous complaints compromise one of the basic principles of natural justice, namely the right to face one's accuser. The question then is how to address the need for anonymity without diluting the value of this principle.

The problem of anonymity was at the heart of the investigation into one of the leaders of social justice organisation, Equal Education.[78] The co-founder of the movement faced several accusations of sexual harassment. These accusations were made public by an anonymous report in a national newspaper, resulting in the establishment of a commission of inquiry to investigate the allegations.

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[75] R Mizrahi 'Sexual Harassment Law after #MeToo: Looking to California as a Model' (2018–2019) 128 *Yale Law Journal Forum* 121, 138.

[76] *Levenstein & Others v Estate of the Late Sidney Lewis Frankel & Others* [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC). *L & Others v Frankel & Others* [2017] ZAGPJHC 140; 2017 (2) SACR 257 (GJ) at paras 13–15.

[77] *Levenstein v Estate Frankel* at para 56.

[78] Equal Education 'Equal Education Media Statement: Update on Doron Isaacs independent inquiry' (12 July 2018), available at https://equaleducation.org.za/2018/07/12/statement-update-on-doron-isaacs-inquiry/.

Throughout the inquiry, the complainants refused to be named. One of the reasons for the demand for anonymity was that there was a culture of impunity within the organisation and that senior members of the organisation had protected the co-founder from previous complaints.[79] The organisation, therefore, was itself a source of fear. The complainants feared that they would be removed from the organisation and, given the insular nature of the social justice world in South Africa, that they would not be able to work in the sector again.

A three-member panel was established to investigate these claims. Two of the three panellists, Judge Satchwell and Dr Langa, found that there was no evidence to confirm that the co-founder was guilty of sexual harassment or that there had been a cover-up of sexual harassment claims in the past. This was so notwithstanding the evidence of 19 anonymised complainants. One of the bases for this finding was that the complainants refused to reveal their identities to the panel. The report of the two panellists was scathing about the complainants' insistence on anonymity. It took the view that in the absence of named complainants, there was 'no evidence of sexual harassment, and no complainants came forward.'[80] This is not a representation of the truth. There was evidence of sexual harassment, and complainants did come forward. The anonymity did not mean that no-one came forward. It means that no one identified themselves. This statement wipes from existence every complainant on the basis that they did not feel safe enough to reveal their identities.

In the majority report, Satchwell spoke about the difficulty of not being able to interrogate the written versions of the complainants. This is a legitimate concern: anyone who has sat as an adjudicator knows the importance of questioning people about their complaints (and the responses thereto). I do not understate the importance of this. The report spent some time discussing the issue of anonymity. In its discussion, however, the report reproduced the vitriolic anger that complainants of sexual harassment typically face:

> But I do believe that it is necessary to express my greatest concern, serious disquiet and even disgust at persons who hide behind anonymity for themselves when making grave and reputational destroying allegations against persons whom they freely name and shame and deny the same opportunity for privacy before any investigation into the truth or otherwise of these allegations is conducted.[81]

In contrast to her disdain for the victims, Satchwell painted the leaders of Equal Education as victims, who were the subject of 'an attempt to destroy good names and reputations without even a hearing or to confront the substance of any allegation.'[82]

I query the reason why the panel was not able to create a procedural context that would have allowed and encouraged the complainants to meet with them. This point was raised in the independent report by Professor Manjoo:

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[79] S Smit 'A Culture of Sexual Harassment and Bullying Existed at EE – Report' (11 December 2018) *Mail & Guardian*, available at https://mg.co.za/article/2018-12-11-a-culture-of-sexual-harassment-and-bullying-exists-at-ee-report/: 'An examination of the "19 statements may have resulted in the identification of patterns of conduct at EE [Equal Education] that reflected an organisational culture of sexual harassment, intimidation and bullying", Manjoo says.'.

[80] P Ensor 'Sexual Harassment & EE: Paula Ensor's Reply to the M&G's Questions' (18 May 2018) *Politicsweb*, available at https://www.politicsweb.co.za/documents/sexual-harassment--ee-paula-ensors-reply-to-the-mg .

[81] K Satchwell & M Langa 'Report of the Equal Education Appointed Panel of Enquiry to Investigate Allegations against Doron Isaacs and Others and Review the Proceedings and Outcome of the Equal Education Human Resources Subcommittee Hearing of 2011' (27 November 2018) at para 93.

[82] Ibid at para 98.

> A crucial question is whether we effectively exercised a duty of care and worked within an ethic of 'do no harm' to uncover facts that would provide prima facie evidence of patterns of behaviour, which have led to a fractured organisation that seems unable to deal with allegations that continue to haunt it.[83]

The complainants were open to being asked questions about their complaint via their legal representatives and in writing.[84] In light of the typical trauma that accompanies interrogating complainants in complaint proceedings, it is not unsurprising that the complainants did not want to expose themselves to this level of trauma. It is also not clear why the two panellists could not at least describe the content of the complaints in their report, noting that they had not been subject to interrogation or verification. This is in fact, what the dissenting panellist, Professor Manjoo, did in her independent report, stating that:

> what is a loss for the social justice sector, was the opportunity to substantively address issues of power, privilege, patriarchy, racism, sexism, classism and social status, including the intersections, among others, in our quest to understand the silences of women whose dignity, privacy, and bodily integrity rights are violated, and to have empathy for their consequent requests for protective and participatory measures. During this process, the overwhelming need was for vindication, and not necessarily the best interests of women and/or EE [Equal Education].[85]

We see in the different reports a clear jostling of two seemingly countervailing positions. On the one hand, is the robust and important protection of the constitutional principles of fair process. On the other hand, there is the seminal insight into the fact that 'fair process' might be unfair when it comes to sexual harassment. As Manjoo noted:

> An inquiry that is set up to seek information on sexual violence broadly, including sexual harassment, will by necessity have to be victim-responsive, taking into account issues of vulnerability of complainants who choose to participate and exercise agency. Respecting the rights of all parties, including those accused of wrongdoing, does not preclude a greater focus on protecting the interests of the victims of sexual harassment, intimidation and bullying.[86]

An organisation can no longer pivot its response to sexual harassment around the individual complainant. This is especially so given the increasing attention to vicarious liability on the part of organisations for their failure to address sexual harassment.[87]

E The 'good' and 'bad' witness

Formal workplace disciplinary procedures replicate courts. As is the case with judges, disciplinary procedure adjudicators will determine the veracity of a complainant's story with reference to her behaviour. Does she *look* and *act* like a good witness?

Witness demeanour is mandated by South African law. Judges are enjoined to adjudicators to determine the veracity of a witness's testimony based on their demeanour when giving evidence. In *R v Dhlumayo*, the importance of a witness's appearance, demeanour, and personality became central to the determination of guilt.[88] The SCA referenced the fact that

[83] R Manjoo 'Report for Equal Education' (10 December 2018) 6.

[84] Satchwell & Langa (note 81 above) at para 59.

[85] Manjoo (note 83 above) at 6.

[86] Ibid at 8.

[87] *Gaga v Anglo-Platinum Ltd* 2012 33 *ILJ* 329 (LAC); *Media 24* (note 39 above); *Grobler v Naspers Bpk en n' Ander* 2004 (4) SA 221 (C); *E v Ikwezi Municipality* 2016 37 *ILJ* 1799 (ECG). See Krieger (note 30 above).

[88] *R v Dhlumayo* 1948 (2) SA 677 (A) at 706. See also *S v Heslop* [2007] 4 All SA 955, 2007 (1) SACR 461 (SCA) at 472c.

one of the complainants was a good witness in that 'She was unshaken in cross-examination'.[89] Similarly, Smythe's research into policy attitudes to sexual violence cases, reveals an entry into an investigating officer's case note as follows:

> the case was closed abruptly with a note from the prosecutor that the complainant had deviated substantially from her statement. Written boldly across a number of lines in the investigation diary is the note: "VERY BAD WITNESS AND CASE!!" the investigating officer followed up with the annotation: "Case withdrawn because the complainant lied".[90]

So, what makes a good witness? Typically, we tend to judge veracity with reference to a person's ability to look you in the eye; to be clear and articulate in the wrong they have experienced; to have a perfect recollection of the events that occurred; and to be certain that they have a legitimate right to be in court asking for assistance. The notion of witness demeanour has been described as —

> the tone of voice in which a witness' statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candour or seeming levity.[91]

These forms of conduct, however, are very often absent in sexual harassment cases.[92] Merely being in physical proximity to an abuser may trigger physical responses to the trauma of past harassment.[93] This is akin to the trauma of, for example, a car accident: every time one passes the scene of the accident, one trembles or one's heart rate increases. The body remembers the harm and responds accordingly. For a person who has experienced sexual harassment in her work, that space is the paradigmatic site of the near-fatal car accident.

Even if the complainant does not have to face her harasser, the resurrection of the harm itself is traumatic. It triggers several physiological responses that are in stark contrast to the notion of a 'good witness'. For example, it will be difficult for some complainants to look the adjudicators or legal representatives in the eye when talking about the harassment. The harassment may be intimate and, as discussed above, often accompanied by shame and a disharmony about one's role in triggering the harassment. This emotional quagmire may also manifest in a low and unconfident voice, a nervousness in tone and bodily expression, and a reluctance to discuss all the details of what happened.[94] These features are the hallmarks of a non-credible witness. In truth, however, they *confirm* the claim of sexual harassment. Anyone schooled in the area of gender-based violence will understand that the apparent uncertainty of a complainant is not evidence of falsehood, but rather, it is potential evidence of truth. Of course, not all complainants testify in this manner, and some are confident and fit the usual

[89] *Egglestone v The State* (297/2005) [2008] ZASCA 77 (30 May 2008) at para 21.

[90] D Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (2015) 156–157.

[91] JA Blumenthal 'A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility' (1993) 72 *Nebraska Law Review* 1157, 1164.

[92] RA Schuller, BM McKimmie, BM Masser & MA Klippenstine 'Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes' (2010) 13 *New Criminal Law Review: An International and Interdisciplinary Journal* 759. See also Blumenthal (note 91 above).

[93] For a discussion of this phenomenon in the context of sexual assault of children, see PC Regan & SJ Baker 'The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases' (1998) 13 *Journal of Family Violence* 187.

[94] P Easteal & K Judd '"She Said, He Said": Credibility and Sexual Harassment Cases in Australia' (2008) 31 *Women's Studies International Forum* 336, 337.

mould of a 'good witness'. The absence of physiological trauma should not be used against a witness. This would be nonsensical. My point rather is that adjudicators of sexual harassment complaints should be trained to understand that traditional beliefs of good witness demeanour may be misleading. The inverse is true: being a 'bad' witness may well be a sign of the veracity of the testimony.

I note an important caveat. It is essential that my recommendation should not be confused with condonation of the idea that there is a typical victim of sexual harassment who should behave in a standard way. Not all persons who experience sexual violence experience the physiological complexities described above. My point only is that one cannot impose an assumption of 'good witness' demeanour on sexual harassment complainants. In addition to the complicated physiological reactions of a sexual harassment complainant, there is the intransigent patriarchy of law, which —

> 'speaks to men while it alienates and excludes women'. Therefore, when we look at how credibility is assessed within the criminal justice system, we must recognise that it is subjectively determined and measured through a series of patriarchal lenses.[95]

F The false complaint/witch-hunt

A common backlash to sexual harassment claims is that they are false and are acts of retribution for a rejected promotion or a spurned romantic overture. This is why procedural fairness is so important. If there is a false claim, so the narrative goes, then this will be unearthed when the perpetrator faces and challenges his accuser. My recommendation that the employer may be the complainant and/or a witness appears to deny the accuser of this opportunity. As I describe below, this is not the case. However, it is important to review the spectre of false claims.

The typical trope is that women make false accusations in order to ruin a person's career, to garner economic benefits, or to take revenge for a grievance for which the accused may have been responsible. Ironically, this response suggests that women have the power to ruin a person's career simply by making the allegation of sexual harassment. The reality is different. More often, it is the complainant who finds herself ostracised from her field of work, irrespective of whether or not she is successful in her claim. There is no real power on her part at all. The opposite is true: one of the most devastating aspects of sexual harassment is how disempowering it can be.

We, therefore, see a complete disjuncture between the lived reality of women in the workplace who experience sexual harassment, on the one hand, and the perception of complainants on the other. Women in the workplace report feeling fear, alienation and sexism in the workplace, whereas the popular narrative is that women are vindictive, powerful and opportunistic in making false complaints.

In her seminal piece on policing sexual violence in South Africa, Dee Smythe reports the view of police that:

> an inordinate number of rape complaints received by them are false and suggest that in certain communities this has become a commonplace means of exacting revenge on male partners (past or present).[96]

[95] Ibid at 337.

[96] Smythe (note 90 above) at 5.

There is no doubt that there are false claims of gender-based violence.[97] The issue, however, is the erroneous perception that it is so common. While statistics are difficult to produce, given that there are so many different interpretations of what constitutes a false claim, it is clear that the number of false claims of sexual assault is minimal. Most sources report that false claims constitute between 2–10% of all reported cases of sexual assault.[98] This is certainly no more than false claims about other offences. As Schwikkard notes in respect of rape complaints, '[t]here is no empirical data showing that more false charges are laid in respect of sexual offences than in any other category of crime.'[99]

If there is no evidence of mass false reporting, why is this the standard belief in response to complaints about gender-based violence? Once again, we can see how law distrusts women. In 1949, the then Chief Justice posited that one of the reasons women would lay false charges of rape, is if they become pregnant as a result of a consensual affair:

> Where pregnancy has supervened and in that way it has become necessary for the girl to explain her condition, she may be tempted to shield some young friend who is the actual wrongdoer and to implicate someone of relatively sound financial standing who may be better able than the actual father of the child about to be born to provide it with maintenance.[100]

The fascination with the stereotype that women are duplicitous and untrustworthy is evident today. In 2018, Christine Blasey Ford accused Supreme Court nominee Brett Kavanaugh of sexual assault. Ford, an American professor of psychology at Palo Alto University and a research psychologist at Stanford University School of Medicine, was both hero and demon.[101] Ultimately, she was unsuccessful. In the wake of the allegation, President Trump stated what so many people believe:

> It's a very scary time for young men in America, when you can be guilty of something that you may not be guilty of… Think of your son. Think of your husband.[102]

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[97] Ibid at 142–154.

[98] C Spohn, C White & K Tellis 'Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports' (2014) 48 *Law & Society Review* 161, noting that a "multi-site study of eight U.S. communities including 2,059 cases of sexual assault found a 7.1 percent rate of false reports. A study of 136 sexual assault cases in Boston from 1998-2007 found a 5.9 percent rate of false reports (Lisak et al., 2010). Using qualitative and quantitative analysis, researchers studied 812 reports of sexual assault from 2000-2003 and found a 2.1 percent rate of false reports (Heenan & Murray 2006). https://www.evawintl.org/Best-Practices/FAQs#Answer69: "While there is a wide range of figures in the literature, methodologically rigorous research shows that the estimated range of false reports is between 2-8%. These studies include: The "Making A Difference" (MAD) study of approximately 2,000 cases from law enforcement agencies in eight communities – 7.1% false; David Lisak and colleagues' (2010) study of reports made to a university police department – 5.9% false; A review of sexual assault cases reported to the Los Angeles Police Department (Spohn, White, & Tellis, 2014) – 4.5% false; British police cases reviewed for compliance with the official criteria for false allegations (Kelly, Lovett, & Regan, 2005) – 2.5% false.'.

[99] PJ Schwikkard 'Getting Somewhere Slowly – the Revision of a Few Evidence Rules' in L Artz & D Smythe *Should We Consent* (2008) 72, 74.

[100] *R v With* 1949 (3) S A 772 (A) at 780 and 781.

[101] MA Case 'Institutional Responses to #MeToo Claims: #VaticanToo, #KavanaughToo, and the Stumbling Block of Scandal' (2019) 33 *University of Chicago Legal Forum* 1-36, 33.

[102] E Moon 'False Reports of Sexual Assault Are Rare. But Why Is There So Little Reliable Data About Them?' (7 October 2018) *Pacific Standard*, available at https://psmag.com/news/false-reports-of-sexual-assault-are-rare-but-why-is-there-so-little-reliable-data-about-them.

This is not only the sentiment of a rambunctious and widely discredited president. In his opinion piece in the *New York Times*, veteran and respected journalist, Bret Stephens, wrote about the President's comments. He described how a friend remarked that

> 'I'd rather be accused of murder,' he said, 'than of sexual assault.' I feel the same way. One can think of excuses for killing a man; none for assaulting a woman. But if that's true, so is this: Falsely accusing a person of sexual assault is nearly as despicable as sexual assault itself. It inflicts psychic, familial, reputational and professional harms that can last a lifetime. This is nothing to sneer at.[103]

False reporting is harmful, but it can hardly be equated to the harm of sexual assault, especially where this white, wealthy American man will likely never experience gender-based violence. As noted by the South African High Court thirteen years prior, 'the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited.'[104]

The fetishisation of false reporting is disturbing, given that the airtime it receives in the public discourse is entirely disproportionate to its occurrence. In addition, there is an unhappy conflation between the notion of a false claim, a failed claim and a withdrawn claim.[105] Women experience victimisation, demonisation and exhaustion at having to simultaneously deal with the trauma of the event and withstand the onslaught of aggression as a result of her complaint.[106] Given the disjuncture between the harm and the law, there is a high likelihood that the legal system is *unable* to find that sexual harassment occurred or that the complainant withdraws the complaint. This does not mean that the event did not occur; it means only that there was no acceptable evidence to prove that the harm occurred. The common narrative, however, is that an unsuccessful claim equates to a false claim.[107]

Therefore, it is easier to believe in the fiction of the false report than in the veracity of claims of sexual violence. This is at the heart of the deficiencies in the workplace disciplinary procedures.

IV PROPOSED PROCEDURAL CHANGES

The need to reform procedures is not only a project of equality. Organisations should see it as an act of self-interest. It has been argued that both formal complaints and 'readily observable harassment in the workplace' trigger a duty to respond.[108] In *Media 24*, the Supreme Court of Appeal held that organisations have an obligation to 'take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so.'[109]

[103] B Stephens 'For Once I'm Grateful for Trump: In the President, One Big Bully Stands Up To Others' (4 October 2018) *New York Times*, available at https://www.nytimes.com/2018/10/04/opinion/trump-kavanaugh-ford-allegations.html.

[104] *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 778.

[105] Smythe (note 90 above) at 142, discussing the definitional problems of false complaints.

[106] Ibid at 5 (Smythe notes how 'direct or indirect intimidation forces complainants to withdraw charges').

[107] Ibid at 142

[108] Grossman (note 4 above) at 15–16.

[109] *Media 24* (note 39 above) at para 68. See also *Minister van Polisie v Ewels* [1975] ZASCA 2, 1975 (3) SA 590 (A) at 597A–B; *E v Ikhwezi Municipality & Another* [2016] ZAECGHC 20; [2016] 2 All SA 869 (ECG); (2016) 37 (*ILJ*) 1799 (ECG); *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC), [2010] ZALAC 23. For a discussion of the principles of vicarious liability for sexual harassment in South Africa, see Calitz (note 25 above).

As discussed, the process is one of the weakest links in achieving accountability for sexual harassment. As artfully noted by one commentator on the Equal Education inquiry:

> Although apprehension regarding the departure from accepted natural justice procedures is generally understandable, those interested in genuine justice should be equally concerned about the reality that, in the absence of such protection, the complainants would not have come forward at all. What sort of justice would that be?[110]

Without an effective investigatory and disciplinary process, there can be no punishment. We are left with a quagmire. The existing disciplinary process has been designed to address a certain form of harm that applied by and in an all-male workplace. It addresses insubordination, fraud, theft and non-performance, for example. These are relatively objective, visible and provable infractions of the workplace rules. When women entered the workplace, they were met — and still are met — with the twin evils of harassment *and* a disciplinary system that is simply not designed to deal with harm arising from that harassment.[111] It is against this backdrop that I make the following recommendations.

A Reconceptualising the use of anonymous complaints as evidence

If organisations are serious about addressing sexual harassment, they need to re-sculpt their disciplinary procedures to be responsive to the reality experienced by the person who was harrassed. It is necessary 'to adopt substantive legal standards in analysing complaints [rather than] apply a general concept of fair treatment to all claims'.[112]

Sexual harassment is different; so too should be the responses. The difficulty is how to change the system without sacrificing procedural fairness.[113] I propose two alternatives. The first is that anonymous complaints may be admissible in certain circumstances. The second is that the management of an organisation itself could be the complainant.

The first is that anonymous complaints may be admissible where they are used to substantiate a named complainant. There should be an opportunity for an adjudicatory panel to interrogate the content of the anonymous complaints via written questions to the complainants, who would then be required to respond in writing. The anonymous complainants should also explain their reasons for anonymity as far as possible. This, of course, should be treated with circumspection. It departs from a basic premise of procedural justice and should be treated with caution. However, that does not mean it cannot be considered at all.

There is an important caveat to the utilisation of anonymous complainants. Many persons do not want the detail of their experiences to be told for fear that the specifics of their stories will enable the perpetrator to identify them. So anonymous complainants are further weakened

[110] Staff Reporter 'Equal Education Sexual Harassment Inquiry Will Have Lasting Effect' (30 January 2019) *Mail & Guardian*, available at https://mg.co.za/article/2019-01-30-ee-inquiry-will-have-lasting-effects/. For a discussion of how this plays out in the criminal justice system, see M Machisa, R Jina, G Labuschagne, L Vetten, L Loots, S Swemmer, B Meyersfeld & R Jewkes 'Rape Justice In South Africa: A Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012' (2017) *Gender and Health Research Unit, South African Medical Research Council*.

[111] Interestingly, when sexual harassment cases are successful, the most common backlash is an attack on procedural fairness. It is therefore essential to demonstrate how disciplinary proceedings are structurally unfair vis-à-vis complainants and to consider how these may be revised in a manner that is consistent with fairness and transparency.

[112] Grossman (note 4 above) at 63.

[113] One option is to develop a type of class action equivalent for the workplace. This has occurred in the United States: *Jock v. Sterling Jewelers* Case No. 11-20-0800-0655, (Am. Arb. Ass'n 2015).

by the fact that they are probably going to contain high-level allegations, devoid of specific details such as dates, times and locations.

My argument is that this evidence should be admissible to an adjudicatory panel. The panel might — and should — treat this evidence with caution because the perpetrator is not able to defend himself against vague allegations. However, this procedural compromise should be weighed against the fact that most women have no incentive to — and indeed have every reason not to — bring formal complainants. This amounts to the workplace denying complainants the right to access a form of justice.

So, there are two procedural deficiencies. One the one hand, denying a perpetrator an opportunity to face and interrogate his accusers is serious. On the other hand, denying persons the right to bring proceedings against perpetrators of sexual harassment, is equally serious. The right to face your accuser is stacked against the right to access justice. This can be ameliorated by curtailing both rights, in a sense. The right to face an accuser is justifiably limited because of the institutional embargo on sexual harassment complaints, i.e. without this limitation, there would be no sexual harassment cases. On the other hand, the right of access to justice is limited because an anonymous complaint must be handled with a great degree of caution *and* can only ever be used where there is a formal, identified complainant.

It should be possible to allow persons who have been harassed to give evidence through an intermediary. The perpetrator would be able to interrogate the version being put to an adjudicative body without compromising the well-being of that person. Having said that, this method should be used only in circumstances where the complainant fears severe repercussions, including threats to her or her family's safety.

All these approaches require analysis in themselves. Overall, however, they demonstrate how a disciplinary procedure may be adjusted to cater for the nuances of sexual harassment claims without compromising the rights of the perpetrator.

B Reconceptualising the complainant

This brings me to the second point. Who is a complainant? The current model of complainant-centric disciplinary procedures 'renders largely invisible the organisational employer's role in creating a hostile work environment; it magnifies the significance of the victim's role in preventing sexual harassment.'[114] Relying on individual testimony 'undermines, rather than fosters, the deterrence of workplace sexual harassment.'[115]

In many cases of sexual harassment (although by no means always), there is the knowledge that a perpetrator sexually harasses persons in the workplace. There are two types of knowledge. The first is the 'everyone knows', general knowledge, emanating from corridor talk about stories that persons tell of their experience. This has been referred to as the 'Traditional Whisper Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion'.[116]

The second is where a person reports sexual harassment to a manager within the organisation but does not want to lay a formal complaint. This creates actual knowledge. In those instances, the organisation's management knows about sexual harassment. In particular, when there are multiple complaints against a perpetrator reported to management over a period of time, the

[114] Lawton (note 31 above) at 846.

[115] Ibid at 855.

[116] Tuerkheimer (note 24 above) at 1150.

management develops knowledge of the perpetrator's conduct. Management itself could then become the complainant and/or witnesses in a case against a perpetrator, even if no other complainants want to come forward.

This would constitute indirect evidence and, technically, hearsay. Organisations typically rely on the persons to give evidence because they need a 'full proof' case. However, the truth is there is no such thing as a full proof case. Even if complainants do give evidence in disciplinary proceedings, this testimony, coupled with an alienating procedure and further harassment by the perpetrator, may lead to a withdrawal of charges. Bias or ignorance on the part of an adjudicator may lead to the conclusion that there is not enough 'hard' evidence to dismiss the perpetrator. In other words, the current procedural structure that centralises the complainant's evidence in proceedings is not full proof. An alternative is needed: the evidence of management that over a period of time, a number of reports of sexual harassment by the perpetrator came to their attention, *is* a form of evidence. This evidence may not convince an adjudicatory panel but that is not a reason not to submit the information as evidence.

I should note categorically that this suggestion must be premised on the basis that the complainant's needs must take priority. If there is strong opposition from complainants that formal disciplinary procedures are pursued, alternative responses must be used.

The global and national hashtag movements point to a burgeoning set of convictions that impose a stringent obligation on employers to address sexual harassment.[117] It is impossible for organisations legitimately to argue that a person's failure to report sexual harassment or bring a formal complaint is a legitimate reason for abstaining from an investigation.[118] This is especially so where an employer knows that a perpetrator exists. As deficient and non-specific as that evidence may be, employers should try this route. If it is insufficient for an adjudicatory panel to make a finding of guilt, so be it. I reiterate that this is often the case even where a person gives evidence. However, if the evidence is delivered *not* as evidence of the harm itself but rather as evidence of the employer's knowledge of the harm, a different case is being made. It certainly is an indirect case, but it is still a legitimate case against a perpetrator.

Ultimately, managerial complainants mean that the organisation is taking an institutional response to an institutional problem, and not a one-off aberration. Relying on 'isolated individual complaints, retroactively, and often after lengthy delays, sexual harassment is treated as aberrant individual wrongdoing, rather than an institutionalised problem of inequality.'[119]

C Reconceptualising admissible evidence

Adjudicative bodies, be they disciplinary tribunals or courts, seek tangible or verifiable evidence. This works well in respect of fraud, for example. Fraud can be proved by objective numbers, balance sheets, bank accounts and audits. Sexual harassment usually lacks such visible and tangible evidence. Typically, the harassment occurs in private, behind closed (and locked) doors.[120] Renowned American television anchor, Matt Lauer, had a spectacular fall from grace

[117] For a discussion about the liability of schools in the United States for their failure to address sexual violence in schools, see Mackinnon (note 30 above) at 2038–2105.

[118] *Minarsky* (note 32 above).

[119] Sheppard (note 4 above).

[120] This is by no means the definitional norm of sexual harassment. It encompasses equally incidences of public harassment. See for example, S Zietz & M Das 'Nobody Teases Good Girls: A Qualitative Study on Perceptions of Sexual Harassment Among Young Men in a Slum of Mumbai' (2018) 13 *Global Public Health* 1229.

when he was fired from the 'Today' show for multiple claims of sexual harassment. One of the most horrifying aspects of the allegations was the fact that Lauer had a secret button under his desk that allowed him to lock his office door from the inside without going over to the door. As commentators noted, 'This afforded him the assurance of privacy. It allowed him to welcome female employees and initiate inappropriate contact while knowing nobody could walk in on him.'[121] This is not an analogy of *feeling* trapped; Lauer's targets were *physically* trapped. By definition, there was no evidence that the alleged harm occurred, other than the person's report of harassment.

Is it correct, however, that there is no verifiable or objective evidence in sexual harassment cases? I propose that there is evidence in circumstances that typically surround sexual harassment cases. For example, there may be instances where several people have been the subject of harassment by the same harasser. Often the targets of the harassment may not complain or may lay an informal complaint to procure the intervention of management to stop the harassment. In the current workplace regime, there is no mechanism to record these allegations formally or to bring them to the attention of an adjudicatory panel. The result is that an individual will be renowned for sexual predation, but the workplace formally does not record the trends.

This is one example of how procedures around sexual harassment should change. Any allegation of sexual harassment against a harasser, irrespective of whether it is formal, informal, actioned or withdrawn, should be recorded in an employee's human resources file. These record-keeping requirements are being explored in California where employers are required to maintain such records on their employees' files. It is precisely this type of record-keeping that would constitute a manager's evidence before an adjudicatory panel. It also ensures that the perpetrator's pattern of sexual harassment is brought before an adjudicatory panel. Indeed, organisations should ensure that their disciplinary procedures require adjudicatory panels to take such information into account and not dismiss it simply because it does not relate to the claim at hand.[122]

If there are multiple claims, this could be submitted as evidence to corroborate the complaints of a single complainant. This is necessary in order to understand the continuum and trends of sexual harassment. It offsets the difficulty of the invisible and 'invisibilised' harm and allows for evidence of predatory behaviour. If we were to redesign the disciplinary process to respond to the particular harm of predatory behaviour, numerous complaints against the same person would constitute evidence of predation, shifting the onus onto the accused to prove otherwise. It is not unreasonable to present to an accused with a series of allegations against him for rebuttal.

When a formal but anonymous complaint is then filed, the combination of the anonymous formal complaint and the previous informal complaints should be sufficient to trigger an investigation into the accused.

Let me be clear: I am not proposing that the allegation of one complainant should be dismissed because it is a sole complaint. Nor do I suggest that a multiplicity of complaints

[121] David Sims 'About That Secret Button in Matt Lauer's Office; The Anchor's Door-Locking Mechanism Acts as a Particularly Vivid Metaphor for the Amount of Power and Protection Many Influential Men Enjoy' (30 November 2017) *The Atlantic*, available at https://www.theatlantic.com/entertainment/archive/2017/11/about-that-secret-button-in-matt-lauers-office/547106/.

[122] Mizrahi (note 75 above) at 142.

about one harasser is irrefutable proof of harassment. Rather, the current system of employment relations can be adjusted to harness objective factors relating to a sexual harassment claim in a way that does not compromise fairness.

D Reconceptualising who runs the disciplinary procedure

1 *The establishment of an independent specialised sexual harassment office*

It is necessary to have an independent unit within an organisation to receive, investigate and prosecute sexual harassment cases. This was the model adopted at Wits University following an investigation into sexual harassment at the University (the author headed the investigation).[123]

An independent office is necessary for a host of reasons. The first is that organisational units and officers that typically deal with sexual harassment have little knowledge of the harm of sexual harassment. They also are often conflicted. For example, in-house legal units are usually tasked with handling legal matters across an organisation. In cases of sexual harassment, it is often unclear in whose interests in-house lawyers are, or should be, acting. In sexual harassment cases, generally, the primary concern for in-house lawyers is to ensure that the organisation does not get sued by a disgruntled employee. They generally resort to an exaggerated disciplinary process that mimics a court trial. This is what in-house lawyers are supposed to do. However, they cannot simultaneously protect the organisation against potential litigation while also ensuring that sexual harassment cases proceed effectively.

A similar problem arises with human resources and employee relations offices. These offices are responsible for the interests of all employees, including both the person and the perpetrator. Their expertise and frame of reference is employment law. Employment law offers various protections to the employee as well as processes that must be followed in dealing with employment-related disputes. Employment law, however, demands neutrality between parties in sexual harassment that, together with the miscellany of other deficiencies in sexual harassment disciplinary procedures, results in a process that is dysfunctional and unstable.

It becomes functionally impossible to do right by both parties. An independent unit, which is mandated to pursue the needs of the complainant (much like a prosecutor in a criminal case), would be able to drive a process on behalf of the complainant. Trade unions, employee relations and human resources are then able to do the job of ensuring that all parties are treated under governing labour law. The separate office can take the reins of the investigation and prosecution.

An independent and specialised office also addresses the problem that, more often than not, complainants do not know to whom and how to report sexual harassment. There are three essential components of an independent office. The first is a preventative role. A specialised office, staffed with lawyers, social workers and gender specialists, has a much greater chance of creating rules and driving policies that prevent sexual harassment.

The second is an intervention component. A specialised sexual harassment office should include psycho-social specialists who must be the first port of call for complainants. The trauma and fear involved in sexual harassment cannot be under-estimated. Properly trained experts should be available for persons who are dealing with sexual harassment.

[123] Independent Inquiry into Allegations of Sexual Harassment at the University of the Witwatersrand, Johannesburg 2013, 45, available at https://www.wits.ac.za/media/news-migration/files/Final%20Report%20Independent%20Inquiry%20into%20Sexual%20Harassment%20at%20Wits%20University%203%20September%202013.pdf (Wits Sexual Harassment Inquiry).

The final is an accountability role. An independent office should act much like an independent prosecuting authority. It should be responsible for the investigation into sexual harassment complaints and run both formal and informal complainant procedures. It ultimately should also act as the 'prosecutor' which presents its case to an adjudicatory panel.

2 *Specialised and independent investigators*

It is not unusual that legal and investigatory responses to sexual harassment are managed by people who lack expertise in, or knowledge of, the nuances of sexual harassment. This is in stark contrast to the approach, for example, to cases of fraud. Investigations into fraud often rely on experts in forensic auditing, with sophisticated knowledge of financial fraud and with the skills to investigate the matter appropriately and propose workable solutions.

The same level of specialised expertise is required in respect of sexual harassment. Those investigating sexual harassment must be able to understand that complainants may change their minds about bringing a formal complaint and they should not be pressurised into doing so; that complainants may be fearful of retribution and vilification. They should have the expertise to know what type of information constitutes evidence of harassment, and they should be skilled in the ability to convey this information to an adjudicatory panel in such a way that the panel will understand the nuanced nature of the harm and impose an appropriate sanction.

It is also important that investigators work with psycho-social experts. Such experts can assist the complainant in the difficult and often traumatising process of pursuing a formal complaint. This assists the complainant in navigating and completing the process and helps attenuate the disempowerment that occurs within the context of unequal power and gender relations.

3 *Specialised adjudicators*

It is equally important that the people adjudicating sexual harassment complaints have a variety of specialisations, one of which is knowledge of gender-based violence. It is not unusual to have specialised adjudicatory bodies. We see this in specialised crimes courts, sexual offences courts, children's courts and equality courts.

Ideally, a panel adjudicating sexual harassment complainants should comprise at least one legal adjudicator and one adjudicator with a specialisation in gender-based violence. The latter suggestion has been met with concerns that this will prejudice the panel against the accused. This is a false assessment. Experts are essential to understanding the nuances under discussion. The knowledge of such nuances does not eviscerate the ability to make an independent decision. Rather, it ensures that the adjudicative structure is better able to make a decision.

The sex of the expert is irrelevant. The fact that an adjudicator is a woman is irrelevant. An assumption that a woman will be able to adjudicate sexual harassment cases because she has some essential understanding of gender is erroneous. The critical criterion is that of expertise. The two should not be conflated.

4 *Specialised procedures*

In 2014, Wits established the Gender Equity Office (GEO) in response to the findings of an inquiry into whether the University's functions in relation to gender matters and sexual harassment were too decentralised and fragmented to offer an effective mechanism of

prevention, intervention and accountability.[124] In addition to the policy and institutional reform, the University also adopted specialised procedures to deal with sexual harassment cases specifically. It is beyond the scope of this article to discuss the full panoply of procedural considerations, but of particular relevance is the role of the investigator. The investigator is required to work with the complainant, interview the perpetrator, prepare a report on their findings and submit that report to the adjudicatory panel and, of course, the person harassed and the perpetrator. The investigator then presents its case to the panel. The panel may ask questions of the persons involved on both sides through the investigator. The perpetrator may also ask questions of the person harassed but must do so through the investigator.

We must liberate ourselves from the assumption that sexual harassment is a non-specialist area. It is a technical, complex and difficult issue to address. Technical experts, therefore, should be the ones to address it.

V CONCLUSION

These recommendations are a small incision into the diagnosis and remediation of procedural deficiencies in respect of sexual harassment. As I note in my conclusion, this is part of a much larger analysis. My only purpose is to demonstrate, through the analysis of these three procedural considerations, that (i) workplace disciplinary proceedings are moored in assumptions and workings that mitigate successful outcomes in sexual harassment complaints; (ii) there are ways of developing investigative and adjudicatory procedures that are responsive to the nuanced nature of the harm of sexual harassment and the gendered structures in which it occurs; and (iii) that we can make those adjustments in a measured, defensible and procedurally fair way.

A regular theme in the sexual harassment narrative is that if persons do not lodge complaints, it is impossible to hold perpetrators to account. I challenge this assumption. The status quo is that women are blamed for the violence they experience; blamed when they bring a complaint; and blamed when they do not. This is an impossible situation that demands a review of the way we understand who a complainant of sexual harassment may be.

We continue to see the fetishisation of persons who lodge complaints. The dominant belief is that it is the *target* and not their harasser, who is responsible for an unhappy work environment. The intransigence of gender-based discrimination manifests in a range of tropes that are common to the workplace. When women complain about sexual harassment, the structural response resuscitates a host of biases. Often there is a knee-jerk response that the complainant is exaggerating; that the harm is minimal and should not trigger disciplinary proceedings; that the harassment was consensual; that the complainant initiated the events about which she is complaining; and that complaining about the harm will ruin the accused's career. Most conventional, however, is the belief that the person cannot prove the harassment and, therefore, she must be lying.

All of these stereotypes have infused the law.[125] Seemingly neutral and 'fair' principles of law and procedure were created by lawmakers and judges who were blind to, or indeed perpetrated, gender-based discrimination and violence. The stereotypes about women, therefore, much like

[124] For a discussion of this process see J Dugard & B Meyersfeld 'Sexual Harassment and Violence: Higher Education as Social Microcosm' in C Ballantine, K Erwin & G Mare (eds) *Living Together, Living Apart?: Social Cohesion in a Future South Africa* (2017) 153.

[125] For a discussion about the historic definition of rape, see N Naylor 'The Politics of Definition' in D Smythe & L Artz (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) 22.

the stereotypes around race, underpin law and procedure. As a result, law and procedure are neither fair nor neutral when it comes to cases of sexual harassment.

The hashtag movements have shattered the legitimacy of these assumptions. The recreation of disciplinary procedures is the indisputable next step. The post #MeToo moment demands that we create tangible and practical replacements for current generic disciplinary procedures. In this article, I propose a few such replacements. I do so with the certainty that there will be a backlash to these suggestions, but equally, I do so with the certainty that at least half the women reading this article will nod their head in recognition of the fallacy of effective disciplinary procedures for sexual harassment cases because they have lived it.