Section 3

A Comprehensive Guide to Campus Gender-Based Violence Complaints:

Strategies for Procedurally Fair, Trauma-Informed Processes to Reduce Harm

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Land Acknowledgement

We would like to begin 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 colonialism that is used to marginalize and dispossess Indigenous peoples from their lands and waters. Our work on campuses and in our communities must centre this truth as we strive to end gender-based violence. We commit to continuing to learn and grow and to take an anti-colonial and inclusive approach to the work we engage with. It is our intention to honour this responsibility.

Dedication

We dedicate this Guide to every person who has been harmed as a result of their involvement in a campus complaints process.

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About Possibility Seeds

We are a leading project management and policy development social purpose enterprise that works alongside communities, organizations, and institutions to cultivate gender equity. Courage to Act is a national initiative by Possibility Seeds to address and prevent gender-based violence at post-secondary institutions in Canada. The project builds on key recommendations from the vital 2019 Courage to Act report. Connect with us at www.possibilityseeds.ca.

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Key to Symbols

 Learning from Case Law/Legislation

 Reflection

 Further Research Needed

 Available Tools

See the Glossary of Terms in Section 1

SECTION 3:
Strategies for Practice

In this section, we provide specific strategies for each step of a complaints process: receiving a complaint, interim measures, investigation, and adjudication (including outcomes and appeals). We recognize that different post-secondary institutions (PSIs) are at different stages in their policy development and implementation, and that, where current policies that do not align with our recommendations above have already been approved, there may be little room to adjust. In those cases, we suggest strategies for practice to minimize or mitigate any harm created by the policy but advise that, wherever possible, PSIs update their policies to ensure that they are procedurally fair and trauma-informed, aiming to reduce harm. These practice strategies are therefore for all PSI practitioners, regardless of the degree to which policy aligns with the recommendations in Section 2.

Infusing trauma-informed care and harm reduction strategies into practice becomes even more important as PSIs implement new policies, update their old ones, and launch educational and support campaigns. Doing so encourages those subjected to gender-based violence (GBV) to come forward and make a complaint, with the promise that they will be safe and supported. When they experience harm as a result of the process, the feeling of betrayal can be especially acute.[1] An excellent policy can cause significant harm to involved parties if it is not implemented with careful practice.

In Chapter 7, we discuss the initial stage of the complaints process and the role of intake workers receiving GBV disclosures. In this chapter, we provide information and strategies on how to clarify the process with the discloser to ensure that potential complainants have all the necessary information required to make an informed decision on whether or not they want to proceed in making a complaint.

1 See "Principle 1: Tackling Retraumatization & Institutional Betrayal" in "Chapter 3: Introduction to Harm Reduction" for a more detailed discussion.

We analyze the need for, and parameters of, interim measures in Chapter 8. In this chapter, we outline the purpose and function of interim measures for involved parties, and the principles under which they should be applied, such as preventing future harm, providing a sense of safety for involved parties as well as the greater PSI community, clarifying behavioural expectations, and establishing the environment necessary for a thorough and timely investigation.

In Chapter 9, we discuss the requirements of carrying out trauma-informed, procedurally fair GBV investigations. Here, we provide strategies on how to establish procedural fairness in the investigation, and how to accommodate for the needs of involved parties, as well as to mitigate potential harm and attenuate any negative consequences that may arise within the investigation.

We discuss the adjudication, outcomes, and appeal stages of the complaints process in Chapter 10. Here, we provide information to decision-makers regarding the design and delivery of decisions that are grounded in the principles of procedural fairness, trauma-informed practice, upholding human rights, and mitigating (wherever possible) harm for the involved parties, as well as the PSI community as a whole.

In Chapter 11, recognizing that the complaints process may not meet a discloser's needs, we discuss alternatives that do not involve a disciplinary decision by the PSI, or non-adjudicative options. These options may be used in conjunction with or in lieu of a complaints process.

Chapter 7: Receiving a Complaint

An individual triggers the complaints process when they provide information about a potential policy violation to the appropriate post-secondary institution (PSI) official, or intake worker, with the intent to initiate an investigation. We use the generic term *intake worker* throughout this chapter because PSIs may assign the intake role to any number of staff, including sexual violence prevention and response personnel, student conduct staff, residence life staff, human resources professionals, security officers, investigators, and many others. As discussed in Chapter 6: Personnel, Roles, and Training, one person can fill multiple roles, particularly in small institutions. The strategies in this chapter are designed to be adaptable to any PSI structure, no matter who fulfills the roles.

Not every disclosure will trigger the complaints process.[1] We recognize that the steps involved in a complaints process do not necessarily serve the interests of every discloser. **Those who have been subjected to gender-based violence (GBV) have diverse needs, a right to autonomy, and are the experts in their own recovery. The PSI can support them by offering alternatives to the complaint process, exit routes, services, accommodations or adaptations, and other resources without requiring a complaint.** Remember that, both within and outside of the complaints process, where a need related to Human Rights Code-protected grounds arises, the institution has a duty to accommodate.

The complaints process is triggered when a person makes a report with the intent of pursuing the institution's complaints process. In this chapter, we refer to the person who was subjected to the GBV as the *discloser*, until they decide to make a complaint, at which point we refer to them as the *complainant*.

This first step in a complaints process sets the tone for a complainant's entire experience. The principles of procedural fairness, trauma-informed processes, and harm reduction are required from the very beginning of a complaint, including a consistent and transparent application of a fair, accessible, understandable, and flexible policy that articulates values,

1 See "Chapter 4: Creating a Comprehensive Policy Framework", "Chapter 6: Policy Strategies for the Complaints Process", and "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for more discussion on the various pathways available to a person who discloses an experience of GBV.

principles, and goals. It requires an intake worker to provide clear and explicit information about how to make a complaint, how the process works, and potential outcomes and information about how a disclosure may be used, *prior to receiving a disclosure.*

It requires an **intake worker** who is accessible, knowledgeable, neutral, recognizes and understands the impacts of trauma, stays within the boundaries of their role, practices cultural sensitivity and culturally aware practices, and works against personal biases.

Strategy 1: Allow the discloser to decide whether or not to make a complaint

Strategy 1.1: Clearly articulate the process

Intake workers must be appropriately trained in and knowledgeable about the complaints process and resolution options. Explain the complaints process and resolution options in plain language and culturally appropriate ways to the discloser. Important information includes:

- how the process works;
- where the PSI has authority to act and the limits of that authority;
- timelines for the various steps of the process;
- what is required from the parties, initially and throughout the process;
- the discloser's rights and options, including the choice not to make a complaint;
- who is involved in each step of the complaint and what their roles are;
- the range of potential outcomes;
- confidentiality and its limits;
- what could happen should the complainant choose not to participate;
    - institutional obligations in cases where the safety of the individual and/or community is at **risk**, and where the thresholds for those decisions might be; and
- services and supports for the complainant to access throughout the process, including:
    - who to contact if the complainant's safety needs change, such as where there is increased violence, retaliation, etc.;
    - who to contact if the complainant has new or additional information;

- how to request accommodations or interim measures;
- who to contact if the complainant's accommodation or support needs change, or if faculty/staff are not honouring the complainant's accommodations or support plans;
- union processes, services and supports, where applicable; and
- free legal support, where available.

The discloser may be experiencing the effects of trauma which may impact their ability to retain or process information. To account for this, provide information tailored to the discloser, and avoid providing information or details that are not applicable to their particular context. Provide information about the supports, options, and services available that are specific to the discloser's role as a student, employee, or both. Where the discloser is a union member, or the complaint is about a union member, provide information about what elements of the collective agreement might apply in addition to institutional policy, as well as relevant information about union services and supports available.

The discloser's ability to make decisions at the time that they receive information may also be affected if they are experiencing the effects of trauma. Wherever possible, provide information verbally and in writing to allow the discloser to make an informed decision on how to proceed.

Strategy 1.2: Ensure that the intake process is rooted in informed consent

Establish informed consent from the beginning of the process by providing the discloser with any additional information they need to make a decision that is in their best interest. Provide clear information about the triggers and thresholds for a disclosure to become a complaint, including when:

- the discloser decides to make a complaint; or
- the PSI deems it necessary to move forward with a complaint because the disclosure:
  - is a community safety **risk**; and/or
  - meets a threshold within provincial, territorial, or other legislation that requires an investigation.

Before a person discloses an incident of GBV to an intake worker or other PSI staff, ensure they understand when a PSI may deem it necessary to move forward with a complaint even if the discloser has not chosen to make a complaint. Intake workers should provide the following

information to a person who may be disclosing an experience of GBV in addition to the information listed in Strategy 1.1:

- their role as the receiver of the complaint:
  - Is there a law or policy requirement to report an incident of GBV upon receiving it?
  - Are there relevant professional obligations that the intake worker must adhere to if they are registered with a regulatory college?
- any relevant legislative or policy obligations (e.g., if incidents occur in the workplace, there may be a duty to report this information under occupational health and safety law).[2]

Refrain from pressuring the discloser into making a complaint; instead support their autonomy by providing enough information for them to make an informed decision (Wisconsin's Violence Against Women with Disabilities and Deaf Women Project, 2011). One of the defining elements of a traumatic event is a feeling of loss of control or power. Counter this by allowing the discloser to be the primary decision-maker in matters relating to themselves, including whether, what, and to whom to disclose, and whether to make a complaint to the PSI.

Clearly articulate the process, provide the basic information about the investigation and adjudication procedures, and discuss any additional information the discloser may need to understand what the complaints process may look like for them. This might include:

- availability of accommodations for the discloser and interim measures for the respondent;
- whether a written complaint is required and, if so, what that would entail;
- how long an interview might last;
- whether there will be follow-up questions or the possibility of cross-examination;
- the amount of detail and type of information needed from the complainant;
- the number of times they will have to repeat their story, and to whom;
- how their information will be used, including that it will be summarized and disclosed to the respondent as a matter of procedural fairness;

2 See "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for a detailed discussion of occupational health and safety investigations.

- the appeal process, who can access it, and what it could look like; and
- expectations for confidentiality.[3]

Strategy 1.3: Make access to an advisor available from the very beginning of the process

Providing the discloser with access to an advisor can mitigate the social, psychological, spiritual, financial, or physical harm inherent in the complaints process. An advisor can help the discloser work through all of the potential consequences based on the neutral procedural information provided by the intake worker in order to make an informed decision. For example, an advisor can discuss, explore, consider, and work through the following with a discloser:

- the discloser's needs and desired outcome, including the availability of alternative options if the discloser's needs can be met without a complaint;[4]
- the time and energy commitment inherent in making a complaint;
- the timing of the complaint relative to the academic year or other considerations;
- potential harm that may result from the investigation;
- potential benefits of making a complaint;
- potential harm caused by including community members in the complaints process:
  - Will bringing witnesses from their workplace or academic program make things more difficult for the discloser at work or in their studies?
  - Are there conflicts of interest that need to be explored?
  - What risks will this process have for the discloser's well-being?;
- The risks and benefits of pursuing multiple complaints (e.g., institutional, grievance, criminal, and/or human rights); and
- The complexities of making multiple statements.[5]

An advisor must be empathetic and able to challenge internalized biases where present and affirm the discloser's experiences. They should be able

3 See "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for more on providing alternatives to the complaints process.
4 See "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for more on providing alternatives to the complaints process.
5 See "Chapter 13: Concurrent Post-Secondary Institution and Criminal Processes" for a more in-depth discussion on multiple statements in concurrent processes.

to help the discloser navigate the complaints process and support any relevant academic or workplace accommodations.

For smaller institutions where a permanent advisor is not feasible, or where so few complaints are being made that a full-time position would not be necessary, consider appointing advisors as needed.

Strategy 1.4: Provide information on accommodation, supports and other options available for the person who chooses not to make a complaint

Access to support, services, or non-adjudicative options, should never be contingent on making a complaint. If, after receiving clear information about the process and available options, the discloser chooses not to make a complaint, or is interested in pursuing the other options available to them, explore available accommodations with them and provide the relevant referrals to supports available within and external to the institution.

Strategy 2: Be aware of the boundaries of the intake role

Strategy 2.1: Remain scrupulously neutral, offering clear information about the process without speculation as to procedural choices or outcomes

A discloser will have many questions about what will happen in the complaints process. The information provided by the intake worker can feed or create expectations that may not be helpful. Provide transparent and detailed information about options and processes, but limit any discussion of sanctions to information about the range allowed by the policy. Any speculation about likely outcomes in the case at hand could lead the discloser to expect a specific result. According to *Baker* (1999), participants' legitimate expectations can shape what the courts expect of PSIs in the context of judicial review.[6] Mitigate legal institutional risk by confining commentary to stated processes and avoid leading a discloser to anticipate a certain outcome.

6 See "Chapter 1: Introduction to Procedural Fairness" for more on legitimate expectations and procedural fairness.

Strategy 2.2: Actively work against personal biases

Every person holds implicit or unconscious biases, developed as a result of socialization, life experience, and "generations of exposure to affect-based (positive or negative) stereotyped information" (Amodio & Divine, 2006 & Devince et al., 2002, as cited in Monahan-Kreishman & Ingarfield, 2018). It is important to understand, acknowledge, and work to correct your own implicit biases. Actively work against conflating deep-rooted myths and stereotypes about GBV with the signs and symptoms of trauma to avoid victim-blaming behaviour. In addition, work against personal biases based on race, religion, class, sexual orientation, gender identity, and disability to avoid inflicting additional pain or harm on the discloser (Garnett, 2016).

To begin, recognize implicit or unconscious biases and identify any associated negative behaviours (Monahan-Kreishman & Ingarfield, 2018) and take steps to unlearn these biases and behaviours. This requires understanding the cultural, historical, and gender issues that underlie GBV, and how trauma signs and symptoms of trauma are often mirrored in stereotypes and myths. Gently and respectfully ask questions about an individual's experience rather than making assumptions based on perceived characteristics.

Strategy 2.3: Do not overstep by attempting to diagnose or treat trauma

Intake workers must not overstep the boundaries of their role and attempt to treat or diagnose trauma, or lack thereof. A trauma-informed approach to receiving a complaint is not the same as treating trauma, which is the role of counsellors, therapists, or other trauma-response specialists. Stay within the boundaries of the intake process to allow the discloser a degree of control over the response they are seeking. Some individuals who experience GBV may be reluctant to seek counselling at this stage and should have the autonomy to decide when and from whom they decide to do so (American College Health Association, 2020). Both the discloser and the intake worker may be harmed by an inappropriate attempt to treat or diagnose trauma.

Rather than treating or diagnosing trauma, recognize the signs and symptoms of trauma and accommodate for the discloser's needs and safety. Inform disclosers of (and connect to, where wanted) appropriate services and supports.

Strategy 2.4: Ask only what is necessary to determine a breach of policy

Use discretion when determining the amount of detail needed to trigger an investigation. First, consider whether the PSI has the authority or jurisdiction (as laid out in the enabling statute, collective agreements, and/or relevant policies) to act. Next, consider the specificity required to determine whether there is a potential breach of policy, rather than actually exploring the breach itself. Policies define acts of GBV using broad terms and indicate that if those terms are met then that is a breach of policy. The question at this stage is: If this complaint is taken at face value, would the behaviour described constitute a breach of policy? Consider the following example:

Reflection

> An employee alleges that a co-worker followed them home after a holiday party in the workplace. This is the first time they were followed home, although the employee under allegation has previously tried to come along to lunches uninvited and left unwanted gifts and tokens in the discloser's workspace.
>
> The PSI policy defines stalking as: *"Repeated unwanted contact or communication directed at another person that causes reasonable fear or concern for that person's safety."*
>
> The employee described repeated, unwanted behaviour, and was fearful for their safety. At the point of intake, their description meets the elements laid out in the definition. The time, place, frequency and exact nature of the contacts are unnecessary at this stage.

Where the intake worker and the investigator are the same person, allow the discloser to consider options, consult with their circle of support, and take the time they need to decide next steps. Begin the investigation only once the discloser has considered all of the information provided and decided to go ahead with a complaint. Until then, there is no need for a detailed statement that could result in retraumatization or contribute to barriers to disclosing an experience of GBV. This has the added benefit of allowing the investigator time to prepare an investigation plan and broad questions for the complainant.

Strategy 3: Approach every interaction with the assumption that trauma is present

A trauma-informed approach means that any intake process and interactions are built on the assumption that trauma is present. This assumption accounts for the inherent trauma in GBV, as well as the history of trauma a person may be holding. According to the Canadian Psychological Association (n.d.), "over seventy-five percent of Canadians have reported that they have experienced a traumatic event at least once in their life."

Intake workers should be knowledgeable about how trauma impacts behaviour, interactions, decision-making, and memory. A large part of this knowledge is understanding that the signs and symptoms of trauma may not be immediately recognizable, or may manifest differently for each person. Even where a discloser does not demonstrate obvious, explicit, or stereotypical signs of trauma, there is no harm and much to gain from treating participants in a trauma-informed way. Take advantage of professional development opportunities on trauma and smart practices for engaging with persons who have experienced trauma.

To account for trauma and avoid retraumatizing or harming the discloser, create a safe space for the discloser to understand the process, make informed decisions, and provide the necessary information. Recognize that an individual engages with a PSI process because they trust that the PSI will address the matter with sensitivity and the gravity it deserves, providing some form of justice. A careless, perfunctory, or dismissive response at the outset can be a betrayal of trust and result in additional harm.[7]

Note that presuming the presence of trauma is not at odds with neutrality or procedural fairness; it does not affect the outcome of a process, even when trauma is not present.

7 See "Chapter 3: Introduction to Harm Reduction" for more discussion on institutional betrayal and sanctuary trauma.

Strategy 4: Provide information about the specific process that would be used in a complaint

Provide the discloser with information about the specific process their complaint would trigger, particularly if your PSI has different procedures for students, staff, and faculty. In general, the applicable procedure will be based on the relationship of the person under allegation to your PSI. However, these relationships can be complex. Student volunteers, staff who are taking classes, graduate teaching or research assistants, (and others) occupy multiple roles within the institution. In order to determine which procedure might be used, consider what role the individual was occupying at the time of the potential breach. Should the person be occupying more than one role at the time of the conduct in question, consult with a lawyer or other experts where required, and follow up with the discloser with the relevant information.

When the discloser is a union member, ensure that they are informed of their right to representation. In addition, if the respondent is a union member – whether under the same collective agreement or a different one – ensure that the discloser understands the terms of the collective agreement(s) in relation to complaints so that they can make an informed choice of how to proceed.

Strategy 5: Consider how to manage complaints in which the person who was subjected to the GBV is not involved

Anonymous complaints, proxy complaints, and processes in which the PSI takes on the role of complainant each present unique challenges to the PSI.

Anonymous complaints

Anonymous complaints generally come with insufficient detail to independently verify a policy breach. An anonymous complaint is therefore unlikely to be sufficient for a PSI to proceed with any action against an individual. As a matter of procedural fairness, respondents have the right

to know the case against them, and the right to respond. An allegation of GBV without information about who was subjected to the violence is unlikely to meet these basic rights. Note that these limitations mean it is equally problematic to use an anonymous complaint to create a record of (as opposed to investigating) an incident.

However, it is important to provide the option for anonymous complaints so long as you are clear about the limitations.[8] This respects the range of needs and the autonomy of the person subjected to GBV.

Where an anonymous complaint is made, clearly communicate the limitations it poses to the institution, offer support, options and services to the individual, and let them know that the complaints process is available to them should they choose it in the future.

In addition, provide them with information about any available **non-adjudicative alternatives**.[9]

Proxy complaints

Some, but not all, of the challenges of anonymous complaints may also be present in a proxy complaint, that is, where a complaint is brought by someone other than the individual who was subjected to GBV, for example, a person who witnessed the GBV or someone who is initiating the complaints process on behalf of another person. In the case of a proxy complaint, establish whether the individual who was subjected to the GBV has given consent for the complaint to be made, and whether they consent to participate in an investigation and the following processes.

There will be times when a witness account will provide sufficient evidence to make a finding that a policy violation occurred. However, it is important to manage expectations by explaining that there may be elements of the investigation that require detailed, first-person accounts of what happened and the surrounding context that only the person who was subjected to it might be able to provide. An investigation may not uncover enough evidence for a policy breach finding without that statement, especially in the absence of other evidence. Be clear about the limitations of how the PSI may be able to respond to a third-party complaint. In all cases, provide information about options and supports and encourage the person who was subjected to the violence to take advantage of available services.

8 See customizable services offered through REES (2021) for creating trauma-informed online platforms for anonymous reporting.
9 See "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response".

PSI AS COMPLAINANT

When a discloser decides not to proceed with a complaint, but there is sufficient information for administrators to believe that the matter must be investigated, the PSI may itself become the complainant.[10] Administrators might choose this option, for example, when there have been multiple disclosures about the same individual; when allegations, photos, video or other evidence surface on social media or in the press; or when there is a legal obligation to act (such as imminent harm to self or others, or there is a minor involved).

In some cases, it may be safer for the discloser or the person who is identified as having been subjected to the GBV to provide a witness statement without being responsible for the complaint. In others, the person who was subjected to the violence may choose not to participate in the investigation at all. Recognize when there is sufficient other evidence that a statement from the person who was subjected to the GBV may not be necessary. In all cases, provide information to the discloser about the process and provide access to supports, whether or not the discloser participates in the process.

Strategy 6: Build in practices to address Trauma Exposure Response

The nature of receiving complaints of GBV means that you are exposed to trauma and may be at risk of experiencing Trauma Exposure Response, vicarious trauma, secondary trauma, and/or compassion fatigue. In addition to causing harm to yourself and those you interact with, it can cause you to respond inappropriately to future trauma of others.

Implement practices and take advantage of resources to actively support your well-being and self-care, especially if you are repeatedly exposed to others' stories of violence. This helps you to understand your own and others' responses to violence, and works to prevent "trigger responses" for you and those who disclose to you (Public Health Agency of Canada, 2018).

10 See "Strategy 9: Be clear about situations in which the PSI might act as complainant" in "Chapter 4: Creating a Comprehensive Policy Framework".

Some practices that help to prevent and address Trauma Exposure Response include:

- educate yourself about the existence of and symptoms associated with Trauma Exposure Response, vicarious trauma, secondary trauma, and compassion fatigue;
- arrange regular opportunities to debrief with colleagues and/or supervisors (maintaining appropriate confidentiality); and
- access counselling or flexible workdays and locations.

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Chapter 8: Interim Measures

Interim measures provide a means of responding to gender-based violence (GBV) while the sometimes lengthy complaints process is underway. The goals of interim measures are to stop the alleged behaviour, prevent future harmful behaviour (including retaliation), protect both the respondent and the complainant, clarify behavioural expectations, create space for a thorough and timely investigation, and create a safe working, learning and living environment for students, staff, and faculty.[1] In this chapter, we address interim measures as a step within a complaints process; however, we also recommend their use in the absence of a complaint.[2]

Balancing a respondent's rights with the well-being of the complainant and the safety of the community is a complex and dynamic undertaking. The need to act quickly is complicated by the dangers of over- or under-reacting, and the speed with which circumstances can change. The cascade of processes that follow the initial intake present many opportunities for harm for involved parties. Interim measures, in particular, raise the following opportunities for harm:

- They can feel isolating for both parties.
- They can affect a respondent's academic program, ability to carry out work-related duties, or reputation in unintended ways.
- Although they are non-disciplinary, interim measures can feel punitive to the respondent.
- Insufficient interim measures can increase both harm and safety risks for the complainant or can retraumatize the complainant by making them feel as though they were not taken seriously.
- Temporary restrictions can further devolve already damaged relationships with individuals and the institution.

When applied using trauma-informed and harm-reduction principles, interim measures are an important tool in the healing and recovery process. Striking an appropriate or fair balance in applying interim measures allows a post-secondary (PSI) to reduce harm to the complainant, respondent, community, and institution.

1 See "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for a discussion of non-disciplinary measures in the absence of a complaint.
2 See "Strategy 3: Provide non-disciplinary measures as an option in response to disclosures" in "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for applying non-disciplinary measures, including interim measures, outside of a complaints process or when a formal complaint has not been made.

Strategy 1: Make interim measures strictly non-disciplinary

Strategy 1.1: Do not use interim measures as punishment or evidence of misconduct

Disciplinary actions create a record of misconduct, based on an investigation and finding of a policy violation. Interim measures must be non-disciplinary and create no such record. Design the measures to carefully preserve the respondent's rights (as opposed to privileges). For example, when placing an employee on leave as an interim measure, consider leave with pay while the investigation is underway. Provide a student respondent with alternative living arrangements if the interim measure means removing them from residence. Wherever possible, allow a respondent who has to be removed from in-person classes to continue their academic advancement through online or reading courses.

Be scrupulous about ensuring that interim measures, which are applied before a finding of policy violation, are not misused as an alternative way to punish someone without a full and fair process. First and foremost, do not hold interim measures in a student's or employee's discipline file and, further along in the adjudication stage, do not mistake the use of interim measures for evidence of misconduct.

Finally, consider any cultural, historical, disability, class, race, and gender issues that contribute to historical and intergenerational trauma that a respondent might be living with. Taking a disciplinary approach to interim measures is more likely to harm a respondent.

Strategy 1.2: Include a support mechanism for the respondent

The very nature of implementing restrictions or boundaries on a person's conduct may feel punitive, particularly for those living with trauma. Take steps to mitigate this when applying interim measures by providing the respondent with support throughout the process. Start with a clear explanation of the process, the respondent's rights, the reasons for the interim measures, a clear statement and reassurance that the measures are non-disciplinary and not based on a presumption of guilt, and an outline of any avenues for review. Provide the respondent with access to support navigating the system, academic consideration for student respondents, union support for employees, and therapeutic support, which may help address any trauma they may be holding.

Strategy 1.3: Involve the union early

When addressing allegations against a **union** employee, whether student or professional staff, adhere strictly to the terms of the collective agreement. Allow the employee to seek support and advice from their union as a regular practice when considering interim measures.

Where time is of the essence and a union representative is not immediately available, these discussions can and should be ongoing, even after making the decision to apply interim measures, to ensure the union is involved as early as possible.

Where a disclosure is made about a non-union employee, ensure there is no discrepancy in the procedural fairness offered to non-union and union employees and inform the non-union employee under allegation of their right to seek private legal advice.

Strategy 2: Provide required procedural fairness for the respondent

Although interim measures are non-disciplinary, they tend to include conditions or restrictions on an individual's privileges, and therefore they require some procedural protections. The person or team imposing interim measures must be unbiased and manage any potential conflicts. In addition, the respondent requires an opportunity to respond in the case of interim measures.

Interim measures are used to fill the gap between a complaint and a decision created by a potentially lengthy investigation. Consequently, timeliness is crucial; be prepared to apply them within 48-72 hours of receiving the complaint or disclosure. There is no need to collect evidence to support a finding on a balance of probabilities that the incident occurred at this point. **Interim measures can be imposed where the information received in the complaint or disclosure gives rise to the reasonable belief that precautionary action is necessary.**

Because of the need for a timely response, you will likely impose interim measures in advance of the right to respond. Provide the respondent with a letter containing the measures at a meeting with the respondent where they will have an opportunity to respond, or ensure the letter includes an invitation to meet or otherwise communicate with the person imposing the measures in order to respond after the fact.

Provide the respondent with reasonable disclosure of the case, including a high-level summary of the allegations and, in most cases, the name of the person who made the disclosure or complaint, except where a risk assessment determines that providing the name introduces a safety **risk**. Give the respondent an opportunity to lay out their version of events and discuss the impact of the measures on them. Where necessary, you can adjust the measures to minimize any unintended consequences on the respondent, such as access to necessary services.

Finally, the parties to a complaint have a right to a timely resolution; ensure that the presence of interim measures does not diminish the urgency to complete a timely investigation.

Strategy 3: Design interim measures that are minimally restrictive

Strategy 3.1: Start with voluntary informal measures where possible

Before applying interim measures, gauge the willingness of the respondent to make changes to their behaviour or routines voluntarily. Have a conversation with the respondent about the named behaviour and an assessment of their understanding of its impact on others. This provides an opportunity for a respondent to take immediate steps not to repeat behaviours that make others feel uncomfortable or unsafe before having to apply interim measures.

Be transparent about the fact that any voluntary measures will be communicated back to the person who made the disclosure. Should the respondent no longer be willing to continue the measures, or should the complainant's safety or well-being not be adequately addressed through the voluntary measures, follow up with both parties to gauge needs and ensure safety. If voluntary measures are inadequate or otherwise ineffective, progress to interim measures as the next step.

Strategy 3.2: Implement interim measures that are proportionate to concerns raised

Interim measures must be reasonable and justifiable, given the alleged conduct. The measure(s) should directly reflect the level of concern

raised by the alleged behaviour. This has been established by the courts in employment contexts where an employer puts interim measures in place (*Ryerson University v Ryerson Faculty Association*, 2018; *Queen's University v Queen's University Faculty Association,* 2019; *St James-Assiniboia School Division v St James-Assiniboia Teachers' Association*, 2014). These same principles apply in cases involving students.

Institutional responses, including interim measures, must be broad and reflective of the nature of the conduct in question to align with GBV policies which are, by design, broad and inclusive of a wide range of behaviours.[3] When deciding appropriate interim measures, consider the nature of the allegation as well as the goal of the measure. Often the goal is to simply identify and stop the behaviour. Consider the following example:

Reflection

> An individual has disclosed that they are receiving numerous unwanted text messages per week from a co-worker. At least initially, they are simply asking for the behaviour to stop.
>
> A minimally restrictive measure, in this case, might be to impose a provision that any contact between the individuals must be work-related only and through work-related channels, for example, a work email. Unless and until the circumstances change, this may be all that is necessary.

Strategy 4: Take steps to mitigate the negative effects of interim measures

Strategy 4.1: Understand the impacts on the respondent

It is the PSI's responsibility to mitigate any unavoidable negative effects of interim measures on the respondent's rights as much as possible. Consider the following example:

3 See "Chapter 4: Creating a Comprehensive Policy Framework" and "Chapter 5: Policy Strategies for the Complaints Process" for more on designing institutional policies to meet inclusivity requirements.

Reflection

> A student is removed from a specific class in order to avoid contact with another student who has disclosed GBV.
>
> While it may be the reasonable thing to do in the circumstances, the institution must try to find a way to mitigate any academic consequences that arise by allowing the student to complete the course in an alternate way. Can they video conference into the class? Complete readings and do assignments online? If it is a larger classroom, can you allow that student to continue attending but assign a seat and restrict their entering/exiting the room to a specific door and/or time to prevent an encounter? The more flexible and responsive you can be about meeting the specific need, the better.

There are limitations on what the PSI can disclose to faculty members who are being asked to provide these accommodations for students. We acknowledge that this can be challenging for faculty members and might lead to resistance or refusal. Where the PSI has not effectively written or communicated the policy around interim measures, help the instructor understand that the institution is obligated (and, in some provinces or territories, legislated) to provide academic considerations. Make an effort to understand the effect of the measures on the instructor as well – for example, increased workload – and provide whatever supports they may need.

Should it be necessary to remove an individual from campus entirely, mitigate the negative consequences as much as possible. For employees, this means remote work or a leave with pay; for students, it may mean arranging distance education or, in a worst-case scenario, retroactive withdrawal from courses, classified as an academic leave, and tuition refunds to attenuate the academic and financial consequences. Depending on the situation and nature of the program, decisions on refunds may have to wait until the complaints process is completed.

Every person's circumstances are different. It is important to ask questions to understand an individual's specific situation before imposing any measures in order to mitigate any negative consequences. Procedurally, this meets the person's right to respond, and it allows the PSI to mitigate the harm. From a trauma-informed perspective, it helps to prevent additional harm to respondents who may be carrying a history of trauma or violence

that influences how they will experience the introduction of interim measures. Where an urgent response is required, it is possible to apply the measures before a meeting, and indicate that the respondent will have an opportunity to discuss them with the decision-maker as soon as possible.

Having the authority to apply interim measures comes with the obligation to ensure that it is done appropriately. Examples from case law illustrate the various considerations that need attention:

Learning from Case Law

Queen's University v Queen's University Faculty Association (2019)

Out of concern for staff safety, Queen's University moved a professor to an alternate office space and effectively banned her from the building occupied by her colleagues without consulting with her regarding the impact of such measures. The Faculty Association argued that her unilateral removal to a remote office space significantly and negatively affected her professional and personal reputation. The arbitrator found that Queen's failed to explore alternatives, such as allowing Mercier to use her office on evenings and weekends, or changing staff duties so that those involved would not have to work with her. The arbitrator further found that that failure was contrary to the collective agreement, and a breach of fairness.

Ryerson University v Ryerson Faculty Association (2018)

A complainant reported that an Associate professor at Ryerson had sexually assaulted her in her home eight years earlier while she was a student. While the investigation was underway, Ryerson implemented the following interim measures: (1) no contact with the complainant; (2) a campus ban; and (3) no unsupervised contact with other students. The Faculty Association took issue with the second and third measures, arguing that they were disproportionate to the complaint, that the professor had not had other complaints against him in the intervening time, and that they had a significant adverse impact on him, effectively preventing him from fulfilling his duties. The arbitrator found the measures to be reasonable and justified in light of the facts that: teachers hold a special position of trust in our society; and the institution's reputation would be damaged if they did not take the complaint seriously and respond accordingly.

Learning from Case Law

St James-Assiniboia School Division v St James-Assiniboia Teachers' Association (2014)

The School Division suspended a teacher without pay after he had been charged with the criminal offence of sexual assault causing bodily harm and had bail conditions imposed that restricted him from having contact with students. The offence was outside the school context and unrelated to students. The Teachers' Association argued that there was no demonstrated risk to staff or students, and no risk of reputational harm to the Division in employing the teacher. In his decision, the arbitrator noted that an employer is obligated to make "reasonable efforts" to find an alternative job that mitigates risk and found that the Division did not consider other positions for the teacher. The arbitrator upheld the suspension but found that the teacher was entitled to be paid for the length of the suspension.

Strategy 4.2: Create interim measures that are conducive to receiving therapeutic support

Complaints processes can be lengthy, involving parties in the process for months at a time. In addition to the aims discussed above, interim measures can serve as a time for growth and reflection. They also provide an opportunity for both parties to access the **services and supports** they need while they await next steps.

Coordinate efforts to ensure that involved parties have access to PSI and/or community supports and that any interim measures do not interfere with that access. If and when interim measures include removal from campus, provide off-site or online options to compensate.

Strategy 5: Customize the interim measures to the situation at hand

Strategy 5.1: Design interim measures in consultation with involved parties

Consult with the complainant to determine their needs, consider the needs of the community, and speak to the person to whom the measures will be applied to gauge what negative effects need to be mitigated. Doing so will be more effective for the parties involved and also meet the participatory rights under procedural fairness.

Recognize the complainant as the expert in their own needs and include them as much as possible when making decisions regarding interim measures. First, be clear that a complainant has the option to request interim measures. Second, give the person who was subjected to the GBV an opportunity to articulate their needs. Third, manage expectations by outlining the limitations of the process and your role.

Mitigate potential harm by speaking to the respondent about their circumstances, and use this discussion to inform the development of the interim measures.

Where an investigation is underway, consult with the investigators to ensure that the measures are effective in allowing the investigation to proceed without interference.

Strategy 5.2: Create measures that are specific to the situation at hand, not based on precedent

Avoid reliance on precedents or the use of standardized rubrics. Interim measures are both more effective and more defensible when designed to address the particular needs in the situation at hand. No two cases are the same, and the needs of the individuals in similar circumstances may vary significantly from each other.

The impacts of trauma also vary significantly from person to person and are entirely dependent on their lived experiences and how they access resources and navigate the systems that govern our society. **It may be helpful to look at what has been done in similar situations for guidance about what kind of interim measures to use, but these should not be determinative.** Focus on the involved parties' circumstances and tailor interim measures accordingly.

Consider the following two examples:

Reflection

Case 1

AB disclosed that a distant acquaintance sexually assaulted them while they were passed out at a sorority party. AB was afraid for their safety and did not want this person to harm others in the same way.

Case 2

CD reported that her best friend's brother admitted to having a crush on her and kissed her without consent in their residence common area. He later apologized and explained that he had been drunk and did not intend to make CD uncomfortable. CD does not want him to be punished but wants him to understand that he must have consent before kissing someone.

If the institution defines sexual assault as "any form of sexual contact without consent," both of these scenarios involve a sexual assault, yet they are very different in terms of impact and desired outcomes. The interim measure applied in Case 1 will be different to the interim measure applied in Case 2.

Strategy 5.3: Consider how the interim measures can meet the complainant's needs

There may be times when a complainant has difficulty conceptualizing specific measures, for example, when trauma hinders their executive functioning, or when they lack knowledge about what the PSI is able to provide. Begin by asking the complainant to articulate their needs. Instead of asking or expecting complainants to specify the measures they would like, consider providing examples of needs that have been expressed by others, such as the need to use the campus recreation centre in the mornings or to take coffee breaks without encountering their harasser in the breakroom. Use examples unrelated to the complainant's situation to provide a model of how specific interim measures can be without leading them to particular requests. Once the particular needs are understood, it becomes easier to identify specific measures to address those needs.

A complainant with specific solutions in mind may have expectations beyond what is feasible and/or fair. **Manage expectations without infringing on the complainant's sense of autonomy and safety by using**

their needs as a starting point and working through possible options with them to meet those needs. Understanding the flexibility available can also stimulate more creative problem-solving, provide greater transparency, and mitigate a complainant's perception of lack of control over the process.

Where a complainant feels guilt and/or shame about reporting, or believes that they are causing unnecessary trouble for the institution or the respondent, mitigate these concerns so that they can more easily ask for what they need. Discuss with the complainant what interim measures are, what they are intended to achieve, and what the PSI is able to do.

Strategy 5.4: Include a range of perspectives to design interim measures that take into account the involved parties' life circumstances

There are a range of considerations necessary to address the impacts of GBV, including, but not limited to, financial, academic, work-life, and mental well-being. Where possible, consider creating a campus **Coordinated Response Team (CRT)** and include various offices that address a broad range of needs. We acknowledge that some institutions may be unable to convene CRTs or similar support and response teams due to limited resources or where a single person fills multiple roles. In either case, take care to reflect the specific situation at hand, whether the individual is a student, staff or faculty, and aim for holistic care, with attention to the multiple areas in which a complainant and respondent can be affected.

A response team can work alongside administrators in charge of determining interim measures to identify areas where parties may be in need of support and require access to certain offices. For example, if an involved party requires student financial support during their academic period, develop interim measures that allow them to access financial aid offices. Similarly, if an involved party has specific academic, work from home, or medical needs, create interim measures that allow them access to the relevant supports and services.

Strategy 6: Design interim measures to adapt to evolving circumstances

Be prepared to adapt to any changes in circumstances in a timely manner, recognizing that emerging or evolving information is common in the

GBV context. In some cases, new information will elevate the level of concern and require additional or stricter measures. In others, some of the measures can be eased or removed. A PSI should anticipate changes and be ready and flexible enough to respond to them.

Strategy 6.1: Make interim measures time-limited

Recognize that the language of *interim* measures is intentional and reflects the idea that such measures are time-limited. Time limitations may refer to the time needed to complete an investigation or to a specific context or situation. Consider the following example:

Reflection

> A complainant and the respondent are in the same lab for only one term. Using the strategies in this chapter, it was decided that lab access for the respondent would be restricted to ensure that the complainant and respondent would not share time together in the lab.
>
> Once that term is complete, the interim measures restricting access to the lab will no longer apply to the respondent, but there may be new areas where they could be likely to cross paths that would need to be addressed.

Design interim measures to be in place no longer than necessary. Where there is no natural endpoint for the interim measures, set a date to review them. Where circumstances change; for example, when the complainant decides to withdraw from or pause the investigation, review the interim measures and, where appropriate, put a timeline into place.[4] This provides both the complainant and the respondent with clear boundaries and expectations and can help eliminate anxiety arising from uncertainty.

Strategy 6.2: Incorporate regular check-ins with the involved parties

Throughout the period in which interim measures are in place, regularly check in with both the complainant and the respondent. Regularly scheduled check-ins that include the needs of each party provide

4 See "Strategy 3: Provide non-disciplinary measures as an option in response to disclosures" in "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for non-disciplinary measures outside of a complaints process.

procedural protections by providing the opportunity to respond required for procedural fairness and relational fairness for both parties (Smith & Usick, 2016).

Check-ins with the complainant:

- provide an accessible mechanism to voice their needs throughout the period when the interim measures are in effect;
- account for the non-linear and unique pathways through trauma that each individual takes;
- provide a means to communicate changes in circumstance or needs; and
- relieve the complainant of the burden to monitor interim measures themselves.

Regularly scheduled check-ins with complainants provide a degree of control and are a simple, tangible way to incorporate trauma-informed practice into the complaints process.

Regular check-ins with the respondent are equally important as both an accountability mechanism and "to ensure measures are effective and not unintentionally disciplinary" (Khan, Rowe & Bigood, 2019, p. 128). They reinforce the non-disciplinary nature of the interim measure and provide procedural fairness by demonstrating a commitment to hearing the respondent's concerns and listening to their needs.

Strategy 6.3: Provide an accessible communication channel for involved parties

In addition to regular check-ins, ensure that parties know who to contact in the case of changing needs or circumstances outside of regular check-in times. This accounts for the fact that there is no linear path to navigating trauma, and a complainant's or respondent's comfort and feelings of safety with the interim measure can change at any time. Give both parties an open line in addition to regular check-ins to ensure that the interim measures in place are meeting the needs of the complainant and do not have disproportionately adverse effects on the respondent.

Strategy 6.4: Have a plan in case of breach

Plan how you might respond in the case that the individual refuses to comply, or simply does not respect the boundaries or requirements laid out for them in the interim measures. The plan will likely depend on the relationship of the individual to the institution, and the reasonable wishes of the discloser or complainant.

Let the complainant know that you have a plan in place to relieve some of the concerns they may be holding about a potential breach, and to reinforce feelings of safety and trust. Reflect the heightened concern in your level of intervention, as illustrated in the following examples:

Reflection

Example 1

Interim measure: Non-contact with reporting party

Breach: Respondent begins to appear in places the complainant is known to frequent

Complainant's wishes: Does not want to change class schedule and does not wish to encounter respondent

Possible institutional response: Revise interim measures to include spatial restrictions

Example 2

Interim measure: Restriction to attend gym in evenings only

Breach: Respondent continues to attend gym at random times

Complainant's wishes: Does not want to encounter respondent in gym

Possible institutional response: Revise interim measure to revoking gym membership; consider refunding related fees

Example 3

Interim measure: Weekly check-ins with HR advisor

Breach: Respondent does not attend scheduled meetings

Complainant's wishes: PSI received no specific disclosures, but has concerns about inappropriate behaviour towards other staff

Possible institutional response: Commence performance management steps related to refusal to attend meetings

Any time you amend or reconsider interim measures, follow the same process of collaboration with both parties and communicate the new measures in writing.

Strategy 7: Put decisions about interim measures in writing for the respondent

Written decisions set out the nature and details of the interim measures and act as a reminder to consider the principles of proportionality, commensurate action, and balancing the interests of all parties with the needs of the institution. In addition, a written decision is a fundamental element of procedural fairness for the respondent, providing both clear expectations and avenues for review.

Include the following in your decision:

- all necessary details about the conditions or restrictions, including relevant times, places and names (where applicable);
- the reasons for the specific interim measures chosen and how they address the problem at hand;
- procedural fairness considerations built into the measures; including:
  - opportunity for review;
  - contact name for check-ins and providing new information; and
- all necessary information about your policies, procedures, and available support and services to the person receiving the interim measures.

Strategy 7.1: Communicate the interim measures to the complainant

Inform the complainant as to what the interim measures are, and provide guidance or instructions on what to do if the respondent breaches them including available channels for reporting and where to access support. **As a harm reduction measure, reassure the complainant that the responsibility to enforce the measures rests with the institution.** Manage complainant expectations by providing reasons for the choice of the measures, and offer additional supports to help the complainant manage any trauma response.

There will be cases in which the complainant's requests are reflective of more than just the situation at hand; past trauma can compound the trauma experienced in the current case and lead to complainants asking for interim measures that are not proportionate to the respondent's actions. While interim measures must be informed by the needs of the complainant, it is the PSI's role to make the final decision as to what the

interim measures will ultimately be, taking into account all of the factors discussed above.

Discuss with the complainant their role in the safety plan. For example, if the respondent has a right to access a certain space at a designated time, the complainant can choose whether or not to attend at the same time. However, should that choice result in an interaction, the complainant should understand that this would not be considered a breach of the interim measure. Additionally, advise the complainant against taking any action that could result in an unintended breach.

Strategy 7.2: Disclose the interim measures as required to administer them

It is the responsibility of the PSI, not the complainant, to inform the relevant individuals or units – those who are involved in or responsible in some way for the implementation – of any restrictions or conditions. The goals of disclosing the information are to:

- ensure that the respondent complies with the conditions or restrictions;
- prevent a situation in which the respondent is placed in the untenable position of having to choose between their academic or work requirements and compliance with the interim measures; and
- prepare relevant individuals or units with potential responses in the case of a breach.

When communicating interim measures to relevant individuals or units, the information disclosed should consist of only that which is necessary to meet those goals. Consider the following example:

Reflection

> A teaching assistant (TA) is prohibited from contacting an undergraduate student who is in their class. The PSI has requested that the course professor assign the TA to a different section of the course, or give the TA duties in which there is no interaction with the undergraduate student.
>
> In this case, it is not necessary to disclose the fact that the conditions are a result of a disclosure or complaint under the GBV policy to the course instructor. This information should therefore be kept confidential.

For each condition applied, determine who has a need to know, provide them with only the necessary information, and, where relevant, give them instructions on what to do should they become aware of a breach.

Strategy 7.3: Keep interim measures confidential but allow parties to seek support

Confidentiality of complaints processes, including interim measures, is important in maintaining the integrity of the investigation and can prevent potential trauma or harm to the respondent, the complainant, and the community. Confidentiality may help shield complainants from experiencing judgment or blame, either for the violence itself or for bringing it to light. Confidentiality protections are also beneficial for respondents who may be navigating the interim measures process with their own history of trauma.

Inappropriate disclosure of interim measures increases the risk that respondents may face repercussions from their community where they are treated as an "accused" or "guilty" person, as though they were criminals. This can be retraumatizing for those who come from communities that have traumatic histories with the criminal justice system. Where there are no safety risks that require information about a complaint be shared with the campus **community**, confidentiality measures can also be a way to avoid triggering or unnecessarily frightening non-involved community members.

The balance of confidentiality required should be determined on a case-by-case basis. Balance the need to adhere to confidentiality with a complainant's needs to be able to speak about their experience and disclose on their own terms. Overly restrictive confidentiality measures can be incompatible with the trauma-informed principle that those who have been subjected to GBV are experts in their own needs; a complainant may be navigating their own trauma and be searching for agency and control in the process.

In all cases, ensure there are mechanisms in place to prevent isolation and allow complainants and respondents to seek and receive support. Requiring involved parties to keep information to themselves during the investigation can prevent them from discussing its impacts with trusted people in their lives, and lead to alienation and feeling alone in the process that lies ahead of them. Isolation during sensitive and potentially traumatizing periods of one's life can exacerbate mental health concerns and lead to further harm (Saito et al., 2012). For persons who are experiencing sexual assault-related PTSD, avoidance is considered a significant barrier to healing from trauma.

> [O]ne theory is that those individuals who recover do not "avoid" the trauma. That is, they do not avoid thinking about it, talking about it (which is suggested, with a trained mental health professional), and expressing natural emotions related to the assault. Conversely, avoidance is known to be the most significant factor that creates, prolongs, and intensifies trauma-reaction or PTSD symptoms. (Barbash, 2017)

Discuss expectations of confidentiality with the complainant and respondent. Be clear that the process – and anything they learn within the process, including the existence of the complaint and the investigation – should never be made public (i.e., shared via media, social media, or with wider social groups). Explain that they are allowed to share their experiences – which may include the identity of the other party and the existence of, or their experience in, the complaint process – with their circle of support.[5] Finally, discuss potential nuances, such as specific contexts where they may be allowed to share that they are participating in a GBV investigation or complaints process with those outside their circle of support. For example, a complainant would be able to disclose to a professor that they are going through a difficult time due to their participation in a GBV investigation, as long as they gave no details. Let them know who to contact if they have questions or are unsure about whether, to whom, and what information they can disclose in a specific context.

Strategy 8: Take steps to prevent retaliation

Where a person has participated in a complaints process as a complainant or witness, ensure that others involved in the complaint are not in a position of power over them. As previously discussed, retaliation can take both overt and covert forms. A study by the TIME'S UP Legal Defense Fund found that more than 7 in 10 workplace complainants experienced some form of retaliation (Tucker & Mondino, 2020). Wherever possible, anticipate and minimize opportunities to retaliate. Consider positional and social power relations, for example:

5 See "Chapter 12: Privacy and Disclosure" for a more in-depth discussion on considerations and requirements for confidentiality throughout the process.

- Where the respondent manages the area in which the complainant works, assign a new supervisor or have someone else assign duties and/or evaluate their work.
- Where the respondent is involved in a student's academic program as a teacher, mentor, supervisor or committee member, remove that person from those roles, and ensure that there are others who can provide letters of recommendation.
- Where the respondent is able to mobilize a large social group to act in retaliation to a complaint, for example by excluding the complainant from their own social circles, provide strong warnings against doing so and take steps to minimize the potential effects.

There will be cases where this will be difficult, such as when the complainant's research is a component of their supervisor's project, but explore every option in order to minimize the potential for or impacts of retaliation.

In cases where interim measures result in the interruption of an involved party's academic work, the institution should take steps to mitigate or compensate for the harm caused to the students' academic careers. For example, in situations where a faculty member is supervising the work of a complainant, design interim measures that provide substitutes for supervision from within the institution, or through partnerships with affiliate schools using methods similar to that of transferring credits. In cases where the institution is too small, or the area of study is too specific and it is not possible for the involved parties to continue with the course of study under substituted supervision, the institution should attempt to reduce the harm caused by referring affected students to pathways to financial restitution for the cost of the course or degree, and/or supporting the student in transferring programs, fields of study or institutions.

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Chapter 9: Investigation

A sound and effective investigation of a gender-based violence (GBV) policy complaint is one that is procedurally fair, meaning that "no party to an investigation is unfairly affected by the procedural elements of that investigation, and especially that no party is affected to the advantage of the other" (Curtis, 2019). Rubin and Thomlinson (2018) identify the "Four Pillars" of an investigation as fairness, thoroughness, timeliness, and confidentiality, and insist that although the pillars may be difficult to balance, an investigator must make the effort to do so at all times.

A sound and effective investigation is also one that is trauma-informed. Crucially, **"[p]rocedural fairness is a necessary driver in effective and sound investigations and adopting a trauma-informed practice does not conflict with applying the principles of procedural fairness" (McCallum, 2019).**

A trauma-informed approach to investigations is necessary for two important reasons. First, it enhances both the quality and the effectiveness of investigations, making them supportive of a procedurally fair process (Houskeeper, 2018; McCallum, 2019). Critics of trauma-informed investigations who contend that a trauma-informed approach advantages the complainant and harms the respondent misunderstand what a trauma-informed investigation is.

> A well done trauma-informed investigation does not assume everything a complainant reports is true, disadvantage respondents, or fail to seek answers to crucial questions. Instead, it gathers information from potentially traumatized and/or stressed parties in a way that is often more effective than traditional investigative techniques, avoids snap judgments based on stereotypes, and considers all available evidence the parties are able to provide in a holistic, equitable manner. (Houskeeper, 2018)

Second, and equally important, a trauma-informed approach allows for a safer investigation for all parties. Investigations can be stressful and harmful to complainants, respondents, and witnesses. Given that the nature of investigative practices requires probing further into what may have been a traumatic experience, involved parties may suffer symptoms of trauma and other harm during their participation. Applying trauma-informed principles to an investigation is a necessary protective measure to reduce harm and work against retraumatization in the process. Strategies

to reduce harm are crucial in mitigating the burden of these negative impacts on the well-being of involved parties, and facilitate a more sound and effective investigation. Importantly, a procedurally fair and trauma-informed **investigative process** that aims to reduce harm requires both an anti-oppression and equity lens to address the systemic oppression inherent in GBV and post-secondary institution (PSI) processes.

Strategy 1: Follow policy and collective agreements

Investigate when there is a complaint. **The purpose of a complaint is to trigger a formal response from the PSI; a complainant has the reasonable and legitimate expectation that their complaint will be taken seriously and a thorough, fair and impartial investigation will occur.** A person who has been subjected to GBV may make a complaint as a way for a complainant to take control of their situation. Failure to act on a complaint is unsupportive of a trauma-informed approach as it can contribute to a further sense of perceived or actual loss of control. In some cases failure to act can also be an instance of institutional betrayal.[1]

To protect against fairness breaches and limit grounds for appeals or grievances, initiate an investigation when a complaint is made. The two cases below illustrate how failure to investigate constitutes a breach of fairness:

Learning from Case Law

TM v Manitoba (Justice) (2019)

A Human Rights Adjudication Panel found that the employer "contravened its obligation" to address workplace harassment. T.M. made multiple complaints to his employer that he had been subjected to unacceptable harassment, ridicule, and assault by co-workers at the Manitoba Youth Centre. Only after 19 months of inaction, when T.M.'s father raised the matter with the government, did the employer finally initiate an investigation.

1 See "Chapter 3: Introduction to Harm Reduction" for more on institutional betrayal.

Learning from Case Law

Chandran v National Bank (2011)

The Ontario Superior Court of Justice found that Mr. Chandran was constructively dismissed, in part because there was no investigation at all before disciplinary action was taken. Instead, the employer relied on information provided through an employee satisfaction survey. Nine of the 11 employees provided unsolicited information about Mr. Chandran's conduct in their survey responses. The comments on the survey were taken at face value, with no further investigation. The investigator failed to interview Mr. Chandran regarding the statements about his conduct and did not give him the opportunity to provide his own perspective.

There may be times in which an investigation is not possible, such as where the PSI does not have authority to act, where the described behaviour does not violate policy, or where the respondent is no longer a member of the PSI community. In these cases, provide support services to the complainant and explore other, **non-adjudicative options** to meet their needs.[2]

Note that *disclosures* should not be investigated unless there are legal requirements, such as under occupational health and safety laws, or other instances where the institution deems it necessary to take on the role of the complainant.[3]

Strategy 2: Manage expectations from the beginning of the investigation

Complainants, respondents, and witnesses who know what to expect may find it easier to participate in the investigation. Understanding the goals and limitations involved with the investigation allows them to envision their own role, and understand where they fit in the process and what next steps might be. This helps to create an environment in which participants feel safer and are able to most thoroughly and accurately communicate

2 See "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for more on providing alternative options.
3 See "Chapter 4: Creating a Comprehensive Policy Framework" for a more detailed discussion on the institution as complainant.

what they know to the investigator. Given that a significant majority of the information available to an investigator in a GBV complaint comes from interviews, every effort to make participants feel safe and informed is important.

Strategy 2.1: Help involved parties understand the process and each person's role, rather than just naming the steps

Clearly lay out the steps in the process, explain what is necessary for procedural fairness, and outline the parties' rights under law, policy or applicable collective agreement(s) to assist involved parties in understanding the process.

Inform all complainants, respondents, and witnesses that they are permitted to bring an advisor, if not prohibited in policy. Explain the expectations and boundaries of the advisor role. Where involved parties are union members, inform them of their right to union representation. Where policy is silent on the issue of advisors, err on the side of allowing them to assist the participant in understanding processes, ask clarifying procedural questions in the meeting, and debrief with the individual afterwards.

Explain the requirements for and limits of confidentiality. Inform involved parties that the process is confidential, but be clear about when their information may need to be shared with other offices or individuals, or, if relevant, when the PSI has a duty to contact co-op, intern, student employment, or other experiential learning placements; human resources; or other units or agencies.[4]

Situate yourself within the process, clearly describing your role as investigator. Explain that your job is to collect the available information to determine whether there is sufficient evidence to find, on a balance of probabilities, a violation of policy. Be clear about who makes each of the decisions along the way. Discuss your commitment to neutrality, timeliness, and fairness, and demonstrate respect and compassion for all participants.

Clearly explain the role of each party and what is expected and not expected of them throughout the investigation. Provide opportunities for parties to ask questions about these expectations at the start of the investigation, as well as throughout the process.

4 See "Chapter 12: Privacy and Disclosure" for a more in-depth discussion of some of the limits of confidentiality.

Discuss with involved parties *why* such processes need to be undertaken to ease any anxiety. Explain what making a decision on a balance of probabilities means, why decisions may be subject to appeal or grievance, etc. Allow the interviewee to "ask as many questions as they want about what will happen with their evidence/testimony/information" (McCallum, 2019).

Clearly inform each participant of the possibility that you may be contacting them again if you receive new information, or if the scope of the investigation changes. Explain that you will contact them so they can respond to potentially adverse information, as required for procedural fairness. Ask what their preferred method of communication is and if there are any support persons they would like included when being contacted. Explain that you will not contact them outside of the hours where support resources are not available.

Where the matter turns on consent (rather than whether the event occurred), tell the participants about the type of information they may be asked to provide. Explain that they may be asked about what words or actions made them believe they had consent, or what words, actions, or inaction they used to indicate that they did not consent to the activity; their capacity to consent (e.g., whether they were incapacitated or unable to provide consent); or simply what their understanding or misunderstanding of the meaning of consent is. Let them know that you are using the definition of consent in your policy, and explain what that means.

In most cases of GBV, only the complainant and the respondent know what actually happened. **As the investigator, it is important not to claim to have the final say about what happened. To do so invalidates and ignores the experience of the person who was subjected to GBV.** Help involved parties understand that the aim of the investigation is to gather information related to a policy violation rather than to determine whether or not GBV actually took place. This can help them depersonalize the procedures from their own experiences and can mitigate feelings of loss of control that can exacerbate symptoms of trauma.

Let the parties know if you will be seeking access to their social media or other types of evidence or personal information, and explain both why you need it and what you will do with the information. Assure them that only the relevant material – information that speaks to what happened – from any personal source will be considered. Consider the following examples:

Reflection

Example 1

An investigator has been told by the complainant that the respondent contacted them on June 1st, 2020. The complainant sends them a screenshot of the text as evidence. In response, the investigator says they will have to bring this information to the respondent to further verify if contact was made.

In this example, the investigator has not provided the complainant with information about how the process works, why such processes need to be undertaken, or the investigator's commitment to neutrality and fairness. As a result, the complainant, who has spent time and energy extracting evidence, is perplexed and feels their evidence is not being given the same credibility as evidence provided by the respondent.

Example 2

An investigator has been told by the complainant that the respondent contacted them on June 1st, 2020. The complainant sends them a screenshot of the text as evidence. In response, the investigator says they will have to bring this information to the respondent for a response. They thank the complainant for taking the time to find this information and explain to the complainant that their evidence is in itself valid and useful. They also explain that the evidence will be disclosed to the respondent because both parties have the right to respond to any evidence that counters their own, and, should the respondent introduce evidence that contradicts the complaint, they would bring it back to the complainant for a response.

In this example, the investigator has provided ample explanation. The complainant now knows the intent behind the investigator's questions and is aware that their evidence is not being seen as less valid than evidence from the respondent.

Strategy 2.2: Use clear, simple, accessible language and repetition where possible

Acknowledge that the language of disciplinary processes is likely to be unfamiliar and may be intimidating or confusing to involved parties. Make no assumptions about what the participants understand, and define terms when they may be unfamiliar. Avoid the use of jargon, including legal terminology, which only serves to obscure the process.

Use clear, simple, and accessible language when explaining the investigation procedures and processes to involved parties. Recognize that stress and misunderstanding can be exacerbated when an involved party is not using their first language, when they are unfamiliar with procedures, when they learn or process information in atypical ways, or when they have experienced or are experiencing trauma.

"[A]nything you can do to reduce the processing load for victims during an interview will increase the chances that they will be able to understand your questions and provide accurate responses" (Graffam Walker, 2005, as cited in Archambault et al., 2019). Be as clear and accessible in your language as possible to ensure that you will be given accurate responses from any interviewee, regardless of any communication-based barriers (Archambault et al., 2019). Check in with the interviewee periodically and provide them with opportunities to ask questions or request repetition of information wherever needed. Where available, provide interviewees with written information to supplement your explanations, or follow up with an email to reiterate what you told them.

If possible, use an investigator who understands the preferred language spoken by the interviewee or provide translation services. Where these options are unavailable, make an extra effort to ensure that both the investigator and the interviewee understand each other: speak slowly and clearly, paraphrase and mirror back what you heard, and ask for clarification whenever necessary.

Strategy 2.3: Acknowledge and affirm that the investigation can be stressful, emotional, and frightening

A GBV investigation can be stressful, emotional, or frightening for complainants, regardless of the level of care and attention to trauma-informed approaches. The mere act of making a complaint may lead to blame, social isolation, and disrupted relationships. Acknowledge where you cannot protect against these outcomes. Recognize and validate these feelings or experiences to mitigate their harm (McCallum, 2019).

Some people feel frightened or stressed by the process; all reactions and responses are valid. This recognition of what the complainant might be experiencing helps normalize these feelings and avoid retraumatization, and is therefore conducive to the complainant's ability to recall memories and their willingness to share those memories with the interviewer (Alberta Justice and Solicitor General, 2018).

Investigations are similarly stressful for respondents for whom the outcome may have significant consequences. Respondents may be experiencing fear of the unknown, distrust of the process or the investigator, and/or concerns around being labelled as a deviant or rapist. They may have attitudes about GBV that result in an inability or unwillingness to take responsibility for harm. A respondent who is facing concurrent criminal charges or the threat of a criminal investigation will experience an added layer of stress and uncertainty. Provide the respondent with clarity on the intersections and limitations of parallel processes.[5]

Witnesses may also be susceptible to feelings of stress and vulnerability in an interview. They may fear retaliation, harassment, or broken social relationships as a result of their participation in the process. Let them know how the information they provide will be used and who will have access to it.

Finally, feelings of stress, anxiety or fear experienced by participants in the process may be further compounded where participants are Black, Indigenous, or People of Colour (BIPOC), 2SLGBTQQIA+, financially insecure, and/or people with disabilities. Investigators within the complaints processes at Canadian PSIs largely tend to be white, cisgender, straight, and/or able-bodied, while interviewees may have additional stress or vulnerability rooted in systemically oppressive systems. As much as possible, differentiate the investigation from criminal processes. At the same time, acknowledge the power dynamic in the room, validate any feelings of anxiety or fear, and explain your role as clearly as possible to mitigate some of the distrust.

5 See "Chapter 13: Concurrent Post-Secondary Institution and Criminal Processes" for a more detailed discussion on parallel institutional and criminal processes.

Strategy 3: Create conditions that support the integrity of the investigation

Strategy 3.1: Start out as an independent investigator

Ensure that you have true independence from any (other) decision-maker in order to conduct an impartial investigation. Note that the *perception* of bias is as problematic as actual bias. For example, where your supervisor will be the ultimate decision-maker in the case, consider whether they could directly or indirectly (by virtue of their position) influence the direction of your investigation. Maintain strong boundaries and structure your investigation to work against influence or the perception that you could be influenced. Finally, identify any conflicts of interest or commitment you might have and declare them to your supervisor so that they can be appropriately managed.

Where either your independence or a conflict is unmanageable, consider recusing yourself and recommending that the PSI consider an external investigator, particularly at smaller PSIs where it may be more difficult to manage an internal investigator's (other) role(s).[6]

Strategy 3.2: Conduct the investigation in good faith

As an investigator, act with honesty or "sincerity of intention" (Oxford, 1996). Follow the evidence wherever it leads, interview the relevant individuals and keep an open mind. An investigation initiated with improper intentions or ulterior motives can affect the thoroughness, impartiality or confidentiality of the investigation and leads to unfairness throughout the process. Evidence of improper intentions or ulterior motives increases the possibility of a grievance by the union and judicial review or civil action by the parties, and can affect the process further down the line.

Some examples of not acting in good faith include:

- making a determination as to the outcome early on – potentially based on personal biases – and collecting only evidence to support the initial assumptions;
- conducting the investigation with a particular outcome in mind;

6 See "Chapter 5: Policy Strategies for the Complaints Process" for a detailed discussion on the relative merits of using internal versus external investigators.

- basing the investigation on unfounded assumptions that reinforce biases; or
- having a personal interest in the outcome or some element of the investigation.

Consider the following two examples of bad faith in investigations:

Learning from Case Law

TM v Manitoba (Justice) (2019)

T.M. worked in a youth correctional facility, where he reported having been subjected to unacceptable harassment based on his sexual orientation. In addition to a number of other problems, the investigator showed bad faith by limiting the scope of the investigation to only one of the many allegations, despite the presence of evidence supporting other allegations, such as the use of the term "code pink" in T.M.'s presence. In addition, the investigator included in her report a false statement that there were no witnesses to the use of the "code pink" language, which she later acknowledged was untrue.

Disotell v Kraft Canada (2010)

The employer ignored or dismissed complaints of sexual harassment as exaggerated, despite the employee raising concerns a number of times. An investigation finally concluded that no harassment took place. However, the investigators did not interview the four individuals alleged to be harassing the employee, nor did they interview any other workers on the same shift or who worked near the employee. By not interviewing those most likely to have witnessed the harassment, the investigators simply reinforced the conclusions they made from the outset.

Strategy 3.3: Conduct a prompt investigation that adheres as much as possible to timelines provided in policy or the collective agreement

Timeliness is critical to procedural fairness. Avoid lengthy and drawn-out investigations which can unnecessarily prolong the stress inherent in the process for both the complainant and respondent. As much as possible, conduct a timely investigation to better ensure that evidence is available and preserved, that memories of relevant details have not faded, that

parties and witnesses are more likely to be available, and, crucially, that the situation is resolved in a way that the parties are not subjected to extended periods of uncertainty, precariousness, or insecurity.

Interruptions and delays are to be expected in any investigation. Account for scheduled closures or breaks, exam periods or other events that could slow down an investigation. Additional delays might result from:

- the amount of time it takes involved parties to schedule and complete interviews;
- an involved party's inability to participate due to sudden health or wellness concerns;
- an investigator's caseload and ability to manage time in accordance with expectations;
- the number of witnesses or involved parties; and/or
- the time it takes to gather witness testimony.

Where delays do arise in the timeline, put mechanisms in place to mitigate any impacts. Alert the involved parties at the earliest possible opportunity when upcoming deadlines will be missed. Be transparent and communicate factors that will impede or extend the investigation to the parties as they arise, as early as possible.

In a unionized environment, timelines in the collective agreement are legally binding. Failure to work within the timeline could result in a grievance. If either party is a union member, discuss and negotiate any delays and interruptions that may affect timelines with the union.

If your policies do not stipulate timelines, provide your own estimates to the participants, being cognizant of the effects of a drawn-out investigation. When you encounter delays, update the parties on your progress and provide new estimated timelines, where possible.

Strategy 3.4: Conduct a thorough investigation

Note that an incomplete investigation, or one that does not thoroughly explore a complaint, is unfair and could lead to incorrect conclusions. A thorough investigation is both well-planned and flexible, identifies evidence and witnesses up front, and follows up on new information raised during the investigation.

Consider the investigation to be an iterative process (Busby & Birenbaum, 2020, p. 196). Plan to interview both the complainant and the respondent

(separately) at least once and possibly again to follow up when new information is uncovered. Throughout the investigation, identify potential witnesses and other sources of relevant information, such as documents,[7] electronic evidence, photos, and video, and include that information in the investigation report, regardless of whether it supports any initial assumptions.

Clarify the scope of the investigation up front and stay within that scope. Ask questions relevant to the matter at hand, and, to support a trauma-informed approach, avoid asking questions related to conduct outside the authority of the PSI or beyond what is necessary for an administrative process. For example, where a respondent is known, avoid asking about details of the GBV and personal identifiers that would only be necessary if the respondent was a stranger.

Strategy 3.5: Conduct an impartial investigation

An impartial investigation is a prerequisite for an unbiased decision and a fundamental element of procedural fairness. An impartial investigation requires objectivity, neutrality, thoroughness, and self-reflection to ensure that bias and prejudice have not influenced either the collection or interpretation of evidence.

Recognize the different foundations of bias that can impede an impartial investigation, such as pre-existing relationships between the investigator and those providing information in the investigation. The following case illustrates this example:

Learning from Case Law

Disotell v Kraft Canada (2010)

The Ontario Superior Court of Justice cast doubts on the neutrality of the investigation, particularly in light of the involvement of "employees with longstanding relationships" and "conflicting reports between supervisors and first level employees." The lack of neutrality was evident in the fact that Human Resources did not consider relevant information and did not interview relevant parties, including those alleged to have engaged in the GBV.

7 Note that different privacy legislation applies in relation to privacy of medical information.

Bias or prejudice can also manifest in implicit assumptions based on race, national or ethnic origin, colour, religion, age, class, sex, sexual orientation, gender identity, marital status, family status, genetic characteristics, size, disability, and citizenship status. Draw on your training to gain an understanding of how systems of oppression interlock to create the conditions for GBV and the intersecting ways in which vulnerable and marginalized populations are affected by GBV and justice systems. Continually exercise cultural humility and apply an anti-oppression lens in recognition that biases will persist despite training and knowledge.

Begin by recognizing biases and identifying any associated negative behaviours (Monahan-Kreishman & Ingarfield, 2018). Conduct a self-assessment to better understand your ability to respond to a complainant in a way that creates safety and facilitates openness to answering questions. McCallum (2019) offers the following questions to help guide a self-assessment with the purpose of minimizing the potential to retraumatize a complainant:

- Do I need to control the room? If so, why?
- How comfortable am I sitting in silence?
- What is my relationship to time? How flexible am I?
- How comfortable am I with displays of emotion? How do I respond to expressions of sadness, frustration or anger?
- How would I describe the language I use to ask questions? Soft? Firm?
- How do I identify deception?
- What are my biases?
- Am I experiencing de-sensitization? If so, what should I do?

In addition, consider whether you are over-identifying with one of the participants; what other internal or external factors might influence your impartiality; or whether you might be experiencing signs of Trauma Exposure Response, vicarious trauma, secondary trauma, compassion fatigue, or burnout.

Strategy 3.6: Keep the investigation confidential

Allegations of GBV can carry a significant stigma and may have cascading effects on the respondent if they are not treated confidentially during the investigation, but there is potential for harm to a complainant as well. Knowledge about complaints or investigations can stir disharmony among

families and social groups, polarize a community or workplace, arouse feelings of shame or humiliation, or even provoke retaliation.[8]

Explain to participants that confidentiality does not mean secrecy and that there are situations in which information will be disclosed. Procedural fairness requires that the name of the complainant and nature of the allegations be disclosed to the respondent in order to provide them with an opportunity to respond. Where accommodations or interim measures are used, some information will be disclosed to those implementing them, but only to those with a legitimate need to know and only the information they need in order to implement them.[9] Both complainants and respondents will receive information about the process and about each other's experiences of the incident. Witnesses, on the other hand, are not entitled to any information about the matter other than what they need in order to tell the investigator what they know. Provide regular reminders to all interviewees, both in meetings and in writing, that they and those who accompany them to meetings are expected not to share that information any further.

Expectations of confidentiality may feel overly restrictive to the participants, effectively preventing them from discussing the matter with those who can support them through it. When discussing confidentiality with them, make clear that knowledge gained through the *process* is confidential, but that participants own their personal experience and may seek support from their families, close friends, counsellors, advisors or supports, and lawyers.[10]

Recognize that the PSI is not in a position to promise total confidentiality and that there are circumstances when information must be disclosed, such as:

- when there is risk of harm to self or others, concern about the safety of the community, where minors are involved,
- where information has already been distributed on social media,
- where there is a subpoena or production order,
- or where regulatory bodies or collective agreements require reports (Busby & Birenbaum, 2020, p. 98).

8 See "Strategy 10: Address retaliation in policy" in "Chapter 4: Creating A Comprehensive Policy Framework" and "Strategy 8: Take steps to prevent retaliation" in "Chapter 8: Interim Measures" to consider steps you might take to prevent retaliation.

9 See "Strategy 7.2: Disclose the interim measures as required to administer them" in "Chapter 8: Interim Measures" for more on what degree to disclose information on interim measures.

10 See "Chapter 12: Privacy and Disclosure" for a detailed discussion on confidentiality of the process.

Inform and prepare involved parties for the possibility that information may be disclosed, and disclose only what is necessary in the circumstances. When information is disclosed, inform the affected party(ies) of what was disclosed, to whom, and for what purpose.

Strategy 4: Conduct thorough and skilled interviews with the complainant, respondent and witnesses

As an "investigator who understands trauma, sexual assault law, and has a deep familiarity with how discriminatory stereotypes influence thinking" (Busby & Birenbaum, 2020, p. 218) you should be skilled in probing the evidence and asking questions to elicit good information over a series of trauma-informed interviews. You should build rapport with interviewees, create an environment where they feel safe enough to be open and honest in their answers, and give them the space to process and consider the questions before answering. **This allows for more thorough responses and stronger and more defensible determinations of credibility than is possible through court-like questioning under pressure, which can retraumatize, belittle, humiliate, or blame the complainant, and prevent them from fully processing, understanding and answering the questions put to them.**

Strategy 4.1: Account for the potential presence of trauma

Understanding how trauma can affect memory encoding and recall,[11] apply trauma-informed interviewing techniques to collect the most reliable and comprehensive information from involved parties and witnesses. Applying the following techniques and attending to trauma when it arises creates the conditions for interviewees to be able and willing to share the most thorough and accurate information. In addition to reducing or attending to the harm an interviewee might experience, it is conducive to a more thorough understanding of the accounts provided by the interviewees. Consider adopting research-informed interview approaches like the Forensic Experiential Trauma Interview (FETI) method for all interviewees, recognizing that anyone can come to the complaints process with trauma.

11 See "Chapter 2: Introduction toTrauma-Informed Practices" for more on how trauma affects memory encoding and recall.

Be careful to avoid asking an individual to justify or rationalize their behaviour during and following a traumatic experience. Explain to the interviewee that they do not have to justify why they reacted the way that they did, that you understand that their behaviour may have been an autonomic response or have no explanation, and that the reasons for their reactions and behaviours are irrelevant to the investigation.

Focus on what an individual is able to recall rather than asking for specific details about the incident in a specific order (Houskeeper, 2018). A person who has been subjected to GBV may remember sensory details, such as sounds, smells, tastes, and sensations, more than specific details about the person who caused them harm, or the time, duration, and place in which it occurred (Wilson et al., 2016).

Information that you might consider central to the investigation – such as the who, what, where, when, and how of the incident – may have been peripheral to the complainant, and not encoded into their memory. In other words, the details you are seeking may not have been the details central to the *experience*. In the moment, a person being subjected to GBV may be focusing on things that may help them survive, cope with, or withstand the experience (Wilson et al., 2016), making specific details less central to their experience.

Focus your questions on the memories central to the person who was harmed and ask follow-up questions to get at more concrete information. For example, follow-up questions may pick up on a sensory detail raised by the interviewee, such as the feeling of not being able to breathe, and get more concrete details by asking questions like:

- Where on the body did they experience the feeling?
- Can they describe in more detail what it felt like?
- Can they describe whether there was an object involved?
- Was there a texture or smell associated with the experience?

"Think out loud with the victim to identify new information in the victim's account that may be used as evidence. This process may help jog additional memories" (International Association of Chiefs of Police, 2018). Let the interviewee know that it is alright to say they don't remember a detail and that it is better for them to do that than to fill in details when they are unsure.

Crucially, it is not necessary for the interviewee to create a cohesive story arc during the interview. **It is the investigator's task to take all of the**

seemingly disjointed information and create a cohesive picture after the fact. The interviewees provide information, but it is not their responsibility to make their statements organized, comprehensive, or chronological. The onus is on the investigator to ask questions designed to elicit the required information and organize it into a cohesive narrative.

Use a "safe interview approach" to gather the most reliable and comprehensive information, by "adapt[ing] communications or engagement to accommodate the emotional/psychological needs of the interviewee" (McCallum, 2019):

- acknowledge that the process may be stressful, emotional, and frightening;
- be flexible and allow the interviewee to take the lead, within reason;
- actively listen;
- display empathy and patience;
- be transparent and clear about your role in the investigation;
- use open-ended questions wherever possible; and
- allow the interviewee to take breaks as needed.

Whether you are recording the interview or taking notes, explain why you are doing so and how those notes and/or recordings will be used.

> We can create a safe space for an interviewee by allowing them to control the process, the seating arrangement, the lighting and the speed and flow of information...Be mindful of the environment you are working in and who you are interviewing and consider mirroring techniques which include your style of dress, manner of speaking and body language. This approach should apply equally to complainants, respondents and witnesses... Consider permitting the interviewee to:
>
> - Determine where they sit in relation to where you sit;
> - [Determine where they sit in relation to doors and windows;
> - Decide whether they want the door open or closed];
> - Decide when and how often breaks are taken;
> - Deliver answers in their own time;
> - Decide whether the lights are turned up or down. (McCallum, 2019)

Acknowledge that, **even where trauma-informed practices have been applied meaningfully throughout an investigation, there is no guarantee that an interviewee will not be triggered.** Be able to recognize signs that

this may be happening, and have a plan to respond (McCallum, 2019). This both supports the interviewee and helps protect against your own Trauma Exposure Response.

Pay attention to both verbal and non-verbal cues to recognize signs of trauma, and acknowledge that trauma may present in a variety of ways. "Trauma symptoms can present as nervousness, nausea, headache, aggression, fear, avoidance, prolonged silence, paranoia, sadness, disorientation, feeling cold, sweating, shaking, confusion, appearing overwhelmed, sensitivity to light, fragmented recall and dissociation (lack of emotional connection to the narrative)" (McCallum, 2019).

Consider the following responses when an interviewee becomes caught in a traumatic memory to the extent that they withdraw from the present moment:

- call for a break;
- bring attention to something in the room/to the moment;
- state your observations and ask what is going on for the interviewee;
- ask whether supports are needed if there is not a support person in the room; and
- listen. (McCallum, 2019)

Provide interviewees with, or allow them to bring their own, tools and resources to help them stay grounded. These can include fidgets; handouts detailing crisis line information or simple grounding exercises; and small snacks or candy, water or a hot beverage. Ask the interviewee how you can support them, and let them know you are ready to sit with them as long as they need. If necessary, be prepared to pause the interview and return to it another time.

When the interview is drawing to a close, bring the interviewee "back to the moment" before they leave by:

- asking how they found the interview;
- asking if they have any questions about the process or next steps;
- leaving the door open for follow-up questions/clarification;
- asking how they want you to communicate with them at the follow-up stage;
- offering to shake their hand;
- drawing their attention to something tangible, such as a scene outside the window, the weather, or something in the room. (McCallum, 2019)

As a result of the COVID-19 pandemic, physical distancing may continue to be necessary into the foreseeable future, and we will be increasingly operating in a virtual environment post-pandemic. Take steps to adapt these techniques to a remote environment. Where video-conference technology is used for investigations, work with the interviewee to ensure they are safe and have adequate privacy during the interview. Watch for signs of trauma and work with the support person, where available, to ensure that the interviewee has tactile items with them during the interview, such as a hot drink or a stress ball. Remind the interviewee to feel the item with their hands in order to bring them back to the present, or have them concentrate on, for example, how their feet are feeling at that moment.

Strategy 4.2: Allow any interviewee to bring a support person and/or an advisor

Clearly state the respondent's right to bring an advisor, lawyer, or union representative, as allowed or mandated in policy and collective agreements when giving notice and inviting the respondent to participate in the investigation. Where policy is silent on the issue, err on the side of allowing the respondent to bring an advisor with them to any investigative meeting.

In addition, allow complainants to bring an advisor, who may assist them with legal and/or procedural issues. This can help foster a safe environment as well as greater confidence in the process, enabling parties to engage more fully.[12]

Finally, allow complainants, respondents, and witnesses to bring a support person to any interview or meeting. Clarify roles to mitigate any concerns related to undue influence or interference. Allow only the interviewee to answer questions directed to them.

Allow the support person to:

- ask for breaks, attend to the interviewee in the case of a trauma response, ask process questions, and debrief with the interviewee after the interview;
- act as an advocate for the interviewee to access the accommodations they need, taking the burden off the person navigating the complaints process to have to understand the process for receiving accommodations;

12 See "Chapter 10: Adjudication, Outcomes, and Appeals" for a more detailed discussion on the use of lawyers in the process.

- assist a party in understanding trauma and its effect on memory: the support person should explain to the interviewee that, even when being truthful, trauma can affect memory and introduce inconsistencies in statements, but this does not mean the statements are wrong or untruthful, even if they may not be coherent or consistent in the manner expected.

Strategy 4.3: Disclose the case to be met and provide the respondent with the opportunity to respond

Once the information about the complaint is collected through interviewing the complainant and any initial witnesses, bring the matter to the respondent. Summarize the allegations and relevant details and provide them to the respondent. Hear the respondent's account of what happened, and give them the opportunity to provide any additional evidence, name potential witnesses, or suggest lines of inquiry.

Note that procedural fairness is critical to a fair and impartial resolution throughout the entire complaints process. Failure to treat the investigation as a type of administrative hearing (with all of the associated rights, such as notice, disclosure, opportunity to respond) is a failure of fairness (Henry et al., 2016). The Association of Workplace Investigators provides a succinct description of the need for procedural fairness in the investigation phase, equally applicable when investigating allegations against students:

> The respondent must be provided with a full and proper opportunity to respond to the allegations and provide [their] own version of events. This includes providing the respondent with sufficient notice of the process and opportunity to be interviewed, sending the respondent a written copy of the complaint and/or specific allegations and particulars in advance of the meeting so that the respondent is not 'ambushed' with the allegations during the interview. (Jeffrey, n.d.)

Avoid interview tactics such as springing incriminating evidence on an interviewee, or asking questions designed to trap them. **As an administrative investigator, you should not rely on the element of surprise to make your case.** Respondents have a right to reasonable disclosure before providing their response.

Reasonable disclosure may not be the same as providing full, unfettered access to documents, videos, interview transcripts, and other evidence.

Provide the respondent with the information necessary for them to provide their account of events. As a matter of procedural fairness, the respondent has a right to know the nature of the allegations against them, the identity of the person or persons making the allegations, the policy breaches being considered, and the potential consequences they may be facing. Be aware of collective agreements or policies that may require specific or more comprehensive disclosure, such as stipulating that the respondent receives a copy of the written complaint, and ensure the required disclosure is provided.

The procedural fairness principle of notice of the case to be met is addressed in many cases. Three examples are outlined below:

Learning from Case Law

Chapman v Canada (Attorney General) (2019)

The Director of Investigations in the Office of the National Defence and Canadian Forces Ombudsman (Chapman) was found to have committed gross misconduct based on the investigation report. The Court set aside the finding, on the basis that Ms. Chapman was not afforded procedural protections, including "(1) the right to know the evidence against her prior to being examined, (2) the opportunity to provide a full response to that evidence, (3) the right to know beforehand exactly what wrongdoing she is alleged to have committed, (4) the right to call additional witnesses to support her position, or counter evidence already offered, and (5) the right to know the evidence against her before a decision regarding wrongdoing is reached on the basis of that evidence." (para. 42)

TTC Investigation

The Toronto Ombudsman noted in its inquiry of a TTC investigation of an incident, "In cases where there is conflicting evidence, particularly between the accounts of an alleged victim and an alleged perpetrator, it is important for investigators to give each person an opportunity to know what the other says about key aspects of what happened, and to respond. This is a matter of procedural fairness." (Ombudsman Toronto, 2019)

Azeff and Bobrow (2013, as cited in Rubin & Campbell, 2013)

In a 2013 decision, the Québec Labour Relations Board found that two employees of CIBC were unjustly terminated. One of the reasons for this decision involved inadequate notice or opportunity to respond: the employees were given very short notice, were required to appear in Toronto to be interviewed by the investigator, and were not provided with the documents or information about the case against them.

Strategy 4.4: Schedule follow-up interviews and open lines of communication

As the investigator, you will likely need to reconcile conflicting information after the initial interviews. Schedule a second interview with the respondent to signal that you have heard them and take the information they have provided seriously, for example by trying to corroborate their account, checking on details, or following any additional leads they provided.

Schedule a second interview with the complainant as well, and let them know what they can expect next in the process. Understand that trauma can affect the way a person recalls the details of an event, often by making it difficult to remember all relevant details when asked in an interview or at a particular moment in time. The added stress of being interviewed can further impede a person's ability to recall the full details of an event. Consequently, a single interview may not be sufficient to understand the full or comprehensive account. Give complainants, or those who were subjected to GBV, the opportunity to provide additional information that they were unable to recall in the first interview and allow for clarifying questions. This will strengthen the investigation and increase the quality of information (International Association of Chiefs of Police, 2018). It also provides the complainant with the opportunity to hear and respond to any evidence from the respondent or witnesses that may contradict their account.

Give all interviewees contact information and guidance on how they can provide additional details and more information should they choose to at a time outside the scheduled interviews.

Strategy 4.5: Ask the hard questions to reconcile conflicts between accounts in a way that avoids blaming or diminishing the interviewee

A thorough investigation involves trying to reconcile, explain, or choose between conflicting accounts provided by the involved parties in interviews and follow-up interviews. Build enough trust with the interviewees so that difficult questions can be received with openness. This will foster a willingness or ability for them to answer without defensiveness, triggering, or other barriers that can limit your ability to collect comprehensive information. It can help to acknowledge that some questions may be stressful or emotional for the interviewee to answer and apologize for having to ask them (McCallum, 2019).

Explain why you need to ask certain questions to soften what sounds like blaming or diminishing in the questions. Be transparent and clear when explaining the reasons for tough questions (McCallum, 2019).

Avoid "truth-seeking" language and instead emphasize that you are collecting information to determine whether, on a balance of probabilities, there was a policy violation. Ultimately, "the way in which the question is asked and the explanation for why the question is being asked makes all the difference, for example:

- I hear you saying…
- Help me understand why you…
- What was going on for you in that moment following…
- In retrospect, what do you think you were reacting to?" (McCallum, 2019)

Strategy 4.6: Share only what is necessary in follow-up interviews

Use follow-up interviews to pinpoint the specific facts in dispute and ask questions that address those facts. Avoid sharing a full slate of information or entire statements. Wherever possible, only ask questions about the contentious details that are relevant to a violation of the GBV policy.

The nature of GBV, and the intensity of the sentiments that are brought up while recounting traumatizing events, may elicit reactions, comments, and attitudes from involved parties that are triggering or harmful. Only sharing what is necessary during follow-up interviews helps to identify and dispute specific facts for the investigator to follow up on. It allows involved parties

time to process overwhelming information in discrete pieces and protects against information overload while providing the procedural fairness right to challenge adverse information.

Strategy 5: Assess the evidence fairly and skillfully

Understand that your role as investigator is not to uncover the "truth" or to establish what happened, but to collect the information necessary to determine whether, on a balance of probabilities, a violation of policy occurred. Often the only people who will ever know exactly what happened are those who were present at the time. Approach the investigation with humility and curiosity to create a safer space for the participants and improve the quality of the investigation. Look for corroborating evidence, make inferences where necessary, and apply an anti-oppression and trauma-informed lens to counter bias. **Unless you find evidence that the report was fabricated, avoid any language that implies a false report.**[13]

Increasingly, investigators are responsible for the initial decision on whether the evidence collected supports a finding of a policy violation, while some PSIs have a separate decision-maker responsible for making this determination. In either case, build a persuasive case for a decision-maker to work from by skillfully organizing and assessing the evidence collected.[14]

Strategy 5.1: Look for independent corroboration and make use of inference where there are conflicting accounts

Where the investigation features a "one said/the other said" situation where there is very little evidence outside of the complainant's and respondent's accounts, begin by identifying the elements on which the statements conflict, and seek independent evidence to corroborate one account or the other, applying a trauma-informed lens.

13 Even in criminal matters, the courts have found that simple disbelief cannot lead to a conclusion of fabrication without independent evidence. In *R v Iqbal* (2021), the justice wrote: "I would find that the trial judge drew an inference of guilt against the appellant based on a finding of fabrication. I see no independent evidence on the record before the trial judge that could have grounded such a finding" (para. 81).
14 See "Chapter 10: Adjudication, Outcomes, and Appeals" for strategies on assessing evidence and making a finding.

Some examples of independent evidence may include:

- messages (text, email, social media) sent immediately before, during, or after the alleged offence;
- witnesses who, while they did not witness the event, may have information about the context or other details (e.g., the first person to receive an account of the experience, or a person who saw the respondent providing large amounts of alcohol to the complainant); or
- timelines, schedules, or calendars which may provide information about concurrent relevant events.

Follow up on these details in an attempt to reconcile, explain, or choose the more credible of conflicting accounts to conduct a thorough investigation. Work hard to corroborate all relevant aspects of the information provided by complainants, respondents and witnesses, basing any decisions or conclusions on the evidence collected (Archambault & Lonsway, 2019).

Where there is no corroborating evidence available, remember that the statements themselves are evidence to be weighed, and that they should never be dismissed simply because they are contradictory. Where there is no other evidence available, assess the statements carefully and make inferences where appropriate. Ask whether the account is plausible, the witness is credible and reliable, and the account is consistent, taking into account what we know about the effects of trauma and the role of power.

Strategy 5.2: Use an anti-oppression lens and understand the potential effects of trauma when collecting evidence used in assessing credibility

Credibility is a culturally constructed concept, often assessed using so-called common sense – which can be fraught with systemically oppressive assumptions that influence decisions – as the measure of reasonable behaviour. Acknowledge that an individual's behaviour in an interview or throughout an investigation can reflect their experience of power structures, oppression, and institutional betrayal. Behaviours including avoidance, distancing, and vague or counterintuitive responses (such as laughter) may be the result of fear and distrust of authority figures, rather than indicators of dishonesty.

Do not rely on demeanour as an indicator of credibility. For example, a common assumption may be that people who make eye contact are more honest than those who do not. This assumption fails to account for any cultural, disability-related, or trauma-response reasons that a person may not make eye contact.

Counter any unfair assumptions by being aware of their presence. Ask questions designed to elicit information about the person's experiences given their particular intersections and identities, and understand how that might affect their demeanour, choices, and behaviour.

Trauma may also be present, and must be taken into account particularly when assessing credibility:

- Take into account the effect of trauma on memory, encoding and recall: Inconsistent statements, inability to recall details, inability to put events in chronological order have all incorrectly been considered reasons to conclude that the allegation was false.
- Stay clear of judgments based on seemingly inexplicable behaviour during or after the GBV: Behaviours such as remaining in a relationship with the respondent; or contacting them again after the alleged GBV occurred; failing to scream, run away, or fight off the assailant; or not reporting to the police immediately, have been mistakenly taken as signs that the individual did not behave the way a "victim" would be expected to.
- Take into account behavioural cues: Inappropriate outbursts in the interview, or emotional reactions not "consistent" with having been subjected to violence can be wrongly viewed as evidence of someone who is not to be trusted.

Approach all interactions with a sophisticated understanding of how signs of trauma can be mistaken for indicators of dishonesty, and work to challenge the underlying assumptions associated with those indicators. Ask non-judgmental questions, such as: "help me understand why you did x"; or "can you explain what was happening for you at that time". The answers to these and similar questions can draw out the reasons behind behaviours, head off assumptions about what is "normal", and prevent mistaken conclusions. Finally, it is crucial to recognize that failing to account for trauma could result in an inaccurate credibility assessment, leading to an unjust and discriminatory decision in the complaint – increasing the likelihood of a grievance, application for judicial review, civil litigation, or other actions that increase institutional risk.

Strategy 5.3: Provide a comprehensive written investigation report

Provide a concise report to the decision-making authority at the PSI. Document the entire investigation, including:

- a description of the behaviour that gave rise to the complaint, using appropriate **neutral language**;
- what evidence was collected and its relevance to the matter at hand;
- who was interviewed, and a summary of what they said;
- any efforts (successful or not) to follow up on evidence collected;
- clear and explicit assessments of credibility where necessary, with reasons; and
- a description and copies of any relevant documentary or electronic evidence, such as photos, text/email communications, social media posts, or video recordings.

Use the evidence to support any conclusions. Identify additional factors that may have been noted during the investigation, for example, addictions or mental health issues, that can be helpful or important to consider in deciding outcomes or sanctions. In addition to meeting the procedural fairness requirement for reasons, a comprehensive investigation report can contribute to the soundness, reasonableness or correctness of decisions arising from the investigation. Consider the following case acknowledging the importance of the investigation report:

Learning from Case Law

TTC Investigation (Ombudsman Toronto, 2019)

The Toronto Ombudsman highlighted the importance of the investigation report in his enquiry into the TTC investigation of an incident involving fare inspectors. He noted that the investigators' task was "to first identify the factual 'what happened' questions required to decide each issue. Where the evidence on a relevant fact was in dispute or was unclear, they needed to state and explain their factual finding, with reference to the evidence" (para. 76). The Ombudsman noted some examples in which this was not consistently done. This formed one part of the conclusion "that the TTC's investigation into this incident was not adequately thorough, fair and transparent. We therefore cannot find that its conclusions were reasonable" (para. 150).

Ensure the report is comprehensive and thorough enough for the decision-maker to make a finding on whether a policy violation occurred. Where the investigator is tasked with making that decision, ensure that

appropriate decision-making strategies are applied, including using the correct standard of proof, analysis of evidence, assessing credibility, and the provision of reasons.[15]

Strategy 6: Build in practices to address Trauma Exposure Response

The nature of investigating instances of GBV means that you are exposed to trauma and may be at risk of experiencing Trauma Exposure Response, vicarious trauma, secondary trauma, and/or compassion fatigue. In addition to causing harm to yourself and those you interact with, it can cause you to respond inappropriately to future trauma of others.

Implement practices and take advantage of available resources to actively support your well-being and self-care, especially if you are repeatedly exposed to others' stories of violence.

This helps you to understand your own and others' responses to violence, and works to prevent "trigger responses" for you and your interviewees (Public Health Agency of Canada, 2018).

Some practices that help to prevent and address Trauma Exposure Response include:

- educate yourself about the existence of and symptoms associated with Trauma Exposure Response, vicarious trauma, secondary trauma, and compassion fatigue;
- arrange regular opportunities to debrief with colleagues and/or supervisors (maintaining appropriate confidentiality); and access supportive services and structures as needed, such as counselling, or flexible work days and locations.

15 See "Chapter 10: Adjudication, Outcomes, and Appeals" for decision-making strategies.

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Chapter 10: Adjudication, Outcomes, and Appeals

Important decisions are made at a number of points throughout a complaints process, starting from the initial assessment as to whether the gender-based violence (GBV) policy applies, to deciding on interim measures, making a finding on whether a policy violation occurred, what sanction or discipline to apply, and appeals or grievances, where applicable. Personnel receiving complaints, investigators, post-secondary institution (PSI) administrators or tribunals (comprising some combination of staff, faculty, administrators, and/or students) can all be decision-makers at different points in the process (Busby & Birenbaum, 2020).

Given the seemingly endless variations in structures, policies, procedures and practices, we have strived to keep our strategies based in the *principles* of procedural fairness, trauma-informed practice, upholding human rights, and minimizing harm for all involved. We provided a number of structural or procedural strategies in Chapter 4: Creating a Comprehensive Policy Framework and Chapter 5: Policy Strategies for the Complaints Process, but we recognize that where policy is already in place, where a process is enshrined in collective agreements, or where resources are scarce, it may not always be possible to fully implement those strategies or do so in a timely manner (although wherever possible they should be the goal). In these cases, we offer strategies to mitigate or manage harm. Note that these strategies also support stronger practices when policy is comprehensive.

Where policies already exist and procedures are specified, they must be followed and made transparent for anyone to whom the policy or procedures apply, including complainants and respondents. Likewise, where collective agreements dictate procedures for discipline of union members, PSIs are obligated to strictly adhere to what is specified in the collective agreement. External mechanisms like judicial review, human rights complaints, civil action, or grievances are designed to hold institutions accountable when they fail to do this. However, where policy, procedure, or collective agreements are silent or ambiguous, there may be room for discretion and flexibility, provided that the practices are procedurally fair, non-discriminatory and fit within the applicable legislative and policy structure.

At its core, procedural fairness demands a timely, fair and unbiased hearing. Human rights frameworks further require equitable and non-discriminatory processes. A trauma-informed approach ensures that the process is fair for all involved and addresses or mitigates some of the harm resulting from the GBV as well as that arising from the processes themselves. The following strategies address all of these areas.

Strategy 1: Give notice of the case to be met

Procedural fairness requires that you provide the respondent with an opportunity to respond by informing them of the case to be met. At a minimum, provide in writing a summary of the allegations, including the complainant's name, and the evidence in support of the allegations in advance of a hearing. Where policy or collective agreements specify disclosure of certain information or documents, such as the investigation report, share this information with the respondent, adhering to necessary confidentiality measures. Provide information on the jeopardy the respondent may be facing, such as the range of possible sanctions, the recommended discipline, or accountability measures available. Consider the following case as an example in which there was no notice at all:

Learn from Case Law

> **Shaikh v Regional Health Authority (2005)**
>
> In the decision, Justice Riordon explained the unfairness this way: "Dr. Shaikh was not informed that the termination of his contract was being considered. He was not told his services were not satisfactory. He was not told any reason why the action was contemplated nor do I see that he knew that his employer was dissatisfied with his services" (para. 69). Without notice, Dr. Shaikh was given no opportunity to respond and, consequently, the decision to terminate his employment was deemed unfair.

Note that both parties have a right to respond to information that contradicts their account or challenges their credibility. The right to notice "must be afforded to both respondents and complainants" and both parties should be "made aware of the essence of the matter to be determined, the

possible outcomes or ramifications, what they need to do in response, and the consequences of not responding" (Busby & Birenbaum, 2020, p. 62).

Make sure the notice is timely by allowing parties sufficient time to prepare and adhere to any timelines laid out in policy and collective agreements. Where timelines are not specified, put some in place and clearly communicate them to all involved parties. Timelines should be procedurally fair and reasonable, taking into account the potential complexity of the process, and allow for flexibility when unforeseen circumstances arise, the parties request adjustments, or where parties experience barriers as a result of trauma.

Strategy 2: Provide a meaningful opportunity to respond

A hearing can take various forms, including written submissions, individual and iterative interviews, such as those conducted in the investigation, asynchronous in-person meetings, synchronous adversarial-style hearings, or combinations thereof. We have recommended the use of separate hearings for the parties as a procedurally fair and trauma-informed option.[1] However, follow whatever form is stipulated in the existing policies and procedures, recognizing that the goal is for the adjudicator to hear and understand each party's account, and to allow them to provide a response to adverse information or evidence. Give each party the opportunity to raise questions about or challenge the evidence before you.

Note that the key is in the *opportunity* to respond. Participation in campus processes is voluntary, and PSIs are typically not able to compel testimony, witnesses, or evidence. Inform all parties of the opportunity to respond, as well as the implications of not responding or participating. Should a party choose not to participate, the matter is decided without the benefit of hearing from them, based on the information that is available. If the opportunity to respond is absent or insufficient; for example, it is not given in writing, the hearing information is unclear, or the timeline is unreasonably short, it is a breach of fairness.

Set limits in the form of deadlines to respond to the notice (or to meet with the decision-maker, provide information, and so on). Consider the range

1 See "Strategy 7: Choose asynchronous hearings" in "Chapter 5: Policy Strategies for the Complaints Process".

of factors that may impact timelines, including academic calendars, statutory holidays, and institutional closures. Where reasonable efforts to contact the party are unsuccessful, a process should continue without their participation. Recognize that a party may be opting not to participate, or they may be facing what feels like insurmountable barriers to participation.

Take care not to presume bad faith or uncooperativeness should an involved party not respond or disengage. First, consider that there are factors that may contribute to a lack of participation that are not rooted in bad faith or uncooperativeness. For example, trauma may be an influencing factor in a party's lack of participation. Other factors could include disability, religious or cultural observations, and other related to protected grounds under human rights legislation. Second, inquire whether the party requires accommodations and provide reasonable accommodations where required.

Ask parties whether they have any functional limitations that need to be accounted for, such as those caused by disabilities. Offer additional time, breaks during meetings, alternatives to meeting in-person (e.g., the option to provide written responses), or offer to meet at a different time of day, or to accommodate the schedule of their support person. Removing unintended barriers to participation will ultimately result in a more thorough process and a better decision.

Once you have made reasonable efforts to accommodate the respondent and they have either declined to participate or disengaged, base your decision on the evidence before you.

Strategy 3: Maintain control over the process

Note that, while the PSI has the authority to set its own procedures, a concomitant responsibility lies with the decision-maker to adhere to them. Regardless of the procedures in place, maintain control over those procedures to keep the matter fair and on track.

It is important to be clear on the role of legal counsel in the process and the boundaries of that role. The presence of lawyers is, in itself, not an issue and in fact, lawyers can often be helpful. Be careful not to allow a respondent's lawyer, or any other representative, to undermine the

process and the rights of the complainant. Remind counsel that in the administrative process, there is no right to silence, an adverse inference may be drawn from silence, and that the balance of probabilities standard of proof applies.

Employees and lawyers

Note that complaints involving staff and faculty are governed by collective agreements, employment law, and other legal frameworks which may establish or stipulate a right to legal representation in some cases. Where the right to legal representation is not established, consider allowing lawyers to attend any meetings or hearings for both complainants and respondents.

Students and lawyers

In complaints involving students, having a lawyer in the room will not necessarily interfere with the goals of student conduct processes – i.e., to preserve a non-adversarial process, create teachable moments for students, and encourage students to take responsibility for their actions (Busby & Birenbaum, 2020). Allowing students access to a lawyer may make the student more comfortable participating in the process. Where law or evidence is complicated, or where suspension or expulsion are likely outcomes, allow lawyers to be included at every stage of the process (Busby & Birenbaum, 2020), should the student request it.

Maintain the educational goals of the process by asking the student to answer questions in their own words rather than allowing the lawyer to speak on their behalf. Let the student know in the written notice that they will be expected to answer your questions, but that they can bring the advisor of their choice to attend meetings or hearings, raise questions, object to lines of questioning, and clarify processes. None of this is problematic, as long as you maintain control over your own procedures. Clarify roles from the outset to avoid any confusion.

Problems can arise when decision-makers defer to lawyers, or mistakenly allow assumptions from the criminal justice system to inform their own practice. Consider the following strategies:

- Know your own procedures inside and out, including where specific steps are required and where you have discretion.
- Refrain from importing incorrect assumptions, principles, or terminology into your PSI processes.

- Where cross-examination is allowed or required by policy (something we do not recommend), take steps to minimize the harm it causes.
- Recognize and correct inequalities.
- Require procedural requests in writing.

We examine each of these in turn, in more detail below.

Strategy 3.1: Understand where you have discretion

Enabling statutes, applicable laws, collective agreements and the specific PSI policies and procedures guide your actions as decision-maker. Where procedures are specified, they must be followed. Note that while such a wide array of rules may *appear* to leave little opportunity for discretion, there are many points at which discretion can and should be used, starting with the choice of procedures. Any legal or policy framework includes gaps (by design) to allow for choice in how the policy or law is applied; where policies use language like "normally" or "typically," there is room to vary the procedure under some circumstances. PSIs have the discretion to decide how to address matters when the law or policy is silent. Ensure these decisions reflect the spirit of the policy and the environment in which it is being applied – whether educational or workplace – and do not violate any of the many applicable laws.

Your procedures will not tell you what to do in all situations. For example, there may not be clear procedures for when a party requests an extension during the process. In this case, consider the following:

- Human rights law says we must reasonably accommodate those who may be discriminated against on the basis of protected grounds.
- Trauma-informed practice requires adaptations for those who may be experiencing trauma or the after-effects of trauma, and reinforcing a sense of autonomy or control.
- Procedural fairness dictates that the complainant must have an opportunity to provide their position on the request.
- The time of year or other factors may come into play; if the respondent is a student near the end of their program or if witnesses may be dispersing, there may be reason to consider a shorter time frame.

Balancing all the considerations may provide a range of options to choose from. Allow parties to weigh in on the decision, and seek advice from legal counsel as needed when making procedural decisions.

Strategy 3.2: Challenge incorrect criminal law-based assumptions

Actively work against sliding into a more criminal-like model, that is reinforced by using terms from criminal law (e.g., "guilty", "perpetrator", or "victim") and adopting trial-like procedures. Instead choose terms like "responsible", "respondent", and "complainant" and procedures that do not resemble criminal trials. **Regardless of the nature of the violation, a criminal law-based approach is never appropriate at a PSI.** Decision-makers are not trained in criminal law, and PSIs do not have the authority or the means to use criminal law procedures or impose the severe penal consequences proposed by the *Criminal Code* (1985).

A complainant who has chosen to make a complaint to their PSI can justifiably expect the process not to mimic a criminal trial. Imposing a traumatizing process modelled on criminal law in the PSI context infringes on their autonomy and sense of control, can be triggering or retraumatizing for involved parties, and often ignores hard-fought-for rights and protections provided by the courts. In addition, it often results in an incorrect higher standard of proof being applied.

Be alert to lawyers who attempt to introduce legal precedent from criminal cases into the PSI environment. PSI policies and procedures are not based on precedents from criminal law. Administrative law requires each case to be decided on its own merit, taking into account the particular circumstances of the situation at hand and a range of acceptable outcomes.

There may be times, however, where rules from the criminal context may be helpful. For example, adopt the same protections against the use of prior sexual history against a complainant, or reliance on stereotypes and myths in decision-making as those used in criminal courts (Naipaul, 2020). In criminal law, sexual history evidence is rarely relevant and its use is restricted because it has been recognized that it undermines the fairness of trial processes by introducing discriminatory generalizations.

Learning from Case Law

> Our system of justice strives to protect the ability of triers of fact to get at the truth. In cases of sexual assault, evidence of a complainant's prior sexual history — if relied upon to suggest that the complainant was more likely to have consented to the sexual activity in question or is generally less worthy of belief — undermines this truth-seeking function and threatens the equality, privacy and security rights of complainants. (*R v Goldfinch*, 2019, para. 1).
>
> The Supreme Court of Canada (SCC) and appellate courts have repeatedly found that discriminatory myths about sexual violence undermine the fairness of adjudication.
>
> An accused's constitutionally-protected right to make full answer and defence does not permit reliance on prejudicial generalizations about sexual assault victims. Reasonable doubt is not a shield against appellate review if that doubt is informed by inferences based on external, personal assumptions or expectations about how sexual assault victims behave either generally, or specifically. Appellate courts must carefully scrutinize reasons to ensure that findings said to be based on "common sense or logic" are reliably just that, and are not, in fact, unfair and inaccurate external viewpoints that find no foundation in the record. (*R v ARD*, 2017, para. 71).

Adopt these same protections in the administrative decision-making process to guard against unfair assumptions informing decisions. We note that the real risk of importing criminal law ideas into campus processes is that it brings with it the concepts of proof beyond a reasonable doubt, and the right to silence.

Strategy 3.3: Minimize the negative effects of cross-examination

We recommend prohibiting the use of cross-examination in GBV policy violation cases.[2] However, where existing institutional policy or procedures allow for or require the use of cross-examination, take steps to minimize the harm caused and support the parties. Consider the following options:[3]

2 See "Strategy 8: Provide opportunities to respond to and challenge adverse information without cross-examination or direct confrontation" in "Chapter 5: Policy Strategies for the Complaints Process".
3 See also "Chapter 12: Later Stage Procedural Rights" in Busby & Birenbaum (2020).

- place the parties in separate rooms and use video conferencing technology;
- where parties are in the same room, situate them to remove direct sight lines, such as placing a screen between them;
- instruct all parties that cross-examination should not replicate criminal trials;
- provide examples of language for trauma-informed questioning;
- place time limits on questioning;
- discourage the use of yes or no questions, or other forms of questioning which don't allow a comprehensive answer, unless needed for a simple clarification;
- require that any questions be directed through the decision-maker rather than asked directly to the parties;
- provide clear parameters for cross-examination in advance, including lines of questioning that will not be permitted (e.g., questions on sexual history);
- do not allow cross-examination questions or tactics that attack a witness's character;
- do not allow the questioner to badger a witness;
- allow the parties to object to lines of questioning; and
- ensure that the party being examined is given access to an advisor in the room, as well as support after the examination to process their experience.

Where your policy is silent on the use of cross-examination or indicates that it *may* be used, consider it a measure of last resort only. Require parties to make a procedural request in writing to be able to cross-examine, and provide alternative ways for the requesting party to challenge adverse information, such as allowing them to:

- pose questions for you to ask the other party;
- highlight inconsistencies or contradictions in the information orally or in writing;
- provide additional information or evidence to counter adverse evidence;
- provide names of other witnesses who could bring relevant or exculpatory information to the matter; and
- request particular lines of inquiry to be followed by the investigator and/or decision-maker.

Finally, while cross-examination may be considered a necessary element for introducing *reasonable doubt* about a party's veracity in a criminal trial, reasonable doubt is not sufficient to discredit a witness in an administrative hearing, where the standard of proof is on a *balance of probabilities*. The use of cross-examination in administrative processes can contribute to a trial-like atmosphere. Where cross-examination is used, keep procedures squarely within the administrative law context and apply the correct standard of proof.

Strategy 3.4: Recognize and correct inequalities

Particularly in the context of student processes, treat a party who brings a lawyer and one who chooses another advisor – such as an ombudsperson or student advocate – or has no advisor, no differently. Know what your policy says about the degree to which lawyers can participate in a hearing and do not be intimidated by aggressive tactics or give in to unreasonable demands by lawyers. Doing so would mean giving an advantage to those students with the means to hire an expensive lawyer, and may result in well-off students having substantially different outcomes than their less-resourced peers.

Articulate this commitment to involved parties to keep them informed and mitigate concerns that a party who has a lawyer may have an unfair advantage over another. For example, where a respondent brings a lawyer and a complainant is either relying on a student advocate or has no advisor with them, be clear about how you plan to protect against potential influence on your decision. Acknowledge that it may be intimidating for the party without a lawyer, and lay out the rules for the lawyer's participation clearly for both parties. Be vigilant about this throughout the process so that the party who does not have a lawyer does not feel that it is their responsibility to monitor and hold you accountable to this commitment.

Be alive to other factors that give rise to inequities in your process; for example, religious or cultural strictures, gender-based factors, ability- or accessibility-related concerns, and any other situations in which the process may advantage one party over another. Where you have not recognized them yourself, be open to concerns about equity in your process when they are raised by the parties or their advisors, including any perceived imbalance in terms of legal representation. Make yourself approachable and be willing to self-correct when necessary. Doing so as the concerns arise may head off costly, time-consuming and emotionally taxing appeals, grievances or judicial reviews.

Strategy 3.5: Require any procedural request to be submitted in writing

Require requests for adjustments to procedures – such as advance disclosure of documents, request to cross-examine, or postponement of the hearing – in writing. Procedural fairness dictates that any decision affecting a party be made only after providing them with an opportunity to respond, and the same applies for procedural changes that affect a party.

Requiring the requests in writing allows time to consult with the other party before deciding, seek legal advice if necessary, avoid adjournments once a hearing has commenced, and time to formulate reasons for granting or denying the request. For the party requesting the procedural change, it allows them more time to think about their request and articulate it in an environment that has fewer stressors, and provides an opportunity to have someone review their request or support them in articulating what they need. For the other party, having the request in writing when being consulted can make it easier to process the information, especially if they have experienced trauma.

In an administrative process, procedures must be flexible and depend on factors specific to the matter at hand. Follow policy or the collective agreement and protect human rights when determining how a hearing is to proceed. Decide on procedural requests with input from the parties involved, and consider the factors specific to the matter at hand with an aim to minimize harm.

Strategy 4: Address bias and conflicts of interest

Adjudicator bias, or the perception of bias, comes from a variety of sources, including having a personal or professional interest in the outcome, having multiple and conflicting roles in the institution, or an institutional or reporting structure that might make a decision-maker inclined to decide a case in a particular way (Busby & Birenbaum, 2020). Bias can also be unconscious and informed by systemic oppression, as well as myths and stereotypes about GBV.

Learning from Case Law

The bar to establish bias is high and does not arise simply from the possibility that the decision-maker may be more sympathetic to one argument over another. The SCC set the test this way:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly'. (*Committee for Justice and Liberty v National Energy Board*, 1976, 394-395, as cited in *R v S (RD)*, 1997)

They elaborated that:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. (*R v S (RD)*, 1997)

The Court notes that "[t]he reasonable person must be an informed person, with knowledge of all the relevant circumstances" (*R v S (RD)*, 1997). In the administrative context, an informed person would be aware of the procedural fairness requirement of an impartial and unbiased decision-maker.

> To that I would add that the reasonable person should also be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. (*R v S (RD)*, 1997, para. 111)

Bias can also be established if a decision-maker shows a hostile attitude towards one of the parties or adopts impermissible attitudes.

> [Within a settler colonial] racist and sexist social framework, racism and sexism masquerade as 'common sense'. Discriminatory statements by white, able-bodied, heterosexual males pass for 'normality'. When anti-racist [and Indigenous] activists, feminists, disability advocates, and gay men and lesbians try to explain their own sense of reality, their statements appear unconventional, aberrant, and askew. (Backhouse, 1998)

For these reasons, take care to ensure that the *reasonable person standard* is also intersectional and multicultural, and not just based on the hegemonic perspective historically relied on in criminal and administrative processes.

Some situations might call for decision-makers to recuse themselves when they find themselves in a conflict of interest, for example:

- where they are also required to provide support to a complainant or respondent;
- where they have provided advice to a decision-maker or made a decision at another stage of the process;
- where they are too close to the issue being investigated or the parties involved; or
- where they are invested in a particular outcome.

This type of bias is illustrated in the following case:

Learning from Case Law

Said v University of Ottawa (2011)

An assistant professor (Dr. Said) applied for judicial review of the decision not to promote him to associate professor. The Dean opposed the promotion on the grounds that Dr. Said had been accused of sexual harassment, an allegation that the Dean investigated, and for which he recommended that Dr. Said be terminated. An Administrative Committee rejected the recommendation and placed Dr. Said on probation. Meanwhile, the application for promotion proceeded to a number of committees, on which the Dean was a non-voting member, but participated in the discussions. The Dean also made a separate negative recommendation to a Joint Committee, which ultimately decided not to promote Dr. Said. The Dean communicated the decision to him and implied that there was no avenue for appeal.

> The court found that:
>
> > the [University] did not meet its obligation of procedural fairness in the circumstances of this case because of the Dean's participation at every level of the process, after he had made a determination in 2009 that Dr. Said ought to be dismissed. (para. 32)

We recognize that institutional or structural factors may be difficult for small institutions to avoid, particularly where individuals have multiple roles. To avoid conflicts, advice for the parties, advice to decision-makers, carrying out investigations, and decision-making should be independent of each other. Merely knowing about a situation, however, does not create bias: "Impartiality is not the same as 'ignorance of all evidence and charges until the hearing.' Rather, it means rendering an objective finding free from impermissible bias and prejudice" (Henry et al., 2018). In other words, simply having knowledge of allegations, processes, or information related to the case does not necessarily create bias or sway a decision-maker one way or the other.

Where a reasonable perception of bias is present, you must declare and manage it by taking steps to mitigate it, or recuse yourself when mitigation is not possible.

Strategy 5: Approach every decision with an open mind and avoid bias

Decision-makers are required to approach every case with no pre-formed opinions about the complainant, the respondent, or the situation. Take steps to identify and counter bias rooted in preconceived notions, prejudice, and presumptions. We examine three common situations below that could compromise your decision: a presumption of innocence for the respondent, believe-the-survivor campaigns, and reliance on myths or misconceptions around GBV in decision-making.

Presumption of innocence and the right to remain silent

The presumption of innocence and the right to remain silent are two notions commonly and mistakenly imported into GBV complaints

processes. Both of these concepts are integral in criminal processes where the *beyond a reasonable doubt* standard of proof is used. In a criminal case, defendants have a right under the *Charter* to remain silent (or not to incriminate themselves), while the onus is on the Crown to prove the case beyond a reasonable doubt. The right to remain silent, combined with the presumption of innocence, means the judge cannot make any adverse inferences from the defendant's silence.

Beginning with a presumption of innocence in the administrative complaint process, however, is a misapplication of the law and risks importing a higher standard of proof as a result. Whereas the Crown bears the burden of proof *beyond a reasonable doubt* in the criminal process, the burden rests with the complainant in the administrative context to provide sufficient evidence to the investigator to the point of more likely than not. This lower standard of proof requires the decision-maker to approach a case with an open mind, without any presumptions.

As explained in *FH v McDougall* (2008): "The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials." The standard for civil and administrative processes is the *balance of probabilities*, and there is no presumption of innocence.

The following two cases reinforce the fact that the presumption of innocence and a right to silence are applicable only in criminal prosecutions:

Learning from Case Law

Shoemaker v Canada (Drumheller Institution) (2018)

This case involved an inmate (Shoemaker) at the Drumheller Institution who was serving a life sentence for murder. As a result of Shoemaker's activities in the drug culture within the institution, it was decided he would be transferred to another facility. Shoemaker opposed the transfer. Justice Yamauchi determined that "the decision to transfer Mr. Shoemaker to the Edmonton Institution is better characterized as an administrative rather than criminal proceeding" and therefore "traditional rules of proof and evidence do not apply, and there is no presumption of innocence or necessity for proof beyond a reasonable doubt". (para. 65)

Learning from Case Law

Gao v Canada (Public Safety and Emergency Preparedness) (2010)

Gao sought a review of the refusal to approve his sponsored application for permanent residency in Canada. The application was refused in part due to the concern that he had used forged documents in making the application, Gao raised his right to be presumed innocent of the allegation in his appeal. The Tribunal noted: "The right to be presumed innocent under section 11(d) of the *Charter* is *limited* to criminal matters" (para. 24), and "[t]herefore, I find that in the context of immigration matters, the applicant if he wishes to obtain a permanent resident visa does not have a right to be silent and the presumption of innocence does not apply in the immigration as opposed to criminal context". (para. 26)

Given the voluntary nature of PSI complaints processes, a respondent may choose not to provide information or participate; however, that choice is not consequence-free. A decision-maker in a GBV policy context is permitted to draw an adverse inference from a respondent's refusal to participate. Where that is the case, consider the following question: If this person has information to demonstrate that they did not violate the policy, why would they not provide it? In the absence of such evidence, you could infer that no such evidence exists, or that the respondent did, in fact, commit the violation.

Where a respondent chooses to remain silent, inform them that the process will continue without the benefit of their perspective and that an adverse or negative inference could be drawn from refusing to participate without a reasonable explanation. Ensure they are aware that electing not to provide information (or choosing to remain silent) means forfeiting the opportunity to put potentially valuable information before the decision-maker. Choosing to remain silent is always an option, but in an administrative process, it is not without consequences (*Ontario English Catholic Teachers' Association v Brant Haldimand Norfolk Catholic District School Board*, 2019, para. 82).

Presumption of innocence, the right to silence, and proof beyond a reasonable doubt do not belong in PSI administrative processes. Instead, keep an open mind, and rely on the information available to you to make decisions on a balance of probabilities.

Believe campaigns

There is important work underway outside complaints processes in response to the fact that disclosures of GBV continue to be met with skepticism and disbelief. Decision-makers have often started from the assumption that the complaint was exaggerated, distorted, or false. Campaigns promoting belief first[4] have provided a necessary correction to the years of disbelief, based on sexist myths and stereotypes that have led decision-makers to routinely discount allegations of GBV, particularly when made by racialized or Indigenous women and 2SLGBTQQIA+ persons, and when the allegations depart from the pervasive "real rape" archetype. In many cases, the matter is dismissed or buried before a decision-maker is ever involved. These "believe" campaigns are integral to the support a PSI provides to those who have been subjected to GBV. People who support, advise, take disclosures, and assist them, or who receive complaints *should* believe them.

However, importing the language of belief into the adjudicative elements of policy statements or decision-making gives the impression that a decision-maker has decided on a GBV complaint before hearing it, making the institution vulnerable to an allegation of bias. Additionally, it can be harmful for BIPOC respondents for whom allegations of GBV have been weaponized to perpetuate racist or xenophobic stereotypes.

Commit to taking each statement at face value without any assumptions or disbelief, and base your decision on only the evidence before you.

Myths and misconceptions

Bias also arises from importing assumptions and prejudices based on commonly held beliefs about what a victim or perpetrator looks like, what so-called 'normal' behaviour or reactions would be, racial- or gender-based biases, victim-blaming, and those rooted in systemic oppression. A lack of awareness about the effects of trauma on behaviour and memory only serves to reinforce these societal myths and can infect proceedings with discriminatory assumptions that detract from fairness and undermine the process, including any resulting decisions.

Apply a trauma-informed lens to correct these biases against complainants.

4 Notable campaigns include #IBelieveYou, Start by Believing, #OnVousCroit, and CUPE's #BelieveSurvivors, among others.

> [T]hese approaches require that complainants (as well as respondents) be treated with dignity and respect, instead of being exposed to victim-blaming attitudes. Decision makers at all levels need to be alive to the ways in which trauma affects complainants' perceptions, ability to act, memory or conduct during an assault or afterwards. (Busby & Birenbaum, 2020, p. 53)

The Supreme Court of Canada has also warned against the use of myths and misconceptions in decision-making. Damaging assumptions based on sex, gender expression and identity, and race (including anti-Black, anti-Indigenous and Islamophobic attitudes) have poisoned sexual violence trials and campus GBV hearings alike. According to Busby (in press):

> In a trilogy of sexual assault cases in 2019, the Supreme Court of Canada recognized that the investigation, prosecution and adjudication of criminal sexual assault cases continues to be plagued by stereotypical beliefs (*R v Barton, R v Goldfinch, R v RV*). Throughout these three decisions, the Court sends a rallying cry not only to judges, but also to Crown Attorneys and defence counsel to take active steps to recognize and eliminate these types of discriminatory thinking and, more broadly, to take steps to address systemic biases that operate against Indigenous persons and, in particular, Indigenous women and sex workers. This cry should also appeal to other fact-finders in sexual violence cases including those charged with making breach determinations under campus sexual violence policies. (p. 13)

Do	Do Not
• enter a decision-making process with an open mind • be attentive to your own preconceived presumptions, assumptions, or prejudices and actively correct against them; and • make your decision based on the evidence before you	• presume that the respondent is innocent • start from a position of belief or disbelief of a complainant; or • base decisions on assumptions based in myths or misconceptions

Making a Finding

Strategy 6: Apply a balance of probabilities standard of proof

The standard of proof required for all civil matters is a balance of probabilities, or "50% plus a feather" (Jahanzadeh, 2019). This is the correct standard for policy matters in PSIs, despite the fact that GBV can also be criminal in nature. The following cases state the requirement for a balance of probabilities standard of proof and the need to apply it properly, even in the most serious of allegations:

Learning from Case Law

FH v McDougall (2008)

The SCC definitively stated that "it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities" (para. 40). It directed judges to "scrutinize the relevant evidence with care to determine whether it was more likely than not that an alleged event occurred" (para. 49).

Student X v Acadia University (2018)

In this decision, the Supreme Court of Nova Scotia recognized that using criminal trial-like processes and language can undermine the use of a balance of probabilities standard. In other words, the way we conduct hearings can result in an improperly applied higher standard. The Supreme Court of Nova Scotia found that the reasons provided by the decision-maker improperly used the beyond a reasonable doubt standard, despite the policy requiring application of the balance of probabilities standard.

Apply a "more likely than not" analysis to policy decisions, taking into account the statements of the parties, their responses to adverse information, any witness statements, and any other evidence available. Consider factors such as trauma-informed credibility assessments, whether statements or explanations are plausible, or whether corroborating evidence or statements exist.

In the rare case that the balance is truly equal (or 50%) – e.g., when the two accounts are equally plausible but mutually exclusive, the parties are equally credible, and there is no evidence other than the statements provided by the parties – the finding in an administrative law context must be that a policy violation is unsubstantiated. In all other cases, where there are factors weighing for or against a finding, even if that weight is *ever so slight*, it is possible to make a determination on a balance of probabilities.

Crucially, the person subjected to GBV is not required to establish a lack of consent; rather, the respondent may raise consent as a defence. This is illustrated in the following case, where the respondent chose not to provide evidence:

Learning from Case Law

Doe v University of Windsor (2021)

> He [the initial decision-maker; "the AVPSE"] recognized that as in a civil proceeding for battery, including sexual battery, "consent" is an affirmative defence. Once it is shown that a person has interfered with the body of another, a prima facie case is made out, and the person implicated is called upon to explain if he can or be found at fault. [The AVPSE] conceded that given the facts provided by Ms. Doe to the investigator, a prima facie case of sexual assault was made out, and it was not open to him to find that the respondent had established the defence of consent. He recognized that he had erred in finding that the appellant consented to sexual touching and intercourse by requiring the appellant to establish an absence of consent and agreed that his decision was clearly unreasonable and unsupportable on the evidence. (para.14)

Strategy 7: Assess the evidence fairly and skillfully

Strategy 7.1: Understand the rules of evidence[5]

The rules about what evidence may and may not be considered differ in the PSI environment from the strict rules applicable in criminal processes.

5 For detailed information on the rules of evidence for PSIs making decisions in sexual violence cases, see "Chapter 8: Rules of Evidence: Types and Exclusions" and "Chapter 9: Rules of Evidence: Challenging Credibility" in Busby & Birenbaum (2020).

Administrative decision-makers are free to consider a wide range of evidence, as long as it is relevant and credible.

Evidence is *relevant* if it helps answer the question at hand, namely, whether a policy violation took place, "if it increases [or decreases] the probability that a fact is true" (Busby & Birenbaum, 2020, p. 141). In any

GBV case, this requires taking a trauma-informed and anti-oppressive lens. Importantly, this does not mean that the appearance of trauma (or lack thereof) is evidence that an incident did or did not occur, but that a knowledge of trauma is necessary to better understand what is and is not relevant.

Weigh the evidence responsibly and be able to justify the conclusions drawn.

> … the relaxation of the rules of evidence does not relieve an administrative decision-maker of the responsibility to assess the quality of the evidence received in a reasonable manner in order to determine whether it can support the decision being made. (*Pridgen v University of Calgary*, 2012, para. 59).

Strategy 7.2: Take care in assessing credibility and reliability

Evidence is *credible* if the witness providing it appears to be honest, and the information they provide is *reliable*. This is illustrated in the following case:

Learning from Case Law

Ontario (College of Physicians and Surgeons of Ontario) v Lee (2017)

The Inquiries, Complaints and Reports Committee of the Ontario College of Physicians and Surgeons recognized:

> [T]he importance of carefully assessing the credibility of each witness and the reliability of their evidence. In cases of sexual abuse allegations, it is extremely important because typically the only witnesses are the complainant and the physician. Credibility of the witness speaks to his or her honesty. Reliability of a witness speaks to the accuracy of his or her evidence.

When assessing credibility, consider the many factors that contribute to human behaviour, including cultural features, personal attributes, life experiences, levels of community support, and manifestations of trauma. Each of these factors shapes how an individual may behave in the context of a complaints process and may be easy to misread as dishonesty, particularly when compounded by biases held by the decision-maker.

Take into account the impact of trauma on memory and recall when assessing evidence and making decisions.[6] Consider the following:

- how the method used to interview the complainant, witnesses, and the respondent (e.g., whether trauma-informed interview techniques were applied) may affect the quality of the evidence – where involved parties were not interviewed with trauma-informed interview techniques, the evidence presented may be incomplete or less reliable;[7]
- the inability to recall memories in a chronological order or presenting fragmentary memories does not indicate a lack of credibility;
- sensory information or emotional memories provided by the complainant without contextual details are valid; and
- a complainant's failure to report immediately, or generalizations about how an "ideal" victim should behave are not relevant considerations.

The following case recognizes the need to adopt a trauma-informed approach:

Learning from Case Law

AB v Joe Singer Shoes Limited (2018)

In this case, despite the victim's clear memory problems, the Adjudicator accepted the testimony of the doctor (an expert witness) who explained that "the applicant's pain and trauma caused her to have problems accessing information, even simple information about her own life" (para. 126). Consequently, the Adjudicator viewed the evidence provided with that awareness in mind.

6 See "Chapter 2: Introduction to Trauma-Informed Practices" for a more detailed discussion on how trauma affects memory and recall.
7 See "Chapter 9: Investigations" for more on trauma-informed interviewing.

The balance of probabilities is also the correct standard to use when assessing credibility. This is illustrated in the following case:

Learning from Case Law

Amalgamated Transit Union v Toronto Transit Commission (2018)

"Despite a very careful and thorough cross examination by Counsel for the TTC and an equally thoughtful and careful argument concerning [the grievor's] testimony, on balance, I determine that the Grievor was consistent and credible in her denial of consent and I prefer the overall objective evidence. Any other deficiencies in the Grievor's evidence were overwhelmed by [the respondent's] mendacity, his predatory conduct and his distortions of the situation, as well as the objective facts."

Strategy 7.3: Consider what evidence to exclude

Certain kinds of evidence can and should be excluded, such as claims about what a person is likely to do, layperson opinions, evidence based on discriminatory assumptions, or statements made in the context of alternative processes. We examine each of these below.

Assumptions based on what a person is likely to do

When deciding whether a respondent's conduct has violated GBV policy, it is inappropriate to assume that every respondent is a serial offender.[8] Avoid considering propensity evidence, or claims that a respondent is "the type of person more likely to commit an act of sexual violence" when determining a policy violation (Busby & Birenbaum, 2020, p. 147). This is especially important where a respondent is BIPOC, as societal bias and racism incorrectly label those who are BIPOC as more likely to commit an act of sexual violence.

Guard against the use of previous behaviour as proof that a person has violated policy. Prior findings will become an important factor in determining outcome but are rarely applicable as evidence in a new case.

8 One example of assumptions about serial offenders comes from a widely cited article by Lisak and Miller (2002, pp. 83-84), who found in their study of perpetrators of sexual violence that most of the "undetected rapists" in their sample had committed rape and other acts of interpersonal violence prior to being caught. This research has been critiqued by Coker (2017) and others who have questioned both the methodology and the conclusions in this study, and urge caution especially in applying the findings more broadly.

Opinions and character witnesses

Do not consider other people's opinions, particularly those based on less or different information from what you have before you. One such example is a witness who attests to the good character of a respondent. Their opinion is neither informed by any specific expertise, nor does it help to answer whether or not the respondent has violated the policy. Another example is a witness who provides opinions on the credibility of the complainant by discussing their sexual history or other information that feeds into common myths and stereotypes. It is the decision-maker's job to prohibit such evidence; these opinions are not relevant to the finding.

Evidence based on discriminatory assumptions

Discriminatory beliefs and assumptions are particularly toxic and counterproductive to good decision-making; evidence based in these myths must be excluded.

For example, exclude evidence or assumptions:

- based on what a complainant was wearing, whether they were behaving provocatively, or their reputation related to sexual activity, implying that the complainant is somehow responsible for violence perpetrated against them;
- that men are helpless against their natural urges and cannot be held responsible for giving in to them;
- about what constitutes "real" sexual violence, leading to questions about why a complainant didn't fight, resist, scream, or report immediately;
- that an allegation has no merit based on behaviour following the incident, including continuing contact or a relationship with the respondent; and
- based on the demeanour of the complainant who behaves in unexpected ways during the complaints process (Busby & Birenbaum, 2020).

Individuals who have been subjected to GBV act and react in different ways before, during, and after the incident. *Doe v University of Windsor* (2021) serves as a reminder that it is incorrect to make a finding of whether or not consent was given based on the complainant's behaviour, and that, where an investigator has done so, the decision-maker is not bound by that finding. The range of behaviours that a person who has experienced trauma may exhibit and the appearance of trauma, or lack thereof, in a complainant's behaviour has no bearing on their credibility. Asking a person to justify their behaviour in response to a traumatic experience can

be harmful or even retraumatizing. Do not ask a complainant to rationalize their behaviour or include an assessment of an individual's behaviour at the time of the incident, in the period following the incident, or during the complaints process, in your decision.

Apply trauma-informed, anti-discriminatory, and anti-oppression lenses to correct against toxic assumptions and discriminatory beliefs. Be aware that biases will persist despite training and knowledge and it is important to actively and consistently work to address these biases. Begin by recognizing biases and identifying any associated negative behaviours or assumptions (Monahan-Kreishman & Ingarfield, 2018). Conduct a self-assessment to better understand the assumptions you may hold, either explicitly or implicitly, and take steps to unlearn these assumptions. This requires understanding the underlying cultural, historical, and gender issues.

Where there is an in-person hearing, be alert to the range of behavioural responses that indicate when an individual may be triggered (this applies to complainants, respondents, and witnesses), and take steps to minimize the trauma they may be experiencing.

The following case illustrates how the courts have addressed the issue of appearance of trauma:

Learning from Case Law

Calgary (City) v Canadian Union of Public Employees Local 37 (2019)

The Court of Appeal in Alberta addressed this issue when the justices commented on the arbitrator's observation that the complainant did not appear to have suffered trauma as a result of the sexual violence she experienced. They made it plain that "the presence of significant harm or distress to the complainant *may be* an aggravating factor. However, the converse line of reasoning, that the absence of distress on behalf of the complainant is a mitigating factor, is impermissible" (para. 43).

Where it is necessary to ask a question that might sound like it is based in a discriminatory belief, provide an explanation as to why you need to know. Consider the following example:

Reflection

A decision-maker needs to establish if the complainant was incapacitated at the time of the incident. To make this determination, they ask a question about how much the complainant had to drink. However, this question could be interpreted as blaming the complainant due to persistent discriminatory beliefs about GBV and alcohol.

The decision-maker, in this case, must look for evidence relevant to the question of incapacitation. They can mitigate potential harm by prefacing a question about the number of drinks consumed with a simple explanation as to why the information is necessary. In addition, they should include other questions about signs of incapacitation that might have been present: was the complainant struggling to walk or talk? Were they vomiting or losing consciousness? These might be better indicators of incapacitation than the amount of alcohol consumed.

Statements made in non-adjudicative processes

Where a respondent and a complainant have agreed to enter a non-adjudicative process – for example, using **restorative** or other methods – ensure there is room to be open and honest in non-adjudicative spaces.[9] Parties may be fearful that what they say in a non-adjudicative process may be used against them in another process, and respondents may feel particularly vulnerable in a restorative process where participation is predicated on admitting to having caused harm. **To preserve the integrity of any non-adjudicative process, do not permit statements made within it to be used in a complaints process or form part of a decision.**

Applying Outcomes

If the decision-maker (or investigator) has determined on a balance of probabilities that the respondent has violated PSI policy, the next decision relates to the application of sanctions, remedies, consequences, or disciplinary action, which we refer to as *outcomes* in this section.

9 See "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response" for a description of non-adjudicative options and "Chapter 13: Concurrent Post-Secondary Institution and Criminal Processes" for a detailed discussion on the implications of using information from non-adjudicative options in disciplinary or criminal processes.

Strategy 8: Attend to substantive as well as procedural fairness

Fairness in procedures, while crucial and required by law, does not necessarily guarantee a specific outcome. Apply principles of substantive fairness when deciding outcomes, specifically that outcomes are reasonable, justifiable, proportionate, and commensurate.

There is a range of acceptable outcomes in administrative decisions, and the circumstances of the particular case will determine what those are. There is not a one-to-one relationship between type of policy violation and the outcome that follows. When deciding outcomes, consider potential mitigating, aggravating, and compounding factors, for example:

- the severity of the harm caused;
- whether the PSI has records of previous violations (or a series of concurrent ones);
- other patterns of the respondent's behaviour that relate to GBV, whether or not they constitute violations of the policy; or
- the disposition of the respondent (e.g., whether they admitted the misconduct or their level of remorse).

Where the complainant has requested leniency or an enhanced response, factor this request into your decision, and weigh it along with all other relevant factors, especially where their request is rooted in supporting their safety and healing. Note that it is not your job to determine whether a request will actually contribute to a complainant's safety or healing, but to take their word and acknowledge that they are best positioned to know what they need.

In the case of student policy violations, most policies stipulate a list of possible outcomes to be applied alone or in combination. When deciding which of the possible outcomes to apply, consider the range of sanctions available for a particular kind of offence, as well as common mitigating, aggravating or compounding factors that could influence a decision (Henry et al., 2018).[10]

In the employment context, outcomes should be corrective and progressive, not punitive.

10 The *ATIXA Guide to Sanctioning Student Sexual Misconduct Violations* offers a flexible, comprehensive rubric for deciding outcomes; see Henry et al. (2018).

> Progressive discipline usually starts with a verbal warning, progresses to a written warning, then a suspension and finally, as a last resort, termination. From the beginning, you should explain the consequences of a failure to improve on the part of the employee. (KCY at Law, 2019)

Ensure decisions are "justified, transparent and intelligible" and "fall within the range of possible, acceptable outcomes" (*Lethbridge College Board of Governors v Lethbridge College Faculty Association*, 2008, para. 66).

Learning from Case Law

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019

Note that the standard for decisions is reasonableness as held by the SCC.[11]

> Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified.

Balance the interests of the complainant, respondent, and PSI community. Outcomes should support the safety of the complainant and the PSI community, while also encouraging growth and accountability for the respondent wherever possible. They should not be imposed with a solely punitive intent, but rather should be intended to remedy or rectify with the end goal that the respondent learns and is able to reintegrate as a productive and safe member of the community. Only where reintegration is impossible or unreasonable should an outcome result in permanent removal from the PSI.

11 The reasonableness principle was applied in the PSI context in both *Bart v McMaster* (2016) and *Lethbridge College Board of Governors v Lethbridge College Faculty Association* (2008).

Strategy 9: Separate the finding of policy violation from the decision on outcomes

Parties are entitled to speak to the imposition of outcomes, just as they are permitted to make submissions on whether or not a policy violation occurred. For the respondent, it presents an opportunity to accept or disagree with the recommended outcomes. For the complainant, it opens up a discussion of the impact of the misconduct and the resulting needs arising from the harm caused.

Increasingly, PSIs are assigning the decision as to whether the respondent was in violation of policy to the investigator. Where the same individual or tribunal is deciding both matters, consider offering to separate the decision regarding a policy violation from the decision on outcomes as a means to enhance procedural fairness and support a trauma-informed approach.

> It is unrealistic and unfair to expect complainants and respondents to present information on matters relevant to sanction and remedial action (such as the seriousness of the misconduct; mitigating, aggravating and compounding factors; or the appropriateness and availability of punitive, remedial, educational, restorative, or protective measures), at the same time as they are presenting information on the breach. (Busby & Birenbaum, 2020, p. 245)

Separating these decisions allows the parties to concentrate on one potentially traumatizing element at a time; ensures that the impact of the GBV is not confused for evidence in the finding; and, where the complaint is unsubstantiated, avoids extra work for the parties associated with providing information related to outcome.

However, separating the policy violation and outcome decisions may add another step onto an already lengthy process in which the parties may be experiencing process fatigue and simply want a resolution to the matter. You can balance these considerations by offering the option for parties to postpone submissions on outcome until after the determination of breach is complete or allowing them to make submissions at the same time if they so choose. While it is possible to do this in an adversarial hearing, we note that this option is easiest to facilitate, and allows the parties to make different choices from each other, in asynchronous hearings.[12]

12 See "Strategy 7: Choose asynchronous hearings" in "Chapter 5: Policy Strategies for the Complaints Process".

Strategy 10: Provide written reasons

To demonstrate that a decision is reasonable, provide written reasons for the decision: "Courts will be deferential to reasonable decisions by administrative decision-makers, but they will not assume that decisions are reasonable" (Busby & Birenbaum, 2020).

Written reasons additionally encourage administrative decision-makers "to more carefully examine their own thinking and to better articulate their analysis in the process." (*Baker*, as cited in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019, para. 80).

Provide enough information to help readers understand how you made your decision. Include the following points in your reasons:

- who the decision-maker is, and under what authority they are acting;
- what procedural steps were taken;
- a summary of the allegations;
- who gave evidence and a summary of what they said;
- what other material or evidence was considered;
- assessments of credibility and reliability, where necessary;
- what evidence was not considered, and why;
- finding of whether the respondent violated policy for each allegation, and reasons for the finding;
- what sanctions will be applied and why;
- the date the decision becomes final; and
- avenue for appeal or review.

Generally the greater the impact of the decision on the parties, the more detail should be included. The Ontario Superior Court provided some guidance in *Bart v McMaster University* (2016):

> A tribunal's reasons do not have to include all the evidence that the tribunal heard; they merely have to allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of possible and acceptable outcomes. (para. 176)

However, an absence or dearth of reasons is problematic in that it can suggest "a capricious and arbitrary process" (*Dunne v Memorial University*, 2012, para. 22).

Decisions on appeals likewise require written reasons with the same or similar level of detail to that of the original decision: "The rationale for an appeal result should mirror the extent and detail of the written rationale issued in the original determination" (ATIXA, 2018).

Written reasons are beneficial in that: they may promote buy-in by the parties who may be persuaded to accept a decision with reasons even if they do not agree with or like the outcome; they provide parties with anchors for their arguments should they choose to appeal; and, when skillfully written, they can mitigate the harm inherent in the process by acknowledging the information put forward by the parties and demonstrating that it was taken seriously. Provide the decisions and reasons to both parties, where permitted.[13]

Strategy 11: Deliver bad news with care

Generally, it is not likely that the decision will be positive for both parties, and you will be delivering bad news to one or, in some cases, both parties. Whenever you are delivering bad news, do so with care.

Delivering bad news to the respondent

A finding that the respondent has breached policy and the application of outcomes will likely be difficult for the respondent. You will have included avenues for appeal or review in your written reasons, but ensure that these opportunities are clear to the respondent.

Frame the decision when you deliver this news so that the respondent understands the intent. Be clear when the outcomes are a remedy or rectification (i.e., that it is a finite and limited step required for them to become part of the community once more). Encourage them to learn from the matter and use this opportunity to become a productive member of the campus community. Remind them that it is not intended as a punishment, but rather a time for reflection.

Provide referrals to services and identify available supports, including those that assist the respondent to process the news and navigate the next steps. Additionally, provide a list of available services to help the respondent reflect, learn and take productive steps to reintegrate into the community as a positive and safe member.

13 See "Chapter 12: Privacy and Disclosure" for a more detailed discussion on when providing decisions and reasons to both parties may or may not be permitted or advisable.

If you have decided on permanent separation or termination from the PSI, be clear that your decision was made in consideration of the safety of the community or other factors, rather than imposing a strictly punitive measure. Provide information about available community supports to assist the respondent in processing the news and decide on next steps. Where applicable, offer support in transitioning out of the institution, for example, assisting a student who has been in residence, has a meal plan, bus pass, health plan, and so on. Where there is an option in the future to seek approval to return, be sure it is clear.

Delivering bad news to the complainant

Be explicit in your written reasons about what the finding means. A finding of "no violation" is rarely a finding that the complaint is fabricated or false and most likely reflects a lack of evidence, jurisdictional or time limitations, or credibility assessments which come with their own limitations and challenges.

Where a decision turns on a determination of credibility, clearly explain the factors taken into account. The decision is whether or not the available evidence supports a policy violation, and is not necessarily a determination of what happened. Emphasize, where applicable, that the decision is based on a lack of information or authority and not a lack of trust in the complainant. For example:

- the student respondent has left the institution, and policy does not allow you to continue the process (where policy does allow it, the complaint can continue);
- the staff or faculty member respondent has left their employment at the institution and is no longer within PSI authority;
- the finding was a result of insufficient evidence, and not from a determination that the incident did not occur; or
- the incident occurred outside the authority of the PSI (as laid out in the enabling statute or the GBV policy).

You will have included avenues for appeal or review in your written reasons; ensure that these opportunities and the potential for their involvement in an appeal are clear to the complainant.[14]

14 See also "Strategy 11: Make the appeal available to both parties" in "Chapter 5: Policy Strategies for the Complaints Process".

Recognize that a finding of "no policy violation," no matter how carefully worded, could still have a significant impact on the complainant. Include a list of available services and encourage them to access all the supports they may need.

Standard of care

Every decision will likely have a significant impact on both parties. Mitigate any harm when delivering news of your decision with a high standard of care. Some basic standards include:

- inform involved parties of the date of release for the decision letter well in advance;
- provide a "heads-up" 24 hours before the news goes out;
- ensure news is not delivered on a Friday so involved parties can seek supports on campus;
- ask if involved parties would like advisors to receive a copy of the letter, where not prohibited by law, policy or collective agreements; and
- encourage the respondent to respect the complainant's wishes wherever possible, even where they were not explicitly enforced in your decision. (Jafry, 2020)

Appeals

We recommend, where possible, conducting appeals on the record rather than holding a fresh re-hearing of the case.[15] This is both procedurally fair and trauma-informed, and also supports a more timely and less costly process. Regardless of type of appeal, the following strategies will help minimize harm.

Strategy 12: Follow all the strategies related to adjudication

All of the strategies for the initial decision-making stage apply at the appeal stage as well, including:

15 See "Strategy 10: Provide an appeal on the record, not a fresh rehearing of the case" in "Chapter 5: Policy Strategies for the Complaints Process" for a more in-depth discussion on appeal types.

- Clearly communicate rights, roles and responsibilities in the appeal process;
- Provide notice and the right to provide information (strategies 1 and 2, above);
- Maintain control over the process (strategy 3, above);
- Ensure decisions are free from incorrect assumptions, bias, myths, stereotypes, and discrimination (strategies 4 and 5, above);
- Keep the process strictly within the confines of administrative law and apply the correct standard of proof (strategies 5 and 6, above);
- Provide written reasons (strategy 10, above);
- Use an ethic of care when delivering bad news (strategy 11, above).

Strategy 13: Show a high degree of deference to previous decisions

Where a PSI policy requires a fresh or *de novo* hearing rather than an appeal on the record, give all due respect to previous decision-makers. Show a high degree of deference to previous decisions (both determination and outcomes) made by impartial, skilled, and well-trained decision-makers free from conflicts of interest, and having had no conflicting involvement in earlier stages. Where the decision-maker applied the policy correctly, provided appropriate procedural fairness and chose from the range of available outcomes, allow the decision to stand. Where the outcome or sanction falls within the reasonable range, do not adjust it simply because you would have decided something different.

Courts also show a high level of deference to reasonable decisions made through PSI processes, as articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov* (2019):

Case Law Example

> The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable. (para. 100)

Where an appeal is successful – that is, there was a breach of fairness, or the initial decision was unsupported by evidence – return the matter to the appropriate decision-maker (or investigator, as appropriate) to be reconsidered or revised. Referral for a new hearing should be a last resort, used only when no other option will satisfy the requirements of procedural fairness (ATIXA, 2018).

Strategy 14: Build in practices to address Trauma Exposure Response

The nature of hearing cases of GBV means that decision-makers are exposed to trauma and may be at risk of experiencing Trauma Exposure Response, vicarious trauma, secondary trauma, and/or compassion fatigue. In addition to causing harm to the decision-maker and those they interact with, it can cause them to respond inappropriately to future trauma of others.

Implement practices and take advantage of available resources to actively support your well-being and self-care, especially if you are repeatedly exposed to others' stories of violence. This helps you to understand your own and others' responses to violence and works to prevent "trigger responses" for you and others involved in the adjudication process (Public Health Agency of Canada, 2018).

Some practices that help to prevent and address Trauma Exposure Response include:

- educate yourself about the existence of and symptoms associated with Trauma Exposure Response, vicarious trauma, secondary trauma, and compassion fatigue;
- arrange regular opportunities to debrief with colleagues, tribunals and/or supervisors (maintaining appropriate confidentiality); and
- access supportive services and structures as needed, such as counselling, or flexible workdays and locations.

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Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response

One of the most important elements of trauma-informed responses to gender-based violence (GBV) is ensuring that the person who has been harmed is able to make a free and informed decision about whether or not to engage the complaints process at their institution. A person might choose not to move forward with a complaint for a number of reasons, but may be seeking interpersonal accountability or a restorative justice approach. Supporting a discloser in making the decision about which process is best for them requires the institution to ensure all persons are informed of the different options available. These options include alternatives to the institutional complaints process as well as concurrent or complementary processes that may either be initiated by choice or triggered by policy or legislative requirements.

We use *non-adjudicative process*[1] as an umbrella term to refer to any post-secondary institution (PSI) resolution or accountability process available in response to a disclosure of GBV that does not involve disciplinary decisions by the PSI. Non-adjudicative processes include what are sometimes known as alternative resolution processes or informal resolution processes. We use the term non-adjudicative processes here to indicate that they are equally valid processes. Non-adjudicative processes include a range of options, elaborated in the strategies below, including, but not limited to, collaborative resolution options, restorative practices, transformative justice, and processes that are intended to change the culture or systemic issues that allowed or contributed to the violence (Khan, Rowe & Bidgood, 2019, pp. 129-130).

Making non-adjudicative processes available is important for a number of reasons. Broadly, non-adjudicative options can be beneficial to both the person subjected to GBV and the person alleged to have caused harm in that they provide alternatives to adjudicative processes that can be inherently harmful, affecting educational outcomes as well as psychological

1 The term "non-adjudicative process" was recommended by the Expert Panel on Sexual Violence Policies in their Recommendations for a new Sexual Violence Policy to the University of Toronto (2018), and can be found in the University of Toronto's Policy on Sexual Violence and Sexual Harassment (2019).

and social well-being. **They can also open up new opportunities to move from individual accountability to interpersonal and institutional accountability, addressing the systemic or environmental factors that may have contributed to the violence.** This makes non-adjudicative processes not only beneficial to those directly affected by incidents of GBV, but also to the broader campus community and the institution.

One of the many barriers to reporting GBV is the desire by the person subjected to the violence to avoid punishing those who caused the harm. While this may seem counterintuitive, we also know that most cases of GBV involve family, friends, acquaintances, and co-workers. In other words, they are members of the community inhabited by the person who was subjected to the harm. As Karasek (2018) articulates: "We're simultaneously dehumanizing the people who committed sexual assault ... by calling them monsters, and learning that the people who commit these crimes are our friends, co-workers, family members and partners." Many are searching for a way to hold those who have harmed them accountable, and to ensure that they do not harm others in the future, without resorting to punitive measures.

We are not proposing to eliminate or replace complaints processes; instead, **we recognize that there are a significant number of students, staff, and faculty who are seeking some form of accountability but choose not to be subjected to a long and often painful complaints process. Their reasons for doing so are varied, deeply personal and, most importantly, valid.** Providing non-adjudicative options opens up greater potential for those subjected to GBV to pursue an **accountability pathway** that will best support their ability to heal and thrive in the PSI environment.

Once the options are made available, clear, accessible information detailing the different avenues of resolution allows a survivor to make an informed decision that aligns with their path to healing. It is also necessary to ensure that any person who may be involved, whether it is personnel involved in the process, a person who has been subjected to harm, or a person who has caused harm, has the information and guidance they need to navigate these processes. This is particularly important for those non-adjudicative processes which require that both parties agree to proceed with the chosen approach to resolution.

Many of the processes included in this chapter have different goals and outcomes from the complaints process. For example, a complaints process involves investigating whether an individual violated PSI policy, and could

result in sanctions against that person. In contrast, an environmental review seeks to prevent future harm by addressing the conditions conducive to GBV, and a circle process could assist the development of new group norms. The strategies below provide guidance for implementing non-adjudicative options and can be used in the absence of, or as a complement to, a complaints process. They may be used in a specific order – for example, following a complaints process with a circle of support and accountability (CoSA) – or concurrently.

GBV IS A SYSTEM, NOT JUST AN INCIDENT

Recognizing GBV as a communal and systemic issue opens the door to resolution options not otherwise considered in PSIs. This is the first step when designing non-adjudicative pathways to GBV resolution or response.

There is danger in thinking of either GBV or trauma as individual phenomena. Both sustain, and are sustained by, societal attitudes that condone and normalize GBV and power structures that privilege certain groups over others. The presumption that trauma belongs to a single person after a single event puts the overwhelming burden of healing back onto that person, and implies that they are somehow "less than" if they are unable to move on. Likewise, the presumption that GBV consists of discrete, unrelated incidents ignores the seemingly unshakeable culture of complacency and blame in which it is nurtured and protected.[2]

This is precisely the weakness of the individual accountability approach inherent in complaints processes, which are designed to focus on a single incident, in which a single individual reports that another individual has caused them harm. The incident is investigated and 'resolved' through sanctions, with little consideration for the context in which it is allowed to happen. Despite best efforts, complaints processes can be poisoned by attitudes and opinions fueled by systemic oppression. Canadian PSI systems were founded through colonization and tend to feature strict hierarchical structures, creating an environment that fosters GBV and its siblings: harassment, racial violence, exclusion, and retaliation. Given this context, those who have been subjected to GBV may find it difficult to feel safe or supported by complaints processes and prefer to seek out other options that better align with their understanding of justice.

2 See Gorsak (2019) for an excellent discussion on the culture of complacency and blame that allows for and exacerbates GBV.

Alternatives to complaints processes are equally valid

Throughout this Guide we have identified a number of barriers to accessing the complaints process and offered strategies to make it more accessible for those who choose to pursue this route. These same strategies apply to making non-adjudicative options accessible to those seeking accountability or resolution in response to experiencing GBV.[3]

When applying these strategies, however, be attentive to the fact that those who have experienced and/or caused harm are less likely to be familiar with non-adjudicative options. Likewise, the broader campus community may be un- or under-informed about the options and the possibilities they bring. They may wrongly assume that non-adjudicative options are less valid or credible than the complaints process. Be clear in all communications about the existence of various resolution options and the equal validity of each.

Complaints processes are underused,[4] criticized from multiple perspectives, come with significant financial and human costs to the involved parties and the institution, and raise a number of personal, legal and reputational risks. **Institutions have focused on removing barriers to reporting in order to increase the number of complaints they receive, but often fail to recognize that, for some, it is the harm caused by the complaints process itself that is a barrier to reporting** or seeking accountability or resolution options.

Throughout this Guide, we have identified reasons why individuals choose not to report and proposed ways to address those barriers. In addition to trying to find ways to encourage those who have been subjected to GBV to make complaints through our disciplinary systems, we must acknowledge that the complaints process may never be appropriate for a survivor. There are other ways a PSI can respond to disclosures of incidents of GBV that do not involve the complaints process at all, and are better suited to meet the needs of those affected and the community.

Complaints processes focus on the individual under allegation. The conduct of that individual is investigated, they are provided with procedural protections, a finding is made and outcomes are considered and possibly imposed. **Complaints processes are not designed for, nor are they**

3 See "Strategy 11: Ensure the complaints process is simple and accessible" in "Chapter 4: Creating a Comprehensive Policy Framework".

4 "[E]xperts say the number of students reporting sexual assault to universities and colleges is well below national averages" (Sawa & Ward, 2015).

particularly effective at, addressing harm or attending to complainant and community safety and well-being.

Examples and accounts of the negative effects of complaints processes are abundant.

Reflection

- A student who went through the process at the University of Alberta wrote:

  > I chose this process because I felt the criminal justice system would do nothing to support me and would only victimize me further. I felt I had a better chance of being supported and believed by my own university. This was not the case. (cited in Omstead, 2019)

  She also wrote that, "[t]hroughout the hearing, I felt as though I was the one put on trial" (cited in Omstead, 2019).

- In her study of the effects of campus sexual assault, Gorsak (2019) detailed the many negative consequences her participants experienced, from the financial, emotional, and reputational costs, loss of friendships, ability to trust individuals or their institutions, and hope, to the time, money and energy wasted on processes that would end up blaming them, and the exhausting burden of pretending they were okay in order to shield their loved ones.

- Activist Sofie Karasek (2018) wrote about her experience with a campus sexual assault:

  > When I was assaulted at 18, I knew clearly what I wanted: I wanted him never to violate anyone else again, ever. Four of us whom he'd assaulted told the university, through proper channels; he was eventually found responsible, but the punishment was negligible. Nor did it achieve my goal: He assaulted another person the weekend of his graduation. The whole process made me feel betrayed, angry and unvalued. It was worse than the assault itself.

Reflection

- Activist Marlee Liss experienced the dehumanizing effects of the criminal system after she was assaulted. As a result of her experience with a restorative justice alternative,

  > Marlee and [her mother] Barbie Liss started the Re-Humanize movement to raise awareness of the restorative justice option in sexual assault cases. 'We cannot break cycles of dehumanization by responding to violence with dehumanization. We strive to make justice and healing synonymous.' (Elsesser, 2020)

- Through her RESTORE program, professor and researcher Mary Koss (2014) identified some of the common outcomes that victims of sexual assault sought: validation, acknowledgment of the harm they experienced at another's hands, the desire to tell their story and be heard, the desire to make decisions about how their case is handled, and the need to contribute in a meaningful way to holding the person who harmed them accountable, and finally, to reclaim the power they had lost during the assault (Koss speaking in Coker et al., 2020). Those who have been subjected to GBV and are seeking the kinds of outcomes listed here will not typically find them in a complaints process.

While this guide was designed specifically to discuss complaints processes, **we'd like to take this opportunity to encourage PSIs to think outside the complaints box and be open to other ways to respond to GBV – ways that are driven not by procedures, but by the needs of the person who was subjected to harm and the imperative to transform our culture into one in which GBV is unacceptable.** Needs created out of GBV are highly individualized; there is no one-size-fits-all response. McGlynn and Westmarland (2018) reframe "justice as an ever-evolving, nuanced and lived experience" and suggest "justice as consequences, recognition, dignity, voice, prevention and connectedness" as a new way to approach GBV based on the needs of those most affected. In the strategies that follow, we propose a number of non-adjudicative options to this end.

Strategy 1: Make culturally appropriate resolution options available

It is incumbent on Canadian PSIs to ensure the safety of Indigenous students, faculty, and staff, and meet obligations for truth and reconciliation and move towards decolonization. Providing access to culturally appropriate GBV accountability options is a necessary step in that direction.

The Calls to Action in the *Final Report of the Truth and Reconciliation Commission of Canada* (2015), recommendations from the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019), and movements like Black Lives Matter and Idle No More are just a few examples calling on PSIs to confront their colonial and racist legacy, including in their complaints processes. *Reclaiming Power and Place: The Final Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls* (2019) identifies how existing structures and institutions, rooted in colonialism, have "created the conditions for the crisis of missing and murdered Indigenous women, girls and 2SLGBTQQIA+ people that we are confronting today" and a lack of willingness to enact change has maintained and allowed this crisis to continue.

While the strategies in previous chapters support the development and implementation of a safer complaints process, attentive to the harms of colonialism and anti-Indigenous racism that exist in both adjudicative and post-secondary spaces, no strategy can entirely dismantle the colonial and racist foundations of these spaces. It is, therefore, necessary to make culturally appropriate resolution options available in addition to the complaints process. This is one step to addressing the Calls to Action identified in *Reclaiming Power and Place: The Final Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls* (2019), specifically 5.11: "We call upon all governments to increase accessibility to meaningful and culturally appropriate justice practices by expanding restorative justice programs and Indigenous Peoples' Courts."

These options are equally valid to the PSI complaints process. It is important to make them accessible to the PSI community and to inform survivors about these options when they disclose an experience of GBV, in the same way we inform them about support services or the steps in a complaints process. PSIs should consider building these options into institutional response trees and other tools as a way to address the harms around GBV.

When offering culturally appropriate resolution options for Indigenous students, staff, and faculty, Courtney Skye (2020) teaches us that PSIs must take care not to duplicate or co-opt the work already being done within communities. She recommends that PSIs take the opportunity, instead, to build relationships with communities and support their work. Begin by learning about the land on which your institution is built – every PSI is built on the land of Indigenous nations or communities. Who are the local nations or communities living on this land? Start here and work towards building a relationship. This is work that needs to be continuous and ongoing, but there is no need to delay getting started. Learn about the justice and accountability processes that are available in these communities and discuss with them their openness to offering these services to Indigenous students, staff, and faculty from your institution and how you can best support them in this work. Discuss the costs of supporting PSI members, and be prepared to contribute or reciprocate in an appropriate way (Skye, 2020).

Like all processes, these options must be voluntary; not all Indigenous people will be comfortable or familiar with the local Indigenous community if they are from a different community and especially if they have travelled from other locations to attend the PSI (Skye, 2020). Recognize that they may or may not pursue this option even if it is available and accessible to them: it should be their choice, always.

It may also be the case that local First Nations or Indigenous communities do not have processes available or appropriate for people who have been harmed. If this is the case, the PSI may need to provide a culturally appropriate process internally (Skye, 2020). Take steps to educate yourself and invest in Indigenous GBV response leaders to support the development and implementation of such processes.

Ultimately, whichever path you take to making these resolutions available must be rooted in a long-term vision of Indigenous leadership, rather than a short-term vision of service delivery (Skye, 2020). This means giving power and decision-making positions to Indigenous persons and supporting them (both in resources, financially, and in terms of power) to implement responses to GBV in their own ways and to incorporate principles of cultural safety into all processes available through your institution.

Like Indigenous communities, Black, 2SLGBTQQIA+, religious and other racialized and cultural groups may have existing ways to work toward accountability collaboratively. In addition to posing personal risks to

involved parties, investigations and resulting sanctions can be polarizing and damaging to relationships within social or cultural groups. Those in small or marginalized communities may fear that making a complaint will alienate them from each other, and may prefer to rely instead on group cohesion to hold each other accountable. Recognize that this is likely happening regularly at a grassroots level; however, should a disclosure come to your attention, support any available culturally appropriate responses and make space for communities to work together in ways that reinforce and strengthen rather than tear their communities apart.

Where the parties come from different cultural communities, recognize the power in co-facilitation, cross-cultural engagement, and multiple cultural perspectives when those of different groups participate together. Collaborative efforts to understand and come to mutually acceptable resolutions can strengthen rather than fragment the PSI culture.

Strategy 2: Involve the community in facilitated discussions to address and prevent GBV

We have argued that GBV is a collective problem that cannot be solved by individual resolutions. One antidote might be the possibility of *collaborative accountability* options, such as facilitated discussions or community-based grassroots projects. There is a vast unexplored opportunity to address the needs of those who have been harmed by GBV, hold those who have harmed others accountable in different or more meaningful ways, or change the attitudes and norms that insulate, perpetuate, or promote GBV in PSIs.

Terminology in this area is currently not settled and can be fluid and confusing. Terms like restorative justice, restorative practices, mediation, victim-offender dialogue, circles, conferences, transformative justice, and many others, are all used, sometimes interchangeably, to signal collaborative, facilitated approaches. For our purposes, we would simply say that any of these approaches can be valuable or useful, so long as:

- they treat the GBV as a harm and not a conflict;
- they are voluntary for all parties;

- they involve skilled facilitators with an understanding of GBV, trauma, anti-oppression, power structures, and intersectionality;
- they involve extensive preparation with the parties to prevent further harm; and
- they acknowledge and respect the origins of the given approach.

The distinction between accountability processes and conflict resolution cannot be overemphasized. **GBV is not a conflict in which two parties find themselves at odds. Using conflict resolution methods implies that there is shared responsibility for what has happened, and that compromise is an appropriate way to resolve the problem.** GBV is an act of harm perpetrated on a person; one that traumatizes, disrespects bodily autonomy, removes agency, dehumanizes, and humiliates. It cannot be resolved without an acknowledgment of that harm and the needs that harm creates, both in the person who experienced it and in the broader community.[5]

Collaborative accountability processes include the following common elements according to Koss (speaking in Coker et al., 2020):

1. They are forward facing – they look to what needs to be done in the future rather than trying to establish what happened in the past.
2. They recognize and try to address harm by upholding meaningful accountability.
3. They focus on relationships rather than processes or policies.
4. They involve friends, family and/or community in the resolution process.
5. They are driven by the needs of those who experienced the harm.
6. Decisions about how to resolve the problem at hand – whether it be changing norms and attitudes, addressing the harms resulting from an incident of GBV, or supporting accountability – are made collaboratively by the group and not imposed by a higher authority.

Restorative options

First, we want to acknowledge that restorative justice (RJ) is a contested term, understood in different ways by different people. For some, the term evokes Indigenous justice traditions; others may understand it as a diversion from, but still directly connected to, the criminal justice system; still others may associate the term with the more recent movement to

5 See also the University of Alberta Report from the Working Group on Restorative Initiatives for Sexual Violence (Eerkes & Hackett, 2018).

use restorative processes within institutions as an alternative resolution option. RJ has been variously described as a practice, a framework, a set of principles, an approach, a philosophy, and a way of living. These understandings can be in conflict with each other, but can also influence each other.

Historically, the retributive (or crime and punishment) model that is so familiar, and that has been reproduced in some PSI complaints processes, is only a few centuries old. It replaced a "non-judicial, non-legal community-based approach that has dominated Western history" (Latimer & Kleinknecht, 2000). In fact, "[r]estorative justice has been the dominant model of criminal justice throughout most of human history for all of the world's peoples" (Braithwaite, 1999). The adjudicative process is itself a cultural construct which was deliberately developed to centralize power and take it away from communities at the end of the Dark Ages (Braithwaite, 1999). That system, and the processes put in place to limit community-based decision making, became associated with both basic fairness and the cultural construct of civilization.

The recent interest in restorative practices is, in fact, a "re-emergence of restorative principles" (Braithwaite, 1999). Chartrand and Horn (2016) describe a complex and nuanced relationship between RJ and Indigenous legal traditions. Indigenous traditions influenced the "early development of restorative justice programs," for example, in articulating principles and values, and "providing examples of how programs might function" (p. 14). Because of the way the Canadian government aggressively suppressed Indigenous legal traditions, there is evidence that RJ has likewise influenced modern Indigenous justice practices, "in that it has filled the gaps that colonization created" (Chartrand and Horn, 2016, p. 14). Chartrand and Horn anticipate a future in which the two continue to evolve and influence each other.

Many Indigenous traditions and teachings have influenced the current restorative practices being adopted or considered in PSIs. Some examples include the talking circles of the Tlingit people in Yukon and Alaska (Teslin Tlingit Council, 2021); the Navajo peacemaker court spanning Arizona, New Mexico and Utah (The Peacemaking Program of the Navajo Nation, n.d.); and Maori family group conferencing in New Zealand (Ma Mawi Wi Chi Itata Centre, 2021; Schoeman, 2013). Various Indigenous worldviews, such as the Nguni Bantu conception of *ubuntu* ('I am because you are'; Eze, 2011) and the Cree and Métis natural law of *wâhkôhtowin* ('we are all one'; Voices of Amiskwaciy, 2021), also inform restorative understandings.

Sociologists and practitioners in North America have drawn on these traditions, as well as those of Mennonite and other religious communities, the prison abolitionist movement, and the alternative dispute resolution movement, to develop RJ programs and practices in PSIs around North America. In addition, robust restorative practice communities, within and outside PSIs, exist around the world (Centre for Justice and Reconciliation, 2021).

Howard Zehr (2014), a leading RJ scholar and practitioner, laid out minimum requirements, stipulating that RJ must, "address victims' harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in this process."

RJ is often conceived as scripted, in-person, face-to-face dialogues. While that is one approach, principle-driven practice (e.g., collaborative and inclusive decision-making, active accountability, and a commitment to repairing harm and rebuilding trust; Karp, 2015) allows restorative processes to be adapted and customized to specific situations and circumstances. Some examples might include using surrogate conferences, written or pre-recorded exchanges, and other asynchronous methods. It can, under the right circumstances, be used to address an incident of GBV, or it can address secondary harms, such as broken relationships with others, or instances of institutional betrayal. Where some of the elements necessary for RJ are absent, Zehr (2014) discusses a "restorative continuum" to mitigate harm and take every possible step toward a restorative response.

Campus PRISM Project (Promoting Restorative Initiatives for Sexual Misconduct) is "an international team of researchers and practitioners committed to reducing sexual and gender-based violence by exploring how a restorative approach may provide more healing and better accountability" (Karp, 2019). The goal of the project is to "create space for scholars and practitioners to explore the use of RJ for campus sexual and gender-based misconduct...as an alternative or complement to current practices" (Karp et al., 2016). In their 2016 report, the PRISM team applied restorative principles to both campus sexual misconduct and consent education. There is significant work happening across Canada in this area as well and, while not a panacea, it promises to be a good option for some.

Reflection

Dalhousie University provided an excellent example of how restorative processes can be used to address both an incident of GBV and systemic causes in 2015. In that case, some male students in the Faculty of Dentistry posted misogynistic and violent comments on a Facebook page, which later became known to some of the female students named on the page. The University took a multi-pronged, restorative approach to addressing the issue, in which they:

- provided extensive education around the issue of GBV;
- worked with groups of students to name and understand the harm;
- worked with the faculty to identify and address the underlying systemic causes; and
- brought the key players together to decide what needed to happen to make it right.

The process was plagued with seemingly unrelenting media attention, criticism from individuals and groups outside the process, and miscommunication, yet the Llewellyn et al. (2015) report on the process and its outcomes reflects an almost universally positive experience and significant learning and growth among the student participants. In addition, the agreed reparative steps included actions that would lead to a positive culture shift in the Faculty of Dentistry.

The University of Alberta *Report from the Working Group on Restorative Initiatives for Sexual Violence* recommends parameters for using RJ in the context of sexual violence (Eerkes & Hackett, 2018):

- the process should be initiated by the survivor;
- the responsible person must acknowledge their actions and give fully-informed consent to participate in good faith;
- the process should be designed and customized to address the specific needs of the specific situation and participants;
- protections should be in place to ensure that communication within the process is confidential; and
- the environment must be supportive for all participants.

Eerkes and Hackett (2018) recommend that a restorative process should be completely separate from any complaints process, initiated on request rather than by a complaint, and act as a stand-alone option. To allow for the kind of flexibility required for a restorative response, PSI policy can (and should) refer to restorative practices as an option, but should avoid creating procedures that would hamper or constrain facilitation of specific matters. **Over-regulation can cause its own harm to the participants; it is important to recognize the ways in which the procedural constraints and typical remedies can bring additional consequences that perpetuate violence and systemic oppression.** We have discussed how complaints processes in the PSI context can be discriminatory, both in how parties are treated and in the outcomes that are delivered. Properly done, restorative processes can provide a safer and more equitable solution.

While most restorative processes tend to rely on some in-person engagement, asynchronous and distanced processes have become the new normal. Technology has adapted quickly to remote meeting and circle processes because of the mass switch to online service delivery required by the COVID-19 pandemic (The Circle Way, 2020). As a result, options and alternatives to in-person processes have only increased. For small, remote or rural PSIs, the new technology means geographical location may be less of a constraint, although it will pose a new barrier for those communities without reliable internet service.

We note that the use of RJ in response to sexual harm may not be an option everywhere across Canada. Check for moratoriums on this practice that may be in place in your province or territory.[6]

Transformative options

Transformative justice (TJ) shares some of the elements of RJ, but its lineage comes from grassroots communities of colour, gender non-conforming folks and/or women of colour with disabilities, who, in addition to addressing interpersonal violence, also aim to address the violence of the state (Kim speaking in Coker et al., 2020). While RJ is often attached to or associated with law enforcement, TJ is a collective community response, often accompanied by anti-carceral and abolitionist beliefs. Its adherents do not believe there is a previous good order to be restored but view current state systems as both responsible for and supportive of the violence it purports to address. If the goal is to eradicate

6 As of July 2020, Nova Scotia continues to have a moratorium in place on the use of RJ for sexual and intimate partner violence cases (Macdonald, 2020; Nova Scotia Department of Justice, 2018).

violence, the only option is to seek *transformation* in individuals, communities, and systems of power.

PSIs can learn from and be inspired by TJ, recognizing that their own systems can also contribute to and perpetuate inequality. Processes that identify discriminatory or oppressive systems within our institutions and advocate for change can be empowering, provided they are taken seriously. This may be a desirable option when, for example, the person under allegation for an incident in the past is no longer with the PSI, or a complainant feels harmed by the way the institution responded to their complaint.

While TJ is often used in response to an *episode*, transformative processes like Transformative Community Conferencing (TCC) can be used specifically to examine and change structural or societal elements conducive to GBV. TCC addresses the epicentre of an issue (Hooker, 2016). It "invites people to discover previously unconsidered narrative frames that may reinforce or reproduce the problematic conditions and to also identify the presence of events and make observations in different ways that align with their preferred narrative" (Hooker, 2016, "What's the Story?"). It is less about holding individuals to account for a particular wrongdoing than providing the opportunity for a community to reset its values and put a plan for change into action (Hooker, 2016). This may be a desirable option when students, staff and/or faculty identify ways in which institutional policy or practices are likely to cause harm or the environment of their PSI or department is harmful to their teaching, learning, or working life.

Circle options

PSIs have the opportunity and responsibility to prevent as well as respond to GBV. As one example, PRISM has proposed and mapped out circle processes as a new way to deliver consent education (Karp et al., 2016).

Peacemaking Circles draw from Indigenous traditions of the Talking Circle, and are useful when two or more people need to make a decision together, have a disagreement, need to address an experience that resulted in harm, want to strengthen teamwork, celebrate, share difficulties, or learn from each other (Pranis, 2014). Under this framework, the potential for the use of circles as a form of facilitated dialogue is extensive. **Because it is not limited to addressing an incident of harm, a circle can form the basis for addressing group dynamics, setting goals, identifying gaps in current policies or processes, and countless other difficult discussions.**

An especially promising aspect of circles is that they offer an opportunity for social norming, which itself can lead to "norm negotiation and normative change" when group norms are harmful or toxic (Polavarapu speaking in Coker et al., 2020). Similar to TCC but on a smaller scale, a community can use a circle to:

- identify unreflected habits, beliefs, or attitudes;
- articulate how they create or perpetuate harm;
- agree on ways to transform these to a more positive environment; and
- plan how they will all hold each other accountable to maintain the new culture.

A carefully guided circle process allows the group to move from a discussion of the harm resulting from their shared dynamic to a collaborative exercise in which they choose new, inclusive norms that they have generated collectively.

Circles of Support and Accountability

Circles of Support and Accountability (CoSAs) originated in Hamilton, Ontario, in 1994 as a way to support sex offenders on their release from prison. A CoSA provides "trained volunteers to act as friends. They provide the supports to help ex-offenders succeed, hold them accountable for their behaviours, and work closely with police and mental health professionals to raise the alarm if necessary" (CoSA, 2021). Recidivism among CoSA participants has been found to be 80 percent lower than for non-CoSA participants (Wilson, Cortoni, & McWhinnie, 2009, as cited in CoSA, 2021).

Again, PSIs can learn from CoSA processes; for example, by applying a CoSA model to help reintegrate a student or staff member who is returning from a suspension as a result of GBV. Alternatively, a CoSA can prioritize interpersonal, rather than individual, accountability in a case where there was no separation from the PSI, but there is a desire to hold a person who caused harm accountable and support them in learning and changing their beliefs and attitudes, and thereby their future actions.

In some ways, small, remote or rural PSIs may have an advantage in this area: collaborative or communal responses require a sense of community, something that may not always be present in large, impersonal institutions. When relationships within the community are perceived as worth saving, participants may be more invested in collaborative processes. A large institution may seem impersonal but when it is viewed as a community of communities, there is ample opportunity to collaborate on accountability and culture change.

Strategy 3: Provide non-disciplinary measures as an option in response to disclosures

Interim measures can be used to apply non-disciplinary restrictions, conditions, or enhanced monitoring prior to a finding that the individual violated policy. These measures have multiple goals, including providing a safe working, learning and living environment, preventing future GBV, and discouraging retaliation. In other words, they are precautionary rather than punitive (Busby & Birenbaum, 2020).

Interim measures are typically understood as a tool for when a complaint is received and an investigation is underway; however, it is equally possible to use non-disciplinary measures in the case of a disclosure only, along with the associated procedural fairness protections. The following case speaks to the issue of applying measures in the absence of a finding:

Learning from Case Law

Queen's University v Queen's University Faculty Association (2019)

In this case, complaints of harassment against a professor were sufficiently concerning that the institution moved the professor to an office away from the rest of the department. An investigation into the matter found no policy violation; however, the University kept the measure in place as a matter of safety for the two complainants. The Arbitrator did not take issue with the fact that the measure was applied outside the complaints process. Rather, the concern was that the employer did not, as was required by the collective agreement, explore other options to minimize what was a disproportionately negative effect on the professor who was required to move offices.

The availability of non-disciplinary measures in the absence of a complaint is an important option for those who have been subjected to GBV, and who fear the investigation and/or hearing involved in a complaint will be harmful. At the same time, they may still require some administrative support to avoid triggers, retraumatization, or harm as they move through

campus life and spaces. Requiring someone to make a complaint in order to receive support of this kind can push survivors into the complaints process unwillingly, taking away their agency and control; or, more commonly, mean that survivors will not reach out, taking away their access to resources and support. Trauma-informed practice means not pushing those who have been subjected to harm in any particular direction but providing the full array of options and allowing them to decide what will best meet their needs.

Making non-disciplinary measures available without requiring a complaint also creates space to interrupt colonialism and colonial practices on BIPOC PSI community members (Garnett, 2016). Offering alternative avenues for safety measures allows for resistance/rejection/refusal of colonial complaints processes while still allowing survivors to feel safe and mitigate the potential for retraumatization. These measures are not the perfect solution to addressing colonial harms as there is still engagement with the colonial system. However, they can serve as a harm reduction tool and allow for greater cultural safety.

While non-disciplinary measures do involve a decision by a PSI administrator, the nature of that decision is fundamentally different from the lengthy complaints process, which requires an investigation, hearings, a decision, and an appeal. Because they are "precautionary rather than disciplinary" (Busby & Birenbaum, 2020), there is no requirement to investigate or make a finding on a balance of probabilities. Rather, it is sufficient to rely on a disclosure that provides a *reasonable basis to conclude* that there is a need to prevent any future GBV or retaliation. The non-disciplinary measures decision involves the parties to the matter in an ongoing, responsive process with regular check-ins. It offers a timely response that, unlike the complaints process, centres the needs of the person who was subjected to harm and the PSI community, with relatively less impact to the person who caused the harm.

The scaled-down procedure underscores the importance of procedural fairness, including an unbiased decision-maker and the right to respond, as well as principles such as proportionality and reasonableness in applying measures outside of the complaints process. The best way to achieve this, and to ensure that the measures remain relevant and effective, is to tailor them to the situation at hand and adjust, reconsider, revoke, or strengthen them as needed.[7]

7 See "Chapter 8: Interim Measures" for strategies on ensuring measures remain relevant and effective.

Non-disciplinary measures in the absence of a complaint require all of the procedural protections outlined in "Chapter 8: Interim Measures", with clear timelines, check-ins and review periods specified.

Strategy 4: Take steps to prevent future GBV

In some cases, it may be desirable or appropriate to address a complaint or disclosure of GBV at a systemic level, either as the only response or concurrently with an adjudicative or non-adjudicative option. Taking steps to prevent incidents of GBV from occurring in the future means identifying the environmental factors that contribute to a culture that allows or supports GBV and acting to address these factors.

In some cases, such an approach is required by law, as is the case when the incident is a matter of workplace safety and triggers occupational health and safety (OHS) legislation, and in others, it may be requested by the survivor in the form of an environmental assessment or review. This is an important option to make available to survivors, as prevention is often cited by survivors as a goal of resolution processes.

Like both the complaints process and non-adjudicative options, when a person discloses or reports an incident of GBV, PSIs should:

- inform them of the systemic responses that are available to them or required under OHS legislation;
- explain how such a process will work as the sole response or concurrently with other processes;
- inform the reporting party, whether they are the person subjected to GBV or a witness, of their role in the process, expectations for the investigation, and, when finalized, the findings of the investigation with the steps to be taken by the institution in response to the findings, where applicable.

Occupational Health and Safety investigation

Prior to the inclusion of social and psychological safety in OHS legislation, there was never a need to prove whether a particular workplace incident – such as falls, chemical spills, explosions, forklift accidents – actually occurred before an OHS investigator could make recommendations. The OHS investigation centred on the conditions that may have caused the

incident (e.g.: Were chemicals properly labelled? Was equipment up to date and properly maintained? What were the workplace hazards that could have caused the incident or injury?). However, the introduction of social and psychological safety (including GBV) into OHS legislation has shifted the focus of an OHS investigation in these cases from the factors that may have contributed to the incident, to whether or not the incident actually happened.

The nature of GBV or other social and psychological safety infringements means that now OHS investigators are required to investigate a workplace hazard that may not be self-evident, or that may even be contested. Many investigators have fallen into the same pattern we've seen elsewhere – starting from a position of skepticism or disbelief, investigating whether or not the incident happened, and focusing on the question of whether the individual under allegation committed some kind of offence.

Many, if not most, provinces and territories require employer action when a workplace safety issue comes to light, with or without a formal complaint. However, it is the type of investigation that matters here. In our view, it is important not to confuse a workplace safety investigation with a GBV policy investigation. **Workplace safety is about the interplay between the physical environment and workplace culture that is conducive to GBV, and not about the actions of an individual.** This view is supported in the CUPE (2018a) *Health and Safety: Workplace Violence and Harassment Prevention Kit* and the following review of some examples of provincial workplace health and safety legislation:[8]

Legislation

- The Ontario *Occupational Health and Safety Act* (1990) includes a requirement to "assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work" (s. 32.0.0(1)). The legislation does not require a specific kind of investigation but the Guide to the Act explains that workers should know how the employer will investigate and deal with incidents, threats or complaints of workplace violence (Ministry of Labour, Training and Skills Development, 2020).

8 See also the obligations for federally-regulated employers laid out in amendments regarding harassment and violence to the *Canada Labour Code* (Bill C-65, 2018).

Legislation

- Part 2 of the Alberta *Occupational Health and Safety Act* (2017) requires "Hazard Assessment, Elimination, and Control," and specifies that for the purposes of the Act, harassment and violence are hazards. The mandate, then, is to investigate "the circumstances surrounding the incident" of harassment or violence, and "prepare a report outlining the circumstances [of the incident] and the corrective action taken, if any" to prevent future incidents (Government of Alberta, 2020). It is notable that neither of these requires the investigator to first establish whether the incident occurred or explore the details of the GBV.
- The Manitoba *Workplace Safety and Health Act* (2020) requires employers "to prevent harassment in the workplace," provide "a procedure for investigating accidents, dangerous occurrences and refusals to work" (s. 7.4(5)i), and to investigate and implement measures to reduce, eliminate or control the risk of violence to workers.

Workplace safety investigations aim to prevent future harassment or violence (workplace hazards, as defined in applicable provincial or territorial legislation). This is distinct from a GBV policy investigation where the goal is to collect evidence that supports or refutes an allegation that a specific person committed an act of harassment or violence contrary to policy. The outcome of a health and safety investigation is *corrective action in the workplace*, targeting environmental or cultural factors, while the outcome of a GBV policy investigation in a workplace may be a consequence for a specific employee or employees who have been found to have violated the workplace GBV policy.

In the absence of clear provincial or territorial investigation guidelines, the language used in provincial and territorial OHS legislation and the distinction between a workplace investigation and a GBV policy investigation instruct us to respond to OHS complaints about GBV in the workplace as a workplace hazard – investigating environmental and cultural factors that need to be assessed and remedied. **Do not investigate whether the reported incident occurred; rather, investigate what factors could have allowed it to occur.**

To do this, do not ask the person who reported the harm to recount the intimate details about who did what, but focus questions on the conditions in the workplace that may have allowed the reported or disclosed action to occur. This is good practice from a trauma-informed perspective, as it does not require the person who was harmed to recount a potentially triggering experience. This practice additionally reduces harm by eliminating points of stress from having to participate in the process itself. Having to give multiple accounts of the experience can be especially harmful if they are pursuing a concurrent adjudicative or non-adjudicative process as well.[9] However, even though the investigator is not asking for the survivor to discuss the incident of GBV directly, the person they are interviewing may have experienced trauma and asking questions, even when not about the specific incident, may be triggering. The investigator must take care to conduct the interview in a way that reduces or mitigates any harm and that takes the potential presence of trauma into account.

Fear of being disbelieved is a significant barrier to reporting for many people who have been subjected to GBV. Because the goal of an OHS investigation is to identify any workplace hazards and eliminate them, it is counterproductive to disbelieve a report. Even in the case that a report of GBV would be unsubstantiated for lack of evidence under a complaint policy, corrective actions on workplace hazards can only benefit a workplace by making it safer for all employees without disadvantaging any individuals.

Do not allow anyone to blame or hold the person bringing forward the disclosure or report responsible; this is never an appropriate reaction to a disclosure of GBV, but it is also out of place in the context of workplace safety.

> Often, when there has been an incident, workers are made to feel as though they did something wrong, despite having no responsibility over the actions of others. This reaction is especially common for workers who are marginalized (eg. women, workers with a disability and LGBTQ2SIA, racialized and Aboriginal [sic] workers). (CUPE, 2018b, p. 24)

Ensure that employees understand that all workplace safety issues, including GBV, require an investigation when they become known, and

9 See "Chapter 13: Concurrent Post-Secondary Institution and Criminal Processes" for some of the risks of multiple statements in concurrent institutional and criminal processes.

that the focus of the investigation is not to determine whether the incident occurred. Avoid any judgments that imply disbelief/belief. Emphasize instead "that reporting every incident of violence is important to ensure proper investigation and future prevention" (CUPE, 2018b, p. 24).

Examples of questions explored in an OHS investigation of GBV can include:

- How is the GBV policy disseminated and discussed?
- What training is available? Is it optional or mandatory?
- What are the practices, attitudes and beliefs in the workplace that could allow for GBV to flourish?
- What is the level of tolerance for sexist or racist jokes and/or comments?
- What are the power relationships in the workplace and how are they expressed?
- Are there mechanisms in place to discuss, disclose, or report GBV? How well are they known?
- Are the faculty/staff/students in the area equipped to intervene or prevent GBV?
- What is the physical or virtual space of the workplace like? What physical or virtual features might allow for GBV to go unnoticed or remain hidden?

Consider using a checklist or rubric tailored to specific workplace contexts to "identify aspects of the workplace or work tasks that may place workers at a higher chance of being exposed to a violent incident" (CUPE, 2018c, p. 1). Having an assessment tool like a checklist can provide transparency for all employees to understand the purpose and content of a workplace investigation. This not only supports informed decision making for survivors but also demonstrates the goals of the workplace to address workplace violence and harassment.[10]

Recommendations for remedy as a result of this kind of investigation might include such measures as:

- training, awareness and bystander intervention initiatives;
- structural improvements, such as to lighting, walls, doors, windows or furnishings;

10 CUPE has a sample checklist to identify potential risks for violence and harassment in the workplace that can serve as the foundation for your own (CUPE, 2018c).

- new policies or protocols around acceptable norms, addressing practices like holding classes at home, excessive alcohol consumption at events, acceptance of sexualized jokes, and so on; or
- collaborative initiatives to change the workplace culture, such as GBV committees, facilitated discussions around expectations and accountability; or holding restorative, circle, or transformative processes to envision a safer work environment.

Where an OHS investigation does raise concerns about the conduct of a particular individual, information related to a policy violation should be handed over to the relevant official for an investigation under GBV policy. In this case, be sure to inform any person who brings forward a complaint for the purposes of an OHS investigation that one potential outcome of the workplace investigation is that it might trigger an investigation under the GBV policy. Provide them with information about when this might be the case, their rights to participate or decide not to participate, and the implications of both decisions. Where possible, make it a practice to inform them of these guidelines prior to a disclosure being made, so that workers can decide how they might share information with you.

Environmental Assessment or Review

The kind of assessment done in an OHS investigation can also be offered as a response in student, staff and faculty groups – it does not have to start with a workplace incident or a complaint about an individual. Like an OHS investigation, this type of review "seeks to gather information relating to the culture, practices or behaviours in the workplace and to identify the root cause of any conflicts or issues, or to determine the effectiveness of an organization's operations in order to identify possible areas of improvement." (Rubin & Thomlinson, 2018).

The benefit of this approach is that it provides a way to deal with those contexts or situations in which rumours exist without any individuals willing or able to make a complaint. It also supports survivors by providing an alternative or concurrent process to tackle broader issues and give them agency to push for systemic changes to prevent the occurrence of further incidents of GBV. Consider the following case:

Learning from Case Law

The Human Rights Panel that heard *TM v Manitoba* (Justice) (2019) clearly articulated the employer's obligation and responsibility to take "reasonable steps to make sure that harassment does not take place" (para. 188). The Adjudicator took it a step further when she noted:

> In a situation where an employer does not feel that it is able to carry out an investigation, its obligations may not end. It may still have to consider other ways to address a complaint. In this case, for example, even if the respondent felt it could not carry out an investigation because T.M. had not identified the names of individuals, it could still have taken proactive steps to ensure that harassment based on sexual orientation was not taking place in the work environment.
>
> It could have taken such steps as posting signs, sending out information, holding workshops, having discussions with staff in groups or on an individual basis, to remind or confirm about the nature of appropriate conduct in the workplace.
>
> The respondent could also have monitored the workplace to see what type of interactions were taking place in the work environment. (paras. 255-257)

In our view, PSIs can and should adopt this advice outside the workplace, expanding it to student spaces, such as residences, classrooms or labs; formal or informal organizations or groups; cross-unit, cross-constituency, or cross-disciplinary teams; committees, working groups, task forces; and many others. When the PSI is aware of the possible existence of GBV, an environmental review of this type, asking the same questions as one would in an OHS investigation, provides a way to interrupt, intercept, and prevent further harm and offers a way to improve what may be a toxic environment for students, staff and/or faculty.

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