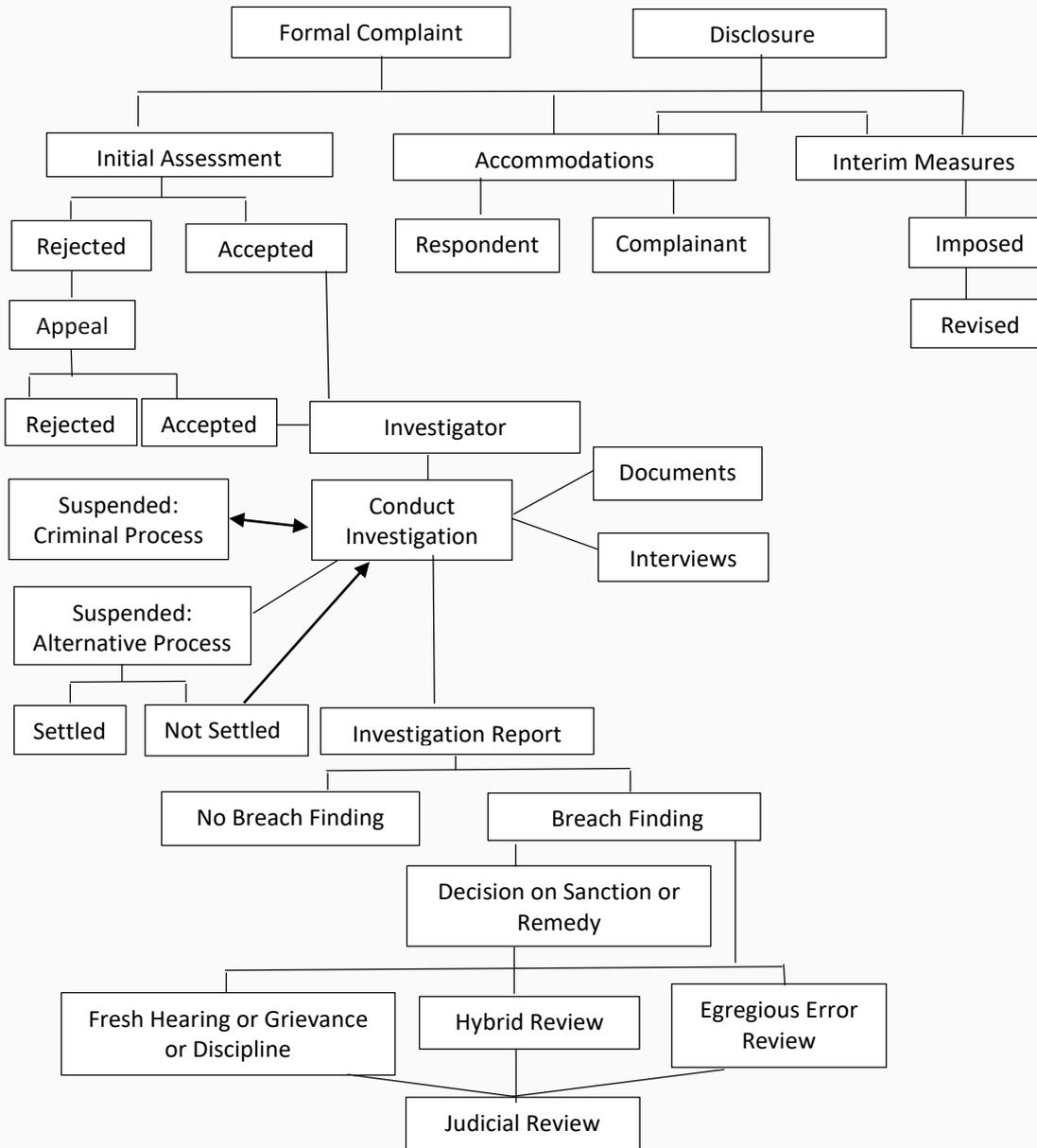


Common Concerns about Campus Sexual Violence Complaint Policies: Some Responses

By Karen Busby, Professor of Law
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Rights Research



Flowchart: Typical Sexual Violence Policy Processes



If she was really sexually assaulted, then this should be a matter for the police to investigate and the criminal courts to decide.

Sexual violence policy

2.3(3) In accordance with this section, a board must adopt and implement a policy for its institution that...

(e) **establishes complaint procedures** and response protocols for incidents of sexual violence.

[Manitoba] Advanced Education Administration Act

Case law has established that employers and service providers, including educational institutions have an obligation to:

- demonstrate that they are aware of systemic issues of discrimination and harassment and have provided training, developed a policy, and established complaint procedures;
- establish that they treat complaints seriously and promptly and sensitively **investigate those complaints**; and
- provide a reasonable resolution of the complaint, **including communicating their findings and actions** to complainants.

Eg Laskowska v Marineland of Canada Inc, 2005 HRTO 30

What happens off campus and after-hours between adults should not be a matter for post-secondary institutions to investigate.

The University may investigate incidents of Sexual Violence that occur:
a) on **any property** controlled by the University and used for University purposes; b) **at an event or during an activity** sponsored or under the auspices of the University including but not limited to: athletic events, field schools, study abroad, distance/online courses, coop placements/practica, academic or professional conferences, volunteer activities, and research/academic field work. *University of Winnipeg*

This policy applies to all members of the university community including individuals employed directly or indirectly at the university, students, volunteers, and visitors of any kind. This policy applies to risks, threats and incidents of sexual assault or sexual misconduct that occur on university premises and other work, study, social, recreational and living sites under the university's control or during the course of any university sponsored event or activity. **This policy also applies to conduct that does not occur on university premises but that has an identifiable and substantial link to the university, or that affects the university working, learning or living environment.** The policy applies to virtual environments such as any form of electronic or social media.

University of Saskatchewan

The media has caught wind of a story and is pressuring the institution to confirm or deny it and the details.

When, if ever, can a complainant tell her story? Is she subject to a gag order during an investigation and then into perpetuity?

To ensure due process while a formal complaint process pursuant to this Policy is underway, the person making a formal complaint, the person who is said to have engaged in sexual violence and others who may have knowledge of the matter, including a support person, **must maintain confidentiality in accordance with this Policy and not make public statements pending the outcome of the complaint.** Breaches of confidentiality may jeopardize the proper handling of the matter and the functioning of the formal complaint process outlined in this Policy. If a breach of confidentiality occurs, the circumstances of the breach and its impact on properly addressing the matter and the fairness of the formal complaint process may be considered in the ensuing handling of the matter and in the processing of the formal complaint.

University of Ottawa

Subject to section 17.14, survivors and those impacted by sexualized violence **are free to tell the story of their own experiences.** 17.13 University community members must not disclose information that they learn solely as a result of an investigation or reporting process because under BC privacy law, this is personal information that must be kept confidential. See the procedures for more detailed information, and contact the intake office for guidance about confidentiality and privacy.

University of Victoria

It is unfair to proceed with a sexual violence investigation while the same matter is before the criminal courts.

Where criminal and/or civil proceedings are commenced ...Sheridan **shall conduct** its own independent investigation into such allegations, and will make its own determination in accordance with its policies and procedures. *Sheridan College*

Notwithstanding the existence of any parallel criminal, civil and/or other legal proceeding relating to the sexual assault, the **Mount may conduct** its own investigation as set out in this Policy, and **will make its own determinations** of responsibility and appropriate disciplinary or remedial action in accordance with Section 1.1... Where the sexual assault has been reported to the police, the Mount may temporarily suspend the Mount's investigation pending the completion of the police interviews. *Mount Saint Vincent University*

Should a Complainant, with respect to the subject matter of a Complaint dealt with under this Policy, seek redress under ..any other forum external to the University,[senior admin], will determine in the circumstances whether proceedings under this Policy will be initiated. If proceedings under this Policy have already been initiated [senior admin], will determine in the circumstances whether or not the proceedings under this Policy will: a) **be permanently discontinued; b) be disallowed; or c) be suspended until proceedings in the external or other forum are concluded**, although Interim Measures may be put in place to safeguard the environments of the parties involved. *McMaster University*

Sexual violence policies are premised on the assertion that “complainants must be believed.” These and other elements in some policies, such as use of the word “survivor”, give the clear impression that they are biased against respondents.

Many complainants and respondents were drunk when the events giving rise to the complaint occurred. It is impossible to sort out what happened or who should be believed in these circumstances.

Silence or non-communication must never be interpreted as consent and a person in a state of diminished judgment or capacity cannot consent. A person **must be sober** in order to give consent.

University of Saskatchewan

Cannot be given by an individual **whose judgment [added 2019] is impaired** by alcohol and/or drugs, is unconscious or asleep [emphasis added].

Carleton University

Incapacity (Incapacitated): an inability to understand the sexual nature of the activity or appreciate the option of declining to participate in the activity.

Under this policy, a person who is **significantly impaired (and not merely disinhibited) by alcohol or drugs is deemed to be incapable of consenting**, as is a person who is asleep, unconscious or otherwise unable to communicate.

Queen's University

Consent **cannot be given or received while under the influence of alcohol** or drugs, while incapacitated, unconscious or otherwise incapable of consenting.

Memorial University

Many policies restrict or deny the parties the right to counsel. Given the complexity of these cases, this approach seems unfair.

Throughout the investigation, Complainants and Respondents may invite a support person or advisor (including a union or association representative or legal counsel) to meetings with the investigator, though support persons and **advisors are not to answer questions** and are not to **otherwise interfere** with the conduct of interviews.

Queen's University

Throughout an investigation, parties may be accompanied by and receive guidance and support from an advisor, who must be a person acting without remuneration in this capacity and a **Member of the University community**.

McGill University

The Student may be accompanied to the hearing by of a person of his choice; however, **this person cannot represent** him before the Student Discipline Committee (trans).

Université de Montréal

An accused person has the right to silence. What happens when a respondent refuses to give his side of the story or otherwise cooperate with a campus sexual violence investigation?

University of Manitoba

The Respondent may appeal a disciplinary decision made against him or her as follows: (a) If the Respondent is a unionized employee, in accordance with the appropriate grievance process defined by any applicable collective agreement; (b) If the Respondent is a student, in accordance with the Student Discipline Bylaw and the Student Discipline Appeal Procedure.

The [LDC] hearing must be by way of a trial de novo unless the appeal has been made only in relation to the severity of the Disciplinary Action imposed.

The hearing before the UDC hearing panel must be by way of a trial de novo unless the appeal has been made only in relation to the severity of the Disciplinary Action imposed.

Some policies unfairly prohibit respondents from ever asking complainants any questions.

- Dalhousie University’s 2018 policy provided that the administrator, upon receiving the investigator’s report “will decide whether there is sufficient evidence to support a finding that this Policy has been breached and if so whether the matter should be referred to the senate discipline committee for a hearing or if any remedial or educational outcomes should be imposed.”
- In June 2019 the policy was changed to provide that the administrator “will decide whether the respondent has breached this policy and if so whether the matter should be referred to the Senate Discipline Committee for a hearing to determine sanctions or if any remedial, educational or restorative outcomes should be imposed.” The policy now also provides that the parties may provide comments to the administrator on the investigator’s report “challenging the report’s finding based upon jurisdiction, a denial of natural justice, or unfairness in the application of the policy. **For added clarity, this is the only stage at which the finding of sexualized violence made by the Investigator can be challenged.**

It is naïve to think we can suspend, fire, or expel our way out of the problem of campus sexual violence.

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Questions or Comments?

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