Section 4

A Comprehensive Guide to Campus Gender-Based Violence Complaints:

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

POSSIBILITY SEEDS

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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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Women and Gender Equality Canada
Femmes et Égalité des genres Canada
Canada

Key to Symbols

 Learning from Case Law / Legislation

 Reflection

 Further Research Needed

 Available Tools

See the Glossary of Terms in Section 1

SECTION 4:
Unsettled Questions

In our research for this Guide, it became evident that there are some questions with no clear answers. Sometimes the legislation is ambiguous, and there may be no authoritative judicial interpretations to turn to for clarification. Legislation may vary from province to province, territory to territory; interpretation within a province or territory may vary from post-secondary institution (PSI) to PSI, or even within a single PSI.

The issues we've identified bring significant risks to both the institution and the individuals involved. But, unfortunately, there is no magic wand to wave to come to answers to these unsettled questions.

Our goals are twofold in this section: to work out what the law currently is and make recommendations as to what it should be. When writing this Guide, and until more clarity is provided either in case law or legislation, all we can do is marshal arguments for and against various courses of action. Where possible, we will note potential legislative changes that could clarify the issues.

We have identified three main areas that require a closer examination of the ambiguities in legislation and subsequent questions that arise in practice. These are not the only unsettled questions related to complaints processes. We have identified several other questions that need more attention through research and/or leadership in Chapter 15.

In Chapter 12, we discuss privacy and disclosure, exploring the following questions:

- How much information is a complainant entitled to in the course of a complaints process?
- When might non-disclosure agreements be appropriate or useful?
- How can a PSI address confidentiality breaches?

In Chapter 13, we consider the risks and challenges related to concurrent PSI and external processes (especially criminal charges), exploring the following questions:

- Should a PSI stay their complaints process when criminal charges are pending?
- Are there ways a PSI can conduct a full and fair process when criminal charges are pending?
- What kinds of legislative protections might there be to encourage accountability within the PSI?

In Chapter 14, we address the PSI's responsibilities and challenges in responding to delayed disclosures and historical complaints, exploring the following questions:

- What is the PSI's responsibility to respond?
- How does that responsibility change when the individual under allegation is no longer affiliated with the PSI?
- What kinds of responses are best suited to historical or long-delayed disclosures and complaints?

Finally, in Chapter 15, we identify topics, questions and concerns we were not able to address in this Guide, including:

- Risk assessments;
- Finding qualified investigators;
- Immunity clauses;
- Personal relationships between faculty and students; and
- More on information sharing.

Methodology

Given the dearth of judicial or other guidance in the challenging questions explored in chapters 12-14, we enlisted a panel of experts from across the country. We put a call out for volunteers from within

the 10 Courage to Act Communities of Practice, asking for folks who had at least five years of recent experience in one or more of the following areas:

- Applying or working within the parameters of student conduct or sexual violence policies;
- Adjudicating incidents of sexual violence;
- Supporting survivors of sexual violence;
- Working with people who have caused harm;
- Supporting faculty/staff in a unionized environment;
- Developing campus conduct, human rights, or sexual violence policies;
- Providing legal guidance to PSIs; and
- Researching gender-based violence in the PSI context.

We provided them with our unsettled questions on privacy and disclosure, concurrent PSI and criminal processes, and historical complaints, along with the associated issues and challenges as we understood them. Each panel member provided written responses to the questions and took the opportunity to raise issues and challenges we had not considered. Once we collated the responses, we summarized them and sent them back to the panel for review. Finally, we organized a virtual summit, where we examined areas of agreement, dispute, and uncertainty before landing on recommendations for how to address these challenging issues in these difficult times.

Expert Panel

Lyndsay Anderson

Lyndsay Anderson (she/her) is the Assistant Director, Student Culture and Experience at Saint Mary's University in Halifax, Nova Scotia. Lyndsay has extensive experience with student conduct and

accountability, which includes developing a restorative justice program for students causing harm in the Halifax community, revising student behaviour policies, investigating sexualized violence cases, and facilitating educational sessions and workshops on sexualized violence, consent, and bystander intervention. Lyndsay holds a BA in Criminology from the University of Toronto and a MA in Women and Gender studies from Mount Saint Vincent University, with a research topic of rape culture and sexualisation discourses on university campuses.

Karen Busby

Karen Busby has been a law professor at the University of Manitoba for more than 30 years. One focus of her teaching, research and advocacy work is gender-based violence. Most recently, together with Joanna Birenbaum, she has written a book titled "Achieving Fairness: A Guide to Campus Sexual Violence Complaints" which Thomson Reuters will publish in March 2020. Another of her current research projects is an empirical study on the reasons for attrition in criminal sexual assault cases. She is on the University of Manitoba committee charged with reviewing that institution's response to campus sexual violence. Karen has worked with various community and professional groups on numerous law reforms projects and case interventions related to gender-based violence, queer issues, and assisted human reproduction. This work has garnered numerous awards including the YW-YMCA Woman of Distinction Award, the Canadian Bar Association Hero Award, and the LAMBDA community changer award. She is also a recipient of the University of Manitoba's highest teaching honour, the Saunderson Award for Excellence in Teaching.reproduction. This work has garnered numerous awards including the YW-YMCA Woman of Distinction Award, the Canadian Bar Association Hero Award, and the LAMBDA community changer award. She is also a recipient of the University of Manitoba's highest

teaching honour, the Saunderson Award for Excellence in Teaching.

Lise Gotell

Lise Gotell is the Landrex Distinguished Professor in the Department of Women's and Gender Studies at the University of Alberta. She is the past Chair of the Board of the Women's Legal Education and Action Fund, Chair of the Board of the Centre for Constitutional Studies, and a member of Edmonton's Safe Cities Collaboration Committee. Lise teaches, researches and engages in policy advocacy on sexual violence. Her publications on sexual assault law have been widely cited, including by the Supreme Court of Canada. Lise is currently engaged in research that explores the justice gap for sexual assault survivors in Alberta and that examines the legal treatment of sexual fraud in Canadian law. An advocate for improved responses to campus sexual violence, Lise has been engaged in the implementation of the University of Alberta's sexual violence policy.

Lara Hof

With experience in both the university and college post-secondary sector, Lara has become a recognized professional working in student conduct administration since graduating from the University of Guelph in 2002. After serving at Humber College as the Manager for the Office of Student Conduct, Lara recently transitioned to Mohawk College in September of 2019 and is now serving as the Director for the Student Rights & Responsibilities Office. During her time at Humber, she is credited with developing the student conduct program, managing complex cases and serving as the lead investigator on sexualized violence cases involving students. Additionally, Lara had oversight for the sexual violence prevention portfolio at Humber and continues to do so at Mohawk College. She is regarded among her peers for her understanding of the practice and procedural fairness. Lara has been an asset in building a strong community of student conduct practitioners in Canada

and has served as a Co-Chair, Student Conduct Community of Practice (CoP) with the Canadian Association of College & University Student Services (CACUSS) for several years. Throughout her career, Lara continues to facilitate training workshops, serve as a guest speaker, contribute to various publications, and curates a social media platform for CACUSS members. Most recently and alongside her peers, Lara has developed and facilitated the national student conduct training institute.

Amie Kroes

With a Masters in Social Work, Amie Kroes brought a trauma-informed lens to her role as the Manager of Student Rights and Responsibilities at Fleming College in Peterborough ON. Amie started her career working in the not-for-profit sector working with youth justice programs, sexual violence counselling, and mental health programming. As a constant learner, Amie focused her education on understanding and responding to the issues of gender based violence. While working at Fleming College, a part of Amie's role was prevention, education and response under the Sexual Violence Prevention Policy. While Amie has recently left post-secondary to work at Peterborough Youth Services with their Justice Services team, she is still dedicated to creating effective, fair, and survivor-centric processes, which survivors can trust.

Chapter 12: Privacy and Disclosure

Disclosing Outcome Decisions to the Complainant

In most complaints processes, crucial information contained in the investigation report and the decision(s) related to outcomes and appeal are provided to the respondent as a matter of procedural fairness. We have recommended that post-secondary institutions (PSIs) disclose details from the investigation report and the outcome of the complaints process to both the respondent and the complainant as a procedurally fair and trauma-informed measure that respects human rights. When both the complainant and the respondent are considered parties to a matter – as we have argued they should be – they are entitled to this information. Some provincial and territorial legislation already requires that this information be disclosed to the complainant. However, while it is generally accepted and understood that the respondent is entitled to the information related to the complaints process, investigation, decision, interim measures, and outcomes, this is rarely the case for a complainant.

The complainant, as an active stakeholder in the process and a person who provides much of the private and very personal information needed to successfully complete the process, should have access to the same information about the investigation, decision, interim measures, and any other information related directly to the complainant. In addition to attending to the complainant's participatory and human rights, having this information contributes to the complainant's sense of validation and safety (Busby & Birenbaum, 2020). However, some provincial and territorial legal frameworks, including privacy laws, raise the question of whether it is legal to disclose investigation reports and outcome decisions to the complainant.

Privacy

Privacy laws vary across provinces and territories,[1] but interpretations can also differ significantly from PSI to PSI within the same jurisdiction.

1 See the "Provincial and territorial privacy laws and oversight" overview available from the Privacy Commissioner of Canada (2020).

In general, most PSIs interpret privacy law narrowly, understanding that it allows for disclosure of information on a "need to know basis," meaning that only those details that are necessary to disclose can be provided to those with a legitimate need to know them.

However, **our expert panel recommends considering more broadly the reason for collecting information in a policy investigation. Privacy laws across the country allow disclosure of information that is consistent with the reason the information was collected.**

Complaints processes exist as a mechanism to ensure that the learning, working, and living environment is safe and free from harassment and conducive to the educational mandate of the institution. In other words, all members of the PSI community must have the ability to carry out their activities without being subjected to gender-based violence (GBV). When it does occur, there will be a process to address it.

Using this interpretation, disclosing the information related to the investigation to the complainant fits squarely within the purpose for which the information was collected. A complainant who has only received partial information – for example, that the PSI found the respondent in violation of a policy but without detail, information about the outcome, or reasons – is unlikely to feel free to carry out their daily activities. They may reason -ably fear encountering the respondent on campus, retaliation, or further GBV. On the other hand, a complainant who is informed of the details of the investigation, the nature of the interim measures, and the outcome, are far more likely to feel safe and able to participate in campus life.

To date, provincial and territorial privacy legislation remains unclear. There has yet to be any judicial guidance that can help confirm whether more comprehensive disclosure to a complainant is permitted. On a broader scale, it would be beneficial to have legislative clarity that considers and accounts for the differences across provinces and territories. It may also be necessary to see legislative amendments to privacy laws, as well as amendments to PSI policy and collective agreements to clarify the ability to disclose investigation reports and outcome decisions to complainants.[2]

2 As of October 27, 2020, there are over 1,600 signatures on a petition to the Assemblée Nationale du Québec demanding an amendment to the *Act* respecting access to documents held by public bodies to allow PSIs to disclose outcomes of disciplinary action to student and employee complainants in GBV complaints processes (Boutros, 2020).

In the absence of this clarity, we argue that most PSIs interpret privacy legislation too narrowly. While privacy legislation is both paramount and quasi-constitutional, privacy considerations must not be applied without regard for human rights and procedural fairness.

Human Rights

Like privacy law, human rights legislation is both quasi-constitutional and paramount, meaning it is as important as the constitution and takes precedence over any other applicable legislation when a conflict arises (*Tranchemontagne v Ontario* (*Dir., Disability Support Program*), 2006, para. 33). Under human rights law, GBV – or reduced or compromised access to the campus environment as a result of incidents of GBV – constitutes discrimination on the basis of gender. There are "well-established principles under human rights legislation that complainants should be advised of outcomes" (Busby & Birenbaum, 2020). Human rights case law on sexual harassment has also recognized the right to know outcomes. For example, where both the respondent and the complainant are employees, the right to a workplace free of harassment requires communication of the findings and details of actions taken to avoid a "poisoned work environment" (*AB v 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, 2020, paras. 118-120).

Procedural Fairness

In administrative law, parties are entitled to procedural fairness. We define "party" as a person who brings or is the subject of a complaint, who participates and is accorded procedural fairness rights in a complaints process. Witnesses, advisors, decision-makers and other participants who do not have a stake in the outcome are not parties.

In some models, the PSI treats those subjected to GBV as witnesses only and does not accord them party status in a complaints process. Although this may have been designed as a protective measure, it is not trauma-informed. It takes agency away from the person subjected to the GBV and denies them the opportunity to participate in the process fully. This alone can be viewed as discriminatory. In addition, one of the procedural fairness factors raised in *Baker* (1999) is that the greater the impact a decision has on the individual(s) affected, the higher the expectations for procedural protections will be. There is little doubt that the person subjected to GBV is significantly affected by a GBV policy decision. Therefore, they can expect higher procedural protections, including a right to be considered a party to the matter, with all of the concomitant participatory rights.

Employment law, workplace health and safety laws, and collective agree -ments also come into the mix in cases involving employees. For example, the employment framework generally allows for more disclosure to the complainant at the investigation stage than is found when a complaint is against a student. However, there may be stricter readings of privacy law regarding any disclosure of findings or outcomes in employee cases.

Recommendations

Under this legal framework, the answer to the question as to whether you can disclose the investigation report and outcome decision to the complainant requires consideration of human rights and procedural fairness rights, in addition to the privacy rights of both parties.

At a minimum, we recommend disclosing the investigation report findings and the outcome. Where possible, we recommend disclosing the entire investigation report and/or outcome decision to the respondent and the complainant. Redacting any third-party personal details, such as health information, identification numbers, contact information, etc., would mitigate any concerns about unreasonable invasion of privacy. Where the complainant requests more information than that available in the investigation report, findings, or the outcome decision, work with your privacy experts or advisors to determine what can be disclosed given the reason for collecting the information. Consider the following questions:

- What was the purpose of collecting the information?
- Does not disclosing create a barrier for the complainant?
- Will the person's ability to fully participate in the teaching/learning/working/living environment be limited if the desired information is not disclosed?
- Given the full legal framework, is disclosure an unreasonable invasion of privacy?

In addition, we recommend offering to provide the outcome to the person who was subjected to the GBV regardless of whether they were the complainant in the process. Given the serious impact of the GBV itself, the outcomes of the complaints process, and the potential for a poisoned working, learning, living environment in the absence of any information, disclosing the outcome, including any interim measures and reasons, is fair, trauma-informed, and reduces harm.

Non-Disclosure Agreements

Concerns about privacy, confidentiality and institutional risk raise questions about the use of Non-Disclosure Agreements (NDAs) as a condition for resolving a GBV complaint quickly. While NDAs are most commonly used in cases involving employees, they have also been used in student cases.

Student complainants have raised concerns of being subjected to "gag orders" from their PSIs, either by explicit instruction not to speak to anyone about the process or by a lack of clarity around confidentiality in sexual violence policies (Jones, 2018). Preventing a person from having supportive conversations about their experience of GBV can exacerbate and entrench the original trauma, leading to or extending symptoms of PTSD (Barbash, 2017). The same can be said for respondents; prohibiting them from having supportive conversations may inhibit the potential development of empathy or self-awareness. **Confidentiality clauses in policy must be interpreted to allow complainants and respondents, whether student or employee, to confide in their circles of support.** The question is whether broader disclosure, for example, to instructors or a wider group of friends, might be permissible.

Dr. Julie MacFarlane, professor of law at the University of Windsor in Ontario, is a vocal opponent of NDAs related to campus sexual violence. She notes that NDAs, commonly used in employee cases, can be a way to get a tenured faculty member to leave the institution without risking a costly defamation suit or arbitration. Dr. MacFarlane explains that such agreements protect both the institution and the individual from scrutiny and facilitate the movement of those known to have engaged in sexual misconduct to new institutions (Ward & Gollom, 2018). The NDA effectively becomes a gag order when the complainant is also asked to sign (MacFarlane, 2019). Dr. MacFarlane and others believe that "they are unethical, undermine universities' commitment to transparency and leave students vulnerable" (Ward & Gollom, 2018).

PSIs are risk-averse entities, only too aware of the legal risks related to confidentiality breaches. Two recent cases have underscored this risk and will likely serve to strengthen the resolve not to disclose information:

- Author and professor Stephen Galloway received a significant award from the University of British Columbia (UBC) after being fired for having an inappropriate affair with a student. The arbitrator, in that case, awarded him $167,000 for damages, finding that some of UBC's communications contravened Galloway's right to privacy, causing

reputational harm (*University of British Columbia v University of British Columbia Faculty Association*, 2018a). Subsequently, an additional $60,000 was awarded to Mr. Galloway and $15,000 to the UBC Faculty Association from the University for violating the confidentiality terms laid out in the original decision (*University of British Columbia v University of British Columbia Faculty Association*, 2018b).

- Dr. MacFarlane herself has been embroiled in legal action. When her colleague who left the University of Windsor due to allegations of sexual misconduct was about to be hired by a law school in Trinidad, she contacted the Dean there to disclose the circumstances of his departure, despite an NDA signed by the University of Windsor and the University of Windsor Faculty Association (MacFarlane, 2019). Her former colleague sued her for defamation in a Trinidad court, a decision that defaulted in his favour because her legal team missed the deadline to submit evidence of her claims (Gollom, 2020). The court awarded him over $100,000 CAD, saying that Dr. MacFarlane both defamed and libelled him. At the time, Dr. MacFarlane was awaiting another court decision on whether her legal fees would be insured by the Canadian Universities Reciprocal Insurance Exchange (CURIE), a case that was ultimately decided in her favour (*MacFarlane v Canadian Universities Reciprocal Insurance Exchange,* 2019). However, the matter is far from settled, as Dr. MacFarlane has accused the University of withholding documentation that could have cleared her in the Trinidad case (Gollom, 2020).

As troubling as NDAs can be, the expert panel was not inclined to immediately condemn their use. Under certain circumstances, they can be beneficial to the complainant as well. For example, an NDA could facilitate a quick conclusion to a complaint rather than requiring a drawn-out process or in situations where the evidence is not strong, which may be desirable for those seeking closure. An NDA can also benefit confidentiality for a complainant who does not wish to be subjected to scrutiny or attention or act as a protective mechanism in environments where retaliation or other negative social consequences might be more likely, such as residence communities.

Recommendations

The expert panel ultimately decided that there is no one-size-fits-all answer but that an NDA should never be imposed as a condition of receiving information to which a discloser would otherwise be entitled. In other words, the word "agreement" must be taken seriously. When the NDA is part of a settlement, complainants may be left with the feeling that it is part of an effort to sweep the matter under the rug. By contrast,

if part of the answer to "what does justice look like for you?" is that the matter remains confidential, there may be a significant benefit to using an NDA. In these cases, an NDA may be a desired outcome where it results from a dynamic process in which all parties have a voice.

Should this be the case, the right people need to be at the table. The terms might vary, depending on whether staff, faculty, or students are parties to the agreement and to ensure that the parties fully understand the NDA, it may be helpful for them to seek legal advice or representation during negotiations or before signing any documents. If the institution and union are signatories, they must also be included in negotiating the terms of the agreement.

The expert panel recommends that any NDA must take into account the needs and wishes of the complainant. It should include specific language about what confidentiality means in the context of the agreement. **While it is reasonable to prohibit the release of confidential information publicly – for example, to the media or through social media – agreements must be written in a manner that does not muzzle parties or prevent the complainant from being able to discuss their experiences with counsellors, family and/or close friends (i.e., their circle of support).** Discuss the role of a circle of support and the risks associated with any disclosures outside the circle, either by the involved party or a member of their circle. We come back to this in the following section on confidentiality breaches.

In addition, ensure the NDA acknowledges and makes space for disclosures as needed, as long as no identifying information is provided. For example, an individual may need to explain to an instructor or supervisor that they are involved in an investigative process to request an extension to a deadline. It should be evident in the NDA that this level of disclosure is permissible.

Signing a permanent legal document does involve certain risks for the person subjected to GBV. Individuals may continue to process their experiences for some time. It is impossible to predict whether the document that was intended to be beneficial may become harmful in the long run. Circumstances may change as well: if new information comes to light about others who have been subjected to GBV at the hands of the same individual, the complainant may feel compelled to speak out. It is essential to distinguish, for example, disclosing information to an investigator or to seek personal support on the one hand, from posting it on social media or making it public on the other. Consider making

the agreement a broad statement of agreed principles rather than an iron-clad legal document prohibiting any disclosure at all. Include a mechanism to revisit the agreement should change be needed over time.

Confidentiality Breaches

Any time confidential information is disclosed, the potential exists for someone to communicate that information further. Some PSI communities are close-knit, and news has a way of travelling fast. Social media presents myriad opportunities to make the private public. It is incumbent on PSIs to scrupulously maintain confidentiality, subject to the disclosures discussed above (i.e., the need to know and disclosures for the purpose of which the information was collected), but how an individual manages the information they receive is a far different matter.

The expert panel raised the issue of the PSI's role in enforcing confidentiality. Enforcement may be beyond the scope or competency of PSI student affairs or human resources practitioners. They are not in a position, for example, to scour social media for breaches. There are also questions about the limits of enforcement; for example:

- Would it be a breach for a party to talk about it to their roommate in residence?
- What happens if one of the parties discloses information after they have left the PSI?
- What happens if someone were to disclose information to a potential employer?
- What is the recourse for a PSI when a parent, dissatisfied with the response, goes to the media?
- What are the limits of the PSI's authority to enforce policy breaches over private social media?
- Can a party discuss their participation in an investigation without disclosing the identity of the subject of the complaint?

A breach of confidentiality may be relatively straightforward for the PSI but far less so for the individuals involved, particularly students who are not subject to privacy law. In addition, students may be unaware of the potential for recourse through civil action against them. Therefore, it is important for parties and their circles of support to understand the range of risks they may face from disclosing confidential information.

Learning From Case Law

> For example, in a recent, very public case, Professor Steven Galloway has launched a civil suit for defamation against twelve people – including one of the students who made a complainant of sexual assault and harassment against him – for making defamatory statements public in the media and on social media (see *Galloway v AB,* 2019; *Galloway v AB,* 2020; *Galloway v AB,* 2021a; *Galloway v AB*, 2021b).

In many PSIs, the complaints process is the single mechanism to deal with any harm within the community. It only takes a cursory glance at the questions raised in the previous paragraph to realize that complaints processes will be inadequate or unable to address many of the potential confidentiality breaches. For those cases in which the complaints process could apply, the expert panel agreed that it is distasteful and uncomfort -able for the PSI to take punitive action against a student or staff member for disclosing information. Further, they believed that the perceived threat would be a barrier to disclosing GBV to the institution at all.

The question remains as to whether and how the PSI should respond to breaches of confidentiality related to information provided by the institution. In some cases, where the parties are willing, it may be possible to use a restorative approach, treating the breach as harm to be repaired rather than a policy violation to be punished, an NDA may specify a process in the case of a breach, or collective agreements may include some guidance.

While staff may be more alive to the personal legal risks of inappropriate disclosures, students are unlikely to have any idea that disclosing information could get them into serious legal trouble. PSIs normally tell students that they are expected to keep the information confidential but rarely discuss the consequences of not doing so. That silence might imply to the student that the worst thing that could happen would be a policy investigation and potential sanctions.

The expert panel believed that the PSI is responsible for ensuring this information is clear. Investigators, decision-makers, advisors, and others throughout the process should be able to discuss the matter with parties. That discussion should begin with what information the individual is entitled to, the reasons why the person is entitled to the information, and

the concomitant responsibilities of the person holding the information. Statements such as, "I urge you to treat any information you learn throughout this process with the utmost sensitivity and privacy"; or "I'm not here to silence you, but this process is confidential" are important but do not go far enough.

It is important for the PSI to acknowledge the difference between being able to seek support from a small circle of people, including advisors, counsellors, close friends, and family, and making the matter public; for example, by posting confidential information, statements, images, or documents on social media, message boards, or websites. An individual must not be prevented from seeking support, but must also be made aware of the risks of making the matter public.

One example comes from the University of Victoria *Sexualized Violence Prevention and Response Policy* (2021) which includes a section on what confidentiality entails throughout their process, the responsibilities of the institution and the individuals involved, and the following statement:

> Individuals are advised that, should they choose to make public statements about the investigation (including on social or other electronic media), they may compromise the investigation or be putting themselves at risk of civil lawsuits by those who believe they have been defamed or have had their privacy rights violated. Individuals should exercise care and judgment when deciding to make public statements, and should seek legal or other advice if unsure.
>
> (s. E.16)

Recommendations

Decisions about disclosing information will never be free from legal risk. Those who believe their privacy has been unreasonably invaded and those who believe non-disclosure is discriminatory have access to legal remedies through civil court. There is little doubt that the PSI would be named in either case.

To mitigate the potential risk, we recommend that PSIs be clear about who is entitled to disclosure based on an analysis that includes privacy and human rights law and procedural fairness and be prepared to defend that decision to disclose. All participants should be informed about what is confidential and what they may reveal within their circles of support; for example, their experience is their own to discuss, but they should not discuss details about or from the investigation. It is important to

distinguish between public disclosure, on the one hand, and sharing for the purpose of receiving support, on the other. PSIs should provide information about the risk of civil action for defamation or breach of privacy and urge affected parties to discuss this within their circle of support as well to inform them about the risks of making public what they know.

Finally, given the near-impossible task of enforcing confidentiality and the harm created by engaging in a new complaints process, the expert panel recommends avoiding punitive measures against someone who has inappropriately disclosed information to media, over social media, or to large social groups. Where possible, a restorative approach in response to breaches may be preferable to enforcement.

Finally, given the near-impossible task of enforcing confidentiality and the harm created by engaging in a new complaints process, the expert panel recommends avoiding punitive measures against someone who has inappropriately disclosed information to media, over social media, or to large social groups. Where possible, a restorative approach in response to breaches may be preferable to enforcement.

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Chapter 13: Concurrent Post-Secondary Institution and Criminal Processes

Gender-based violence (GBV) that is contrary to post-secondary institution (PSI) policy can also violate the *Criminal Code* (1985) and can result in concurrent criminal charges. This presents an extra challenge for those administering or going through a PSI complaints process. Any statement made to a PSI may be subject to a production order from the courts and used in a criminal trial, although this is rare. PSI processes are unique in that statements are not compelled, and respondents who make voluntary statements in one adjudicative process may risk their statements being used against them in another. Civil or other administrative processes, such as human rights complaints processes or disciplinary processes in professional organizations related to the same behaviour, can also occur simultaneously. However, given the high stakes and legal risks involved, we will concentrate on the presence of concurrent criminal charges for this discussion.

Some Perspective

To begin, however, we note that most cases involving a poisoned working / learning / living environment, unwanted sexual comments or jokes, or that result from inappropriate relationships are unlikely to involve criminal behaviour. Similarly, much online behaviour (short of non-consensual distribution of sexual images) is unlikely to rise to the level of a criminal charge.

Additionally, it is important to recognize that criminal charges in GBV cases are uncommon. In those cases that do go to trial, PSI records have almost never been accessed by the court. Criminal charges in GBV cases are rare: only 5% of all sexual assaults were reported to police (Conroy & Cotter, 2017, as cited in Rotenberg, 2017). Of those, only 43% resulted in criminal charges. Of those, only 49% went to court. Of those, 39% had charges withdrawn, stayed, dismissed, or discharged. Further, "for every 1,000 sexual assaults reported by police, only 117 resulted in a court conviction for the most serious offence in the case," meaning that of the sexual assaults reported to police, nearly 9 in 10 did not result in a conviction (Rotenberg, 2017).

In addition, our expert panel was aware of only a single case in which a PSI received a court order for its records related to a policy breach. The reality is that information gathered in the PSI context may be of limited use in a criminal trial. PSI processes apply a lower standard of proof and are not subject to the same rules of evidence as a criminal court. If a respondent acknowledges causing harm (rather than admitting to the elements of an offence) or is found to have breached policy, it may have no applicability to or impact in a criminal finding.

Criminal defense lawyers hired by students or employees to represent them in administrative processes may continue to advise their clients to remain silent when there is the risk that their words will be used against them in a criminal trial. It is their responsibility to do so, and they are operating under the system they understand best. However, understanding both the *actual* risk and the benefits to participating in a trauma-informed, procedurally fair GBV process that aims to reduce harm to all participants may result in a much better experience overall. It is possible to work with legal counsel on how the respondent can participate as much as possible in the PSI process with the aim of meeting the educational, developmental and/or restorative goals.

Even without criminal defence lawyers' involvement, many respondents remain wary of the potential implications of participating in a PSI investigation, particularly when the procedures resemble those used in relation to criminal charges. Unfortunately, a respondent's decision to participate in a PSI complaints process has implications for themselves, the complainants, and the institution.

Implications for Respondents

Providing voluntary statements through a PSI process creates potential jeopardy of self-incrimination for the respondent in a criminal trial. As a result, defence counsel for an individual facing or subject to criminal charges would likely advise their client not to provide any statements, admissions, or apologies in a PSI process. Unfortunately, not participating in the PSI process also can create unfairness, particularly when the sole reason for declining to respond is a possible or pending criminal trial.

At its best, a PSI complaint can create space for a respondent to understand and take responsibility for causing harm, to make amends and/or participate in activities that contribute to positive culture change, to learn from their experience, and to change future behaviour. Additionally, it can provide an opportunity to provide exculpatory evidence, clarify their position or statements, and prevent wrongful findings of responsibility.

In deciding whether or not to participate in a PSI process, a respondent can be placed in the untenable position of accepting the allegations and outcomes in the PSI process to avoid facing serious legal repercussions, including potential incarceration. Providing a response to the PSI allegations opens the door for those statements to be used in trial, particularly if the respondent wants to take responsibility or apologize for their actions. As a result, what is more beneficial for the parties in the PSI context becomes much riskier to the respondent in the context of criminal charges. The choice not to participate in the PSI process seems clear, but is also clearly unfair.

Implications For Complainants

Students who have disclosed experiences of GBV report poor academic outcomes among the many negative effects of their experience (Stermac et al., 2020). Employees who experience GBV in the workplace report similar negative consequences, including a reduction in job satisfaction, physical and mental health, and motivation at work (Hango & Moyser, 2018). Feeling supported and taken seriously throughout the complaints process, in which they believe some measure of justice has been achieved, can ameliorate these negative effects. Therefore, complainants can benefit from proceeding with the PSI complaints process in which the respondent is also engaged.

We note that complainants, too, are affected by the potential for their statements made within a PSI investigation to be used in a criminal trial. Inconsistencies between complaints or witness statements in the PSI context and statements made to police are frequently raised by defence counsel to undermine the credibility of the allegations in court, highlighted as creating reasonable doubt about the veracity of the complaint. As we have illustrated, inconsistencies are a common feature in cases where trauma is present and become more common the more times someone gives their account. Cross-examination on multiple statements can be retraumatizing and dehumanizing, making the complainant feel like the one on trial.

In addition, multiple statements collected in the course of a PSI investigation – for example, once in the investigation and again at the adjudication hearing – increases the risk of having those statements used to impeach the complainant's credibility in a criminal trial. As we have previously noted, when making complaints in multiple venues such as the criminal system and the PSI, complainants should be alerted to the risks of making multiple statements and have access to legal advice.[1]

1 As of May 2021, programs that offer free, independent legal advice for survivors of sexual violence are available in Alberta, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan, Québec, and Yukon.

Implications For The Institution

PSIs are places where individuals can become better or more engaged global citizens, prepare for careers, contribute to bodies of knowledge and ways of knowing, collaborate and mentor others, and aim to foster personal, intellectual, and professional growth. Like the parties to a complaint, the institution and the PSI community may benefit from having involved parties participate fully in complaints (or other resolution) processes. First, the presence of GBV hinders these important institutional functions. Additionally, PSIs are required by law to provide an environment conducive to full participation in campus life through both human rights and occupational health and safety (OHS) law. Human rights law is quasi-constitutional, and guarantees non-discriminatory access and processes; OHS law requires a safe and harassment-free workplace. Neither of these is optional for a PSI.

Trauma-informed complaints processes that focus on harm reduction can help a PSI meet those obligations. Should a respondent choose not to participate, a PSI can certainly proceed with an investigation, finding and outcome. However, concluding the matter without all the relevant information increases the risk of a wrongful decision and is less likely to offer meaningful accountability.

Clearly, there are good reasons to encourage full participation in a PSI complaints process with accountability as a goal; however, the potential legal jeopardy to a respondent is significant enough that it will often trump the other interests within the PSI. For many of the reasons above, Busby and Birenbaum (2020) have recommended that PSIs suspend their complaints processes pending resolution of a related criminal matter, with the following possible exceptions:

- Where the PSI investigation is already completed or near completion (i.e., statements have already been collected) before criminal charges are laid;
- Where the police or Crown do not object to continuing, and the respondent consents; and
- Where exceptional circumstances exist, such as health and safety concerns for the complainant or campus community that are not addressed through conditions imposed by the court or interim measures. (p. 115)

They note that for this to be acceptable to PSIs, interim measures must be in place, and the respondent must inform the PSI of any bail conditions or pre-trial decisions.

Suspending campus processes can mitigate the legal risk of self-incrimination to the respondent, but it brings additional challenges. Criminal trials can be long and protracted. The procedural fairness principle of a timely resolution can be seriously compromised when waiting for the criminal matter to come to a conclusion, and the PSI's human rights obligations become similarly difficult to meet. For example, a complainant also has the right to timely resolution; being kept in limbo could negatively affect their well-being or ability to participate in campus life fully. In complaints against students, there is the very real chance that a respondent's program will be completed before the criminal matter ends; in employee matters, absenteeism, lost productivity and job turnover present significant challenges for the institution (Hango & Moyser, 2018).

When concurrent processes are unavoidable, there are ways to mitigate the resulting delays in the PSI process. For example, issue estoppel, or importing a guilty verdict from the criminal court into the PSI process, can help regain some of the lost time. Issue estoppel is described in *Toronto (City) v Canadian Union of Public Employees, Local 79* (2003) as a doctrine which "precludes the relitigation of issues previously decided in court in another proceeding" (para. 23). It requires three conditions be met: (1) the same question is at issue; (2) the judicial decision was final; and (3) the same parties are involved (although this condition is the subject of considerable debate) (*Toronto (City) v Canadian Union of Public Employees, Local 79,* 2003, paras. 25-31).

The Toronto (City) v Canadian Union of Public Employees, Local 79 (2003) decision means that when a defendant has been found guilty beyond a reasonable doubt, no related process can then make a different finding. Adopting the finding of responsibility would save the time it would take to complete an investigation and hearing, and the adjudicator could move directly to the issue of appropriate outcome or sanction. The same is not true, however, when the courts have found a defendant not guilty. Because PSIs use the balance of probabilities standard of proof, it is possible to find a policy violation even when a court has issued a not guilty verdict.

Non-Adjudicative Options

Opting for non-adjudicative methods, such as restorative, transformative, or circle processes in lieu of a complaints process may offer some protection.[2] These processes are voluntary, and most require that a person who caused harm take responsibility as a prerequisite to participating. This would likely act as a barrier to participation in the context of a complaint, but in these collaborative resolution forums, the responsible person

2 See "Chapter 11: Non-Adjudicative Options for Gender-Based Violence Response".

may not be required to admit to a specific policy violation or a crime. Instead, they could acknowledge the harm they caused and be willing to participate in good faith, the only written record may be the agreement or action list that resulted from the process, and all participants may agree to keep the process and what is said within it confidential. These features are designed to allow open, honest and comprehensive discussion of difficult subjects.

A further benefit of offering these non-adjudicative options relates to equity: providing access to culturally appropriate practices for Indigenous people, or safer options for those seeking to hold a facilitated conversation with the person who caused them harm, may remove barriers to full participation in campus life.

Unfortunately, these processes are not immune from subpoenas or production orders from the courts either, and that risk poses a significant barrier to participation for respondents. For this reason, it is highly unlikely that a non-adjudicative option such as restorative justice (RJ) would be attempted where a criminal trial is pending; in particular, bail conditions or interim measures prohibiting contact between the respondent and the complainant would preclude any such option. The PSI could potentially reduce the risk of court orders to produce records by partnering with a community organization rather than facilitating the matter internally. However, while they may insulate the institution, collaborative options cannot fully guarantee that the statements are protected from use in a criminal trial. For example, individuals can be subpoenaed to testify to what was said in a collaborative process. In some jurisdictions, there may be an agreement or undertaking by the Crown not to pursue communications originating in these venues and, while this may be helpful locally, it is not a solution that can be generalized across the country.

Derivative Use Immunity

The *Courage to Act* report raised another novel avenue for exploration to protect respondents from risking self-incrimination in court: invoke some form of immunity to protect an individual from legal liability based on evidence provided in the PSI context. The Report called for further research on alternatives to Derivative Use Immunity as a possibility (Khan, Rowe & Bidgood, 2019, p. 134).

Derivative Use Immunity is a *Charter* protection against self-incrimination. In exchange for full and honest testimony in any proceeding, there is a guarantee that the communications will not be used against the person in a criminal complaint. In effect, “the right

assuages witnesses' fears that their testimony may expose them to criminal jeopardy" and serves the cause of truth-seeking. However, this immunity applies only to *compelled* testimony (Department of Justice, 2021, s. 13) – i.e., where the decision-maker can issue a subpoena; where failure to respond to this subpoena can result in an arrest warrant; and when failure or refusal to testify can result in a contempt order, which can include a jail term. While testimony or evidence might be compelled in some cases by professional bodies, PSIs do not have that same authority and typically do not take statements under oath. For this reason, Derivative Use Immunity is not available to protect statements provided in PSI complaints processes.

Wigmore Privilege

A third possibility for allowing respondents to participate in PSI processes without fear of self-incrimination in a criminal trial was to seek *privilege*, or rendering information or statements inadmissible in a criminal court. Many are familiar with, for example, legal privilege, which protects legal advice provided to a client from being admissible in court.

The Wigmore Privilege is established on a case-by-case basis, and lays out four criteria that, when met in a particular case, could shield communications made in one process from being used in criminal court. The criteria are as follows:

1. The communications must originate in a *confidence* that they will not be disclosed.
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties.
3. The *relation* must be one that, in the opinion of the community, ought to be sedulously [diligently] *fostered*.
4. The *injury* to the relationship that disclosure of the communications would cause must be *greater than the benefit* gained for the correct disposal of the litigation. (Palys, n.d., emphasis in the original)

The first three elements can be established in a PSI process and can, and should, be thoroughly documented: the processes are confidential, the confidentiality is essential to the relationship between the PSI and the complainant and respondent, and the relationship between the PSI and its students, staff and faculty deserves rigorous protection. The difficulty with the Wigmore Privilege arises in the final criterion; it is unlikely that a PSI could convincingly make the case that a breakdown in that

relationship is more important than citizens' safety. Protecting society in general from GBV will presumably trump the need to maintain healthy relationships between the PSI and its community members in most, if not all, cases.

So far, this discussion has not led to a solution to this thorny problem: How can PSIs create space for accountability when respondents are afraid anything they say can and will be used against them in a court of law? Is there a way to protect the communications provided to PSIs in good faith by complainants, respondents, and witnesses from being used in court? **How can PSIs live up to their obligations under human rights and other laws when the mechanisms they use to meet those obligations place the participants in jeopardy?**

Until they can assure the participants in complaints processes that they are free to be open and honest without fear of their statements being used against them, either suspending (or staying) PSI processes pending the conclusion of the criminal matter with strong interim measures in place or using non-adjudicative methods may be the options causing the least amount of harm. Unfortunately, PSIs are not able to provide those assurances.

We want to make clear that suspending a decision until the related criminal trial is concluded is not the same as deferring the decision to the criminal courts or making the decision contingent on the outcome of a criminal trial. *Doe v Windsor* (2021) raised a series of concerns with deferring a PSI matter pending the outcome of a criminal trial, including that it could constitute an unlawful delegation of the decision-maker's authority and that, by making a PSI decision contingent on the verdict in a criminal trial, the PSI is effectively raising the standard of proof to the criminal standard of beyond a reasonable doubt. This is impermissible in PSI complaints processes and, furthermore, "[t]he outcome of the criminal trial will not assist the Adjudicator in any way" (*Doe v University of Windsor,* 2021, para. 35).

Recommendations

Legal Reform may be the Only Option

Seeking statutory privilege is unrealistic, as laws would have to be amended province-by-province, territory-by-territory. In the unlikely event that provincial and territorial laws did change, the sheer number of jurisdictions would bring significant risk of differential interpretations

and inconsistencies across the country. Rather than seeking change in the 13 provincial and territorial jurisdictions, it is worth exploring an amendment to the *Canada Evidence Act* (1985), which federally addresses evidence in criminal procedures.

The *Canada Evidence Act* (1985) currently includes a section on business records, with a list of inadmissible evidence, such as records made in the course of an investigation or inquiry, legal advice, privileged records, statements made by individuals who are deceased or not competent, production contrary to public policy, and any transcript or recording of evidence taken during another legal proceeding (s. 30).

We recommend exploring an amendment to the *Canada Evidence Act* (1985) to similarly exclude, or make inadmissible, records, statements and information gathered in the following administrative processes, both of which entail voluntary participation:

- Enforcement of internal institutional policies, including investigation, findings, and outcomes; and
- Collaborative non-adjudicative resolution processes, including restorative, transformative and circle practices.

We believe, given the unique function PSIs serve in society, that evidence collected and documentation generated in the context of a policy breach warrants the same protections against being used in criminal court as those accorded to businesses under the Canada Evidence Act (1985).

In support of this recommendation, we argue the following:

1. PSI goals differ from those of the criminal justice system.
2. PSIs are subject to legislation that governs how we respond to GBV.
3. The risk of self-incrimination interferes with the PSI's ability to comply with this legislation.
4. The more serious the behaviour – and therefore, the more likely criminal charges could apply – the more important the PSI response also becomes.
5. Excluding evidence from policy breaches does not preclude concurrent criminal charges.

The Canadian criminal legal system "is designed to ensure public safety by protecting society from those who violate the law. It does this by

stating the types of behaviours that are unacceptable and defining the nature and severity of the punishment for a given offence" (Correctional Service Canada, 2010, s. 3). In contrast, PSI administrative processes related to GBV are designed to ensure a safe and harassment-free environment (recognizing the term "harassment" includes all forms of GBV in this context), conducive to achieving the PSI's educational mission. In doing so, we are required to meet legislated obligations under human rights, OHS, employment standards, and privacy law, collective agreements, and, in some provinces, campus sexual violence prevention and response legislation.

Student accountability measures in PSIs, including both policy enforcement and collaborative resolutions, require a safe environment where participants can be candid, open and honest, without fear of having their words used against them. Complaints processes for students often incorporate educational goals (student development models) for those who breach GBV policies, and/or accountability to those harmed (restorative models). Neither of these is achievable without the good faith participation of the respondent. Should a respondent choose to remain silent or deny culpability despite the existence of evidence that they did breach policy, decision-makers are often limited to punitive responses. **Unsurprisingly, when punishment is the outcome, the whole process appears to mirror the criminal legal system— neither the respondent nor the complainant benefits when that happens.**

GBV investigations for employees similarly aim for a safe and harassment-free workplace. Like the student respondent, when there is a risk of an employee's statement being used against them in court, their only real options are to deny the behaviour or keep silent. Under these conditions, even when an investigation results in the finding of a policy breach, significant improvement of the work environment, particularly one that has been toxic, is not possible without some mechanism to repair broken relationships. In the absence of open discussion and accountability, relationships will almost certainly continue to be strained.

Collaborative non-adjudicative resolution options promise greater accountability than complaints processes, particularly because the harm is acknowledged upfront and those who have a stake in the matter decide how they will address the resulting needs. Unlike the complaints process, however, collaborative resolutions *require* active, open, and honest engagement; they are guaranteed to fail when participants are hampered in their ability to speak their truth.

The reality, then, is that respondents' decisions not to participate made out of fear of subpoenas and production orders, compounded by

the use of criminal defense lawyers even when there are no criminal charges pending, mean that PSIs are functionally unable to attain their educational, reparative and workplace safety goals. They are, in some respects, forced to mimic the criminal justice system because of the pressures it places on PSI participants.

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The reality, then, is that respondents' decisions not to participate made out of fear of subpoenas and production orders, compounded by the use of criminal defense lawyers even when there are no criminal charges pending, mean that PSIs are functionally unable to attain their educational, reparative and workplace safety goals. They are, in some respects, forced to mimic the criminal justice system because of the pressures it places on PSI participants.

Many policy breaches do not rise to the level of a criminal charge (although PSIs tend not to differentiate those that do and those that do not). However, it is especially in cases serious enough to attract criminal charges that the PSI needs to address them internally. It is these cases in which respondents are most likely to be advised to remain silent. It is also these cases that pose the greatest threat to the learning, working and living environment. A safe and harassment-free environment that upholds human rights depends on healthy relationships. Being able to confront harmful behaviour in a supportive way that promotes accountability draws on these relationships and is the best way to achieve those goals. It becomes nearly impossible to do so if PSIs are unable to engage their own processes fully.

The exclusion of participant statements under the *Canada Evidence Act* (1985) would address this problem. PSIs would be able to achieve their goals and comply with the various legislative requirements governing their processes. Respondents and complainants would be able to openly and honestly engage, possibly resulting in better individual and interpersonal accountability. The exclusion would not, however, preclude concurrent criminal charges. It would simply mean that any evidence used in a trial would be collected through a criminal investigation, not by the PSI. Given their unique and crucial role in society, we argue that it is not appropriate for PSIs to act as servants to the criminal justice system.

The processes we are contemplating for the proposed amendment are all voluntary. There may be employee cases in which a professional body does have the power to compel statements and evidence. When compelled to participate, the respondent has protection from self-incrimination through the *Charter* (1982). However, the complainants in these cases continue to face the risk that multiple statements they provide through the various processes could be used to impeach their credibility in a court of law.

Broader than PSIs

We have focused on the implications of an amendment to the Canada Evidence Act (1985) for PSIs; however, we recognize that our proposal raises the possibility that such an amendment might apply in other contexts, making it important to consider the consequences of a broader application.

An amendment that included voluntary processes from other contexts warrants further research beyond our scope, but it is worth considering that institutions such as hospitals, prisons, non-profit agencies, and other workplaces may very well benefit from such an amendment. They may or may not share the educational mandate of PSIs but may have similar or compatible needs in terms of being subject to collective agreements and human rights, employment, OHS, and privacy legislation.

In addition, there may be implications for providers of restorative, transformative or other facilitated resolutions, either connected to the criminal justice process or through community grassroots efforts. In both of these contexts, restorative, transformative, and circle processes require open, honest and unfettered engagement in order to be successful. Any threat that the statements made in these contexts could be used in a criminal trial would functionally render the process ineffective.

It is important to explore the detriments as well as the benefits of our proposal. For example, exclusion of PSI or administrative evidence may create tension: privilege can be waived by the person who holds it, but exclusion applies in all cases. If a party learns of evidence through a PSI process that may be of use in the criminal trial, it would be inadmissible no matter how incriminating or exculpatory it may be.

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Chapter 14: Historical Complaints

The decision to make a complaint or disclose an experience of gender-based violence (GBV) is informed by several explicit and implicit barriers that often result in survivors delaying their report or not reporting at all. Very few survivors ever make a disclosure to anyone associated with their post-secondary institution (PSI). For example, a recent Statistics Canada report found that only 9% of women students and 4% of male students who were subjected to GBV disclosed to a member of their PSI community. For those who do disclose, delays are very common (Burczycka, 2020). The following are some common reasons a person may delay or choose not to report an instance of GBV, most of which are rooted in myths and misconceptions and socio-cultural attitudes about GBV. A person who is being or was subjected to GBV:

- May know or have a previous or ongoing personal relationship with the person who harmed them, including being in a romantic relationship;
- May be concerned about reprisal or retaliation from the person who harmed them, their colleagues, peers, or employer;
- May feel embarrassed and worry that "everyone in the community, workplace or school will know";
- May not immediately label or understand the incident(s) to be GBV;
- May blame themselves, often because they were intoxicated or knew the person who harmed them;
- May not have a support system to help them navigate the complexity and emotional difficulties of reporting;
- May fear losing their job or negative affects on their employment; and
- May lack awareness of policy and therefore not understand that an incident could be reported to their institution (Khan, Rowe & Bidgood, 2019; Pietsch, 2015; Burczycka, 2020).

Eliminating these barriers to reporting requires both societal and attitudinal changes as well as changes to reporting structures themselves.[1] Until these barriers are eliminated, however, it is important that timelines do not introduce an additional barrier to accessing the complaints process (Khan, Rowe & Bidgood, 2019, p. 123).

However, eliminating limitation periods does not account for cases where the person who caused harm has moved on from the institution before the survivor engages the complaints process (Khan, Rowe & Bidgood, 2019, p. 123). When respondents have graduated, transferred to a different institution, withdrawn from their studies, or left the PSI workplace, it is difficult to tie them to pending complaints processes, unless specifically allowed in policy. The institution no longer has a vested interest in the respondent's moral or intellectual development, and any community safety risk is mitigated by the respondent's absence. Furthermore, depending on how much time has passed, legal settlement timelines may have expired (e.g., human rights tribunal, civil litigation, criminal charges), and those avenues for resolution may no longer be accessible.

This is a particular challenge in post-secondary contexts that have high student turnover, such as college or apprenticeship programs, or where there is regular faculty or staff turnover, or a large number of contract teachers.

It is also a challenge when the decision to make a complaint is made years or decades later. A survivor may intentionally choose to delay reporting for fear of reprisal or retaliation, unaware that the PSI is limited in what it can do once the person who harmed them has left the institution. However, more and more survivors are coming forward with decades-old experiences as societal attitudes and social movements (such as #MeToo) have begun to shift, and barriers to reporting are challenged.

Regardless of the reason, delayed reports of GBV that are made after the person who has caused harm has left the PSI community raise an impor -tant question about the role and responsibility of the PSI in these circum -stances (Khan, Rowe & Bidgood, 2019, p. 123). Specifically, where a survivor is seeking resolution through the institutional complaints process because they believe it is their only option or because it is the option they have decided is best for them, how can or how should the institution respond?

1 See "Strategy 11: Ensure the complaints process is simple and accessible" in "Chapter 4: Creating a Comprehensive Policy Framework" for recommendations to reduce barriers to reporting in the complaints process.

Authority to Engage the Complaints Process

If a person makes a delayed complaint about an incident of GBV, the first step is determining whether or not the PSI has the authority to engage the complaints process for the incident being brought forward.

Authority of Policy

In many cases, institutional policy will provide guidance for determining jurisdiction, and ultimately authority, to launch an investigation and determine outcomes for the incident in question.

Some institutional policies include specific sections detailing the jurisdiction of the institution to respond to reports of GBV. For example, section 10.2 of the University of Victoria's *Sexualized Violence Prevention and Response Policy* (2021) states that while anyone who is a member of the university community may access supports under the policy:

> [T]he university only has jurisdiction to investigate reports of actions, interactions, and behaviours of a member of the University Community in an incident alleged to have occurred in one or more of the following circumstances:
>
> a. On any property that is controlled by the University and used for University purposes;
>
> b. When the Respondent is or was in a position of power or influence over the Survivor's academic or employment status at the university;
>
> c. While engaged in a University Activity, including but not limited to:
>
> i. athletic events;
> ii. online courses;
> iii. placements (including co-op and practica);
> iv. online meetings in furtherance of University business;
> v. academic or professional conferences; and
> vi. academic or research field work.

In other cases, the institution's policy defines jurisdiction to investigate in the negative, outlining the criteria that would limit the institution's jurisdiction to investigate. For example, the University of Regina's *Sexual Violence/Misconduct Policy Procedures* (2019) states:

> The legal authority to investigate under this policy, which is limited by the following: (i) the allegations must be made against an individual who was a member of the University community at the time of the alleged sexual violence/misconduct and at the time the report was submitted; (ii) the alleged conduct must fall within the definition of sexual violence/misconduct; and (iii) the alleged conduct must have a real and substantial connection to the University.

Even with clear guidance in policy, there are incidents that will not fit neatly into the defined jurisdiction, making it unclear what authority the institution has to pursue an investigation when a person reports an incident of GBV. To make this determination, there are three questions that need to be answered: (1) is the individual who allegedly caused harm a member of the PSI community?; (2) does the PSI have authority to enact its policies and procedures?; and (3) was the reported conduct contrary to PSI policy at the time it occurred?

Is the Individual Who Allegedly Caused Harm a Member of the PSI Community?

Many institutional policies will define what is meant by a "member of the PSI community". For example, according to the University of Toronto's *Policy on Sexual Violence and Sexual Harassment* (2019), "Member(s) of the University Community": Includes students, faculty, librarians, post-doctoral fellows, and all employees of the University of Toronto. For clarity, faculty includes clinical, adjunct, status-only, retired, and visiting faculty."

Not all institutions have a policy that defines a "member of the PSI community." Even where a definition is provided, there can still be questions or disagreements about whether a person falls under this definition. One noted gap is a lack of definition for who is considered a "student." For example, whether an applicant or a person completing a dual credit course through their high school is considered a student. This, and other kinds of student status, should be clearly outlined in your policy.

While we cannot offer a standard definition for all members of the PSI community that would apply across institutions, the following are some general considerations to make clear in your policy:

- When the definition applies: to allow for procedural fairness, a person is considered a member of the PSI community if they fall within the definition at the time of the incident.
- Which policy applies: to allow for procedural fairness, the policy in place at the time of the incident should be followed.
- Who is considered a student: are guest lecturers, volunteers, active alumni, visitors, board members, contractors, or external groups using PSI space, and othes with more peripheral roles, included as members of the PSI community?

Does the PSI have the authority to enact its policies and procedures?

The next question that needs to be answered is whether the incident of GBV is within the institution's jurisdiction. Established in the enabling statute(s) and PSI policies, this authority is non-negotiable.

The authority to act might be defined in some PSIs as those incidents having a *real and substantial link* to the institution, it's activities and/or its community. It might be established, for example, when an incident of GBV occurs:

- On a PSI campus;
- At an educational or work event held off campus organized by or affilliated with the PSI;
- At a field school or work placement that forms part of a student's program requirements;
- At a conference or other event where the attendees are representatives of their PSI, or included by virtue of their connection to the PSI; or
- At a PSI approved event, such as student club events off campus.

If the institution does have authority to engage the complaints process, we recommend waiving any limitation periods so that the complaint can move forward.

Historial Complaints

If the complaint is historical – that is, the complaint was delayed for years and the respondent has possibly left the PSI community – then there is an additional step to consider in order to determine whether the PSI can or should proceed with an investigation. In such cases there are unique limitations that will impede the effectiveness of the complaints process. These limitations need to be understood in the context of the specific case to decide whether it is possible to pursue an investigation and apply outcomes or accountability measures for the respondent. Consider the following questions:

- What information will an investigation be able to gather?
    - If a significant amount of time has elapsed between the incident and the complaint, there will be limitations in terms of the information available to an investigator. It is important to assess whether a fair and comprehensive investigation is feasible.
- What outcomes are possible?
    - It may not be possible to enforce outcomes for a respondent who is no longer a member of the PSI community. In a small number of cases, however, it may be possible to exert "control over a graduate's presence on campus and/or place a hold on a graduate's transcript as a means to facilitate engagement in an investigation or implement disciplinary measures post-investigation" (Khan, Rowe & Bidgood, 2019, p. 123).
- Was the described behaviour contrary to policy at the time it occurred?
    - It would be a breach of fairness to hold an individual accountable to standards which were not in place at the time of the incident. While the conduct may have been harmful and morally reprehensible, it cannot be treated as a violation of a policy that did not yet exist.

In addition to these questions, you will need to determine if there is a compelling reason for the PSI to respond, either in response to an ongoing threat or educational imperative. If there is no existing safety risk, either for the complainant or the PSI community, and/or the PSI no longer has an interest in the moral or intellectual development of the respondent, engaging the complaints process may be beyond your jurisdiction for this particular matter. Consider the following factors:

1. The objective of the GBV policy:
    a. Is the objective rooted in mitigating community safety risk? Note that, if it is, it may be difficult to move forward with the complaints process where the respondent is no longer present on the PSI campus, either physically or in a remote context.
    b. Is the objective also rooted in demanding accountability from the institution? In such cases, a PSI can choose to amend or replace outdated and harmful processes or fill gaps where processes did not yet exist. Doing so does not require the participation of involved parties (see recommendations below) and may prevent similar problems in the future.
    c. Does the policy aim to meet the complainant's needs? If so, it is important to discuss with the complainant what is and what is not possible, including the limitations imposed by the passage of time and the policy itself. During this conversation, it is important to emphasize the objectives of the policy to see if they align with the complainant's own objectives (see recommendations below).
2. The jurisdiction and scope of the policy: The expert panel raised concerns about the jurisdiction of campus offices and being tasked with addressing cases that do not fall within the scope of the policy. The following question was raised: "can we be expected to take on historic and non-jurisdictional cases without the capacity to carry out investigations/seek resolution/and/or some semblance of justice?"

Even when a PSI determines that engaging the complaints process is beyond its jurisdiction, this does not mean that the PSI should not respond. **Whenever a person brings forward a disclosure or is attempting to pursue a formal complaint, the PSI has a duty to respond.**

What this response looks like should always depend on the specifics of the incident(s) and the needs of the person who was harmed. In all instan -ces, the person coming forward must be given access to support. If there is a concern about safety or further harm, interim measures can be taken. In some cases, it may also be appropriate to offer non-adjudicative options.

Reflection

In 2019, C came forward about their experience of GBV by their supervisor while working as a Research Assistant for a faculty member in 2011. C disclosed that they chose not to report the incident at the time because they were dependent on their supervisor for their RA-ship and to provide necessary letters of recommendation to continue on to graduate studies. C was also concerned about being believed, and therefore hesitant to share their experience at the time.

By 2019, C had transitioned out of post-secondary studies. In the context of a societal shift towards believing complainants, C felt empowered to disclose their experience and decided to report the incident to their former PSI. Not understanding what their options were, C sought to make a complaint against their former supervisor with the belief that sanctions would be imposed, possibly even resulting in the dismissal of the faculty member from their position and the institution.

However, when making their complaint, C was informed that the faculty member had since retired and that the complaints process was no longer available to them.

How should the institution proceed in this scenario? The following recommendations can help guide this decision.

Recommendations

Eliminate limitation periods

Our expert panel agreed there should be no restriction on how long a complainant may take to request a resolution through the complaints process. They believed that provinces, territories, and institutions should eliminate limitation periods, as has been done in Alberta and Ontario employment standards, for example (*An Act to Remove Barriers for Survivors of Sexual and Domestic Violence*, 2017; *Sexual Violence and Harassment Action Plan Act*, 2016). Eliminating limitation periods creates more space for survivors to process their experiences, access supports, and decide whether or not to engage the institutional complaints process. This is especially relevant where both the survivor and the person who caused harm continue to be part of the PSI community. Investigating offices often have the power of discretion to decide when too much time

has passed between incident and disclosure; they should give as much latitude as possible, erring on the side of accepting a complaint, when deciding whether to initiate a complaints process.

We recommend that policies not include limitation periods. If your policy currently has a limitation period without the discretion to waive it, consider making an amendment to remove it. In the interim, implement strategies to support the person bringing forward a complaint that may fall outside the limitation period. Specifically, ensure that they are informed of and, where needed, connected to adequate support services; be clear about existing limitations; and work with the person who was harmed to address their underlying needs.

Acknowledge in the policy that, depending on the circumstances of the case, the institution may take action

Outline the PSI's responsibility to respond with alternatives, such as providing support and/or offering non-adjudicative options, when the matter at hand is beyond scope or feasibility of the PSI complaints process. Each of these alternatives should align with the clearly articulated objective of the policy, namely supporting the person who was harmed, keeping the community safe, and holding the respondent accountable, where possible.

Consider adopting language like that in section 10.3 of the University of Victoria's *Sexualized Violence Prevention and Response Policy* (2021): "If an incident does not meet one or more of the criteria in section 10.2, the university may still take steps to mitigate the impact of the incident on the learning, living, or working environment."

Manage expectations

Because of the limitations of responding to historical complaints or complaints where the respondent is no longer a member of the PSI community, it is important to manage expectations of those who are considering engaging the complaints process. The most effective way to manage expectations is through information sharing. A person seeking a response from an institution needs a complete understanding of what is possible so that their expectations are realistic. They should also have an understanding of what it means to pursue the available options, and be informed of the limitations and purpose driving each process. PSIs should provide complainants with a comprehensive definition of who is considered a member of the PSI community, as well as a plain language description of the jurisdiction of the PSI.

Having clear objectives and scope outlined in your policy, as described above, are important tools to help manage expectations. However, it is equally important that the staff person who is receiving the complaint or disclosure is able to convey this information clearly and answer any questions the person bringing the complaint or making the disclosure may have.[2]

To this end, be sure that staff are appropriately resourced and knowledgeable in the policy and procedural limitations, and can apply this knowledge to the unique circumstances of each case. Being able to answer questions and provide relevant information about the process, limitations, and feasibility of response options in a clear and direct manner is an under-recognized and under-used competency.

Respond to the underlying needs of the person who was harmed

When a person discloses an incident of GBV that falls outside the scope of the policy or the PSI's authority, refocus the conversation on identifying underlying needs. **While they may be seeking a resolution through the complaints process, shifting the focus of the conversation to their underlying needs allows you to work together to decide what an appropriate response could look like**. It is possible the person initially chose to engage the complaints process because they were not informed of other options, or because they have not been fully informed of what it means to engage in the PSI's complaints process, including the possible outcomes of this approach.

Be clear in your policy that a person has multiple options beyond engaging the complaints process. Historical complaints underline why it is important to have multiple options for resolving complaints explicitly laid out in GBV policies. Our expert panel raised the following points to help guide this work:

All disclosures warrant a response

There are a number of ways a PSI can respond to a historical complaint without initiating an investigation. Responding to the delayed disclosure may include measures such as referrals to support or accommodations for the person bringing the complaint forward. This conversation

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2 See "Strategy 1: Allow the discloser to decide whether or not to make a complaint" and "Strategy 4: Provide information about the specific process that would be used in a complaint" in "Chapter 7: Receiving a Complaint".

could begin by asking the complainant about their desired outcome or resolution. For example, a complainant may simply be looking for the university to heed their warning about a past community member or past incident. From here, the PSI can assess current community safety risks and make improvements based on an occupational health-type investigation.

Where the respondent is peripherally and/or reputationally tied to the PSI community

It is possible to proceed with a complaints process when a respondent has departed from the campus community but still maintains networking relationships or has an interest in maintaining their reputational standing within the PSI.

For example, in cases where the respondent has left the PSI but still is connected to the alumni network, publicly sits on fundraising committees, or other extra-curricular memberships, respondents may feel inclined to participate in order to maintain these networks as well as their good standing in the institution. Some experts raised the importance of creativity in approaching situations where such peripheral connections exist, as they may tether respondents to the PSI, and therefore, to the complaints process.

Acknowledge outdated and inefficient processes

Experts raised the importance of investing time in acknowledging insufficiencies of past or current campus protocols in preventing GBV in instances of delayed disclosures (e.g., when the incidents occurred during periods where a policy did not exist, or complaints processes were not yet established). While reaching out to witnesses and other involved parties in delayed disclosures may be difficult or impossible, it is a good, trauma-informed practice to acknowledge the harm caused to the complainant as a result of an insufficient response. Consider it an opportunity to reduce harm and provide some semblance of justice, even when a complaints process may not be possible.

For example, a complainant providing a delayed disclosure may find comfort in knowing that their feedback has been received by administrators and put to use in creating better and more effective policies and procedures, or in being invited to participate in a project or initiative with those aims.

While some PSIs may be concerned that acknowledging a failure to appropriately respond to GBV in the past may be a reputational risk, that

risk may be mitigated or eliminated by taking action to prevent similar failures in the future.

Explain each option and whether or not they are feasible. Specifically, your conversation with the individual who disclosed should include interim measures, non-adjudicative options, and access to supports (note that this must always be available to a person who discloses an incident of GBV). It may also be helpful to offer examples, although we recommend maintaining a degree of flexibility as a fixed list may be too restrictive to be useful.

Wherever possible, tailor every respose to the needs of the person who was harmed. The following are some example of possible responses to a historical complaint:

- Offer an institutional apology
- Conduct an environment scan to access whether the conditions that facilitated the violence continue to exist and take steps to make changes where necessary
- Restrict access to campus by the person against whom the allegation is made
- Revoke visitors' access to university property
- Follow the collective agreement when connections still exist, such as in the case of a professor emeritus
- Sever remaining impermanent ties, such as not renewing contracts
- Rename scholarships, facilities or buildings

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Chapter 15: For Future Research and Leadership

This Guide has offered a comprehensive list of strategies for procedurally fair processes, trauma-informed practices, and harm reduction for all involved in gender-based violence (GBV) complaints processes at post-secondary institutions (PSIs). it has also filled gaps in understanding procedurally fair, trauma-informed complaints processes that reduce harm by providing an analysis and recommendations on three unsettled questions. However, we recognize that there continue to be gaps that we were unable to address in this Guide as they are either outside of our scope, or require more research and leadership. In this chapter, we call on institutional, provincial, territorial, and federal institutions to address these gaps, specifically around:

- Risk assessment sepcific to the campus GBV context;
- Support for PSIs in appointing qualified investigators; and
- The value of immunity clauses in policy as a way to reduce barriers to reporting.

In addition, we identify the following areas where the PSI community faces other difficult questions related to campus GBV and would benefit from national conversations on, specifically:

- Personal relationships between professors and students; and
- More on information sharing.

Risk Assessment

One of the conspicuous gaps identified throughout our work is the lack of a widely available risk assessment tool specific to PSIs and GBV. As summarized in Eerkes et al. (2021), Structured Professional Judgement tools - such as the Risk Assessment for Sexual Violence Protocol (RSVP), Stalking Assessment and Management (SAM), and the Spousal Assault Risk Assessment (SARA) - have been developed by forensic psychologists for social workers, law enforcement, or other professionals and are commonly used at PSIs to assess factors that increase risk for specific types of violence.

These qualitative tools focus on the safety of the persons harmed and

other potential targets of violence. Consequently, the various models are designed to consider and implement interventions to monitor, restrict, or support the subject of the risk assessment. Rooted in the criminal justice model, most risk assessment tools focus on safety, but fail to consider factors outside of the potential for violence. Many campus risk assessment teams will supplement the standard tools with their own PSI-specific assessment checklists; however it is not clear if these individualized checklists take into account other factors, such as educational risks, or residence-or employment-related needs of the parties.

Currently, private, for-profit companies are filling this niche, which means that training and access to proprietary materials can be prohibitively expensive. Smaller PSIs, or those with fiscal constraints on professional development may not have the budget, or the personnel, to train. Consequently, we call on institutional, provincial, territorial, and federal leadership to support the development of a national standard for risk assessment specific to campus GBV (both student and employee) as a significant need, well beyond the scope of this Guide.

Support for PSIs in appointing qualified investigators

Finding trained, experienced, and qualified investigators remains one of the most formidable obstacles for PSIs. In addition to a potential dearth of qualified investigators, the cost of a single investigation is prohibitive and can be a disincentive to PSIs to accept GBV complaints or to conduct a thorough investigation. Failure to properly investigate a complaint when a described incident, if true, would constitute a policy violation, is both a breach of fairness and contrary to trauma-informed practice. We have encouraged PSI administrators to create their own roster of potential investigators; however, this again places the onus on individual institutions and has a disproportionately negative effect on smaller, remote, or rural campuses.

A national registry for campus GBV investigators, including information about their qualifications, experience, training, and fees would be of enormous value to PSIs across the country. Additionally, investigators could provide information about their commitments to, and experience in, trauma-informed investigations, ability to conduct timely investigations, specializations in intercultural, intersectional, or other complex investigations, or proficiency in multiple languages.

Advances in video-conferencing technology as a result of the global pandemic have resulted in an abrupt pivot to remotely-conducted investigations, one that may very well continue into the foreseeable future. Investigations could be completed from anywhere in Canada, meaning that skilled investigators need not be constrained by geography in many cases, and travel costs may no longer be a factor. In this new reality, a national registry would be more beneficial than ever.

Therefore, we call on the federal government to support the development of a national registry for campus GBV investigators.

The Value of Immunity Clauses in Policy

Immunity or amnesty clauses are designed to remove a barrier to making a complaint in cases where the complainant was engaged in behaviour at the time of the incident that was contrary to a student code of conduct, such as underage drinking or illegal drug use. While the age at which an adult can legally consume alcohol is lower in Canada (18 or 19 years old) than it is in the United States (21 years old), and cannabis is legal across the country, this may seem like less of an issue in Canada than it has been across the border. However, student codes of conduct may include rules regulating the consumption of alcohol and/or cannabis that are more strict than what is legally allowed, introducing a level of complexity where a student may be hesitant to bring forward a complaint if they may have been in violation of a student code of conduct. Despite this potential barrier, there is currently no research in Canada on the effects, if any, of immunity clauses on the decision to make a complaint. There may be little downside to including them in policy, but it is unknown whether they would, in fact, increase reporting rates.

Therefore, we call on institutional, provincial, territorial, and federal leadership to support research into the value of immunity clauses, including the potential to increase reporting rates for students.

Leadership in National Conversations

Personal relationships between faculty[1] and students

Most Canadian PSIs approach consensual intimate or personal relationships between faculty and students as a conflict of interest. It is premised on the notion that one cannot be in a personal and professional relationship simultaneously, particularly where the professional relationship involves a power differential. The power relationship between faculty and students is significant because marks on assignments, course grades, and GPAs cumulatively influence a student's ability to progress through their academic programs. Supervision, joint research, co-authorship, and letters of reference may have a direct effect on a graduate student's future career. An international student may be reliant on faculty for matters related to immigration and study permits. When a student believes any of that is at risk, coercion need not be overt. Faculty might not always feel like they are the ones holding the power, and they may not recognize that simply raising the possibility of an intimate relationship may be coercive by virtue of the position of power they occupy.

The second basis for treating consensual personal relationships as conflicts rather than banning them is the belief that while the PSI has a stake in what happens in the working/learning/living environment, attempting control over the private lives of their community members is a significant overreach. Consensual relationships between faculty and students are a common occurrence and many go on to become long-term partnerships. As both an employer and an educational institution, wading into consensual adult relationships is well outside of the PSI's mission. However, when it raises questions of the integrity of the degree, differential treatment of students, or obtaining consent through implicit coercion, the PSI has the responsibility to manage the professional relationship (as opposed to the personal relationship) of the faculty and student. They can do so by ensuring a professor is removed from any situation in which they might have influence over the evaluation or progress (such as teaching, supervising, recommending or funding) of a student with whom they have a personal relationship.

Among those PSIs that do address the power dynamics in personal relationships as a conflict of interest, some have clarified the link between relationships and conflicts – for example, the University of Alberta (2020)

1 For our purposes, "faculty" includes professors, instructors, teachers, supervisors, and anyone who may be in a position to assess a student's work, promote them within an academic program, provide references, or influence their academic progression in any way.

and McGill (Campbell, 2018) – and some have not, potentially leaving the impression that the issue has not been considered.

In 2017, Québec introduced Bill 151, which mandated stand-alone sexual violence policies, including the following:

> The policy must also include a code of conduct specifying the rules that a person who is in a teaching relationship with or a relationship of authority over a student must comply with if the person has an intimate relationship, such as an amorous or sexual relationship, with the student.
>
> The code of conduct must include a framework aimed at avoiding any situation where such relationships could coexist if such a situation might affect the objectivity and impartiality required in the teaching relationship or relationship of authority or might encourage an abuse of power or sexual violence. (p. 5)

Following Bill 151, Université Laval instituted an outright ban on relationships between individuals in positions of power and students (Page, 2018). Some PSIs have followed suit, including the University of Manitoba which issued a prohibition on relationships between students and their professors in 2019 (Froese & Grabish, 2019). Unlike some of the major American universities (Woolf, 2015), none of these institutions have banned relationships outright, but have confined the ban to those situations in which they also have an active teacher-student relationship. Others continue to call for bans on teacher-student relationships in their institution, especially in light of the Galloway case (Udwadia, 2019).[2]

Rather than each PSI trying to grapple with this question independently, we recommend a national conversation on the intersections of power, consent, and conflicts of interest.

More in information sharing

In 2017, a professor left the University of Manitoba amid sexual misconduct allegations, and was subsequently awarded $286,000 after students and former students informed his new employer at Berklee College of Music that he had harassed them (Geary, 2020). This and similar situations with both students and faculty have raised questions about whether information should be shared between institutions when an individual leaves or is removed from a PSI as a result of committing GBV.

2 See "Chapter 12: Privacy and Disclosure" for an introduction to the Galloway case.

Post-#MeToo, public opinion is evolving on the subject of how we should deal with allegations (proven or not) of sexual misconduct. Some would argue that the right to privacy must be paramount, while others believe that passing the problem onto other institutions without warning is

unethical. This is a developing debate, one which may in part be informed by the outcome of legal action surrounding Dr. Julie MacFarlane, and her disclosure of information about a previous colleague to his new employer in spite of a non-disclosure agreement (Gollom, 2020).[3]

Also in 2017, the head coach of the University of Saskatchewan Huskies recruited a player to the volleyball team despite knowing that the player had left his previous institution under a cloud of suspicion and was facing criminal charges for sexual assault (Radford, 2018). Given that the coach was aware of the pending charges when he allowed the player to join the team, the University fired him, both for recruiting the student, and for failing to inform the University about the allegations of sexual misconduct the player faced. The coach was reinstated by an Arbitrator in 2020 (*Administrative and Supervisory Personnel Association v University of Saskatchewan*, 2020); however, in 2021, that decision was brought under judicial review, quashed, and the question of whether the coach's "recruitment decision should be subject to discipline will be sent back to the arbitrator to be reheard" (McAdam, 2021; *University of Saskatchewan v Administrative and Supervisory Personnel Association,* 2021).

These two situations, and others like them, have raised the question as to whether individuals with knowledge of these matters have an ethical duty to inform and, if so, to whom?

The PSI community would benefit greatly from a national conversation on these complex and divisive questions.

3 See "Non-Disclosure Agreements" in "Chapter 12: Privacy and Disclosure" for a more in-depth discussion on non-disclosure agreements.

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