

UNIVERSITY OF BRITISH COLUMBIA PROCESS REVIEW

EXECUTIVE SUMMARY

On December 3, 2015, I was retained by the University of British Columbia (“UBC”) to conduct a review (the “Review”) into UBC’s response to concerns of sexual harassment and sexual assault raised by certain UBC students regarding a fellow student. The scope of the Review was to make findings as to whether UBC followed its own policies and processes in place at that time.

The report prepared for this Review, submitted to UBC on February 10, 2016 (the “Report”), sets out the relevant facts primarily gathered by extensive interviews and documents provided by the interviewees, involving the women who complained to UBC about concerns of sexual harassment and sexual assault. I have reviewed *Policy 3 Harassment and Discrimination* (“Policy 3”) and I find that there has been no breach of Policy 3 by UBC staff and faculty. Similarly, I have reviewed the *Student Code of Conduct*, and *Rules for the President’s UBC Vancouver and UBC Okanagan Non-Academic Misconduct Committees* and I find no breach. However, because UBC’s systems did not work well together I have found that there were a lack of clarity and unnecessary delays for the students involved, some of which was caused by human error.

1. Clarity

An area of concern is the lack of clarity around both policy and processes. Many different units were involved in the handling of complaints including but not limited to Green College, the Department of History, the Equity and Inclusion Office (EIO), Student Conduct, Campus Security and the Sexual Assault Support Centre. The process of reporting sexual harassment or sexual assault was unclear for the women and even for some staff. Sporadic communication amongst these groups at times resulted in ineffective or little action being taken.

The clarity issue was further exacerbated by the lack of familiarity and knowledge of Policy 3 by several UBC staff members and complainants, and by a lack of clarity within the Policy 3 itself. Specifically, Policy 3 does not explain the difference between a formal and an informal complaint (a distinction that was made by faculty and staff handling the complaints), and there is no written document for complainants detailing this difference. This combined with explanations from a UBC staff member that were unclear resulted in much confusion about the type of complaints being filed. One complainant filed a formal complaint in December 2014, and the day after she filed she believed that she had filed an informal complaint.

The lack of clarity of process stems in part from the inclusion of the sexual assault language in Policy 3. There is some logic to having the language in that Policy, as it deals with human rights-based discrimination such as race and sex discrimination (which includes sexual assault). However, the difficulty is that Policy 3 has a title that does not suggest it deals with sexual assault and it is a long worded policy with only one reference in Section 2.2 to “*sexual assault*.” In addition, there seemed to be a lack of knowledge about Policy 3 by complainants, and some faculty and staff, at least at the beginning of the review process

The lack of clarity, and the delay that flowed in part from this lack of clarity, reveals a flawed system. Even if a better communication system or protocol was implemented amongst the different groups to improve coordination, it is not optimal for one complainant to have to tell her/his story to four or five different people, and to have to be asked on numerous occasions if she/he wants to go through a resolution process, all of which happened in this case. Having too many groups and people involved leaves room for overlap and information not being transmitted from one group to another. Rather, the better option is for a complainant to deal with one or two people, who remain consistently assigned to her/him throughout whatever process is chosen.

2. Delay

There were clearly delays in the handling of complaints. Policy 3 makes no reference to timeliness or timelines, other than to set out the requirement for a complainant to file a complaint within one calendar year of the incident. While there is precedent for placing a time requirement on UBC staff who receive complaints (e.g. UBC's *Statement on Respectful Environment for Students, Faculty and Staff* states that the Administrative Heads of Units are "expected to act promptly" once in receipt of a complaint), unfortunately Policy 3 does not include a time requirement.

I have, however, considered the actions of UBC staff and faculty in light of the following language in Policy 3 at Paragraph 2.1: "*The Equity and Inclusion Office, Access & Diversity, and the Director, Equity Complaint Management will exercise their authority and discretion under these Procedures in conformity with the principles of procedural fairness in the university context.*" "Procedural fairness" refers to the legal requirement that decision makers act fairly. There is no similar language in the *Student Code of Conduct*. However, the *Rules for the President's UBC Vancouver and UBC Okanagan Non-Academic Misconduct Committees* document states in paragraph 5 that "*The role of the Chair is to exercise impartial control over the investigation in order to achieve an equitable, orderly, timely and efficient process in accordance with the principles of natural justice.*" The terms "natural justice" and "procedural fairness" are often used interchangeably and they will be for the purposes of this Report.

There are a number of potential procedural rights that make up procedural fairness, including, for example, a hearing appropriate to the circumstances, and a proceeding without unreasonable delay. With respect to delay, generally the party affected must show some prejudice such as memories having faded, witnesses being unavailable, or evidence being lost as a result of the delay. In this case, the women whose cases went to the Non-Academic Misconduct Committee were all substantiated (either wholly or in part). There is no evidence that there were any issues in the hearing process due to faded memories or unavailable witnesses.

Some of the complaints encountered delay. While part of the delay was caused by the women who either delayed in reporting and/or in deciding what type of complaint to submit, there were also delays caused by UBC staff members. One complainant filed a formal complaint in December 2014 and her file was not sent to the person taking control of the process for two and one-half months. There is no reasonable explanation for this delay. The longest delay was ten months which occurred after one complainant reported the incidents to a staff member on May 1, 2014 and no action on this particular case was taken until approximately ten months later on March 3, 2015. The length of this delay is much shorter than that allowed in *Wachtler v. College of Physicians and Surgeons of Alberta* [2009] A.J. No 347 and there is no evidence of the complainant suffering significant psychological harm as a result of the delay.

Therefore, I find that the facts of this matter do not generally meet the tests outlined in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 to establish an abuse of process or failure of procedural fairness due to unreasonable delay. I do find, however, that the absence of clear timelines in the current policies and procedures for dealing with sexual assault, combined with human error (such as the lack of follow-up referred to above), resulted in what was perceived to be an unnecessarily long timeline.

3. Other Areas of Concern

There are a number of other issues that arose during the Review. There was a reticence by one administrator to investigate the male student's behaviour despite his entitlement to do so and a request from UBC Counsel that he undertake an investigation. As a result, no investigation was conducted at this stage. In addition, the scope clause in the *Student Code of Conduct* resulted in one complaint being outside the University's purview.

Finally, a number of complainants and others felt silenced while the complaints were being investigated. In one instance a group of students were denied the opportunity to

present their *Statement on Harassment* at a Department meeting because of concerns that it was defamatory. Even after revising the statement to address the concerns, the students were still not allowed to present it. It was circumstances like this that made people feel silenced, even though that was not the intent and legal advice had been sought before making the decision. Much of the silencing related to complainants and others being told not to talk about the assaults or the name of the male student involved. In these situations, there will always be a tension between campus safety and the protection of the rights of an individual who has been accused of something that has not been proven. The delays contributed to the concerns of feeling silenced.

In addition, I find CBC's assertion that it took over a year and one-half to deal with these complaints to be misleading. One complainant did bring forward a concern in January 2014 but it was a relatively minor concern and she was uncertain about bringing forward a complaint at that time. The complainant herself said that *"I don't think the flirting stuff [was] worthy of a disciplinary process. I thought it merited a conversation with a professor."* Once she discussed her concerns with a staff member at the EIO, mandatory harassment training was arranged on March 19, 2014 for History graduate students. The male student who was the subject of the complaints attended this training.

It is therefore an inaccurate measure to begin from the date the complainant raised her concern in January 2014 and end at the date of the hearing, as even by her own evidence she did not file a formal complaint until December 2014. Further, it was not included in the October 19, 2015 Committee hearing.

Issues of delay and clarity were caused by the system in place, by human error and by the number of people involved in these complaints. Nonetheless, I find that the people employed by UBC who had a conduct of the complaints or were involved in the complaints all acted in good faith.

The system of handling such sexual assault complaints needs to change. Well drafted policies and procedures specific to the severity of sexual assault complaints that provide clear direction to both staff and students as well as a centralized, coordinated approach across the University are the foundation of a responsive and timely system to deal with allegations of this kind of serious misconduct.

All of which is respectfully submitted.

A handwritten signature in black ink, appearing to read "P. Butler", is written over a horizontal line.

Paula Butler, Barrister and Solicitor
Butler Workplace Solutions

February 15, 2016