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A Primer on Interim Measures

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Anoodth: Hello everyone and welcome to the third webinar in our series. My name is Anoodth Naushan, Project Manager of Courage to Act. Courage to Act is a two-year national initiative to address and prevent gender-based violence on post-secondary campuses in Canada. It builds on the key recommendations with Possibility Seeds' vital report, "Courage to Act: Developing a National Framework to Address and Prevent Gender-Based Violence at Post-Secondary Institutions". Our project is the first national collaborative of its kind to bring together experts and advocates from across Canada to end gender-based violence on campus.

A key feature of our project is a free webinar series, where we invite leading experts to discuss key concepts and share promising practices on ending gender-based violence on campus. Supported by CACUSS these webinars are also a recognized learning opportunity. Attendance at ten or more webinars will count towards an online certificate.

Our project is made possible through generous support and funding from the Department for Women and Gender Equality, WAGE, Federal Government of Canada.

We begin today's webinar by acknowledging that this work is taking place on and across the traditional territories of many Indigenous nations. We recognize that gender-based violence is one form of violence caused by colonization to marginalize and dispossess Indigenous people from their lands and waters. Our project strives to honour this truth as we work towards decolonizing this work and actualizing justice for missing and murdered Indigenous women across the country.

I want to pause now and invite everyone to take a deep breath. This work can be challenging and this topic is hard. Many of us have our own experience of survivorship and of supporting those we love and care about who have experienced gender-based violence. A gentle reminder here to be attentive to our wellbeing as we engage these hard conversations.

So before I introduce our speakers today, a brief note on the format. Karen and Joanna will speak for 40 minutes, and I invite you to enter questions and comments into the question and answer box and I will monitor this. And together, we will pose these questions to Karen and

Joanna at the end of the presentation. This will happen in the last 15 minutes. At the end of the webinar, you will find a link to the evaluation form. We'd be grateful if you take a few minutes to share your feedback as it helps us improve. This is anonymous.

Following the webinar, I will also email you with a copy of the evaluation form, details on how you can purchase their new book, and a link to the recording so you can review the webinar and share with your networks. And now, I'd like to introduce our speakers today.

Karen Busby has been a law professor at the University of Manitoba for more than 30 years. One focus of her teaching, research, and advocacy work is gender-based violence. Most recently, together with Joanna Birenbaum, she has written a book titled "Achieving Fairness: A Guide to Sexual Violence Complaints" which Thomson Reuters published in March 2020. Another of her current research projects is an empirical study on the reasons for attrition in criminal sexual cases. She is on the University of Manitoba committee charged with reviewing that institution's response to campus sexual violence.

Karen has worked with various community and professional groups on numerous law reform projects and case interventions related to gender-based violence, queer issues, and assisted human reproduction. This work has garnered numerous awards including the YW/YMCA Woman of Distinction Award, the Canadian Bar Association Hero Award, and the LAMBDA Community Changer Award. She is also a recipient of the University of Manitoba's highest teaching honour, the Saunderson Award for Excellence in Teaching.

Joanna Birenbaum is a litigator in Toronto with expertise in gender equality and sexual violence. Her extensive experience in this area includes constitutional litigation, civil sexual assault claims, employment law, human rights and workplace investigations, representing complainants in sexual history applications in criminal sex assault proceedings, and defending malicious prosecution and defamation claims targeting women who have reported sexual violence. Joanna's recent Supreme Court of Canada appellate advocacy in these areas includes Platnick v. Bent (2019) and R. v. Quesnelle (2014). Joanna prosecutes for a regulated health college in Ontario, including in cases involving allegations of sexual abuse. Joanna also advises institutions and employers on sexual violence policies and procedures.

Joanna was a 2014-2015 McMurtry fellow at Osgoode Hall Law School and adjunct faculty at Osgoode 2014-2017 teaching in the area of gender, equality and the law and violence against women. In addition to

a private practice, Joanna is also the director of capacity building for the Canadian Centre for Legal Innovation in Sexual Assault Law Response.

It is my pleasure now to turn it over to Karen and Joanna.

Karen: Thank you very much, Anoodth, for that kind introduction. And Joanna and I would really like to thank Courage to Act, especially Anoodth and also Farrah Khan for organizing this seminar today. I should also acknowledge the work of one of my funders, the Social Sciences and Humanities Research Council of Canada. And I'd also like to do territorial acknowledgements.

I'm in downtown Winnipeg so I'm on Treaty 1 territory and I'm very close to the forks of the Red and the Assiniboine River which is a historic meeting place for the Dakota, Dene, Cree, Anishinaabe peoples, as well as the Métis people.

Now, as Anoodth mentioned, Joanna and I have just published a book and I mention the book now for two reasons. Can you advance the slide please, Anoodth? I mention the book for two reasons. One, of course, is to promote it. And some information on how you can order the book will be sent to you after the session today. But the other reason why I mention it is because one of the methodologies we use in this book is to compare and contrast the sexual violence policies in force at 25 postsecondary institutions across the country. And in the presentation, we will often refer to provisions as being in some, many, none, most and so on of the policies. And when we do this kind of comparison, we're talking about the 25 policies that we reviewed in the book. Obviously, we didn't review every sexual violence policy in the country but we took kind of a presentative sample.

So first of all, what is an interim measure? An interim measure is a decision to restrict interaction between respondents and complainants and this is done through actually restricting interaction through say a non-contact order, restricting a respondent's presence on campus or restricting a respondent's proximity to a complainant. So that can include campus bounds for example. So we like to think of interim measures, decisions as about interaction, presence and proximity.

And why is there a need for a primer on interim measures? Well, in our view one of the most challenging decisions that may need to be made in the course of a campus sexual violence complaint is whether to impose interim measures on respondents. Only the determination on whether a policy has been breached is a more difficult decision to make. And we know at least anecdotally that the main reason some, perhaps many

complainants make a formal complaint is that they find themselves in the untenable situation of ongoing contact with the respondents.

The complainant's immediate needs are to continue their education, their residence situation or their employment in a manner that feels safe and supported. For these complainants calling the respondent to account is very much a secondary consideration. What they want to do is manage ongoing contact.

So not only is the decision a difficult one to make, it's one that the decision-maker must make quickly, often quickly and often without much information. So our objective today is to suggest some ways to ensure that interim measures decisions are fair to respondents and complainants.

Now, I want to mention three challenges in doing work on interim measures. The first one is that our policy review revealed a startling lack of detail in policies and related guidance documents on the matters we're talking about today. Very few documents, for example, set out objectives, set out the standard to be met and so on. Particularly concerning in most policies is the total absence of any detail on procedural rights. So of the 25 policies reviewed not a single one gave respondents a right to be heard before a decision is made and only a few expressly stated that a complainant had the right to be heard before a decision was made. So we found that very surprising.

Secondly, there aren't really reliable risk assessment tools available. Some people are trying to develop them but to date, there isn't any kind of a checklist of things that you can look at – a decision-maker can look at to try to figure out whether or not an interim measure is warranted in a particular case. And the third overarching challenge is there's almost no case law on the fairness of measures imposed either substantively or procedurally. In fact, there's only one case on interim measures and Joanna's going to talk about that case for a few minutes right now.

Joanna: Hello everyone. Thank you again at Courage to Act for including me in this presentation. So as Karen mentioned there is very little case law on interim measures. And we thought that both for this reason but also because it's helpful for the rest of our discussion, we'd spend a bit of time telling you about the one case that there is which is an Ontario labour arbitration decision from 2018 involving Ryerson University.

Briefly, the facts of that case are that sometime early in 2018 a complaint was made against a faculty member by a former graduate student. The allegations were that over a three year period, approximately between 2007 and 2010, the professor sexually harassed that student including by

drinking with her and other students, flirting with her, putting his arm around her and generally directing unwanted attention toward her. There was also an allegation that in April of 2010 the professor went to the student's apartment, made a sexual advance towards her when he was alone with her in her apartment and then left after the advance was rejected.

Now, what's important for the purposes of this webinar is that following receipt of the complaint by Ryerson, interim measures were almost immediately imposed on that professor. The most serious of which were that he was banned from campus and he was prohibited from any unsupervised contact with students. He did continue to receive his full pay but practically, he couldn't teach his scheduled courses or fulfil various other of his duties.

Not surprisingly, the faculty association, his union, grieved the interim measures arguing among other things that they were unduly harsh, particularly given that the complaint involved allegations that were almost eight years old or even longer and were made by someone who was not a current student or employee. So the types of concerns that Karen mentioned in the introduction about imposing interim measures in order to prevent contact with a respondent, a complainant, were not front and centre in the Ryerson case. The arbitrator upheld the interim measures including the most stringent ones.

We'll discuss a bit later in this webinar the importance of institutional policies making clear what standard interim measures must meet. In the case of Ryerson, the arbitrator held that the employer had a duty to meet the legal test of the interim measure being reasonable and justifiable. The arbitrator held that the interim measures, in that case, were justified to protect the reputation of Ryerson in responding rigorously and seriously to reports of sexual violence.

In terms of one of the objectives of interim measures being protecting safety, another important aspect of this decision is that the arbitrator held that the consideration of safety must be broadly understood and is not narrowly limited to the safety of the individual student. Rather, interim measures can be justified and were justified in that case because Ryerson had an obligation as an institution to ensure that Ryerson community members more broadly felt safe including in a sense that they had faith and trust that their institution will take appropriate measures in response to reports of sexual violence.

So keep these facts in mind as we move to some of the later slides in this presentation about the considerations for institutions, complainants and

respondents when interim measures are proposed or being thought of being proposed.

So now I'm going to turn to some nuts and bolts. First and foremost, who is the decision-maker? Who is it within each institution that decides whether an interim measure is to be imposed and how. Now, many policies that Karen and I reviewed had quite a broad definition of who that decision-maker might be and could include any one of a program head, a dean, a department head, central administration, registrar for students, among a number of possibilities.

Now, the idea that a range of people could fulfil the role of decision-maker is often attractive to institutions because it allows institutional flexibility. But the downside to that is that it's uncertain and it means that it can be challenging not just for complainants and respondents, but also those within the institution who are either frontline responders or administrators to know in each individual case who that decision-maker is. So if you are attending as a representative from an institution, it's important that you try to get ahead of this problem and be able to figure out who within the institution, depending on who the complainant or respondent is, is that decision-maker so that you can provide clear and quick information to respond to complainants.

And before I move from this slide, at some institutions interim measures are imposed in consultation with some form of team like a sexual violence response team that can be made up of institutional actors like the sexual violence response officer, counsellor, sometimes campus security, which may lend itself to an interdisciplinary approach. And one of the great things about the work that Courage to Act is doing, is to look at some evidence basis as to what the best structures are for making these decisions.

The next question if you move to the next slide, Anoodth, is what are the competencies of the decision-makers in the context of interim measures. A core competency, particularly given that many policies now commit themselves to a survivor centered approach or language that meets those same concerns and objectives. So core competency is that the decision-maker be trained in and be competent in a trauma-informed approach to the complainant. This means having the ability and competence to hear from and understand the complainant's needs in an open and non-judgemental manner.

So one of the questions an institution should be asking themselves is, "What training has been provided to decision-makers on sexual violence

and trauma-informed approaches and how often that training should be revisited and repeated?". Handing it over to Karen.

Karen: OK. I'm going to talk now about what are the objectives of interim measures orders. The first thing that needs to be noted about objectives is that they are not intended to be punitive. Rather, they are precautionary. They're intended to ensure that there is no further harm and that a complainant feels safe in circumstances and yet, policies are not always clear on this point. So we really recommend that a statement about the precautionary nature of interim measures be included in all policies.

The danger if it's not included is that the interim measures decision could become to be seen as a preliminary finding of a policy breach and that's not fair in these circumstances. But the reality is that most of the time objectives of interim measures are often unstated or are limited to kind of a narrow conception of a complainant's personal safety. Not all institutions do this. The University of Alberta, for example, has a much more expansive approach than just personal safety. So it, for example – you can change the slide. It, for example, lists a number of other objectives.

So for example, an interim measure can be issued to discourage or prevent retaliation. It can be issued in order to prevent sexual violence in the event that there is evidence of, for example, serial perpetration by a respondent. It can help to protect confidentiality from a complainant's perspective. It can minimize disruption to the learning, working, or residence environment and also take into account ways in which you minimize disruption for the respondent as well. And finally, sometimes interim measures are necessary in order to preserve an institution's ability to conduct a thorough investigation.

So you can see that the objectives of interim measures can go far beyond just a narrow consideration of what are the safety needs, the personal safety needs of a complainant. Back to Joanna.

Joanna: The next question we wanted to address is who initiates interim measures. Usually, the complainant requests interim measures. But it's important to remember that it's not uncommon for a complainant to be in a state of crisis at the point that she makes the decision to disclose a report to the institution. And a common source of frustration for complainants is that the burden is sometimes or often on their shoulders to know what to ask for in terms of interim measures.

At some institutions, the sexual violence officer does proactively provide the complainant with a range of options that she might be able to request

without of course guaranteeing that the request will be granted. But this proactive step is important because it's not fair and generally not consistent with the trauma-informed approach to simply ask the complainant in an open-ended way so what do you want.

It's also important to remember that institutions generally also have the ability to impose interim measures at their own initiative and so it doesn't have to fall on the shoulders of the complainant to make the request. What we see to date that most commonly institutions will impose interim measures in certain sets of cases. For example, if the respondent is a faculty member like in the Ryerson case or where there's a pattern of behaviour. There's evidence known to the institution of prior conduct on the part of the respondent or sometimes where the seriousness of the conduct or the public nature of it demands the institution to respond at its own initiative. So for example, if there's drugging or strangulation to overcome resistance or where there's a videotape of the assault.

And just to point out how different some policies across the countries can be, unique among the policies that Karen and I reviewed is the Universite´ de Montreal which requires the imposition of interim measures on respondents must be agreed to by complainants and that's comparatively a unique provision.

So the next question is when can interim measures be imposed and this is a really good and important question because of the distinction between a disclosure and a formal report. And I think probably most participants in this webinar are familiar with that distinction but just in case. A disclosure under most institutional policies now is intended to allow the complainant to disclose or reveal her experience and seek support and accommodation from the institution without triggering any formal response automatically and without there be notice to the respondent. Whereas a formal report is a process in which the complainant discloses in the sense of reveals, explains the experience that she's had but with the expectation that the university will respond including by possibly disciplinary measures on the respondent.

Now, interim measures cannot be imposed on a respondent unless he's given some information, right? Interim measures can't be imposed on a respondent unless he knows what the allegations are that gave rise to the interim measure and who made those allegations. And it's probably for this reason that many policies provide that interim measures can only be imposed following a formal report being made and not a disclosure. But what Karen and I notice is possibly an emerging idea or practice where interim measures may be imposed following a disclosure provided the

complainant consents to her name and the details of the allegation being disclosed or provided to the respondent.

And one really significant advantage of that is as Karen said at the outset of this webinar, that for some complainants what they really want is immediate needs met. They want him out of their class or out of their residence. They want to be able to continue with their schooling and complete their degree without having to fear coming into contact with the respondent or otherwise have protection around reprisals. And for some complainants, addressing those needs may be the entirety of what they need and for some complainants, they don't actually want to see a disciplinary response meted out on the respondent.

So allowing interim measures to be imposed following a disclosure, obviously only with the consent of the complainant, has potentially some real opportunities for complainants in terms of meeting immediate needs without then imposing the real stress, emotional toll, distraction, and time that's involved not just for respondents but of complainants in being engaged in formal reporting processes.

We want to next turn to the range of standards for imposing interim measures and this was the issue that I flagged when discussing the Ryerson faculty association case. That there are different standards that different policies may delineate for which the institution must meet when imposing an interim measure. Some policies are silent on what the standard is. Other policies use very different language. So some policies may use the language minimally impairing the respondent's rights. Other policies may use the language of the measure must be appropriate in the circumstances or appropriate and proportionate in the circumstances or for example, reasonably and necessary to ensure safety. And then the new question will be what does safety mean? Is it narrowly construed? Is it broadly construed?

But what Karen and I wanted to do here was just to flag for you that the standard is a critically important issue when imposing interim measures and when developing these policies and that these various words are not interchangeable. A standard of minimally impairing a respondent's rights is a very different standard than appropriate and proportionate or reasonable and justified. And with that in mind, we wanted to specifically address the disadvantages of a standard of minimal impairment.

The standard of minimal impairment unduly narrows and constrains institutions. The standard would appear to exclude or at least very significantly underplay consideration of the complainant's rights and needs. For example, her human rights and needs to access education or work or living accommodations at the institutions. Minimal impairment of

the interests and activities of the respondent is – absolutely is certainly one consideration among many in imposing interim measures but it is not and should not be the exclusive or primary consideration.

Other significant considerations for decision-makers when imposing interim measures and this ought to be reflected or built into the standard is the integrity of any ongoing investigation and as discussed in the Ryerson case, the ability to protect and perpetuate a culture on campus in which this kind of behaviour is not tolerated and community members broadly feel safe and feel trust in their institution.

So to conclude on the question of the standard for interim measures, in the view of at least Karen and I as a policy arbitrator in the faculty association case, the language and appropriate and proportionate or fair and reasonable, justified, are rigorous enough to protect both complainants and respondents' rights and ensure that institutions have the flexibility and are able to consider and balance these multiple concerns without explicitly requiring a more narrow and constrained focus only on minimally impairing measures as they might affect the respondent.

Karen: OK. I'm going to look at the question of procedural fairness. But before I do that, I want to answer one question that's come up in the Q&A or in the chat and that is a question of whether or not our survey was only of university policies. Whether or not it included CEGEP 00:29:24 and colleges and institutes. And we did include colleges – two colleges and institutes and one CEGEP in our policy review. So it's mostly universities but we did make an effort. So Sheridan College and SAIT, Southern Alberta Institute of Technology's policies are included in our survey.

Now, at the beginning, I noted that a small number of policies require or suggest that decision-makers should solicit complainants about their thoughts on interim measures. And as Joanna noted, one of the policies we reviewed, Universite´ de Montreal, expressly requires that complainants consent to interim measures before those measures can be imposed. But I also noted and this was really surprising to me that none of the policies we reviewed expressly acknowledges that respondents have to be heard on the question of whether to impose interim measures and if so what those measures might be. We found this observation really troubling.

So let's look at the question of what procedure rights should respondents and complainants have. And we decided to deal with these two rights together because our view is that the procedural rights for respondents and complainants should not really be that much different. So in other words, in the face of silence in a policy, what procedural rights should a

decision-maker read into the policy. A most basic principle of procedural fairness is that those who might be affected by the decision have the right to know the decision is being made. So this is the right to notice. They have the right to know the case against them and they have the right to an adequate opportunity to respond to the case. And these rights are often shorthanded as the right to a hearing.

So let me just repeat that again. They have the right to know that a decision is being made, the right to know the case against them, and the right to an adequate opportunity to respond to the case.

Now, most policies state that they will take a trauma-informed approach. And so at a minimum, in our view, in the context of interim measures, is a requirement that a complainant must be consulted and ideally should have some measure of control over interim measures that might be issued. So if she doesn't want them then they shouldn't be issued unless there's strong countervening considerations.

In most cases, complainants and respondents should have the right to notice and what this means is that they should have the right to know that a decision is being contemplated around interim measures. Now, the right to notice doesn't have to be fancy. It doesn't have to be served in person. It can be given orally. It can be given electronically. We would suggest email or some kind of text-based format because it makes proof of notice easier if it's later alleged that there was no notice. But in our view, both respondents and complainants, unless there's a real emergency situation, you know, where like a respondent needs to be immediately moved out of the same residence where he lives together with the complainant, there should be a right to notice that a decision is being made.

As far as the right to be heard goes, people often equate the right to be heard with a right to an oral adversarial hearing and that's not what we're suggesting here. There is not right to a – there's no need for an oral adversarial hearing at this preliminary stage. Rather, the right to be heard in this context simply requires that an affected party should have the ability to present information and argument to the decision-maker in a manner that is attentive to the context. So in the context of interim measures, the issues are simply – where the issues are what measures are needed and should they be imposed, the right to be heard could be satisfied through a series of telephone calls between the decision-maker, the respondents and the complainants as to what measures are just and appropriate in the circumstances.

We have little doubt that respondents or complainants who were denied any hearing rights before an interim decision-maker would be successful

in having that decision overturned were there to be a judicial review application unless there was a real emergency. So we think that the failure to have hearing rights and the failure to give hearing rights is a recipe for or an invitation to an application for a judicial review.

Briefly, we want to talk about the right to reasons. Case law in Canada supports the view that decision-makers are required to give reasons for a decision in most administrative matters but in particular, what we're talking about here is the decision to impose interim measures. And the reasons for this are two-fold. One is to engender support for a decision. So if people know why a decision was made in a particular way they're more likely to support it. And also to facilitate judicial review. So judges can't review decisions unless they know something about the basis for the decision being made.

So those are a few reasons why reasons for a decision are, in our view, required with interim measures decisions. The other thing that's important about reasons for a decision is it's critical to ensure that respondents, as well as complainants, understand all aspects in terms of orders or decisions and the reasons – and in cases where an interim order wasn't issued, the reasons why it wasn't issued. So the reasons ensure that respondents and complainants get proper notice of what measures would – have been put in place.

Finally, reasons for a decision should also set out what the consequences of breach are and what the duration of the interim measures order is. So most interim measures orders would expire once a final decision has been made by an institution, but it's possible that the duration could be different. So they should set out, as I said, the consequences of breach and the duration of the order.

What happens if there's a failure of procedural fairness? Well, the consequences can be significant. The most important one probably is it weakens the ability of a decision-maker to make a well-informed decision. If you talk to both of the parties, for example, you might find a solution that the decision-maker would never have contemplated on their own. So an example I always like to give is the decision-maker might say that the complainant can use the gym on Monday, Wednesday, and Fridays and the respondent can use the gym on Tuesdays, Thursdays and Saturdays. And this might be perfectly satisfactory to the parties and it meets the needs of both parties.

So by living up to procedural fairness, so the right to a hearing, the right to notice, and the right to reasons, you're going to get better decisions that are being made. Secondly, the failure to live up to procedural fairness may compromise the complainant's safety. And the third thing, of

course, is the failure to live up to procedural fairness is an invitation to a challenge in court by the respondent for failure to provide procedural fairness. Joanna, next slide.

Joanna: Yeah. The next slide is what information do decision-makers need but in answering that, I wanted to start by addressing one of the questions that was raised on the chat which is – I'll just read it. Which is are there any downsides to framing complainant needs entirely through a trauma-informed approach? Should we not also be considering complainant needs as a matter of human rights? And in case – I realize so it wasn't clear that our book and both Karen and I do situate the analysis of all of these policies and procedures anchoring them in respecting the human rights of complainants and that's part of the reason why the discussion that Karen just had, complainants have the same – effectively the same procedural rights as respondents because if they have experienced sexual violence and that experience interferes with their ability to access their education or their workplace at the institution, the institution just doesn't as a matter of goodwill or, you know, PR, have an obligation to respond to their complaint seriously. But they have a legal obligation under human rights statutes across the country to respond to and meet the allegations that have been in a non-discriminatory way.

So when Karen and I have talked about first and foremost in response to a disclosure or report of sexual violence, an interim measure needing to consider her needs and circumstances in accessing – continuing to access education or work or you know, residence or other activities on campus, what we mean by that is through a human rights approach and a human rights standard. Her right to access education. Yes, that also needs to be intertwined with or intersected with a trauma-informed approach to meeting those needs, but it is fundamentally anchored in the complainant's human rights quasi-constitutional human rights. And then those rights will need to be balanced on a case by case basis both in terms of procedural fairness and substantively with the rights of the respondent when considering interim measures.

But that does lead directly to the question of what information do decision-makers need because there is a range of information that decision-makers should strive to have before them when considering interim measures and the first that we have put on the list is information from the complainant about her needs and wellbeing. And again, we mean that not just from a trauma-informed perspective but from a perspective of her rights to continue. Not to drop out of school or quit her job or, you know, leave her residence, but her right – her legal right to

continue accessing education, work, and whether it's residence or other activities on campus.

Secondly, as we've mentioned, some institutions may have risk assessment tools or ones that are being developed. And those may be available for decision-makers. In some cases, there may be a pattern of behaviour known involving the respondent. Sometimes that could be tricky if there's a pattern of behaviour known because there's a disclosure but the notice hasn't been given to the respondent. So he's not aware that the institution has information about a pattern of behaviour. And certainly, not just as a matter of the respondent, you know, ought to because he should, but there should be a requirement that the respondent advise his institution whether there have been criminal charges and whether there's any court order restricting his movements. And less commonly, those could also be a family court order if there's a restraining order.

Now, it is acknowledged that interim measure decisions are often made at an early stage. So the institution may not have all possible evidence before it, but that's the reality of making these decisions and institutions need to simply make the best decision they can with the evidence before them. And a subsequent question that we were asked on the chat relates to well, what about appeals or seeking to review interim measures. So interim measures – and we'll get to this in a moment – ought to be amenable to change, including change because of new circumstances or new evidence that's available to the decision-makers.

Karen: OK. I'm going to try and look at the question of choice of measures and I can see that we're at 40 minutes. So I think we've got another five minutes or so before we turn to question and answer. So I'll try to be quick, although I promised Joanna I would not speak quickly today. That's a characteristic of mine that's sometimes less than endearing.

So we have to remember that postsecondary institutions are a place of work, study, leisure, and living. So interim measures can have significant impacts. And one of the important things to remember is that these orders need to be custom-crafted to suit the situation and the individuals involved. So you can't rely on boilerplate. You can't rely on standard clauses. You really have to think about what is the situation and what do the individuals involved need. And so sometimes there will be prohibitions on interactions or restrictions on interactions and here we might see, for example, a non-contact order or types of permissible interactions.

So for example, if the parties have classes together then there might be permissible classroom interaction but any kind of interaction outside the classroom might be prohibited. You can also see presence limitations. So

there might be limitations on a respondent's attendance on campus. So they might be temporal limitations like the example I gave earlier of the gym. Or there might be orders to stay away from places that the complainant frequents such as her residence or her place of work if she is employed on campus. And then there might be proximity restrictions. So you know, outside of class you cannot approach the complainant. You cannot come with 100 metres of the complainant. If you do come in within 100 metres then you need to, you know, move yourself out of her space.

So those are the things you need to really think about. Interaction, presence, and proximity. And I'm going to emphasize again that I think it's important to talk about with both complainants and respondents about what is reasonable and justified or reasonable and appropriate in the circumstances.

I want to talk for a minute about mutual non-contact orders because I think that there is in some orders a belief that a mutual non-contact order is what's fair. And here I just want to note that the Association of Title IX Administrators in the United States has issued a position statement opposing mutual non-contact orders unless a victim or a survivor those – that's their language – specifically wishes to be restricted or the conflict is coming from all parties.

So why does it take the position that mutual non-contact orders are – should be avoided? They say that first of all, an institution has to be willing to sanction a complainant for violating the terms of a non-contact order if they make a mutual non-contact order and they say taking such action will be viewed and in fact, will be seen as a retaliatory action. So they have to be willing to sanction if they're going to put those in place.

They also ask the question why would you restrict someone who is engaged in no alleged wrongdoing? And their concern that the terms of a mutual non-contact order could compound the discriminatory effects of the underlying misconduct. So they are opposed to mutual non-contact orders as I said unless the complainant specifically wishes to be restricted or the conflict is coming from both parties. Joanna.

Joanna: Just briefly what form should the decision take when the decision has been made to impose interim measures. It should be in writing in some form although it doesn't have to be lengthy. And both the respondent and complainant should be notified. There may be others who need to be notified in order to enforce the interim measures and that information should also be shared with both parties and how long the measures are in place should also be made clear to both the respondent and the complainant.

One quick issue that we wanted to address is sometimes complainants are told well, these are the interim measures that are imposed but they're strictly confidential and you can't tell anyone about it. And our view is that complainants should not be under that kind of a gag order in response to receiving information about interim measures. That they should be, of course, cautioned to treat the information with discretion particularly if there's going to be an investigation and to preserve the integrity of the investigation. But the complainant ought to be able to share that information with her community of support. And knowing that she can share that information is often essential to her sense of safety and security and her trust in the institution.

Sorry, Anoodth. We're on the next slide. You know, one fact that institutions often consider is the respondent's privacy. But the respondent's privacy rights do not go so far as to make it impossible for the complainant to tell her circle of support and those necessary that interim measures have been imposed.

Lastly, just briefly, we've mentioned that interim measures should be amenable to being changed. Different institutions have different mechanisms for doing that. And because we don't have time to get into the weeds on that, just to flag that there ought to be clear processes for both complainants and respondents to provide new information to the institution or to make requests or to review interim measures.

Now, I don't know. Karen, do you want me to just – there's one question that goes to that and it's one of the hardest –

Karen: So go ahead. Why don't you go with it?

Joanna: – asked. OK. So on the chat, a really tough question, a really good question that was asked is how do – essentially how do interim measures work only with a disclosure if there's no intention of the complainant to pursue an investigation. How is it that – doesn't that imply guilt and then how is there any opportunity for the respondent to respond or appeal the interim measures?

So that's an – it's an excellent question and I – you know, I think to some extent institutions are figuring this out as they go and developing best practices in response to what works. But I agree with you that if an interim measure is imposed only in response to a disclosure that there needs to be some reasonable time limit on how long it endures.

So that may work better for example if it's a disclosure in a student's, you know, fourth year when she's graduating in two months than if it's a

disclosure in first-year vis-à-vis another first-year student and you could be facing interim measures otherwise being in place for four years.

So there needs to be some creativity and flexibility on the part of institutions to address those different circumstances. And practically, you know, it may be that in some cases where that works best the respondent does not aggressively resist the interim measure but, you know, says I can live with not being in that class or not being in that building for the rest of the year particularly if that means that he may actually avoid having to have a substantive determination made in an investigation.

So it will – you know, it will depend on a case by case basis and there would have to be a process for appealing the interim measure regardless of whether it's initiated under a disclosure under a report. I use the word appeal generally. I don't think it needs to be a formal appeal process, but there needs to be some process in the policy for a review of an interim measure imposed. Karen, you probably want to add to that.

Karen: Yeah. On that point, I would say I also think that the original decision-maker could be charged with reviewing the decision. You know, so especially if the decision is made quickly with very little information and let's say for example charges are subsequently laid and there's a bail condition of no contact with the complainant, that might influence what interim measures the institution might want to put in place.

So I think that the original decision-maker should have the ability to review an interim measures decision if there are changed circumstances or new circumstances or circumstances they were unaware of at the time they made the decision.

Anoodth: Great. Thank you, Karen and Joanna. I can see that we have a few other questions in the chatbox and the Q&A box. So now I'd like to invite our attendees to just share any questions and comments. And again, you can do so by typing into the Q&A box at the bottom of the screen.

Karen: So we have a lot of questions. Anoodth, why don't you decide which ones we should answer?

Anoodth: Sure. So we can take the first one. So are there any downsides to framing complainant needs entirely through a trauma-informed approach? Should we also be concerned about complainant needs as a matter of human rights?

Joanna: So I think I tried to answer that one earlier but Karen didn't have a chance to jump in. So Karen, do you want to add to what I said earlier?

Karen: It's a good question. I mean obviously and we haven't framed our – this presentation so much this way but obviously, you want to ensure that all decisions that are made under sexual violence policies are free from bias and discriminatory thinking and that's why for example a human rights framework that would require that. But one of the things I really think is important and I want to underscore. Most people on this call would know this, but it's really important to underscore it. Is that the decisions have to be trauma-informed.

One of the things that Joanna and I have seen in some of the work we've done with administrators is they don't understand why a complainant is coming forward six or eight months later and making a complaint and saying, you know, something needs to be done because this is untenable. An expectation of many decision-makers who are unaware of the trauma of a sexual assault believe that you know, interim measures are something that should be sought within days of the events giving rise to the allegations. And what we know happens with survivors is often, you know, they have a meltdown six or eight months after the events and that's the time at which they require interim measures to be put in place.

So that's one of the things that's really important in this context around having a trauma-informed response is an understanding that you know, the need for measures, it doesn't diminish necessarily with time.

Anoodth: Great. Thank you. And Karen and Joanna, in your opinion should interim measures be available not only when a formal complaint has been filed but also when a disclosure has been made?

Karen: I think we dealt with that in the presentation. It's our view that that's something surely that should be considered and a few institutions are doing it. So it'd be interesting to look at how well that's working at those institutions. You know, so you know, if that's what a complainant needs and if a respondent is amenable to that especially if the respondent – it means the respondent can avoid a formal investigation, then it might be what works best for the parties.

Anoodth: Great. Thank you. And our next question is some institutions have guidelines governing interim measures rather than including details on institutional sexual violence policies. So is the use of guidelines regarding interim measures an acceptable alternative to detailed policy provisions?

Karen: Want to answer that, Joanna, or should I?

Joanna: No, you should.

Karen: OK. I mean there are advantages and disadvantages both ways. You know, some institutions have all of the details in a guideline document.

The guideline document generally speaking is not approved by the board of governors and it doesn't go through a consultation process but it's better than nothing. So if the policy itself has very thin or general provisions in interim measures then a guidance document is appropriate.

Guidance documents need to be available though so that people know what interim measures are available under what conditions, what limitations and what processes. So I'm kind of agnostic on whether or not it must be in a policy or whether or not it's better to have flexibility in a guidance document. What I'm concerned about is the number of policies where there's almost nothing either in a guidance document or in a policy itself.

Joanna: I'm jumping in to just say – to address one of the last comments on the chat which is so Karen and I yesterday did this presentation and it took us an hour and a half. So we've been rushing a bit and maybe it's clear, skipping a few things that needed to be said. So one chat comment was that we've been referring to complainants as she and respondents as he which is both making assumptions about sexual violence and generally we do acknowledge that persons who are women or identify as women are much more likely to be targeted for sexual violence and persons who are male or identify as male are much more likely to be the perpetrators. But we didn't do an acknowledgement at the outset of challenges around language and nonbinary identities.

Anoodth: Thank you, Joanna. So our next question is how should situations be managed where there are restrictions imposed on where a respondent can be and they violate it but it doesn't affect the complainant? So it's reported by someone else and so the complainant wasn't aware of the breach. Should we then notify the complainant in these cases and to what extent?

Joanna: I think that's difficult. One of the institutions we worked with was really clear that there needed to be support for respondents so respondents understood the terms of an order and they understood how they were to comply with an order and understood how to change an order. And it's actually pretty easy to violate orders. You know, proximity orders or interactions or presence orders and it shouldn't be the case that every violation automatically results in disciplinary action. There's got to be some flexibility and some give for, you know, accidental interaction.

So I think one of the things that needs to be in place for respondents is a resource for them to be able to use. You know, to figure out how it is that they comply with the orders.

Anoodth: Great. Thank you.

Joanna: Another question that we have that Karen – both of us maybe want to answer is so there's a question about is it best practice to have the same interim measures imposed on both the complainant and respondent and why doesn't this occur, e.g. harsher measures for respondents. So, Karen, you addressed that a bit in your discussion of the ATIXA position which is that no contact orders should not be mutual. But you know, I think it's important to take a step back and remember that the move towards strengthening sexual violence policies on campus is in response to a massive social problem of violence against women and persons who identify as women not just in society at large which is the case but specifically on university and college campuses. And that as a result of that there's, you know, rates of impact on women and persons who identify as women in dropping out, their grades being affected, their careers and their lives being very, very significantly affected.

And so in the context of a discussion of interim measures and as a matter of human rights and recognizing the systemic – serious systemic social problem, what's being proposed is remembering to focus on the complainant who's come forward and her needs and right to continue to access education if it's a student. And that the interim measures which need to be balanced and appropriate and justified in the circumstances can start with her need to continue going to class and if, for example, in order to do that the respondent is moved to a different class or a different time, for example, that that's not a harsh consequence on him. It's an appropriate and fair and justified measure in order to ensure that both parties but with an initial focus in response to the complainant's report or disclosure, that she can actually continue to get an education and finish her degree.

Karen: This also underscores again the reason why it's really important to speak to both complainants and respondents because you might find that a complainant, for example, would rather change residences rather than have him change residences. So you know, if you talk to her she might say I'm happy to move. You know, I'm happy to move. You might also find out that she doesn't mind him being in the class with her. He just – she just doesn't want him coming, you know, half an hour earlier and staying half an hour afterwards or sitting beside her or sitting in her view range or something like that. So you know, but by talking to her you can find that out. So that just really underscores the need to talk to parties about what it is that they require in the circumstances.

The other thing we should mention is that interim measures are different from accommodation and it's my view, although I could be dislodged from this view, that a respondent who is subject to interim measures might

need to be accommodated. So you know, in the same way as someone who is – well, of course in the current environment, you know, nobody can go to campus. But if you were undergoing cancer treatments for example and there would be an expectation that your program would be modified so you could do as much work as possible from home in a safe environment of home. And in my view, in the event that interim measures are imposed on a respondent, there should be some measure of accommodation where possible to ensure that his education is not compromised or is compromised as little as possible.

Anoodth: Great. Thank you very much, Karen and Joanna. Just a note on time as I want to honour our one-hour commitment today. Thank you again for sharing your time and your expertise with us. We've learnt a ton and the recording for everyone who's asking will be available on our website along with a transcript in a few days.

So thank you to all of our participants today for joining us and sharing with us. We really appreciate and take inspiration from your commitment to addressing and preventing gender-based violence on your campus and we all feel very lucky to be able to work alongside each and every one of you. So thank you, everyone. And a kind reminder to please complete the evaluation forms and we look forward to seeing you at the next webinar in May.

[End of recorded material 01:01:31]