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SEXUAL HARASSMENT IN THE WORKPLACE: AN EVALUATION OF SELECTED HIGHER LEARNING INSTITUTIONS' POLICIES AND PROCEDURES

in partial fulfilment of the requirements for the degree of

MASTER OF LAWS BY COURSEWORK AND RESEARCH REPORT

at the University of the Witwatersrand, Johannesburg

DECLARATION

I, BUSISIWE MTHIMKHULU,

declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

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ABSTRACT

Sexual harassment in the workplace is a plague. Workplaces, in all their forms and magnitudes are increasingly being affected by sexual harassment. Higher learning institutions are no exception. Higher learning institutions form the microcosm of society and are thus worth being placed under scrutiny. The higher learning institutions, by virtue of their composition, activities and structure mirror characteristics of that of a workplace. It is thus important that the role of labour law, which is ensuring that employers provide for a safe working environment is upheld. This paper focuses on three South African higher learning institutions, from the perspective of labour law in evaluating their policies and procedures. Labour law requires that workplaces should have policies and procedures to combat sexual harassment, thus becomes crucial to evaluate the extent to which they are legally compliant and effective. Although, there are various forums and mechanisms to curb sexual harassment, policies and procedures of workplaces remain an important factor in providing for a framework and strategy to eradicate sexual harassment. It is thus paramount that higher learning institutions have effective policies and procedures in place to tackle the plague that is sexual harassment. The shortcoming often arises when even in the midst of well-drafted policies and procedures in the workplace, sexual harassment does not cease to exist. In order to uphold the objective of labour law for a safe working environment, these higher learning institutions ought to ensure that the policies are not only well-drafted but also, legally complaint an effective.

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I INTRODUCTION

> *'Sexual harassment is the most heinous misconduct that plagues a workplace; not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of one's being and must therefore be viewed from the point of view of a victim'.*[1]

Sexual harassment refers to conduct, typically experienced as offensive in nature in the context of a relationship of unequal power or authority.[2] Workplaces are normally structured in a hierarchy which enables the potential abuse of authority. This hierarchy is also seen in workplaces, such as higher learning institutions, where victims, mostly women suffer at the hands of their superiors or lecturers. Workplaces have become unsafe working environments amidst policies and procedures that are put in place to prevent and eradicate sexual harassment. Higher learning institutions are no exception to the scourge that is sexual harassment.[3] In *SA Broadcasting Corporation Ltd v Grogan NO and Another*, Steenkamp AJ observed that sexual harassment by older men in positions of power has become a scourge in the workplace.[4] Higher learning institutions form microcosms of our society as thus ought to be subject to scrutiny. Higher learning institutions are structured in a way that they have characteristics of a workplace as well as an academic institution. As such, the employment relationship between staff and the institution, staff-to-staff relations, as well as other groups within the institution such as students, it ought not to be left unregulated and unprotected. Although, it is beyond the scope of this paper to discuss student to staff relations, the overlap often exists.

The purpose of this paper is to evaluate policies and procedures of three selected South Africa higher learning institutions. The objective is to evaluate the policies as

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1 *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (2018) 39 ILJ 1330 (LC) para 31.
2 Friedman J, Boumil J & Taylor Barbara Sexual Harassment: What it is, what it isn't, what it does to you and what you can do about it (1992) 9.
3 Pierre Joubert, Christo Van Wyk & Sebastiaan Rothmann 'The effectiveness of sexual harassment policies and procedures at higher education institutions in South Africa 2011 2.
4 *SA Broadcasting Corporation Ltd v Grogan NO and Another* (2006) 27 ILJ 1519 (LC) para 51.

to whether they are legally complaint and the extent to which they comply with international standards. It is this crucial to diagnose the problem by evaluating the policies and procedures as they form part of the components of sexual harassment eradication. As a starting point, the background and context of sexual harassment will be discussed. In doing so, the role of labour law regarding sexual harassment will be evaluated as well as establish, as to why to date; sexual harassment continues to plague workplaces. The policies and procedures that will be evaluated are that of the University of the Witwatersrand, an institution which has been implicated in various complaints on sexual harassment. Second, the policies and procedures of University of Cape Town will be evaluated, an institution which has also been implicated in several sexual harassments claims. Third, Rhodes university has attracted a movement to eradicate sexual harassment, where its students protested publicly and thus its policies and procedures will be evaluated.

These policies and procedures will be measured against the existing laws and international standards to establish whether they are legally complaint. The measures that employers can take to combat sexual harassment will be provided. It is from the objective of combatting sexual harassment that barriers in reporting sexual harassment will be identified and how higher learning institutions can break these barriers. Recommendations will be provided as to how, through the identification of barriers, rectification of non-complainant procedures and the consideration of dynamics that present themselves in sexual harassment such as gender, power dynamics and fear - higher learning institutions, can be workplaces that in future are free from sexual harassment.

In the United States of America, judicial opinions in the 1970s and 1980s provided definitions of prohibited conduct beginning with quid pro quo harassment and gradually expanding to the hostile working environment.[5] Moreover, the efforts of the human resources professionals and employment lawyers and a series of Supreme Court opinions made sexual harassment policies and procedures virtually mandatory in the US workplace.[6] The emergence of the mandatory policies and procedures in the US ought to form the basis to which sexual harassment as a phenomenon in the

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5 Anna-Maria Marshall *Confronting sexual harassment: The law and politics of everyday life* (2005) 34.
6 Ibid.

workplace is dealt.[7] This is because sexual harassment should no longer be understood in isolation, that is, independent of making the workplace hostile. The Labour Appeal Court in *Gaga v Anglo Platinum Ltd and Others,* the court held that the conclusion that the commission's rejection of the case against the appellant on the basis that the remarks could not be considered to be sexual harassment because the complainant was not offended, was not premised upon too a narrow inquiry and ignored the material evidence that the remarks were unwelcome and caused discomfort.[8] As such, the effects of sexual harassment need to be recognised and not only making it mandatory for workplaces to have sexual harassment policies, but to bare this basis in mind when drafting sexual harassment policies. Sexual harassment in the US emerged as a social problem coincided with the development of the legal claim,[9] thus it is submitted that a holistic approach ought to be adopted in higher learning institutions, in that policies and procedures of sexual harassment are drafted with the realisation of sexual harassment as a social problem not merely an isolated act.

II BACKGROUND AND CONTEXT

(a) South African law on sexual harassment

Prior to 1998 there was no legislation specifically addressing the problem of sexual harassment in South Africa.[10] Most broadly, the South African constitution protects the right to equality and non-discrimination, the right to security of person and the right to dignity.[11] Further, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits discrimination of any kind on the grounds of sex, gender or sexual orientation.[12] Sexual harassment manifests itself as impairment to one's dignity as it causes the victims humiliation and psychological distress. Prior to the enactment of the Employment Equity Act 55 of 1998, the few

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7 Ibid.
8 *Gaga v Anglo Platinum Ltd and Others* (2012) 3 BLLR 285 (LAC) para 39.
9 Ibid.
10 Deborah Zalesne 'Sexual harassment law in the United State and South Africa: Facilitating the transition from legal standards to social norms' (2005) 25 Harvard Women's Law Journal 156.
11 Ibid.
12 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

South African cases dealing with sex discrimination by means of sexual harassment were generally brought under the Labour Relations Act.[13]

The first case of sexual harassment in South Africa was not heard until February 1989.[14] In *J v M*, the court addressed the validity of the dismissal of a senior engineering manager found to have sexually harassed female co-worker.[15] Further, it was stated that 63% of the women in Johannesburg are exposed to sexual harassment.[16] The harasser was asked to resign after he was found to have repeatedly touched various female employees in a sexual manner without their consent. In *Reddy v University of Natal*, the court endorsed the decision in *J v M* and further held that sexual harassment may be defined with reference to the employer's liability.[17] Further, in *Mampuru v Putco*, an employee was dismissed on charges of sexual harassment.[18] The court found the dismissal was fair as the harasser had an intimidating attitude towards female employees, thus frightening them into not complaining for fear that they would be dismissed.[19] In *Lynne Martin-Hancock v Computer Horizons*, the ruling was limited to the fairness of the dismissal of the female employee and failed to address whether sexual harassment had in fact occurred.[20]

The Policy Framework to Address Gender-Based Violence in the Post-School Education and Training system, stipulates that we as the Post-School Education and Training System have to work harder at creating a safer caring society with a concerted focus on safety and protection of all people, in particular our female students and staff.[21] The formulation of this policy is deeply embedded to the crisis that South Africa is currently facing, namely, gender-based violence. Although, it is beyond the scope of this paper to discuss gender-based violence, the policy remains an essential tool in providing guidelines for the eradication of sexual violence, to which sexual harassment finds application.

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13 Ibid.
14 Zalesne op cit note 8 at 157.
15 Ibid.
16 Elisabeth Snyman-Van Deventer & Jaco de Bruin 'Sexual harassment in South African and American law' (2002) 1 *Acta Academia Supplementum* 197.
17 *Reddy v University of Natal* (1998) 1 BLLR 29 (LAC).
18 Ibid.
19 Ibid.
20 Zalesne op cit note 8 at 158.
21 Policy Framework to address gender-based violence in the post-school education and training system 2019.

(i) Labour Relations Act 66 of 1995

The Labour Relations Act, although it offered recourse in some situations, it had several limitations.[22] Remedies under the Labour Relations Act were limited to instructing an employer to cease the unfair labour practice and did not allow the plaintiff to recover damages for humiliation or lost opportunities.[23] The Employment Equity Act on the other hand, took a progressive stand.[24] The Employment Equity Act, put in force in August 1999 prohibits discrimination in the workplace, either directly or indirectly on the grounds of race, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.[25] It specifies that harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination that are listed.[26] The positive aspects of the Employment Equity Act include the fact that it identifies sexual harassment in the workplace as a serious problem that needs to be dealt with as well as the fact that it places the burden of proving sexual harassment when there are few or no witnesses.[27] Although, these aspects are important, it is noteworthy that since sexual harassment involves an abuse of power dynamics, women remain mostly affected. The burden placed of the victim is increasingly burdened by these power dynamics which not only instil fear of reporting, but fear of losing their jobs, in turn diminishing their dignity.

(ii) Employment Equity Act 55 of 1998

The Employment Equity Act does not define sexual harassment. However, The Code of Good Practice on Handling Sexual Harassment cases does. Sexual harassment is defined in item 4 of the Code as unwelcome conduct of a sexual nature that violates the rights of the employee and constitutes a barrier of equity in the workplace.[28] It thus distinguishes that from conduct which is welcome from that which is unwelcome. The Code also distinguishes between different forms of sexual

22 Ibid.
23 Ibid.
24 Ibid.
25 Zalesne op cit note 8 at 160.
26 Ibid.
27 Ibid.
28 A van Niekerk (ed), N Smit (ed) & MA Christianson et al *Law@work* 5 ed (2019) 128.

harassment.[29] These include victimisation, quid pro quo harassment and sexual favouritism. Victimisation occurs when an employee is victimised for failing to submit to sexual advances.[30] Quid pro quo harassment occurs when a person such as an employer, but not limited to, influences or attempts to influence an employee's employment circumstances, for example a promotion.[31] Sexual favouritism occurs when a person of authority in the workplace rewards only those who respond to sexual advances.[32]

Section 60 of the Employment Equity Act renders an employer liable for sexual harassment of the employee, by a co-employee if it can be shown that an employer failed to take the reasonable steps.[33] In *Grobler v Naspers'* the Cape High Court held an employer vicariously liable for sexual harassment perpetrated by one of its employees.[34] The employee suffered post-traumatic stress disorder as a result In *Media24 and Another v Grobler* the point was made by Farlam JA that the company should have realized that Grobler's unwillingness to pursue the matter had nothing do with the credibility of her claims and that preventative steps were required. Thus, the reluctance of a harassed employee to take formal steps does not absolve the employer from his duty to provide a safe working environment.[35] Employer liability is a complex concept, however, for the purpose of this paper, it is submitted that the where a tertiary institution is the employer in a sexual harassment case, strict liability should apply. This is because tertiary institutions are likely to protect their reputation and cases tend to fall flat. In the case of *Orr and Another v UNISA*, the decision to hold the university liable for damages is one which set a pressure point for employer liability in respect of tertiary institutions. The case of *Orr & Another versus Unisa* took place at the largest university in South Africa, which begs the question of whether this was an isolated incident or an example of widespread sexual harassment in South African universities.[36]

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29 Ibid.
30 Ibid.
31 Ibid.
32 Ibid.
33 Rochelle Le Roux 'Sexual Harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?' (2006) 10 African Journals Online 53.
34 Le Roux op cit note 30 at 49.
35 Le Roux op cit note 30 at 62.
36 Pierre Joubert, Christo Van Wyk & Sebastiaan Rothmann 'The effectiveness of sexual harassment policies and procedures at higher education institutions in South Africa 2011 3.

(iii) The Code of Good Practice on Handling Sexual Harassment Cases

The Code of Good Practice on Handling Sexual Harassment Cases is a guideline for handling sexual harassment cases and sets out an ambitious objective to eliminate sexual harassment in the workplace.[37] This is done by encouraging and promoting the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy and their right to equality in the workplace.[38] The Code of Good Practice on Handling Sexual Harassment Cases defines sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual. Sexual attention becomes sexual harassment if: (a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or (b) The recipient has made it clear that the behaviour is considered offensive; and/or (c) The perpetrator should have known that the behaviour is regarded as unacceptable.[39]

The Code of Good Practice on Handling Sexual Harassment Cases requires that employers should implement a sexual harassment policy and take disciplinary action against employees who do not comply with the policy. While the Code is explicit and detailed about what the sexual harassment policy should include and about what procedures should be followed once a complaint is filed. This managerial prerogative is problematic because management structures are typically dominated by men, who are less likely to identify sexual behaviour in the workplace as sexual harassment and less likely to perceive sexual harassment as a serious issue.[40] The long-standing debate about the test for sexual harassment, whether it is objective or subjective or a combination of the two is given direction by the code which combines both objective and subjective.[41] This is crucial as it takes in account the complexities of sexual harassment, in that there is a danger in ignoring the subjectivity element of sexual harassment as experienced by the victim. On the other hand, it promotes the principle of the audi alteram partem which will prevent the alleged perpetrator from

37 Zalesne op cit note 8 at 161.
38 Ibid.
39 Code of Good Practice on Handling Sexual Harassment Cases.
40 Zalesne op cit note 8 at 164.
41 Van Nierkerk & Smit op cite note 20 at 128.

being falsely accused. In other words, it takes into account the perspectives of both the complainant and the perpetrator.[42]

(iv) Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the world of work

The Minister of Employment and Labour published a draft code on the prevention and elimination of violence and harassment in the world of work.[43] The draft Code is not yet is force, however the new definition of sexual harassment is significant for purposes of this paper. The draft Code applies broadly to employers, employees and other persons engaged in work (irrespective of contractual status); and incidents that occur at the workplace and those the occur during the course of, linked with or arising out of work.[44] The definition of sexual harassment is significantly different in that, it is defined as unwelcome conduct of a sexual nature that violates the rights of an employee, considering the following factors: (a) whether the harassment is on prohibited grounds of sex and/or gender and/or sexual harassment, (b) whether the sexual conduct was unwelcome, (c) the nature and extent of the sexual conduct; and (d) the impact of the sexual conduct of the employee. It is submitted that the draft code eliminates the uncertainties that case with the definition.[45] The subjective element remains intact and a considerable difference in that it takes into account the impact the conduct had on the employee. The Code makes a considerable effect on the policies and procedures. The Code requires that policy should make it clear that all forms of violence and harassment are forms of unfair discrimination or violation of dignity, health and safety and are regarded by the employer as a very serious form of misconduct, which may result in dismissal.[46]

III THE ROLE OF POLICIES AND PROCEDURES OF SEXUAL HARASSMENT

42 Ibid.
43 Dhevarsha Ramjettan, Shane Johnson & Mbali Nkosi *Draft Code of practice on workplace violence and harassment published* https://www.bbrief.co.za/2020/09/21/draft-code-of-practice-on-workplace-violence-and-harassment-published/.
44 Ibid.
45 GN 43630 Draft Code of Good Practice on the prevention and elimination of violence and harassment in the world of work.
46 Ibid.

The creation of a climate to challenge harassment begins with the generation of a policy.[47] A firm, unequivocal statement from the top that harassment is totally unacceptable sends a clear message throughout the organisation.[48] The educational mission of a college or university is to foster an open learning and working environment.[49] The ethical obligation to provide an environment that is free from sexual harassment and from the fear that it may occur is implicit.[50] Each institution has the obligation, for moral as well as legal reasons, to develop policies, procedures and programs that protect students and employees from sexual harassment and to establish an environment which such unacceptable behaviour will not be tolerated.[51] Aside from being formative, a sexual harassment policy helps employers to deal with the issue of sexual harassment, as well as providing themselves with a measure of legal protection.[52]

Effective legal remedies are necessary. However, the main aim of most victims of sexual harassment is not to sue their employer for damages, but that the offensive behaviour should stop, that it should not recur and that they should be protected against retaliation for having brought a complaint. Therefore, the most effective way to deal with sexual harassment is to develop and implement a preventive policy at enterprise level.[53] Workplace-level policies and procedures on sexual harassment exist alongside national legal prohibitions, reinforcing and building on them. In legal systems which prohibit sexual harassment, employers are often subject to a positive duty to prevent it.[54] Someone has to take the lead and make it known to all employees that sexual harassment will not be tolerated.[55] Sexual harassment policies are here to stay, and unless they are accompanied by some form of penalty, they are unlikely to be effective.[56]

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47 Noel Harvey Sexual harassment in the workplace: A practical guide for employers and employees 79.
48 Ibid.
49 Michele A Paludi & Richard B Barickman *Academic and workplace sexual harassment: A resource manual* (1991) 5.
50 Ibid.
51 Ibid.
52 Harvey op cit note 44 at 82.
53 Deirdre McCann 'Sexual harassment at work: National and international responses' 2005 International Labour Organization, Geneva 1.
54 Ibid.
55 Noel Harvey op cit note 44 at 86.
56 Noel Harvey op cit note 44 at 95.

Research has indicated that the type of strategy selected in dealing with sexual harassment is related to the explanatory model victims use in explaining their experiences. Three models have been identified: natural/biological model, organizational model and sociocultural model. Briefly, the natural model views sexual harassment is a consequence of natural sexual interaction between people. The sociocultural model posits sexual harassment as only one manifestation of a much patriarchal system in which men are the dominant group.[57] It is submitted that although these systems are interlinked, the models that identifies more with higher learning institutions is the organizational model. The organizational model asserts that harassment results from opportunities presented by relations of power and authority, which derive from the hierarchical structure of organizations. Since work (and academic) organizations are defined by vertical stratification and asymmetrical relations, individuals can use the power of their position to extort sexual gratification from their subordinates.[58]

The advantage of workplace mechanisms over legislation is that their role is primarily preventive. Rather than being confined to responding to sexual harassment, they are intended to ensure that it does not take place. Effective workplace policies protect employees by dissuading potential harassers, and identifying and responding to harassing behaviour in its early stages. In addition, well-functioning complaints procedures mitigate the likelihood of targets of harassment being forced to resort to the legal process.[59] Effectively communicated and implemented policies have also been found to encourage victims of harassment to report their experience to their employers. Research demonstrates that very few victims of workplace sexual harassment take any formal action for reasons which include ignorance of the routes available to them and a lack of confidence that their organization will adequately respond to their plight.[60]

The mere existence of a comprehensive policy will not necessarily succeed in managing sexual harassment successfully. It is submitted that in order to have the policies and procedures legally compliant, the following should be taken into account. First, the policy should be clearly worded, readily displayed at strategic

57 Paludi et al op cit note 46 at 61.
58 Paludi et al op cit note 46 at 62.
59 Ibid.
60 Ibid.

points and regularly evaluated to ensure that it remains effective.[61] Sexual harassment in institutions of higher learning such as universities differs from sexual harassment in other types of organisations in the sense that while in many organisations sexual harassment will usually involve only employees, sexual harassment in universities may involve staff sexually harassing other members of staff or staff sexually harassing students. The power dynamics in in the case of the latter are characterised by a different reward-punishment nomenclature where students risk being.[62] An example of such an incidence is the case *University of Venda v Maluleke*; the power dynamics seemingly do not represent an occurrence of employment benefits, but rather an exchange of sexual harassment for marks.[63] A question arises of whether such behaviour although outside of the normal employer-employee relationship, is nevertheless an infliction sexual harassment in the workplace. In turn it contributes to the general morale of the workplace, whereby, women are perceived as less than humans who are worthy of respect, regardless of which position the women is in.

It is, therefore, incumbent that sexual harassment policies of institutions of higher learning robustly address sexual harassment involving students and staff as well as sexual harassment among staff. Institutions of higher learning must develop and implement policies that prohibit any amorous or sexual relationships between students and lecturers. Second, the policies must also contemplate and address the unique challenges presented by sexual harassment cases involving staff and students. While it is difficult to regulate human relationships to a tee, universities should discourage relationships between students and their lecturers during the students' study.[64]

UNISA academic Margaret Orr settled her sexual harassment claim against the chairman of the UNISA council in the high court by accepting R150 000.00 plus legal costs and settling her claim against the university in the labour court by accepting a commitment by UNISA to donate R500 000.00 to a bursary fund and a contribution of R430 000.00 to her legal costs.[65]

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61 Pierre Joubert, Christo Van Wyk & Sebastiaan Rothmann 'The effectiveness of sexual harassment policies and procedures at higher education institutions in South Africa 2011.
62 Ibid.
63 University of Venda v Maluleke and Others (2017) 38 ILJ1376 (LC).
64 Ibid.

In the United States, colleges and universities have been stiffing their policies in light of the fact that three years ago, the U.S. Department of Education stipulated what the institution's responsibilities are in responding to sexual assault and sexual harassment. Under Title IX of the Education Amendments of 1972, the federal law prohibits sex discrimination at institutions that receive federal funds and requires colleges to investigate and resolve reports of sexual misconduct whether or not the police are involved. Despite these efforts, sexual harassment and interactions between professors and students are still prevalent on college and university campuses in the United States.[66]

The policies that are established by colleges and universities need to be implemented in order to be effective. Joubert, van Wyk and Rothmann found, in their study of higher education institutions in South Africa, that the implementations of the sexual harassment policies in South African universities were ineffective, because very few academic staff members received training and any guidance on how the policies should be utilized.[67] Any attempt by colleges and universities to address the issue of sexual harassment must take a holistic approach to the problem. This would require more than a general policy of sexual harassment program, but it would require the efforts and support of the campus administration, faculty, employees, and students and the continual training of all members of the campus community, as well as a procedure that encourage, not merely allows, complaints.[68]

Given the negative impact of sexual harassment on learning it is important that institutions of tertiary education develop and implement policies on sexual harassment as well as grievance procedures. One of the issues that triggered concern about policy implementation was an uncertainty whether the policies reach their intended targets – those who are being harassed. Only dealing with a few cases per year make those responsible for the policies wonder what the real state of sexual harassment on campuses was.[69] Was it a case of under reporting or a case of the lack of legitimacy of the policy itself? Furthermore, institutional support was not

65 Janice Joseph 'Sexual harassment in tertiary institutions: A comparative perspective' 2015 Temida.
66 Ibid.
67 Ibid.
68 Ibid.
69 A Gouws & A Kritzinger 'Dealing with sexual harassment of institutions of higher learning: Policy implementation of a South African university' (2007) 1 Unisa Press.

really forthcoming because universities are very concerned about protecting their public image and generally do not want publicity around sexual harassment.[70] Policy implementation is a crucial step in eradicating sexual harassment. Although there are bodies in place to implement policies, their roles more often than not a passive. There is a need for the establishment of bodies within tertiary institutions which have a prime focus of policy implementation. It is submitted that every institution should have an awareness campaign on sexual harassment every year. T

What has become clear is that there often exists is a gap between policymaking and policy implementation. This is a multi-dimensional problem varying from the way the policy was formulated to issues of perceptions of the policy and a lack of institutional support.[71] Recent research at tertiary institutions globally has shown that policy design alone is only as good as the paper it is written on when limited success is reached with policy implementation.[72] There is an appreciation of well-written policies and they contribute to the overall outlook and seriousness of the institution to recognise sexual harassment as a crisis. It will however take beyond well-drafted policies to eradicate sexual harassment. When issues of sexual harassment are dealt with in the informal stage the focus is on mediation and counselling with the aim of resolving the problem between the two parties. When a complaint moves into the formal stage where the disciplinary committee becomes involved, the process becomes one of an adversarial nature where lawyers often force survivors to put experiences into a legal straitjacket where no grey areas of understanding what has happened to them are allowed. The secondary victimization of both the survivor and the alleged perpetrator often undermines the aim of policies and procedures that attempt to redress sexual harassment. Both parties become damaged in the process. It raises the question as to whether a process based on rights claiming through legal recourse can contribute to justice and fairness when the process is adversarial and not reconciliatory.[73] It is submitted that the constant rise in sexual harassment cases in higher learning institution even amidst well-drafted policies, is owed to the isolated understanding of sexual harassment. Sexual harassment should be understood in its entirety, in that, factors such as gender inequality, power

70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid.

dynamics and institutional barriers should be seen as integrated in sexual harassment.

IV HIGHER LEARNING INSTITUTIONS

(a) University of the Witwatersrand

The first and foremost element of a sexual harassment policy should be a declaration of war on sexual harassment.[74] The object of a sexual harassment policy should be not only to insulate the company from liability, but also to ensure a positive and healthy work environment.[75] Prevention is the most effective tool an employer can use for the elimination of sexual harassment.[76] The University of Witwatersrand's sexual harassment policy was retrieved on the University's website, which is available to the public. The policy is titled Sexual harassment, sexual assault and rape policy and procedures was drafted in 2013.[77] In response to recommendations of the August 2013 Formal Inquiry Report of the Independent Inquiry into Allegations of Sexual Harassment at the University of Witwatersrand, the Gender Equity Office was established.[78]The policy begins with a commitment by the University of Witwatersrand to provide a safe institutional environment where all may learn, work and go about their duties and activities free from sexual harassment and sexual violence.[79] The policy recognises sexual harassment as an act that undermines an individual's autonomy.[80] The policy states that the University has zero-tolerance for sexual harassment.[81]

The policy sets out its objective as creating a safe environment but also establishing a common understanding of what constitutes sexual harassment.[82] It further sets out the principle of confidentiality, which is aimed at protecting the reputation of the alleged perpetrator and the compliant.[83] The policy provides a set of definitions of

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74 Arjun P Aggarwal *Sexual harassment in the workplace* 2 ed (1992) 321.
75 Aggarwal op cit note 71 at 325.
76 Aggarwal op cit note 71 at 332.
77 Sexual Harassment Policy of the University of the Witwatersrand 2013.
78 Gender Equity Office University of Witwatersrand Disciplinary Procedure for Gender-Related Misconduct, Staff and Students 30 March 2015.
79 Sexual Harassment Policy of the University of the Witwatersrand 2013.
80 Ibid.
81 Ibid.
82 Ibid.

which, an employee, in this context, means an employee of the University, including students employed by the University, or any other person who has agreed to be bound by the rules and policies of the University relating to staff.[84] Further, an important definition in this context is the University's definition of sexual harassment. Sexual harassment refers to a wide range of practices, including unwelcome conduct of a sexual nature.[85] The unwelcome conduct includes verbal, non-verbal and unwelcome physical conduct.[86] The policy further elaborates on the definition of sexual harassment to include, special victimization, grooming, quid pro quo harassment and the creation of a hostile environment.[87] The University's definition of sexual harassment is consistent with the definition recognised by the International Labour Organization and the Code of Good Practice on Handling Sexual Harassment Cases.

The procedure as set out by the policy establishes the Sexual Harassment and Safety Office which is responsible for providing psycho-social support, awareness raising and capturing statistics among other duties.[88] The Sexual Harassment and Safety Office appears to be the first mode of contact for the complainant. The Sexual Harassment Advisory Committee being the second. Both these bodies are formal and established bodies of the University. The manner in which tertiary institutions are structured is that they greatly overlap with students, third parties and the public. The approach to which the complaint would be laid is rather rigid in light of the institutional structure of tertiary institutions. The University also establishes a legal office which is responsible for representing the University's interests at the disciplinary hearing in the instances where the alleged perpetrator is a student.[89]

The University of the Witwatersrand provides the CCDU for counselling for the victim. The CCDU is in the premises of the University. In the instance where a complainant was harassed within the premises of the University, the University itself will present itself as the hostile environment. The counselling would be futile to the complainant as it will require them to complainant to be exposed to the hostile

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83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid.
88 Ibid.
89 Ibid.

environment again. Moreover, the University establishes the Disciplinary Hearing Panel which is responsible for hearing formal disciplinary processes in terms of the policy.[90] Moreover, there are supportive and protective measures set out in the policy regardless of whether disciplinary proceedings are instituted.[91] The formal disciplinary process is set out in the policy. Lastly, the University aims to provide education and communication. It is however, alarming the in the face of a well-structured and drafted policy, the University of Witwatersrand to date has sexual harassment cases.

In 2018, a complaint of sexual harassment has been made to the Wits Gender Equity Office by someone in the Wits community against a staff member at CALS.[92] An allegation of sexual harassment was made to the Wits Gender Equity Office at the end of August by someone in the Wits community against a member of CALS staff. In a controversial case, Professor Mulala Danny Simatele was reinstated by the university after a successful review of a panel's sexual harassment finding against him.[93] The policy of the University of the Witwatersrand has its shortfalls, but it is to great extent largely compliant. The policy is consistent with the current laws of sexual harassment. There is however room for improvement, in the following respect; reviewing, contact persons and implementation. The current sexual harassment policy of the University of the Witwatersrand was drafted in 2013. The gap is alarming as the policies and procedures should be reviewed frequently. Moreover, the institution should identify patterns of sexual harassment which exist in the institutions, the barriers specific to the institution and formulate the policy in a manner that speaks to the institution's challenges. Moreover, it is submitted that to each institution adopts a institution-specific implementation procedure which will best eradicate sexual harassment and bring about the intended purpose of the policy.

(b) University of Cape Town

The University of Cape Town policy was retrieved on the internet from the University's website. The policy is titled as the University of Cape Town Sexual

90 Ibid.
91 Ibid.
92 Msindisi Fengu 'Wits controversial decision to reinstate lecturer accused of sexual harassmet' available at https://www.news24.com/citypress/news/wits-controversial-decision-to-reinstate-lecturer-accused-of-sexual-harassment-20200218 accessed on 13 July 2020.
93 Ibid.

Harassment Policy. The University begins by committing itself to providing an institutional environment where all may pursue their studies, careers, duties and activities free from sexual harassment.[94] The policy states that sexual harassment constitutes serious misconduct, and will result in disciplinary action.[95] The University does not tolerate sexual harassment.[96] The focus of the policy is to prevent and manage sexual harassment in the University.[97] The policy further sets out various definitions. An employee in this context, means an employee of the University or a person who has agreed to be bound by the rules and policies of the University relating to staff.[98] Further, sexual harassment is defined as unwelcome conduct of a sexual nature that violates the rights of a person. The definition is consistent of the definition as recognised by the International Labour Organization and the Code of Good Practice on Handling Sexual Harassment Cases. The policy further distinguishes between the other forms of sexual harassment which involve, unwelcome sexual conduct unwelcome physical conduct which ranges from touching to sexual assault and rape.[99]

The policy places a burden on managers to take all reasonable steps to create and maintain an environment that is free from sexual harassment.[100] A manager in this context means any employee of the university with managerial, supervisory of Warden's responsibilities.[101] The University also places a burden on itself to communicate to take all reasonable steps to communicate the policy to all employees, students and third parties on a regular basis and to raise awareness about the need to prevent sexual harassment.[102] The question as to whether the communication is effective is debatable as to date there are sexual harassment cases at the University of Cape Town. In a study, Feris shared data collected during the reporting period 1 January to 16 September this year. The reported cases showed up the following: 35% were rape, 27% were sexual harassment, 21% were sexual assault, 12% were domestic violence5% were unknown, which means details

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94 Sexual Harassment Policy of the University of Cape Town 2008.
95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid.
100 Ibid.
101 Ibid.
102 Ibid.

were not provided. Data on the location of the rapes showed that most occurred off campus. In terms of the alleged perpetrators, although four were staff members – three professional, administrative support and service (PASS) staff and one academic – the majority were either students or external to UCT.[103]

The policy provides that continuing education as training are necessary to ensure that employees, students and third parties are aware of the contents of the policy and as appropriate to implement it and prevent sexual harassment.[104] The approach to communication and education is paramount, as it is only through knowledge of the contents of the policy that individuals are not only aware of their right but also aware the route to take in reporting. The University of Cape Town sets out an important principle, the no-contact orders. The no-contact order is intended to protect a complainant from sexual harassment, or the possibility of the sexual harassment, whether or not a formal disciplinary process is instituted or contemplated.[105] This is an excellent approach as some victims of sexual harassment suffer psychologically as a result of the conduct by the perpetrator. A mechanism of this nature not only protects the victims but also lessens the burden that they are likely to suffer through contact with the perpetrator. This includes the provision for supportive and protective measures to the complainant, whether or not disciplinary proceedings are instituted.[106]

A significant case that illustrates the dire consequences of sexual harassment is the case *PE v Ikwezi Municipality*, this case involves an employee who was sexually harassed by her supervisor. The employee in turn suffered from post-traumatic stress disorder and later resigned.[107] The perpetrator was not dismissed but rather received a written warning and two weeks suspension without pay.[108] It is an alarming discovery that the perpetrator only received such punishment. However, the court later found the Municipality liable for damages as there was a direct liability the damage she suffered during the act and the disciplinary hearing.[109] Similarly, in the

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103 Carla Bernardo 'UCT's specialised sexual offences tribunal' available at https://www.news.uct.ac.za/article/-2019-10-01-ucts-specialised-sexual-offences-tribunal accessed on 13 July 2020.
104 Sexual Harassment Policy of the University of Cape Town.
105 Ibid.
106 Ibid.
107 K Calitz 'Sexual harassment: Why do victims so often resign? PE v Ikwezi Municipality' (2016) 37 *ILJ at* 2.
108 Ibid.

case *Liberty Group Ltd v M*, an employee resigned due to ongoing and continued sexual harassment. There was no investigation made until the second resignation by the employee.[110] The court held that the step-in section 60(2) of the Employment Equity Act was not complied with. Section 60(2) of the Employment Equity Act stipulates that the employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provision of the Act.[111] The employer in this case failed to do so, as he acted only after the second resignation. A reasonable employer would have foreseen that it is necessary to take the reasonable steps and act according. The court awarded R250 000.00 compensation to the employee.[112]

The policy also establishes a reporting officer. The reporting officer's duty is to provide the University with a comprehensive sexual harassment response.[113] The preventive approach that the University upholds is significant, in that it combats the futile effects of sexual harassment prior to their occurrence. Further, the policy provides for the Sexual Harassment Advisors, the role is to receive complaints from the reporting officer and amongst others, provide reports.[114] This will ensure that the complaints are given the necessary attention which in turn promotes accountability as reports are required. Moreover, an Advisory panel is established to assist the reporting officer with information, suggestions and expertise.[115] Sexual harassment is not a concept with can be dealt easily, it is complex and requires the necessary skills and objectivity to fulfil justice. In the absence of an external, objective body the results could be futile.

The policy also provides for informal and formal procedures. The informal procedure is a process managed by the reporting officer, in which the relationships between complainant and alleged perpetrators are explored with the consent of both.[116] A complainant may elect to initiate formal procedures either with or without following an informal procedure.[117] The sexual harassment policy of the University of Cape Town

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109 Ibid.
110 Liberty Group Limited v M (2017) 38 ILJ 1318 (LAC).
111 Employment Equity Act 55 of 1998.
112 Supra note 66 at para 2.
113 Sexual Harassment Policy of the University of Cape Town.
114 Sexual Harassment Policy of the University of Cape Town.
115 Ibid.
116 Ibid.
117 Ibid.

is a moderate policy and there is still room for improvement. Firstly, the current sexual harassment policy of the University of Cape Town was drafted in 2008. The University of Cape Town, like the University of the Witwatersrand needs to be reviewed regularly. There are sexual harassment cases which occur in the University of Cape Town which should be used as reference points for improvement. Various sexual offences have occurred within the institution, there is a dire need for the institution to recognise these offences are communicate effectively that the university have no tolerance for sexual harassment and take steps to hold the perpetrators accountable.

(c) Rhodes University

The sexual harassment policy of Rhodes University was retrieved on the internet through the University's website. The policy is titled Sexual Offences Policy for Students. The University commits itself to fostering and maintaining an institutional environment that upholds human rights and recognises the inherent dignity and worth of every person, in line with the Bill of Rights and relevant national legislations.[118] The policy specifically upholds the constitutional rights to equality, dignity, freedom and security of person, bodily and psychological integrity as well as the right to a free trail.[119] It is noteworthy from the onset to appreciate a policy which is founded on these constitutional rights. The policy sets a pressure point for other tertiary institutions to develop the core of sexual harassment policies and procedures which are founded on constitutional values and rights. Sexual harassment does not only impair one's dignity, but causes emotional and psychological abuse.[120] In the case *Ngcobo v Department of Education*, an educator lodged a complaint of sexual harassment against the principal. The applicant, which is the educator got hospitalised due to emotional, sexual and psychological abuse as a result of the sexual harassment.[121] The educator was subjected to verbal sexual abuse and physically in the form of forcefully touching of thighs, kissing and hugging.[122] The court found that many sexual harassment victims suffer ill-health as a result of the

118 Sexual Offences Policy of Rhodes University.
119 Ibid.
120 *Ngcobo v Department of Education Arbitration Award 30 November 2002.*
121 Ibid.
122 Ibid.

sexual harassment.[123] The applicant was awarded R50 000.00 compensation for damages.

The policy defines sexual harassment as unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome.[124] Similarly, the consistent word in the definitions of sexual harassment is unwelcome. The definition is closely linked to the definition upheld by the International Labour Organization and the Code of Good Practice on Handling Sexual Harassment Cases. Further, the policy strives to carry out five principles namely, confidentiality, complainant-centred, rights-based, efficiency and accountability. These principles are fundamental to the any policy.[125] The policy further stipulates how it plans to implement the policy, this includes; education and awareness, reporting, medical care, psychosocial support, safety and security, alternative dispute resolution and regulating the conduct between student and staff.[126] The policy sets out the role of every person involved in the implementation of the policy, from the manager to the Vice-Chancellor. Further it sets out the mechanisms for monitoring implementation. An important component of this policy, which is distinctive from the policy of the University of the Witwatersrand and the University of Cape Town, is that the policy provides for three contacts to which complainants can readily reach. The contact details which include their division and faculty, telephone numbers as well as an email address. Moreover, the policy is set to be reviewed every three years. The current policy is set to be reviewed in 2022 and contains the review procedures as well as the officers involved, ranging from SRC to prosecutor. This enables equal representation in the formation and implementation of the policies and procedures.

In *Viedge v Rhodes University* and Others in which an employee brought an urgent application to have disciplinary action against him declared unlawful. The employee argued that he was contractually entitled to a procedurally fair disciplinary process in accordance with the employer's policies which were an extension of his employment contract. He challenged the process on the basis that the disciplinary hearing was not conducted in accordance with the employer's applicable policy which required the appointment of a chairperson at a specified level and that non-compliance with

123 Ibid.
124 Sexual Offences Policy of Rhodes University.
125 Ibid.
126 Ibid.

the policy constituted a breach of his contractual right to a fair disciplinary procedure. The High Court found that the employer's failure to comply with the policy was a breach of the employee's contract, rendering the disciplinary action taken against him unlawful and void ab initio.[127]

Internationally, sexual harassment in tertiary institutions was ignored by law makers and others in authority. However, recently some countries are addressing this situation.[128] Lecturers on the other hand, who are employed to improve the waning educational system and contribute their bit to activities that will enhance the standard of education, do not help matters. Some of them have lost the passion of their primary assignment which is to impact students with knowledge. Rather, they help to make the University campuses a breeding ground for moral decadence and other vices. They capitalize on the waning educational system, the academic laxity of the female students who are desperate to move forward.[129] Most research on sexual harassment and sexual violence in South Africa has been undertaken with explicitly activist intentions, and had led to the institution of new policies, educational programmes and disciplinary procedures.

The ratification of policies on sexual harassment has to be seen as constituting a major discursive challenge to deeply embedded notions of gendered sexuality; simultaneously institutional support for feminist recognition of the links between sexual harassment and skewed gender ratios of performance and leadership and the insertion of public surveillance into the 'private' zones of campus life, zones in which a lot of complex pleasure was (for some) to be garnered. Resentment, couched in intellectual or ideological terms, was widespread, articulated most powerfully by men claiming 'culture' as their platform, but also by men and women scornful of 'pseudo-studies' of the political body and intellectually dismissive of 'chick stuff. Scepticism about self-serving political theory is always useful (throwing disinfectant over sentimentality, sloppy philosophy, or crudely forged alliances, always carrying paranoia and conspiracy theories in their wake). The resistance to understanding the power of sexual assault within cultures so dependent on gendered approaches to (hetero)sexual citizenship is rarely, however, more than superficially valuable as

127 https://www.labourguide.co.za/law-firms/cliffe-dekker-hofmeyr/2644-beware-of-rigid-and-over-regulated-disciplinary-procedures
128 Janice op cit note 71 at 126.
129 Akptor Julie 'Sexism and sexual harassment in tertiary institutions' (2013) 11 5237.

'disinfectant'. It is deeply anxious and works through deferring accountability - assimilating the 'edge' of an epistemological challenge (ratifying a policy under peer pressure) and refusing living engagement with its principles or consequences (neglecting its potential for contribution to knowledge building at every level).[130]

V FOREIGN LAW

Before 1977, sexual harassment typically met with a "boys will be boys" attitude, which is still the case in modern day, from both the courts and the organizations where the sexual harassment had occurred.[131] Such behaviour was regarded as a purely private and personal matter, not based upon sex, and not the responsibility of the organisation.[132] A significant turning point, however was the emergence of sexual harassment as a social problem in the United State.[133] The United States of America leads the field in terms of the law relating to sexual harassment.[134] The United States is one of the first countries to define sexual harassment and has developed its law over time. In fact, it was the federal judiciary that first recognized sexual harassment as a form of discrimination in the mid-1970s.[135] This was after the US Equal Employment Opportunity Commission (EEOC) issued guidelines in 1980 defining sexual harassment in the work place as unlawful discriminatory conduct which could attract sanctions under Title VII of the Civil Rights Act 1964.[136] Although the concept of sexual harassment is not new and the law is increasingly developing, it is crucial that we measure our law against that of well-development countries. In the United States of America, the Title VII of the Civil Rights Act of 1964 provides that, it shall be an unlawful employment practice for an employer to discriminate against any individual because of such individual's sex.[137] The United States like South Africa recognises sexual harassment as discrimination against an individual's sex. Title VII predated the recognition of sexual harassment as a pervasive problem in the workplace.[138] The courts gradually recognised courts began recognizing that the

130 Ibid.
131 Friedman J et al op cit note 2 at 11.
132 Ibid.
133 Marshall Confronting op cit note 5 at 34.
134 Van Deventer & de Bruin op cit note 1 at 198.
135 Marshall op cite note 5 at 34.
136 Patricia Kameri-Mbote, Sarah Kinyanjui & Yohana Gadafii 'Sexual harassment in the workplace in Kenya' 2018 East African Law Journal 184.
137 Zalesne op cit note 6 at 169.

conduct at issue was intimately related to the target's status as a woman and thus recognized that conditioning employment-related.[139] The diagnosis of the problem is paramount as the basis of sexual harassment is largely based on gender inequality. In order for policies and procedures of sexual harassment to be effective and reach their intended purpose, it is important that the drafters of the policies have the realisation of gender inequality in mind.

In the landmark case of *Bundy v. Jackson,* the Court of Appeals for the D.C. Circuit held that sexual harassment that creates a hostile environment alters the conditions under which an employee must work and constitutes actionable sex discrimination.[140] The benchmark to which the United States created in recognising a hostile environment constitutes actionable sex discrimination. The hostile environment created by sexual harassment should not be taken lightly, as that too can cause dire consequences. In 1986, the Supreme Court adopted this reasoning in *Meritor Savings Bank v. Vinson,'159* holding that Title VII forbids not only quid pro quo harassment but also hostile environment harassment: harassment that while not affecting economic benefits, subjects the plaintiff to a hostile or offensive working environment.[141] Further, the Supreme Court suggested that an appropriately designed policy could protect an employer, in that the employer should be shielded from liability.[142]

In 1993, the Supreme Court clarified the parameters of a hostile environment sexual harassment claim in *Harris v. Forklift Systems, Inc.* holding that for actionable sexual harassment, he victim must subjectively perceive the environment as abusive, and an objective reasonable person must also find the environment hostile and abusive.[143] It is submitted that this approach should be strictly upheld by South Africa as to a large extent will eradicate sexual harassment as this send a messages to perpetrator that sexual harassment of any form will not be tolerated.

The new standard articulated in *Faragher* and *Ellerth* required employers to adopt new policies and procedures addressing sexual harassment in the working

138 Ibid.
139 Ibid.
140 Zalesne op cit note 6 at 170.
141 Ibid.
142 Anna-Maria Marshall *Confronting sexual harassment: The law and politics of everyday life* (2005) 45.
143 Ibid.

environment.[144] First, the policy should define prohibited conduct, provide a list of specific examples, and be widely and regularly distributed to all employees.[145] The procedures should provide multiple avenues for pursuing grievances; employers were advised to designate several managerial positions that could officially receive complaints about sexual harassment.[146] Further, the policies and procedures ought to be proactive in monitoring harassment and in responding to complaints promptly and effectively.[147]

VI BARRIERS IN REPORTING SEXUAL HARASSMENT IN HIGHER LEARNING INSTITUTIONS

(a) Institutional barriers

By protecting their images universities use a tactic of 'stonewalling' that has devastating effects such as Dziech and Hawkins argue.[148] In the absence of awareness of or open discussion of sexual harassment the belief is fostered that it is non-existent and victims start to think that their cases are isolated incidents that are unwelcome to the institution.[149] The tertiary institutions create barriers and lack of trust by continuously choosing to protect their reputation at the expenses of the victims of sexual harassment. The University of the Witwatersrand recently reinstated a Professor even after the panel of sexual harassment against him.[150] When perpetrators are not properly disciplined it leads to mistrust of the institution and a delegitimation of the policy and grievance procedure.[151] The tertiary institutions commit themselves to educating and communicating the sexual harassment policies, yet they do not set out how they aim to this effectively. It is not sufficient that employees are aware of the existence of the sexual harassment policies. Employee should be aware of the contents of the policy and have a sound understanding of

144 Marshall op cit note 139 at 47.
145 Ibid.
146 Ibid.
147 Marshall op cit note 139 at 48.
148 A Gouws & A Kritzinger op cit note 66 at 71.
149 Ibid.
150 Msindisi Fengu 'Wits controversial decision to reinstate lecturer accused of sexual harassment' available at https://www.news24.com/citypress/news/wits-controversial-decision-to-reinstate-lecturer-accused-of-sexual-harassment-20200218 accessed on 13 July 2020.
151 A Gouws & A Kritzinger op cit note 66 at 71.

what constitutes sexual harassment. More importantly the persons involved in the drafting, implementing and monitoring of the policies should have an understanding of their various forms of sexual harassment and the prevalent forms which manifest in tertiary institutions.

There is considerable underreporting of sexual harassment in colleges and universities.[152] In *Bohloko v Central University of Technology Free State,* the commissioner emphasised that the non-reporting of the incident should not be misconstrued to the non-existence of the act.[153] The educational institution is an arena characterized by asymmetrical power relations and a gendered hierarchical structure. The imbalance of power between students, especially female students, and male teachers or professors in position of trust and authority contributes to the high rate of underreporting of this phenomenon. Because of this lack of trust, the victims are reluctant to report their victimization.[154] Some victims are also reluctant to report their abuse because they believe that no action will be taken against the perpetrator if they report incidents, because many of the perpetrators are not punished, especially in undeveloped countries.[155] The low rates of reporting are significant, not only to the individual directly concerned, but also to the employer, who may erroneously conclude from a lack of complaints that there are few incidences of sexual harassment in the workplace. Although the effects of different kinds of policies have not been extensively examined, the available research indicates that having a policy in place significantly increases the likelihood that victims of harassment will make a complaint. It appears that an effective way of encouraging workers to report sexual harassment is to introduce a variety of policies. In these circumstances, victims are more likely to have confidence their employer will respond to complaints.[156]

(b) Gender and inequality

Organisations with weak institutional structures to address sexual harassment may be characterised by widespread cases of sexual harassment of the junior employees

152 Janice op cit note 71 at 136. p
153 *Bohloko v Central University of Technology Free State* (2018) 5 BALR 465 (CCMA).
154 Ibid.
155 Ibid.
156 McCann op cit note 50 at 42.

by their superiors due to the power differentials and the difficulty of holding the superiors to account.[157] It also follows that reporting of sexual harassment in such organisations will be low as victims would rather keep the harassment to themselves than report and risk losing their employment in the organisation.[158] This is a dangerous discovery as the structures that are in place in most policies in tertiary institutions are hierarchical. It therefore strengthens the burden as victims will be reluctant to report sexual harassment because of their junior position or status. It is submitted that structures of reporting sexual harassment in tertiary institutions should be cognisant of the barriers of gender and inequality. There is thus an increasingly urgent need that tertiary institutions establish structures which are approachable and structured in such a way that a complainant would feel safe and confident in the system established by the institution.

(c) Women as prevalent victims of sexual harassment

Women have long been exposed to workplace harassment which involves conduct of a sexual nature or is premised on the sex of the victim. These kinds of behaviour were not given a name, however, until the 1970s, when women in the United States demanded that sexual harassment be recognized as sex discrimination under the federal anti-discrimination legislation.[159] This led to many countries recognizing that sexual harassment is a serious problem. The available research indicates that the vast majority of workers subjected to sexual harassment are women.[160] While relatively few court cases are reported in South Africa, Nel (1993: 244) indicates that 76% of all females are exposed to sexual harassment at some stage in their careers or professional lives.[161] However, these findings demonstrate that harassment does not impact on women in a uniform way, but is more prevalent against the more vulnerable.[162] Women not only experience sexual harassment as a form of sex discrimination but also as a state of inferiority in the workplace. In a developing country like South Africa, casual workers and informal sector workers appear to be particularly subject to harassment.[163] It is not surprising the women to date women as

157 Ibid.
158 Ibid.
159 McCann op cit note 50 at 1.
160 McCann op cit note 50 at 4.
161 Piere Joubert p7.
162 McCann op cit note 50 at 5.

prevalent victims of sexual harassment, as the depth of sexual harassment goes beyond policies and procedures, but the eradication of perceptions in society which are founded on the inferiority of women. The traditional formulation of sexual harassment has always contemplated a circumstance where it is the superior who sexually harasses their junior. However, the paradox of power departs from this general assumption as it posits that it is the juniors, often male, who sexually harass their superior, often female with a view of 'cutting them to size'.[164]

(d) Power dynamics

Sexual harassment can also be viewed as a function of power.[165] Once it is realised that the problem is not sex but sexism, the concept of harassment can be fully understood to be a form of discrimination because it involves men exercising their power to punish women.[166] Power is analysed in the context of the power-powerlessness dichotomy and the paradox of power.[167] The power powerlessness dichotomy as applied in the context of the work place posits that there are two categories of individuals in any organisation.[168] These are individuals with power and those who are powerless.[169] Although, sexual harassment is a concept that needs to be handled with the necessary caution and sensitivity, it nevertheless remains paramount to tread with caution. Section 35(3) of the Constitution of the Republic of South Africa provides that everyone has a right to a fair trial.[170] Moreover, section 23(1) of the same Constitution provides that everyone has the right to fair labour practice.[171] It is for that reason that in *Campbell Scientific Africa v Simmers*, the court found that an inappropriate comment does not automatically warrant sexual harassment. The inappropriate comment was whether the employee wanted a lover for the night.[172] Moreover, the court held that there was no power differential.[173] It is against this reasoning that it is submitted that, although power dynamics are a

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163 Ibid.
164 Patricia Kameri-Mbote op cit note 33 at 191.
165 Patricia Kameri-Mbote op cit note 33 at 190.
166 Pierre jpubert p7.
167 Ibid.
168 Ibid.
169 Ibid.
170 Constitution of the Republic of South Africa, 1996.
171 Ibid
172 Campbell Scientific Africa (Pty) Ltd v Simmers and Others (CA 14/2014) [2015] ZALCCT 62.
173 Supra note 57 at 62.

determining factor in sexual harassment cases, caution should be upheld in applying a blanket approach.

(e) Fear

As Dziech and Hawkins point out 'low reportage has been attributed to numerous factors – fear of retaliation, reluctance to engage in conflict or threaten a relationship with an authority figure, belief that the behaviour will disappear if ignored, concern that institutional remedies are inadequate and powerless to affect change, and conviction that the complaint will be disbelieved'.[174] A significant case which illustrates the fear of being dismissed is *Pretorius v Britz*. In this case, the sexual harassment was alleged to have taken place over a period of 18 months.[175] The employee succumbed to the pressure because of the fear of being dismissed. The employee received unsolicited gifts from her employer, was required to be a work before and after working hours.[176] The employer would put his hand between her legs and send her cards and messages that have explicit and suggestive behaviour.[177] The court held that the party alleging sexual harassment is not required to establish mens rea on the part of the harasser.[178] This is important as the harassers of sexual harassment mostly raise the defence that they did not know that the act would constitute sexual harassment.[179] It is however unlikely that in this case, the employer did not know. The acts of sexual harassment committed are so dire and the employer could have reasonably have known that the employee deems such conduct as unwelcome. The court held that sexual harassment did indeed take place and probably led to Pretorius resigning her position for a similar job without any extra benefits.[180] The court thus awarded that the employer pays that employee a nine months' salary.[181] In *Pillay v SA Post Office*, the court held that the fact that a number of people were present does not discount the probability of the applicant touching the complainant.[182]

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174 A Gouws & A Kritzinger op cit note 66 at 71.
175 Pretorius v Britz 1997 (5) BLLR 649 (CCMA).
176 Ibid.
177 Ibid.
178 Ibid.
179 Ibid.
180 Ibid.
181 Ibid.
182 *Pillay v SA Post Office* (D407/10) (2012) ZALCD para 22.

VII MEASURES TO COMBAT SEXUAL HARASSMENT

Firstly, create awareness by including the policy in as many programmes as possible, such as in orientation, education, training and diversity awareness programmes. This will contribute to the creation of a culture where sexual harassment is not tolerated. Trade unions should be involved in every step of the implementation process. [183]Secondly, communicate the policy to all employees at every level of the organisation by providing each one with a copy of the policy and keep signatures on file that employees received the policy. This signature may prove vital in an organisation's defence against claims of vicarious liability.[184] Thirdly, conduct regular training sessions or workshops where the content of the policy and the complaints procedure are explained. These training sessions should continuously reinforce the conditions that contribute to a harassment-free working environment, and should familiarise or reacquaint each employee with their rights and responsibilities.[185] Fourthly, ensure that managers and supervisors are aware of their responsibility for implementing the policy and ensuring compliance.[186] Provide specialised training for individuals who were assigned an official role in administering the organisation's complaint procedure.[187]

The policy statement should be reissued each year by the college president and displayed prominently throughout the campus. In addition, the policy statement must be published in employee, faculty, and student handbooks. Colleges and universities should also conduct training sessions on sexual harassment for faculty, staff, and students. These training sessions should be mandatory and held annually and have the active support and participation of the administration. Effective training programs send a clear message to all individuals that the sexual harassment policy must be taken seriously and that sexual harassment will not be tolerated by the campus administrators. Tertiary institutions should enforce their policies if they are to be effective in eliminating sexual harassment.[188] Lastly, there is a need to go beyond merely punishing the harasser to providing rehabilitation services for the victim of

183 Pierre Joubert, Christo Van Wyk & Sebastiaan Rothmann 'The effectiveness of sexual harassment policies and procedures at higher education institutions in South Africa 2011.
184 Ibid.
185 Ibid.
186 Ibid.
187 Ibid.
188 Janice op cit note 71 at 126.

sexual harassment. Most current approaches to handling sexual harassment seemingly focus on the punishment of the harasser without recognising the fact that victims of the harassment may require rehabilitation to enable them to move on with their lives.[189]

VIII EXAMPLE OF GOOD POLICIES AND PROCEDURES

One of the most active universities in the early 1990s around the issues of gender-based violence, under the leadership of Carla Sutherland and Mamphela Ramphele, UCT set up an Office on the Prevention of Discrimination and Harassment in 2000 (headed by Francois Botha, an ex-magistrate from the Wynberg Sexual Offences Court) after a number of research reports made it clear that certain forms of sexual harassment (especially between student peers and faculty and students) were part of UCT's institutional climate. The 1989 policy was slightly adjusted in 1998, but it was not until 2006, after the *Media24 v Grobler* judgment that Deputy Vice-Chancellor Martin Hall set up task teams to re-engage the university's thinking on policies around sexual harassment and around racism.[190]

The effectiveness of any definition will depend not only on the grievance procedure that enforces it, but also the commitment of the university administration and faculty to creating a truly non-discriminatory environment for students and staff alike.[191] In the United States, workplace and academic sexual harassment is clearly prohibited as a form of sexual discrimination, under both Title IX of the 1972 Education amendment and, for employees, Title VII of the 1964 Civil Rights Act.[192] These guidelines thus have a regulating force supported by the US Department of Education that is crucial to the effort to curtail the widespread sexual harassment now afflicting our colleges and universities.[193]

The most comprehensive policies include both sex-based and sexual conduct. Suffolk County Council, a local government employer in the United Kingdom,

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189 Ibid.
190 Jane Bennett 'Policies and sexual harassment in higher education: Two steps forward and three steps somewhere else' 2009 JSTOR.
191 Paludi op cit note 46 at 2.
192 Paludi op cit note 46 at 3.
193 Paludi op cit note 46 at 5.

introduced a sexual harassment policy in 1995, which referred to "unwanted conduct of a sexual nature, or other conduct based on sex". Others distinguish sexual harassment and gender harassment and explicitly prohibit both. It is also common for policies to contain definitions which refer to quid pro quo and hostile working environment harassment. The University of Cape Town, South Africa, for instance, prohibits both. It distinguishes between situations in which "submission is made either explicitly or implicitly a term and condition of an individual's employment" and those in which "its purpose or effect is interference with the individual's performance at work by creating an intimidating, hostile or offensive environment in which to work".[194]

Secondly, the task team carefully looked at the ways in which the UCT Human Relations Management had been working to devolve discretion around the handling of grievances and complaints to senior line managers. While it was agreed that such discretion led to the formalisation of responsibility for line managers (no 'passing the buck' was possible), it also meant that managers would find themselves in the position of arbitrating over the seriousness of allegations which came before them. Where these involved sexual harassments, the possibilities for mismanagement expanded hugely as details of personal lives, sexual 'desire', survivors' pain, humiliation or fear (and quite frequently the complexities of consensual relationships followed by sexual harassment where one participant in the relationship wanted to move on) tangled the options of clear judgement and action. The task team did agree that all managers should be well versed in the meaning of sexual harassment as discrimination, but also believed in centralising the management of sexual harassment complaints.[195]

IX CONCLUSION

Sexual harassment in the workplace is a crisis that workplaces cannot escape from. The consequences of sexual harassment have proven to be a dire and serious impairment to one's fundamental rights as a human being. Workplaces, such as tertiary institutions which are multi-faceted have an even greater crisis. The

194 McCann op cit note 50 at 14.
195 Jane Bennett 'Policies and sexual harassment in higher education: Two steps forward and three steps somewhere else' 2009 JSTOR.

formulation of policies and procedures of tertiary institutions as required by law should aim to eradicate sexual harassment. The three universities in this paper have established sexual harassment policies and procedures which are in line with the law. The policies however require refinement in certain areas. The sexual harassment policy of the University of the Witwatersrand is illegal compliant; however, the recent policy needs to be reviewed. The monitoring and evaluation of the policy must be established objectively, as to eradicate bias in the enhancement of the policy. The sexual harassment policy of the University of Cape Town is illegal compliant and clearly establishes bodies that will aid in the effective implementation of the policy. However, the institution needs to be clear on the mechanisms that it will put in place to providing the institution that is free from sexual harassment. The sexual offences policy of Rhodes University is a clear example of a well-drafted, well-structured policy that is founded on constitutional values and rights. This basis ensures that sexual harassment is seen as a grave impairment to an individual's dignity. The policy further elaborates on the route that an aggrieved complainant can embark on in lodging a compliant. Moreover, it provides the direct contact to which a complainant can readily seek assistance.

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