

To: Provost Cheryl Regehr and Professor Angela Hildyard, Vice-
President, Human Resources & Equity
From: The Expert Panel on Sexual Violence Policies
Date: August 4, 2016
Re: Recommendations for a new Sexual Violence Policy

A. INTRODUCTION

Section 17(3) of Bill 132, which comes into effect on January 1, 2017, requires that every college or university described in subsection (2) shall have a sexual violence policy that (a) addresses sexual violence involving students enrolled at the college or university; (b) sets out the process for how the college or university will respond to and address incidents and complaints of sexual violence involving students enrolled at the college or university, and includes the elements specified in the regulations relating to the process; (c) addresses any other topics and includes any other elements required by the regulations; and (d) otherwise complies with the requirements set out in the regulations. **Section 17(5)** requires that every university shall review its sexual violence policy at least once every three years and amend it as appropriate. The accompanying **Ontario Regulations** to Bill 132, which also come into effect on January 1, 2017, require the University to establish a process to consult widely regarding the development of the sexual violence policy.

The Provost created an Expert Panel on Sexual Violence Policies, chaired by Mayo Moran, (Provost, Trinity College and Professor of Law), and whose membership included Saagarika Coleman (Undergraduate Student), Victoria College, Faculty of Arts & Science; Lahoma Thomas (Graduate Student), Department of Political Science, Faculty of Arts & Science; Mark Overton (Administrative Staff Member), Dean of Student Affairs, and Assistant Principal, Student Services, University of Toronto Mississauga (UTM); and Brenda Cossman, Faculty Member, (Faculty of Law).

The Provost asked the Expert Panel to advise her and Professor Angela Hildyard on principles and recommendations for a new stand-alone policy on sexual violence and provide general recommendations for revisions to existing University policies addressing sexual violence and sexual harassment. As well, the panel was asked to make recommendations regarding a companion document that will explain procedures related to the approved policies. In fulfilling

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its mandate, the Panel was asked to consider two key policy issues: the reporting process for sexual violence cases; and the investigation, resolution, and adjudication processes for such cases. Throughout, the panel was asked to consider how to incorporate principles of procedural fairness for all parties – complainants and respondents – and how to ensure that University policies and procedures reflect those principles.

As a new Sexual Violence Policy must be considered for approval by University governance before January 1, 2017, as required by provincial legislation, the Panel completed its work by July 2016. Provincial legislation requires a robust student consultation as part of the process. The Expert Panel conducted a number of consultations across the University of Toronto's three campuses. The Expert Panel's consultations have included in-person consultation days on each of the three campuses (at the University of Toronto Mississauga on June 8, followed by June 9 at the St. George campus, and the University of Toronto Scarborough on June 16). Each day consisted of three separate sessions, one each for students, staff, and faculty, for a total of nine sessions. The Panel also held a number of other consultation meetings, including with representative student committees and Downtown Legal Services. The Panel developed a consultation website and opened it up for online consultation between June 2 and 30, 2016. The Panel received over 100 written submissions through its online portal. The Panel reviewed existing University of Toronto policies and procedures and similar policies currently in existence or in draft form at universities throughout North America.

B. RECOMMENDATIONS

The Panel makes the following 40 recommendations in the six categories of **General, Definitions, Confidentiality, Statement of Purpose, Elements, and the Companion Guide.**

I. The Panel makes the following general recommendations

The Panel recommends as follows:

1. That it is important that one substantive Sexual Violence Policy (SVP) and a coherent set of procedures cover all members of the University community. Given the centrality of the interests protected by a sexual violence policy, the Panel does not believe that it is acceptable to have norms or levels of protection from sexual violence depend on one's status in the University;
2. That the SVP allows for centralized disclosure, reporting, investigation and adjudication of complaints of sexual violence to protect against conflicts of interest and reasonable apprehension of bias, to preserve privacy, to minimize risk of reprisals, and to ensure coordination and consistency across all divisions, campuses and centralized services;
3. That the SVP and associated resources and supports should be easily accessible and easily located;
4. That the SVP processes be designed to minimize the number of times that complainants have to repeat their accounts, as repeating one's account can produce further trauma;
5. That the SVP processes are attentive to providing the most privacy possible for the individuals involved;
6. That the SVP identifies clearly that complainants have the opportunity and option to seek confidential counseling and support as quickly as possible following an incident of sexual harassment or sexual violence;
7. That anyone receiving a report of or responsible for investigating a complaint of sexual violence or sexual harassment has specialized training and that such training is ongoing and regularly updated.

II. The Panel makes the following recommendations about definitions

Section 17 (1) of the Legislation defines Sexual Violence as any sexual act or act targeting a person's sexuality, gender identity or gender expression, whether the act is physical or psychological in nature, that is committed, threatened or attempted against a person without

the person's consent, and includes sexual assault, sexual harassment, stalking, indecent exposure, voyeurism and sexual exploitation.

The Panel recommends as follows:

1. That the SVP defines certain key terms and that the SVP defines these terms in a manner that uses the language *"includes but is not limited to"*;
2. That the SVP defines consent, that it defines consent as something that is positive, active, and ongoing; that it defines when consent cannot be given; that it defines what factors negate consent; and that it defines consent with reference to the definition of "consent" in *Criminal Code of Canada*ⁱ which has a comprehensive and legally sound definition of consent;
3. That the SVP defines sexual assault, with reference to the basic definition of sexual assault as defined in the *Criminal Code of Canada*ⁱⁱ and reflects that sexual assault can be any form of sexual contact without a person's consent, including the threat of sexual contact without consent; that sexual assault can range from unwanted sexual touching to forced sexual intercourse; and that sexual assault can involve situations where sexual activity is obtained by someone abusing a position of trust, power, or authority;
4. That the SVP defines sexual harassment and does so consistent with and with reference to the revised definition of "Workplace Sexual Harassment" in the University's Policy with Respect to Workplace Harassment, the Human Resources Guideline on Civil Conduct and the Guideline for Employees on Concerns and Complaints Regarding Prohibited Discrimination and Discriminatory Harassment, the definition provided by the Ontario *Human Rights Code*ⁱⁱⁱ and the definition in the OHRC *Policy on Preventing Sexual and Gender-Based Harassment*;^{iv}
5. That the SVP defines gender-based harassment with reference to the definition used in the OHRC *Policy on Preventing Sexual and Gender-Based Harassment*;^v
6. That the SVP defines "cyber-sexual violence," with reference to the new provision in the *Criminal Code*^{vi} in this area, and that the SVP define "cyber-sexual harassment" with reference to the OHRC *Policy on Preventing Sexual and Gender-Based Harassment* discussion of cyber-harassment;
7. That the SVP defines the difference between disclosure and reporting and explains the options available to the complainant;

8. That the any definitions in the SVP recognize the intersection of sexual violence with other forms of oppression, discrimination and harassment including but not limited to the grounds set out in the *Ontario Human Rights Code*.^{vii}

III. The Panel makes the following recommendations about the Sexual Violence Policy's

Statement of Purpose

Section 1 of the Regulation states every university described in 17(2) of the legislation shall appropriately accommodate the needs of students enrolled at the university who are affected by sexual violence.

The Panel recommends as follows:

1. That the SVP's Statement of Purpose emphasizes that the University values autonomy, respect, personal and community safety, personal and academic well-being;
2. That the SVP takes an intersectional approach that recognizes that complainants from historically marginalized communities may be especially vulnerable to sexual harassment and sexual violence, with reference to the way in which this issue is addressed in the OHRC *Policy on Preventing Sexual and Gender-Based Harassment*;
3. That the Statement of Purpose contains a commitment to prevention, education and training as well as to supporting persons affected by sexual violence;
4. That the SVP considers the language used in the University of Toronto's *Response to the Final Report of the Presidential and Provostial Committee on Prevention and Response to Sexual Violence* which states "the University of Toronto is committed to preventing sexual violence, [and] to ensuring that those members of our community who are affected by sexual violence receive support."

IV. The Panel makes the following recommendations about the issue of confidentiality

Regulation 2(2)(11) requires information about the measures that will be implemented to protect and keep confidential the personal information of the persons involved in the investigation of an incident or complaint

The Panel recommends as follows:

1. That the SVP and the associated processes offer maximal protection of the confidentiality of persons affected by sexual violence;
2. That the SVP be transparent about the limits of confidentiality;
3. That the SVP explains the reasons why it may not be possible to maintain confidentiality in certain circumstances;
4. That the SVP conveys clearly when a process moves from one that is confidential to a process that may not remain confidential.

V. The Panel makes the following recommendations about the elements of the process for investigation and adjudicating complaints of sexual violence

The following aspects of the Regulation relate to the “elements” of the policy regarding investigation and adjudication of complaints of sexual violence. **Regulation 2(2)1** requires the policy to provide the process to be followed for persons wishing to make a report or complaint about sexual violence (including to whom the report is made). **Regulation 2(2)2** requires examples of the measures that may be implemented to protect a person reporting an incident or making a complaint about sexual from retaliations and the threat of retaliation. Regulation 2(2)3 requires the policy provides the process for deciding whether an incident or complaint of sexual violence will be investigated by the university. **Regulation 2(2)4** requires a statement that the victim may choose not to request an investigation and has the right not to participate in an investigation. **Regulation 2(2)5** requires that the policy state the investigation and decision making process that will take place if an incident or complaint of sexual violence is investigated. **Regulation 2(2)(6)** requires that the policy state the specific officials and departments involved at each stage of the investigation and decision making. **Regulation 2(2)(7)** requires the policy to provide a description of the elements of procedural fairness that will be part of the investigation and decision-making process. **Regulation 2(2)(8)** requires the policy provide a description of the rights of the participants to legal or other representation or to be accompanied during the investigation and decision-making processes. **Regulation 2(2)(9)** requires the policy to provide examples of the interim measures that may be implemented while an incident is being investigated or a decision being made. **Regulation 2(2)(10)** requires that the policy provide examples of the decisions that may be made and measures that may be imposed after an incident or complaint is investigated. **Regulation 2(2)(12)** requires that the policy provide a description of the appeal process that may be available to decisions resulting from the

investigation process. **Regulation 2(2)(13)** requires that the policy include a description of the roles and responsibilities of senior administrators and others upon becoming aware of incidents or complaints of sexual violence.

Additionally, **Section 2(1) of the Regulation relates to supports, services and accommodations.**

Regulation 2(1)(a) requires the policy to provide information about the supports and services available at the university **for students** affected by sexual violence. **Regulation 2(1)(b)** requires the policy to provide information about the supports and services available in the community **for students** affected by sexual violence. **Regulation 2(1)(c)** requires the policy to provide information about available accommodations **for students** who are affected by sexual violence. **Regulation (2)(1)(d)** requires that the policy provides information **to students** clarifying that they are not required to report an incident or make a complaint about sexual violence in order to obtain the supports.

The Panel recommends as follows:

1. That the SVP processes should provide for timely resolution at each stage, as prolonged processes can compromise the psychological, physical and academic well-being of the parties involved;
2. That the SVP replaces the language of “informal resolution” in existing University policies with more apt language. As examples, the Panel discussed “non-adjudicative” or “pre-adjudicative” resolution and agreement;
3. That the SVP clearly identifies what to expect, what is required to report, what level of confidentiality accrues to each step, who will receive the information, what the steps are after reporting, what the possible outcomes are, what the expected timelines are, what supports are available, and what alternatives to reporting exist;
4. That the SVP directs that all procedures for the investigation and adjudication of complaints of sexual violence be available in written form and made widely available, particularly in the area of disclosure, confidentiality, etc.;
5. That the SVP emphasizes fairness and due process for all parties;
6. That the SVP provides for proportional responses that reflect that severity of the conduct;
7. That the SVP recognizes that there is no expectation of a face-to-face mandatory meeting between parties to resolve a complaint of sexual violence or sexual harassment;

8. That the SVP processes have flexibility and variability to address the particular exigencies of the situation;
9. That the SVP clearly identifies interim measures, that those measures be made available in a timely manner, and that the SVP identifies the consequences for a violation of any interim measures or any pre-adjudicative resolution.

VI. The Panel makes the following general recommendations about an SVP Companion Guide

The Panel makes the following recommendations:

1. That the Companion Document includes illustrative examples of consent (see for example the OHRC's *Policy on Preventing Sexual and Gender-Based Harassment* – link below);
2. That the Companion Document illustrates each step of the SV investigation and adjudication process;
3. That the Companion Document and associated information should be in plain language, easily understandable and easily accessible;
4. That the Companion Guide includes examples of conduct that would engage the SVP, including but not limited to examples of what falls within an “act that is psychological in nature,” and “sexual exploitation” as set out in the legislation, and what would be considered cyber-sexual violence;
5. That the Companion Document reflects that survivors ought to be able to identify in advance clear points of contact where there will be confidentiality at the first instance (for example, with the new Sexual Violence Prevention and Support Centre) keeping in mind the existing limits of confidentiality;
6. That the Companion Document explains the reasons why and provide examples of when confidentiality may not be absolute (risk of self-harm, children or others at risk, community safety, or other applicable legal obligation, etc);
7. That the Companion Guide encourages that support be provided through the lens of intersectionality and inclusiveness;
8. That the Companion Document considers providing resources similar to
 - <http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment>

- www.mylawbc.com/paths/abuse and http://www.torontopolice.on.ca/publications/files/print/a_guide_for_sexual_assault_survivors.

i The definition of “consent” from the *Criminal Code of Canada*

273.1 (1) Subject to subsection (2) and subsection 265(3), *consent* means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

Marginal note: Where no consent obtained

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Marginal note: Subsection (2) not limiting

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained. 1992, c. 38, s. 1.

Marginal note: Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused’s belief arose from the accused’s
 - (i) self-induced intoxication, or
 - (ii) recklessness or wilful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

ii The *Criminal Code of Canada* uses its definition of Assault to define Sexual Assault. **Section 271** essentially provides that a sexual assault is when somebody touches you in a sexual way on purpose, directly or indirectly, without your consent.

Assault

265 (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Marginal note: Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Marginal note: Consent

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

iii Sexual Harassment under the Ontario *Human Rights Code*

Sexual harassment

Harassment because of sex in accommodation

7. (1) Every person who occupies accommodation has a right to freedom from harassment because of sex, sexual orientation, gender identity or gender expression by the landlord or agent of the landlord or by an occupant of the same building. R.S.O. 1990, c. H.19, s. 7 (1); 2012, c. 7, s. 6 (1).

Harassment because of sex in workplaces

(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee. R.S.O. 1990, c. H.19, s. 7 (2); 2012, c. 7, s. 6 (2).

Sexual solicitation by a person in position to confer benefit, etc.

(3) Every person has a right to be free from,

- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person. R.S.O. 1990, c. H.19, s. 7 (3).

iv From the OHRC *Policy on Preventing Sexual and Gender-Based Harassment*

In the Ontario *Human Rights Code* (the *Code*), sexual harassment is “engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome.” In some cases, one incident could be serious enough to be sexual harassment.

The reference to comment or conduct “that is known or ought reasonably to be known to be unwelcome” means that there are two parts to the test for harassment. First, we have to consider if the person carrying out the harassment knew how their behaviour would be received. Second, we must consider how someone else would generally feel about the behaviour – this can help us think from the perspective of a person who is being harassed.

v From the OHRC *Policy on Preventing Sexual and Gender-based Harassment*

Gender-based harassment is one type of sexual harassment. Gender-based harassment is “any behaviour that polices and reinforces traditional heterosexual gender norms” (Elizabeth J. Meyer, “Gendered Harassment in Secondary Schools: Understanding Teachers’ (Non) Interventions,” *Gender and Education*, Vol. 20, No. 6, November 2008, 555 at 555). It is often used to get people to follow traditional sex stereotypes (dominant males, subservient females). It is also used as a bullying tactic, often between members of the same sex.

vi The new *Criminal Code of Canada* provision regarding cyber-violence

Publication, etc., of an intimate image without consent

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

- (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) of an offence punishable on summary conviction.

(2) In this section, intimate image means a visual recording of a person made by any means including a photographic, film or video recording,

- (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
- (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
- (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

vii The *Ontario Human Rights Code* prohibits actions that discriminate against people based on a protected ground in a protected social area. The “protected grounds” are age; ancestry, colour, race; citizenship; ethnic origin; place of origin; creed; disability; family status; marital status (including single status); gender identity, gender expression; receipt of public assistance (in housing only); record of offences (in employment only); sex (including pregnancy and breastfeeding); and sexual orientation. The Code applies to five protected “social” areas which are services, goods and facilities (including education); housing; contracts; employment; membership in vocational associations such as trade unions.