President's Report: Reflections on university investigation processes

Paul Andrews, MUFA President

Introduction

In the September, 2021 Newsletter, then MUFA President Nicholas Kevlahan reported that an "unprecedented number of grievances" had gone to the hearing stage over the 2020-2021 academic year: "At least half a dozen, involving dozens of members!" (Kevlahan, 2021). A common complaint in those grievances was that the procedures that had been used in investigations of allegations falling under the *Sexual Violence Policy* (SVP) and the *Discrimination and Harassment Policy* (DHP) had been "inappropriate and/or biased".

To address such concerns, MUFA and the Administration agreed that "an independent review of intake and investigation procedures" would be conducted for investigations falling under the SVP and DHP, as well as the *Research Integrity Policy* (RIP). The independent review was jointly commissioned by MUFA and the Administration, with the Administration covering the investigator's costs.[1] The independent review became known as the *Best Practice Review of Investigation Processes* (hereafter, "Review").

As MUFA President, I have prepared this report because MUFA's membership should be properly informed about the valuable information learned during the Review and the Investigator's recommendations. The membership should also be provided greater detail about the Review to understand how the Association will work with the University administration to make meaningful improvements to investigation processes. The analysis below also explores further recommendations that the Review did not, in my view, fully address.

Background: Scope of the Best Practice Review of the Investigation Processes

MUFA and the Administration agreed to a version of the Terms of Reference (TOR) for the Review, which MUFA published in its May, 2022 MUFA Newsletter. In July 2022, the terms were revised after the parties appointed and received input from the Investigator. In my view, those revised terms should have been published because the document contained substantive additions that would have been of interest to MUFA members, particularly those who had been involved in the grievances. I have appended both the original TOR (Appendix 1) and the revised TOR (Appendix 2) to this document.

The original TOR required the Investigator to submit a report of their findings to Joint Committee (hereafter, "Report"). The revised TOR, however, added a substantive provision that required the parties to keep the full Report confidential (see Clause 9 in Appendix 2). It allowed the parties to request that the Investigator provide a summary of the report that could be shared more widely.

[1] See the Terms of Reference in Appendix 1.

Because the revised TOR were unpublished, many people, including those who had been involved in grievances, were unaware that the Report was to be kept confidential. In addition, the original TOR state that "former complainants and respondents" would be invited to participate in the Review (Appendix 1) (i.e., individuals engaged in continuing complaints would be unable to participate). Because the grievance process was lengthy, many grievors had to decide whether to continue their grievances against the administration or settle them and participate in the Review. I am aware that many former grievors (who chose to participate in the Review) were surprised that the Report would be kept confidential and that they would be unable to access it. It is unclear whether some grievors would have settled their grievances in order to participate if they had known the Report was to be kept confidential.

The Investigator delivered the Report on March 18, 2024 and provided it to Joint Committee. The parties requested a summary from the Investigator (hereafter, "Summary"). MUFA published the Summary on its website on July 5, 2024.[2]

The Summary, however, is not an articulation of MUFA's priorities in improving the investigation process. It does not fully set out the information that the Review revealed or the rationales for the Investigator's recommendations. Nor does it articulate the policy changes that MUFA may seek to improve investigation processes. Unlike the Summary, the Report is over 100 pages long, and the final recommendations are based on: (1) interviews with stakeholders (university staff who handle or process complaints, faculty, members of the MUFA Executive, and McMaster administrators); (2) a review of the relevant policies at McMaster; (3) a review of the literature and jurisprudence on investigation practices; and (4) a review of investigation practices and policies from comparator universities (identified by the investigator as University of Toronto, University of Waterloo, Queen's University, and Western University). In contrast, the Summary is much shorter (a little over two pages), and the recommendations in the Summary lack the detail and context that the Report provides.

As president, one of my goals in preparing this report is to provide transparency to MUFA's membership about the information learned through the Review, and describe changes that the administration should implement to improve its investigation processes. The Report remains confidential because such a condition was found to be preferable to ensure that those who participated in the Review would be candid with the Investigator. To benefit from the value of the Review, however, I feel it necessary to provide the membership with additional context and detail that are required to understand the recommendations and their purpose.

For instance, the Report makes clear that workplace investigations are required by law to be conducted consistent with the principles of procedural fairness and impartiality, and these principles underlie many of the Investigator's specific recommendations. Many of the words, phrases, and concepts that are emphasized in the Report, however, are completely absent from

[2] https://macfaculty.mcmaster.ca/app/uploads/2024/07/Joint-Best-Practice-Report.pdf

the Summary. To illustrate, the phrase "scrupulously neutral" is used 3 times in the Report; "reasonable apprehension of bias" is used 4 times; "procedural fairness" is used 14 times; and "impartial" is used 22 times. None of these phrases are reflected in the Summary.

Moreover, the Summary does not mention the external review of the Equity and Inclusion Office (EIO) (Nouman et al., 2022)[3] that the University undertook and had published prior to engaging in the Review. The EIO external review is referenced multiple times in the Report, and it provided important context for several of the Investigator's recommendations.

In some areas, the Summary lacks the nuance needed to understand certain recommendations that are set out in the Report. Some examples are worth highlighting.

- The Summary portrays the Report as recommending the establishment of "***a complaint investigation office that is separate from intake offices and the advocacy role they play***." The actual recommendation was that the investigation office be kept "separate from ***EIO***" (emphasis added), not necessarily from intake offices. This is a substantive difference, as I will explain in more detail below.

- The Summary refers to a "complaint investigation office" whereas the Report refers to a "complaint ***and*** investigation office" (emphasis added). This is a meaningful difference. The former speaks to an office dedicated to investigating complaints, whereas the latter suggests that complaint intake and complaint investigation could both be housed in the same office.

- The Summary's reference to the "advocacy role" played by intake offices is not sufficiently clear. While McMaster's intake offices have adopted an advocacy role in the past, the Report clearly finds that intake offices should *not* play any role in support or advocacy. Rather, intake offices must be "scrupulously neutral". In comparison, the Report notes that the mandate of the EIO does include non-neutral advisory, advocacy, support, and policy development functions, which is why the Report recommends that complaint intake and investigation be kept separate from the EIO.

The lack of nuance and detail in the Summary leaves the erroneous impression that complaint intake offices are supposed to have a non-neutral advocacy role and should be kept separate from a neutral investigation office. In fact, the Report states that both intake and investigation must be scrupulously neutral and implies that both could be housed in the same office. Moreover, the Summary erroneously implies that complaint intake offices could be housed in the EIO because they are both supposed to have non-neutral functions. But again, the Report makes clear that the suggested complaint and investigation office must be "scrupulously neutral" and should be kept separate from the non-neutral EIO.

[3] https://provost.mcmaster.ca/app/uploads/2023/02/2022-EIO-Review-Report_w-Cover-Note.pdf

For these and other reasons, I believe that it is important that MUFA's members are aware of some of the inconsistencies between the Summary and the Report, as well as the significance and context of the Report's recommendations, so that the members are meaningfully informed about the positions MUFA may take with the administration on the membership's behalf.

I raised many of these issues in Joint Committee. At the June 27, 2024 Joint Committee meeting, it was agreed that if I, in my capacity as MUFA President, felt it necessary to provide additional details to the membership, I could do so in keeping with the confidentiality parameters of the report. I focus on what the Review has to say about investigations under the SVP and DHP.

I organize my review into three sections: (1) the fundamental principles that underlie most of the recommendations; (2) information revealed about McMaster processes specifically that are explored int the Report and informed the recommendations; and (3) the recommendations themselves.

I. Fundamental Principles

Most of the Investigator's "best practice" recommendations derive from the principle of *procedural fairness* from administrative law, as well as from the University's statutory obligations under the *Occupational Health and Safety Act* and the Ontario *Human Rights Code*.[4] In general, the principle of procedural fairness requires fairness, impartiality, transparency, and timeliness in administrative decision-making. The Investigator surveyed available court cases, arbitral decisions, and professional publications to understand the implications of procedural fairness for making recommendations about investigations.

As examples, the Investigator stated that in workplace harassment or discrimination investigations: (1) once the decision to investigate has been made, and at all stages thereafter, respondents have the right to know the allegations against them and the opportunity to respond to them[5]; (2) both complainants and respondents in workplace harassment or discrimination investigations have the right to have decisions about the investigation "made by impartial

[4] Administrative law is one of four major types of law in Canada (the other three being criminal law, civil law, and constitutional law), and it deals with the conduct of public officials who have been delegated decision-making authority by the legislature. Universities that receive public funds, such as McMaster, are required to comply with many provincial and federal statutes. Among these is the requirement to conduct investigations of allegations of sexual violence, harassment, or discrimination. For this reason, many university investigation practices can be scrutinized by the courts to ensure compliance with administrative law. These statutory rules can also apply to the University's contractual obligations, such as the terms of faculty members appointments.

[5] The Report also states that respondents must be notified of the initial allegations against them when interim measures are imposed on them, which would normally coincide with the decision to investigate. As reported in a news article, some McMaster respondents did not receive their allegations for months after the decision to investigate was made and interim measures imposed on them (Kay, 2023a). The versions of the SVP and DHP in place at the time lacked a provision requiring the administration to provide a summary of the allegations (as they exist at the time) in writing when the decision to investigate is made and any interim measures are imposed. Any future revisions to these policies should explicitly include such a provision.

Decision-Makers"[6]; and (3) complainants and respondents must be notified of the outcome of the investigation in a timely manner.[7]

A. Intake staff must be scrupulously neutral

Any system to address complaints of harassment or discrimination in a workplace requires that the organization establish mechanisms to receive complaints, appropriately vet complaints, and make decisions with respect to whether complaints are investigated and by whom. At McMaster, as at other universities, the administration hires intake staff members to perform the role of receiving complaints. The Investigator emphasizes that for the system to be procedurally fair, intake staff must be "scrupulously neutral".

As the Investigator indicated, this principle is clearly set out in a publicly available report that made recommendations on how universities and colleges should handle gender-based violence complaints (Eerkes et al., 2021). I refer to it as the "Eerkes Report", and I provide the full

---

[6] Under the SVP and the DHP, "Decision-Makers" refers to senior administrative personnel who are responsible for making decisions about various aspects of an investigation, often after having received recommendations from the Response Team. Under administrative law, complainants and respondents have the right to have all decisions and recommendations made by an impartial person. In other words, it is not just the occupant of a formal "Decision-Maker" position under the policies that must be neutral. The members of the Response Team must also be neutral, as well as those conducting the investigation, and any others who make decisions or recommendations that affect the course or conduct of an investigation.

[7] In my view, the Report should have more forcefully recommended that it is best practice for a University (or any organization) to follow established policy. Indeed, it is a fundamental aspect of procedural fairness and impartiality is that administrators should follow established policies and procedures, and that a failure to do so can support a claim that the administrator has behaved in an arbitrary or capricious fashion. In Canada, the principle falls under the *doctrine of legitimate expectations*. In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, the Supreme Court of Canada quoted from a leading authority (Brown & Evans, 2012) to explain the doctrine:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.

In Canada, the doctrine of legitimate expectations is a procedural protection (i.e., it only protects legitimate expectations that stakeholders have about the procedures used to reach an administrative decision). At McMaster, many policies that have been duly enacted by the Senate and/or the Board of Governors describe the procedures for how investigations are to be conducted, so they may constitute legitimate expectations. For instance, in the September, 2021 MUFA Newsletter, MUFA President Nicholas Kevlahan noted that faculty respondents who had been investigated under the SVP and DHP, and received a finding of no policy violation, nevertheless received decisions letters containing "sanctions and/or remedies". MUFA considered those decisions letters to be in violation of those policies because they state that "if the outcome is no finding of violation of the Policy the matter will be closed." MUFA unsuccessfully negotiated with the administration to revise the letters to make them consistent with policies, but the administration "invoked management rights that they claim supersede the constraints imposed by the policies." The position of the administration is exactly backwards. If the policies create a legitimate expectation about investigation decision-making processes, they supersede any discretionary authority that administrators might otherwise have in that regard.

citation here because the Investigator relies on it throughout her Report and recommended that Decision-Makers and members of the Response Team review it.

> Eerkes, D., De Costa, B. & Jafry, Z. (2021). *A comprehensive guide to campus gender-based violence complaints: Strategies for procedurally fair, trauma-informed processes to reduce harm*. Possibility Seeds' Courage to Act: Addressing and Preventing Gender-Based Violence at Post-Secondary Institutions in Canada.
> Available at: https://possibilityseeds.ca/resources/a-comprehensive-guide-to-campus-gender-based-violence-complaints-strategies-for-procedurally-fair-trauma-informed-processes-to-reduce-harm/

Neutrality is vitally important to the changes that the University needs to implement to improve its investigation processes. The three related contexts in which the Investigator used the phrase "scrupulously neutral" are as follows.

- ***Complaint intake staff should be, and be perceived to be, scrupulously neutral***. The Investigator's very first recommendation is that McMaster create an online portal for complaint intake and disclosure.

  As context for this recommendation, the Investigator explicitly stated that it is best practice is for intake staff to be, and seen to be, "scrupulously neutral". The Investigator noted that, in the past, some intake staff viewed their role as advocating for complainants and assisting in making complaints more robust.[8] This included participation in receiving complaints and making recommendations on the same complaints, including whether to proceed with an investigation.[9] The existence of an online portal that documents the details of an allegation before interaction with intake staff would help ameliorate concerns that intake staff were influencing the details of the allegation.

  As president of MUFA, I believe the administration must take all steps necessary to ensure that neutrality remains a fundamental principle to maintaining the integrity of its investigation processes. In this regard, I note that positive steps have been taken. It was publicly known, for example, that certain former members of the EIO were in a spousal

[8] A *Hamilton Spectator* article reported that past intake staff often consulted with potential complainants before they filed complaints, and the purpose of those consultations was to build "stronger" cases (Clarke, 2020). Moreover, according to other publicly available information, some stakeholders have expressed concerns that past intake staff may have passed along confidential information and that this may have affected the complaint intake process (Kay, 2023a). An online portal in which the complainant provided the details of the allegation without first discussing them with intake staff would provide an independent record of the initial complaint, reduce such influences, and help preserve the neutrality of intake staff.

[9] As Andrews and Faure (2023) put it: "For instance, a single person provided consultations on how to write strong complaints and was also the primary intake person to receive the complaints that they helped write. This person was also a member of the Response Team that interpreted these complaints to: (1) determine whether they should be investigated; (2) make recommendations about interim measures based on the allegations in the complaints; and (3) make suggestions about the public communications about the investigations."

relationship that affected the perception of bias within that office.[10] This problem no longer exists. Moreover, since the external review of the EIO, the Vice-Provost of the EIO is no longer involved in handling or overseeing how complaints are managed.[11]

Nevertheless, there are many areas where the administration needs to strengthen its respect for neutrality. The Investigator noted several persisting issues that could contribute to stakeholders having a "reasonable apprehension of bias" that intake staff have dual roles. These include:

- According to the University's current practice, intake staff have discussions with the complainant to "elicit facts" to establish the "who", "what", "where", and "when" details of the complaint. Intake staff may also assist the complainant in filling out the intake form.[12]
- The EIO has important non-neutral advocacy, support, strategy, and advisory functions. The Sexual Violence Prevention & Response Office (SVPRO), which is located in the EIO, also has non-neutral advocacy and support functions. Yet, according to the SVP, the SVPRO is the primary intake office for complaints of sexual violence.[13]
- Intake staff of the SVPRO can provide recommendations to the Response Team on interim measures.
- Intake staff from the Employee and Labour Relations Office can present the case to the Response Team and answer their questions.
- Intake staff from the EIO sometimes attend Response Team meetings, and may share with the Response Team what information they provided to the complainant, including how the *prima facie* test is applied.
- The Directors of the SVPRO and Human Rights & Accessibility (HRA) are both members of the Response Team, and they both supervise intake offices. Consequently, the Directors can have an indirect effect on complaint intake processes.
- Furthermore, the Director of the SVPRO has the responsibility of providing information to respondents.
- The lack of a parallel advocacy mechanism for respondents.

---

[10] This information is publicly available (Andrews & Faure, 2023; Kay, 2023a; Nouman et al., 2022).

[11] The external review had recommended that the head of the EIO (which had the title of Associate Vice-President at the time and now has the title of Vice-Provost) be kept at arms' length from investigations (Nouman et al., 2022).

[12] By saying that current practice involves intake staff having discussions with complainants to "elicit facts" and assist in filling out the intake form, the Investigator seems to be implying that concerns that intake staff could influence the intake process have not been adequately addressed.

[13] An obvious implication of the Report is that the SVPRO should not be an intake office at all because of its non-neutral functions and because it is housed in the EIO. According to the Human Rights and Dispute Resolution (HRDR) website, the SVPRO is no longer one of the intake offices.
https://equity.mcmaster.ca/program-resources/human-rights-and-dispute-resolution/
Given that the SVPRO is authorized by the SVP to be the primary intake office for complaints of sexual violence and harassment, this is surprising. The closure of the SVPRO as an intake office should require a formal change in the SVP that is approved by the Senate and the Board, but I don't believe that Senate or Board approval was ever sought for the closure.

- ***Relatedly, the Investigator recommended that a "bright line of separation" be kept between complaint intake staff and support staff***. Again, intake staff must be "scrupulously neutral", whereas support staff are supposed to provide assistance to complainants or respondents.[14]

- ***Also relatedly, the Investigator stated that a "complaint and investigation office" that is kept separate from the EIO would foster a "scrupulously neutral approach to managing investigations"***. As discussed above, this comment of the Investigator's implies that complaint intake and complaint investigation could be housed in the same office because they both have a mandate to be scrupulously neutral. But in any event, a complaint and investigation office should be kept separate from the EIO because of its non-neutral mandate.[15]

As MUFA President, I recommend that MUFA press the Administration to implement such changes.

B. Universities must have a substantive and accessible process for making complaints

Universities are obligated to take allegations seriously and take timely and appropriate steps to address allegations that meet legal thresholds. Part of this obligation requires them to have a substantive and accessible process for making complaints.

C. The decision to investigate is made on a prima facie basis

The Investigator stated that the "prima facie" test is the legal standard for deciding whether to initiate an investigation of allegations in a complaint, and that this standard arises due to statutory obligations (e.g., the *Ontario Human Rights Code* and the *Occupational Health and Safety Act*). Under the *prima facie* standard, all the factual matters alleged in the complaint are assumed to be true.[16] At this early stage, the point is not to determine whether the allegations are actually true. Rather, the point is to determine whether the events alleged in the complaint, if proven over the course of an investigation, would constitute a violation of a specific policy. If the events alleged in the complaint would constitute a policy violation, then an investigation must be initiated.

---

[14] The current practice of housing intake offices within the EIO, the SVPRO, and the Office of Human Rights & Dispute Resolution, with their non-neutral mandates, appears to go against the spirit of this recommendation.

[15] Currently, complaint intake and investigation for allegations falling under the SVP and DHP are the responsibility of the Human Rights and Dispute Resolution program, which is housed in the EIO. https://equity.mcmaster.ca/program-resources/human-rights-and-dispute-resolution/ This is clearly inconsistent with the Report's recommendation to establish a complaint and investigation office that is kept separate from the EIO.

[16] Importantly, it is insufficient for a complainant to simply assert that the respondent violated a policy. The complainant must allege specific actions with sufficient context so that, if they are proven true over the course of an investigation, they would constitute the violation of a policy. That is why the *prima facie* standard only assumes that the "factual matters" alleged in the complaint are true.

There is concern that the *prima facie* test forces a lengthy, burdensome, costly investigation of all complaints – even those involving highly implausible allegations. The Investigator stated that the legal jurisprudence around the *prima facie* test does not require investigations to be initiated for factual allegations that are "patently ridiculous or incapable of proof".[17]

Nevertheless, in a footnote, the Investigator noted that there were situations where the *prima facie* standard could lead to problems. Specifically, if a person who had been accused of wrongdoing had clear evidence that they were not in the place where the alleged offense was supposed to have occurred, and so could not have committed the offense, it would be

---

[17] In my opinion, the Investigator's comments that allegations do not need to be investigated if they are "patently ridiculous or incapable of proof" did not really address the concern that implausible allegations would require lengthy, burdensome investigations. To see why, I need to explain what is meant by the "patently ridiculous or incapable of proof" phrase. The Investigator quoted the phrase from *Ontario Public Service Employees Union (Solomon Smith et al) v. Ontario (Children, Community and Social Services)*, 2019 CanLII 126475 (ON GSB). The arbitrator in that case gave some explanation of the phrase by saying that allegations must be "capable of belief".

The phrase "patently ridiculous or incapable of proof" appears to have originated in *Nash v. Ontario* (1995), 1995 CanLII 2934 (ON CA), 27 O.R (3d) 1 (C.A.), which is a decision of the Court of Appeal of Ontario. The facts of *Nash v. Ontario* are not particularly helpful in elucidating the meaning of these phrases, but the appellate court did rely heavily on a decision by the Supreme Court of Canada, *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959.

In *Hunt v. Carey Canada*, the Supreme Court of Canada held that the complainant must have some chance of success of establishing the facts that they are alleging (p. 980):

> As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

These cases seem to indicate that complaint would have to pass a pretty high bar before it could be dismissed for being patently ridiculous or incapable of proof. An example may help.

In a news article (Kay, 2023b), a journalist proposed the hypothetical of a complainant alleging that the entire senior administrative team of a university had engaged in actions amounting to a sex ring. The author of the article wanted to know if the *prima facie* standard would allow such a complaint to proceed even though a serious investigation would essentially cripple the working administration of the university.

Is the sex ring claim "patently ridiculous or incapable of proof"? Applying the standards above, it would seem that the complaint could not be dismissed for being "incapable of proof" if the actions of the senior administrative team were alleged with sufficient detail. An investigation could determine whether the actions occurred as they were alleged to have occurred.

Are the sex ring allegations "patently ridiculous"? As unusual and unlikely as they seem, they are still "capable of belief" (i.e., it is possible that an entire senior administrative team of a university could be involved in a sex ring), and it would not be possible to determine the truth of that claim without an investigation into the factual allegations. And the likelihood that the senior administrators could present a strong defense would not bar the complaint from being investigated either.

In summary, the Investigator's analysis provides little assurance to concerns that the *prima facie* standard would require full investigations of a burdensome, expensive, and lengthy nature, even when the allegations are highly implausible.

problematic to conduct a full, lengthy, burdensome investigation that lasted many months, even if the allegations met the *prima facie* standard.[18] According to the Investigator, such situations call for alternatives to a full investigation.[19]

The Investigator emphasized that the *prima facie* standard applies only at the initial assessment stage of a complaint to determine whether the allegations warrant an investigation. It does not apply to the allegations during the actual investigation process, it does not apply during assessments of the credibility of the complainant or the respondent during the investigation, it does not apply during assessments by the Response Team, and it does not apply when the Decision-Maker makes a final decision.

In short, the *prima facie* test does assume the validity of allegations, but only for a limited purpose and at a specific point in the process (to determine whether an investigation is warranted). Afterwards, procedural fairness requires that the investigation be conducted without making any assumptions about the outcome or the truth of the allegations.

The Investigator also stated the number of complaints that pass the *prima facie* standard and are investigated should not be a measure of intake success. The role of intake staff is to ensure that complainants have a proper venue to raise their concerns, not to filter complaints based on the *prima facie* standard or restrict the number of investigations.[20]

D. Trauma-informed approaches must be consistent with procedural fairness and impartiality

A trauma-informed approach has become the norm in addressing sexual violence complaints. This norm requires investigative processes to be both trauma-informed and consistent with procedural fairness. A trauma-informed approach should therefore be based in evidence, not perpetuate stereotypes about credibility, and should consider the well-being of every participant throughout the process.

The Report recognised that there was not a general opposition to a trauma-informed investigation processes, but there were concerns about how some trauma-informed principles had been applied, especially in the past. In particular, there was concern that previous staff at the Equity and Inclusion Office (EIO) had misinterpreted "trauma-informed" to mean automatically believing the complainant in all cases.[21] The Report corrects this misinterpretation. It stresses

[18] A similar fact pattern was reported in a news article (Kay, 2023a).
[19] The Investigator's comment raises the possibility that the law might allow some latitude in the *depth* of the investigation that is required once the *prima facie* standard is met. Per footnote 17, a highly implausible set of allegations could still require investigation if it meets the standard, but a full, lengthy, burdensome, and expensive investigation might not be required to reach the legally required level of certainty about the allegations.
[20] Here, the Investigator appears to be further commenting on the need for intake staff to be scrupulously neutral. In fact, the Investigator had, by this point, already stated that intake staff ought not to be involved in applying the *prima facie* standard at all.
[21] Some of this concern arose because members of the McMaster administration who served as heads of intake offices and members of the Response Team during 2020-2021 presented a workshop on "Workplace Investigations", a presentation ("*Trauma-informed investigations of sexual violence*") for the Law Society of Ontario on September

that while the *prima facie* test assumes the validity of allegations at the initial stage to determine whether an investigation is required, it is inappropriate to make assumptions about the validity of the allegations or the credibility of anyone involved after this stage.

The Report cites a British Columbia Human Rights Tribunal decision, *Hale v UBC*, to shed light on what is required by a trauma-informed approach to sexual violence allegations. The Tribunal emphasized that the process should not cause further harm to the complainant and should include:

- Clear and accessible reporting options for complainants.
- A clear investigation process with appropriate support to avoid confusion.
- Access to appropriate support services for complainants.

While the existing case law pertains mostly to complainants, the Report notes that sexual violence investigations are painful and upsetting experiences for respondents as well, and it argues that trauma-informed principles should apply to all participants. The Report advocates for providing respondents with similar supports and guidance as those outlined in the *Hale* case.

The Report suggests that training for personnel involved in the complaint-handling process is essential, covering areas such as:

- How to receive disclosures in ways that minimize re-traumatization.
- Debunking discriminatory myths and challenging internal biases.
- Understanding the potential effects of trauma on memory, recall, affect, and behavior.
- Basic mental health, first aid, and suicide prevention.

Specific training recommendations: The Report recommends training in techniques like Forensic Experiential Trauma Interviewing (FETI) for staff conducting interviews or making decisions, recognizing the potential impact of trauma on individuals' capacity to answer questions, recall information, and communicate details effectively.

I recommend that MUFA emphasise to the administration the importance of providing trauma-informed processes to everyone involved in an investigation, while also putting in place safeguards to prevent the misinterpretation or misapplication of trauma-informed approach from compromising the ability of the processes to reach a reliable and just conclusion.

E. Interim measures

Universities are obligated to take “reasonable steps” to protect the complainant and the university community until the investigation has been concluded, and these are known as

23, 2019. During the presentation they stated that it was a “myth” that complainants “lie/make up stories about being sexually assaulted”, implying that any challenge to a complainant’s credibility should be avoided.

“interim measures”. What is “reasonable” depends on the circumstances and requires a balancing of the risks to the complainant and the university community with the rights of the respondent.

Balancing Competing Interests: The jurisprudence highlights the need to balance the university's responsibility to maintain a safe environment with the respondent's rights to fairness and due process. This involves carefully weighing the potential risks to the complainant and the university community against the potential harm interim measures might cause to the respondent’s career, reputation, and well-being.

Reasonableness and Ongoing Review: Case law underscores that interim measures must be reasonable and subject to ongoing review. The university has a continuing duty to assess whether the measures remain necessary and appropriate in light of new information or changing circumstances.

The "Reasonable Steps" Standard: The sources mention that case law often refers to the requirement for the university to take "reasonable steps" to ensure safety, though what constitutes "reasonable" will vary depending on the specific allegations and circumstances of each case.

Reputational Harm as a Consideration: The sources acknowledge that jurisprudence recognizes the legitimacy of the university's concerns about harm to its own reputation. However, they also stress that while reputational interests are relevant, the university cannot prioritize them above other considerations. Moreover, the university must also consider the potential reputational damage interim measures might inflict on respondents.

The Investigator quoted from an arbitrator’s decision in *Ryerson University v Ryerson Faculty Association,* 2018 CanLII 111683 (ON LA). I reproduce the quote from the decision here.

> It is imperative that the Employer’s legitimate safety and reputational concerns not lead to arbitrarily painting all allegations of sexual misconduct/violence with the same brush. There is a fairly wide spectrum of inappropriate behaviour that could be characterized as constituting sexual misconduct/violence; and in some instances, while the alleged behaviour may be indisputably inappropriate, it does not necessarily rise to the level where there are sufficient safety and reputational concerns that warrant the imposition of strict restrictions on the activities of a faculty member, while the investigation of the allegations is ongoing.
>
> Pivoting to the case at hand, sexual assault is at the higher end of the spectrum of inappropriate sexual misconduct/violence; and an unambiguous and definitive allegation of a professor sexually assaulting a student would, in the norm, provide ample justification for the Employer to impose strict restrictions on the accused professor’s interaction with students while the investigation is underway.[22]

[22] In the Ryerson case, the grievor had allegedly kissed a student 10 years previously. There had been no allegations of misconduct since, and the faculty member had been teaching on campus without incident. The faculty association

Campus Bans and the PNG Policy: The Investigator noted that a campus ban, also known as a *persona non grata* (PNG) declaration, is one of the most serious interim measures that can be imposed on a respondent. In the context of balancing competing interests, including the university's interests in protecting its reputation, the Investigator recommended that the university review whether it can protect safety and reputation with interim measures that are less harmful to the respondent. Also, PNG declarations should be reviewed regularly or at the request of the respondent. In fairness to the respondent, decision-makers should not defer a request to review a PNG declaration until the investigation has been completed.

II. McMaster-specific issues that influenced the recommendations

During the Review, there was general recognition that the investigation process at McMaster University needs to be more transparent, fair, and supportive. The University needs to do more to ensure that the process was not harmful to the participants, and to ensure that it was conducted in a way that was fair and impartial. As MUFA president, I believe the Administration needs to meaningfully consider how the following input received during the Review can be addressed:

- The process for handling complaints at McMaster University has been unclear and has caused harm to participants. There have been negative experiences with previous EIO staff members. The policies are too complicated and difficult to understand, making it impossible to navigate the process without legal counsel and/or MUFA's assistance. This raises concerns about how students and staff can manage the process without access to similar resources. University policies need to be reviewed and revised to correct these issues.

- The University is providing inadequate support for respondents. Respondents feel isolated by confidentiality requirements and the lack of clear communication about the process. Respondents feel that the interim measures imposed can be too harsh, especially because they are imposed before there are any findings against them. The measures can severely harm a respondent's career and reputation due to a perception of wrongdoing. Interim measures also lead to "collateral damage", including that placing a faculty member on an administrative will negatively affect their students.

---

argued that a campus ban was totally disproportionate to any risk of harm. However, the grievance was dismissed and the campus ban was upheld as reasonable. The arbitrator held:

> The obligation upon the Employer is not only to take any and all reasonable steps to protect its students and staff from incidents of sexual violence and misconduct; but that, the obligation extends to ensuring the members of the Ryerson community "feel safe" in the sense that there is faith and trust that the Employer would have taken, and will continue to take, the appropriate measures to provide for their safety, including limiting the activity of an individual alleged to have committed sexual misconduct in relation to a student.

- The confidentiality obligations during the investigation process are not clear. Participants do not know who they could talk to during the investigation, leading to feelings of isolation.

- There is a lack of transparency. The investigation process can feel like a "black box." More information needs to be provided to all parties involved in the investigation process. For example, the Administration needs to provide more clarity on who was making decisions, what the different stages of the investigation were, and how long the process was expected to take. Participants have not been kept informed about the progress of the investigation, and were often left in the dark about what was happening.

- There also needs to be more transparency around data gathering and reporting. Restorative measures should be offered by the university at the close of the investigation process, including facilitating discussions between participants, offering research funding or reimbursement of legal expenses.

- With respect to faculty in particular, the University has not appropriately considered academic freedom and freedom of speech in developing and applying the Policies.

III. The Recommendations of the Report

As MUFA president, I believe it is my responsibility to inform the membership of the information it needs to properly understand of the recommendations in the Report and properly direct the Association on how to work with the administration to improve the University's investigation processes. While the Summary sets out the recommendations, I provide the following to help MUFA members understand the rationale for the recommendations and the context in which they were made.

A. Recommendations related to an Online Portal

The Report recommends establishing a centralized online portal for intake and disclosure, including support resources for complainants. The portal should be easily accessible and user-friendly to improve transparency and communication. The portal should also provide clear information about the investigation process and the roles of the individuals involved. This would help address stakeholder concerns about the ambiguity of the process and the lack of support available to respondents. Complainants should be able to request assistance in filling out the form, but they should not be required to have contact with intake staff before filing a complaint, which could deter or serve as a barrier to the filing of complaints.

B. Recommendations related to a Separate Complaint and Investigation Office

The Report recommends that a separate complaint-handling office be created, independent of the EIO, to enhance impartiality and procedural fairness. The proposed office would focus on

managing investigations and ensuring a neutral and unbiased approach throughout the process. This recommendation stems from concerns about the perception of bias and lack of neutrality in the previous system. The Report noted ongoing issues with dual roles of intake staff (see above), and recommended that more be done to separate intake staff from support or advocacy functions. A separate complaint and investigation office would help foster "a scrupulously neutral approach to managing investigations."

According to the Investigator:

> "In this model, the role of Intake staff is to receive complaints and disclosure through the online portal, obtain additional information (as necessary), liaise with the Response Team and Decision-Makers, provide procedural information to complainants and respondents, and communicate with the parties about decisions and next steps."[23]

C. Recommendations related to Additional Online Resources

The Report emphasizes the need for additional online resources, particularly for respondents. The resources should explain the investigative process in clear and simple language. As best practice, the online resources should include: (1) the specific steps of the investigation process, and what the participants can expect at each step; (2) who will be making recommendations or decisions at each step, including the members of the Response Team and their respective roles, and anyone to whom authority has been delegated; (3) the confidentiality obligations of all the participants of the investigation[24]; (4) an explanation of interim measures, why they are imposed, how participants can provide relevant information, and how participants can request a review of the interim measures; and (5) the supports that are available to complainants and participants, including how to contact their union or association. Such information would help address concerns about the lack of communication and support experienced by respondents. FAQ's and flow charts would be helpful to participants, particularly respondents.

D. Recommendations related to Supports for Complainants and Respondents

The Report recommends establishing clear and consistent support systems for both complainants and respondents. This includes ensuring that the support person assigned to the complainant is different from the one supporting the respondent. All parties should receive a written list of resources and contacts, including union or association representatives, employee assistance programs, and other relevant support services.

---

[23] As will be seen later, the Investigator recommends that intake staff should not attend Response Team meetings. At the same time, intake staff are supposed to "liaise" with the Response Team and Decision-Makers. I assume that the Investigator is making the following point: intake staff need to liaise with the Response Team and Decision-Makers to provide or receive relevant information, but they should be kept separate from meetings where any recommendations or decisions are made because of their need to be impartial.

[24] Based on the full Report, "participants" should probably be interpreted broadly to include complainants, respondents, members of the Response Team, investigators, intake staff, and Decision-Makers.

The supports for both complainants and respondents should minimally include: (1) mechanisms for reporting concerns or filing complaints that are clear and accessible; (2) clear, understandable information about the steps and process of the investigation; and (3) regular reports about the progression of the investigation. As part of this recommendation, the Investigator noted that it is important that trauma-informed approaches not "perpetuate myths and stereotypes" about either party, including credibility, and must be consistent with procedural fairness and impartiality. Complainants and respondents should have access to all supports when the investigation is initiated, as that is often the most stressful time.

E. Recommendations related to Confidentiality Obligations

The Report calls for greater clarity and consistency in communicating confidentiality obligations. This includes providing written guidance to participants outlining the scope and limits of confidentiality, the potential consequences of breaches, and whom to contact with questions or concerns. The Report suggests that a plain-language primer on confidentiality, like the one developed by the University of Winnipeg, could be helpful.

The Report recommended that the participants receive in writing the following information about the obligation of confidentiality:

- They are free to seek support, treatment, legal assistance, or the assistance of their union or association.
- The obligation of confidentiality requires not talking to the complainant/respondent or to potential witnesses.
- They are free to talk about their own experience, but they cannot talk about or share information that they've learned from the investigation. For instance, they cannot talk about or share the fact that an investigation is taking place and that they are participating in it, documents they have received through the course of the investigation, or any questions they have been asked during the investigation.[25]

The Report notes that confidentiality obligations are reciprocal (i.e., the administration also has obligations). There is a need for guidelines to address situations where information about allegations becomes public. These guidelines should specify the circumstances under which the University may comment on a case, particularly when respondents are bound by confidentiality obligations that restrict their ability to respond publicly.[26]

---

[25] Of course, these things can be shared with one's lawyer, although the Investigator did not explicitly state that fact.
[26] There is a great need to have a formal conversation about the confidentiality obligations of the administration. For instance, a *Hamilton Spectator* article reported that an internal email debate took place in August, 2020 between McMaster administrators about whether to withhold certain information about a respondent who was being investigated in a Daily News announcement (Clarke, 2021). On one side of the debate was the Director of HRDR who was concerned that releasing the information could identify the student and compromise procedural fairness. This concern was reasonable, because the release of similar information (date, department, role in department, suspended, banned from campus, courses reassigned) had led to the identification of a faculty respondent earlier in 2020 (Samara, 2020). On the other side was the Assistant Vice-President of Communications and Public Affairs

F. Recommendations related to Alternative Dispute Resolution (ADR)

The Report recommends providing more online information about the ADR process. To help parties make informed decisions about ADR, more information should be provided about when ADR is available and what it entails. ADR is typically available after a complaint has met the prima facie threshold. ADR is also possible once the investigation has begun, up until a final decision is rendered. The online information should explicitly state that participating in early dispute resolution does not require an admission of wrongdoing. The Report recommends the Human Rights Tribunal of Ontario's graphic art guide to mediation as a particularly helpful example of how to present ADR information to participants.[27]

More resources should be devoted to developing effective facilitators, who must be impartial and appear impartial. Due to the advocacy and complainant-support roles of EIO and SVPRO, those offices are not appropriate facilitators. Instead, some members of the complaint and investigation

---

(AVP-CPA). She referenced the previous release of similar information about faculty respondents, but she argued that the failure to release the information about the student would harm the administration's "credibility with both our internal and external audiences." Since the information was released, the AVP-CPA appears to have won the debate (Clarke, 2021).

The decision to put procedural fairness at risk by releasing identifying information to protect the reputation of the University Administration is disturbing. Although the legal jurisprudence indicates that university administrators can factor reputational concerns into their decision-making, they cannot do so at the expense of procedural fairness. Complying with procedural fairness is a fundamental obligation under administrative law and supersedes any such interest.

Moreover, while considering reputational factors is part of administrative discretionary authority, there is an argument that it is possible to create a "legitimate expectation" (*supra* note 7) that such discretionary authority will not be used. In this regard, section III.39 of the SVP makes clear representations about the circumstances under which University administrators can release confidential information:

> "The University will share identifying information only in circumstances where it is necessary in order to administer this Policy, to address safety concerns, or to satisfy a legal reporting requirement. In such circumstances, the minimum amount of information needed to allow such concerns to be addressed, or to meet such requirements, will be disclosed. Such circumstances include those where:
>
> a) an individual is at risk of harm to self;
> b) an individual is at risk of harming others;
> c) there are reasonable grounds to be concerned about risk of future violence or the safety of the University and/or broader community;
> d) disclosure is required by law, for instance, suspected abuse of someone under the age of 16, reports of intimate partner/domestic violence, or to comply with legislation, such as the *Occupational Health and Safety Act* the *Workplace Safety and Insurance Act*, or with human rights legislation; and/or
> e) to comply with the reporting requirements of regulatory bodies and/or professional licensing bodies."

Notably absent from this list is the idea that the University Administration will consider its own reputation in deciding whether to release identifying information. Arguably, the SVP's representation that the University Administration "will share identifying information only" in the specified circumstances creates a legitimate expectation that it will not consider unspecified factors (e.g., its own reputation).

[27] Accessed at: https://tribunalsontario.ca/documents/hrto/Guides/Guide%20to%20Mediation.pdf

staff could be designated to facilitate ADR. However, facilitators must not be involved in processing the complaint that is the subject of the ADR process. Experienced external mediators may be particularly helpful in challenging cases or while internal ADR capacity is being developed.

G. Recommendations related to The Response Team and Decision-Makers

As noted above, both complainants and respondents have the right to have decisions about the investigation made by impartial decision-makers. Relatedly, there should be a "bright line of separation" between intake staff and support staff, and neither intake staff or support staff should attend meetings of the Response Team.[28]

The Report suggests maintaining the Response Team model but with some adjustments. Convening of the Response Team should not be discretionary, and (to improve efficiency, consistency, and transparency) it should be composed of a small team of directors or senior leaders who are familiar with the SVP and DHP. The composition of the Response Team should be publicly available. To avoid delays, the Response Team should establish a protocol for managing disagreements and presenting both majority and minority recommendations to the Decision-Maker with supporting rationales. The Response Team's decision-making process and rationale should be documented in writing, ensuring that all parties are informed.

The Report states that there should be greater clarity on when and how decision-making powers are delegated. It also questions whether there is a need for a two-step decision-making process involving: (1) the Response Team who makes recommendations; and (2) a Decision-Maker who makes the final decision. The Report asks whether some decision-making authority can be given to the Response Team.

H. Recommendations related to Interim Measures

The Report strongly recommends increased transparency and communication regarding interim measures. This includes providing respondents with clear and timely written explanations for the measures imposed, outlining the process for review, and offering opportunities for input. The Report made many recommendations for handling interim measures, including many adopted from the Eerkes Report.

- Institutions should make it clear that interim measures are not disciplinary in nature and not evidence of misconduct.
- Institutions should have supports available for respondents when interim measures are imposed, and their unions or associations should be involved at the beginning of the process.

[28] See also *supra* note 23.

- The mechanisms for imposing interim measures should be consistent with procedural fairness, should consider the impact on the respondent, be "as minimally restrictive as possible", and should be adapted to meet changing circumstances. Respondent should have a fair chance to respond before any final determination is made.
- The imposition of a campus ban, a severe form of interim measure, must be justified and periodically reviewed. Before implementing a campus ban under the Persona Non Grata (PNG) Policy, it is crucial to consider whether other less severe measures can address safety concerns. The report recommends that the PNG Policy include provisions for considering the respondent's interests and balancing those with the university's safety and reputational interests. The report also recommends that the PNG declaration be reviewed at regular intervals or upon the respondent's request, with the respondent's input, to ensure ongoing reasonableness.
- Interim measures should be kept "as confidential as possible" without impairing the ability to seek support.
- Institutions should provide complainants and respondents with a mechanism to request a review of interim measures and to submit information to support their position. Additionally, they should be provided with contact information so they can have their questions answered, so they can provide relevant information, or so they can request a review.
- Institutions should regularly review interim measures to assess their continued necessity and to determine if they could be replaced by less restrictive measures. The obligation to review interim measures is ongoing as new information becomes available. The report recommends that the Response Team should determine at regular intervals (e.g., every 30 days) or at the request of either party, whether new information has emerged that could impact the assessment of interim measures. The respondent and complainant should be able to provide information to the reviewer, including information about any ongoing risks and their own interests. The Response Team should also consider any new information from the investigator. Many respondents were unaware of the ongoing review requirement stipulated in the policies. Institutions should share information about regular reviews of interim measures with respondents, starting with the initial letter notifying them of the measures. Respondents should know when a review of interim measures is being conducted, who is conducting it, and what information is being considered. Moreover, respondents and their representatives should have the opportunity to request a review of interim measures and provide information to the reviewer. While the Provost and other Decision-Makers have the discretion under the policies to defer a request to have interim measures reviewed until the investigation is completed, the Report argues that they should not exercise that discretion because it effectively leaves the respondent without any recourse to challenge the interim measures.

When institutions impose interim measures, all respondents should be notified in writing, and that notification should include the following information:

- An initial summary of the allegations against the respondent, noting that more details may be provided later in the investigation process. A written rationale for the interim measures, and Decision-Makers should demonstrate that they have "struck a reasonable balance" between the interests of the university community, the complainant, and the respondent's interests.
- Respondents should be notified that interim measures are not punitive and do not imply guilt.
- This will provide transparency and assure respondents that their interests have been taken into account. When PNG's are issued, respondents should be informed in writing about it, including its duration, potential extensions, and their right to a review.
- A list of support resources, including contact information for the respondent support person, their association or union, the Employee & Family Assistance Program, and any other resources available.

The urgency of an interim measure should not override the need to balance the reasonable safety concerns for the complainant or the university community with the interests of the respondent. This balancing should be determined based on the information available to the Response Team and the Decision-Maker at the time the complaint is filed.

I. Recommendations related to Transparency and Communication

The Report stresses the importance of greater transparency and communication throughout the investigation process. It suggests making more information available on the website and through clear and consistent communication with the parties involved. This includes explaining each stage of the process, the roles and responsibilities of the individuals involved, potential sources of delay, and available support resources.

Respondents should be informed immediately when a complaint passes the *prima facie* test. When it does not pass the test, the respondent should be informed of the existence of the complaint and that it will not be referred to investigation, and provided with support information.

Information about storage of information, who will have access to it, and with whom it will be shared.

J. Recommendations related to Delay

To address the issue of delay, the report recommends:

- Developing a more effective ADR process to resolve complaints at an early stage and reduce the number of matters requiring full investigation.
- Implementing an online complaint portal to streamline the filing process.

- Establishing clear service standards for key stages of the investigation process, including the timeframe for the prima facie analysis, the time allocated for respondents to prepare their response, and the time for the completion of the investigation.
- Also relevant here is the Investigator's statement, expressed earlier, that once the decision to investigate has been made, and at all stages thereafter, respondents have the right to know the allegations against them and the opportunity to respond to them.
- Creating a streamlined Response Team with clear decision-making protocols to avoid delays.
- Reducing the layers of decision-making by empowering the Response Team to make certain decisions that are currently reserved for higher-level administrators.
- Providing general information on the website about potential sources of delay and confidentiality obligations to help manage expectations and reduce frustration caused by unexplained delays.

K. Recommendations related to Restoration

The Report encourages Decision-Makers and the Response Team to systematically explore restorative measures at the close of the investigation process. These measures should be tailored to each case's specific circumstances and could include facilitating discussions between participants, offering research funding, providing mental health support, and reimbursing legal expenses.

The Report states that training and coaching of respondents can be appropriate even when no policy violation has been found.[29]

L. Recommendations related to Academic Freedom

Some faculty stakeholders reported being investigated for comments regarding their teaching or research outside of the classroom, and they were concerned about their actual freedom to discuss ideas without reprisal or the risk of being investigated. The Report states that the SVP and DHP do not mention academic freedom,[30] and it recommends a collegial discussion to clarify the intersection of academic freedom with the DHP and the SVP. This discussion should aim to establish a clear understanding of how academic freedom is considered within the context of these policies.

M. Recommendations related to Resources

[29] However, if the policies themselves state that the matter will be closed if no violation has been found, that can create a "legitimate expectation" (*supra* note 7) that no further action will be taken. In such circumstances, the imposition of training or coaching could violate the policies and the doctrine of legitimate expectations.
[30] This is an oversight. Those policies provide that they must be read in conjunction with the Statement on Academic Freedom.

The Report highlights the need for adequate resources to manage investigation processes effectively. The University should ensure sufficient resources to implement the recommendations and review resourcing levels regularly to adjust to the fluctuating number and complexity of complaints. The Report also recommends addressing staff turnover issues through strategies like engagement surveys to improve retention and ensure consistent expertise within the complaint-handling system.

N. Recommendations related to Reporting

The Report strongly advocates for expanding the scope of information included in annual reports. It recommends using a standardized case management system, such as Case IQ, across all relevant offices to facilitate consistent reporting while maintaining confidentiality. The Report suggests that annual reports should provide:

- A breakdown of cases by the type of resolution, including the number of cases that met the *prima facie* test but subsequently withdrawn, resolved through early resolution, or not referred for investigation.
- Absolute numbers regarding investigation time, such as the number of cases resolved within six months, one year, two years, etc., to provide a more nuanced picture of the time required to complete investigations.
- Information about complaints withdrawn after meeting the prima facie standard, including a high-level breakdown of the reasons for withdrawal.
- All of these things should be reported separately for complaints received under the DHP and SVP to provide a clear picture of the trends and challenges related to each policy.

Conclusion

Investigations conducted pursuant to McMasters University's *Discrimination and Harassment Policy* and the *Sexual Violence Policy* are increasingly having significant effects on MUFA members. The University needs effective, reliable and robust investigation processes that ensure that instances of discrimination, harassment and sexual violence are properly addressed in a manner that promotes a safe and health working environment. Those who bring complaints need processes that are accessible, clear, and efficient. Members who are subject to complaints must be provided the opportunity to fairly respond to allegations and have any decisions that may affect them decided by decision-makers who are free of bias. The processes must prevent or mitigate the harm to a faculty member's career and reputation that simply being the subject of a complaint can cause, which can be especially unjust when such complaints are not substantiated. To achieve those goals, investigation processes need to respect principles of procedural fairness to ensure that they lead to a reliable and just conclusion, while ensuring that fairness and respect for all involved.

MUFA's involvement int the *Best Practice Review of Investigation Processes* has provided it and the administration valuable information about the fundamental principles that promote fairness in

workplace investigations, the specific concerns about McMaster's policies and processes, and the recommendations for improving investigation processes. As described above, I am committed to working with the administration to see that the lessons learned through the Review are translated into meaningful improvements to those investigation processes.

References

Andrews, P. W., & Faure, P. (2023). Equity and inclusion requires transparency and accountability. *MUFA Newsletter*, *49*(4), Article 4. https://macfaculty.mcmaster.ca/app/uploads/2023/03/202303Newsletter.pdf

Applebaum, A. (2021, October). The new Puritans. *The Atlantic Monthly*, *328*(3), Article 3.

Brown, D. J. M., & Evans, J. M. (with Deacon, C.). (2012). *Judicial review of administrative action in Canada*. Canvasback.

Clarke, K. (2020, December 21). More sexual violence investigations, more violations of policies, new McMaster report reveals. *The Hamilton Spectator*. https://www.thespec.com/news/hamilton-region/whisper-network-more-sexual-violence-investigations-more-violations-of-policies-new-mcmaster-report-reveals/article_41daf098-7b54-5be5-892d-4324d49d085b.html

Clarke, K. (2021, May 18). Emails reveal extent McMaster staffers controlled narrative of sexual assault investigation. *The Hamilton Spectator*. https://www.thespec.com/news/hamilton-region/emails-reveal-extent-mcmaster-staffers-controlled-narrative-of-sexual-assault-investigation/article_d0e8e2c1-f567-5c3c-9f25-e0e93ca190d1.html

Eerkes, D., De Costa, B., & Jafry, Z. (2021). *A comprehensive guide to campus gender-based violence complaints: Strategies for procedurally fair, trauma-informed processes to reduce harm. Possibility Seeds' Courage to Act: Addressing and Preventing Gender-Based Violence at Post-Secondary Institutions in Canada*. Possibility Seeds. https://possibilityseeds.ca/resources/a-comprehensive-guide-to-campus-gender-based-violence-complaints-strategies-for-procedurally-fair-trauma-informed-processes-to-reduce-harm/

Kay, J. (2023a, June 14). *McMaster's imaginary sex ring*. Quillette. https://quillette.com/2023/06/14/mcmasters-imaginary-sex-ring/

Kay, J. (2023b, June 18). *Lessons from an academic social panic*. Quillette. https://quillette.com/blog/2023/06/18/lessons-from-mcmaster-universitys-2020-sex-ring-social-panic/

Kevlahan, N. (2021). President's report: Interesting times. *MUFA Newsletter*, *48*(1), Article 1.

Morrison, M., & Zachariah, P. (2022). Student academic misconduct through a Canadian legal lens. In S. E. Eaton & J. Christensen Hughes (Eds.), *Academic integrity in Canada: An enduring and essential challenge* (pp. 535–552). Springer International Publishing. https://doi.org/10.1007/978-3-030-83255-1_28

Nouman, A., Ngobia, J., Simms, N., & Watts, V. (2022). *External Review of the Equity and Inclusion Office, McMaster University: Review Team Report*. Office of the Provost, McMaster

University. https://provost.mcmaster.ca/external-review-highlights-importance-of-equity-and-inclusion-office-suggests-opportunities-for-strengthening-its-mandate/

Samara, R. (2020, March 21). Associate professor has been suspended. *The Silhouette*. https://thesil.ca/associate-professor-has-been-suspended/

Yoffe, E. (2017a, September 6). The uncomfortable truth about campus rape policy. *The Atlantic*. https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/

Yoffe, E. (2017b, September 8). The bad science behind campus response to sexual assault. *The Atlantic*. https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/

Appendix 1: Initial Terms of Reference, as referenced in the May, 2022 MUFA Newsletter

Best Practice Review of the Investigation Process

Preamble:

Several university policies include reference to an investigation process, including the Discrimination and Harassment Policy, the Sexual Violence Policy, and the Research Integrity Policy. Investigations are needed to impartially ascertain the validity and severity of complaints and are intended to ensure procedural fairness by balancing the interests of complainants and respondents and allowing all parties to present their perspectives and supporting evidence to an independent investigator who makes findings of fact. However, by their very nature, investigations can be lengthy and complex, and can be a cause of significant stress and anxiety for participants.

Review:

The University and MUFA have agreed to conduct a Best Practice Review of the Investigation Process to assess the approach currently followed and to advise whether improvements should be made. An experienced investigator will be retained and asked to meet with former complainants, respondents, key administrators responsible for implementing the policies, current and former MUFA Presidents and MUFA Grievance Officers. The investigator will not have access to specific case files in any intake office. The investigator may consult with intake office staff about the process used in any case, that falls within the scope of this review, and such staff member may consult the file in question. But, in all instances the confidentiality of those cases will be maintained.

The investigator will submit a written report to the Joint Committee that includes recommendations focused on:

- Investigation best practices, including support/guidance for participants and procedural fairness
- The role, if any, of intake office staff in assessing the credibility of complainants at the intake stage
- The role, if any, of intake office staff in assessing whether a complaint meets the test for a prima facie case such that an investigation should proceed
- Timeliness
- Disclosure to parties
- Confidentiality
- Best practices for implementation of interim measures
- Data gathering and record keeping
- Reporting the results of investigations

Joint Committee will agree to a list of experienced investigators to approach to conduct the Best Practice Review. MUFA and the University will agree to a list of former complainants and respondents, whose investigations are completed, for the investigator to interview. The University will assume costs for the review.

Appendix 2: Final Terms of Reference, dated July 29, 2022

McMaster University and MUFA (the "Parties") have agreed to conduct a Best Practice Review ("Review") of the Investigation Process to assess the approach currently followed and to advise whether improvements should be made. The Parties have agreed to appoint [REDACTED] (the "Investigator") to conduct this review.

1. The purpose of the Review is set out at Appendix A[31] to these Terms of Reference.
2. The Investigator will conduct the Review independently and in accordance with Appendix A. In addition to the information provided by the Parties, the investigator may determine which (if any) additional documents and other evidence to review, which individuals to interview, and the sequence in which witnesses will be questioned.
3. The Investigator shall ensure that the investigation is conducted in a fair, transparent, and impartial manner.
4. To the extent possible, but without compromising the integrity or fairness of the investigation, the Investigator will maintain the confidentiality of all information received. All persons interviewed during the investigation will be advised that they will not be identified by name in the investigation report, but that any information they provide could be disclosed.
5. Should the investigator require instructions or have questions in carrying out the Review, she will contact both the President of MUFA and Brent Davis.
6. The Investigator will not provide legal advice or to any of the Parties or witnesses involved in this investigation.
7. As a condition of undertaking this Review, McMaster University agrees to indemnify the Investigator against any and all claims, demands, suits, or other proceedings for costs, damages, losses, liabilities, and expenses, including reasonable legal fees the Investigator may incur by defending any claims that may be made by any third party, which might arise out of this agreement or the investigation described in this agreement, provided that in respect of all such claims, the Investigator has acted within the scope of her engagement as an investigator under this agreement and in compliance with all applicable laws and that she cooperates with McMaster University in the defence of all such claims.
8. In order to support the integrity of the information collected in the review and report, all consultation and investigation records must be kept confidential so that the university may deliberate on the findings of the review.
9. The Investigator will provide a written report outlining their findings and any recommendations in accordance with the Terms of Reference. The full report shall be provided to Dr. Susan Tighe, Provost & Vice-President, Academic and the President of the McMaster University Faculty Association and may be shared on a "need to know" basis within each of the Parties' executive teams but shall otherwise be held in strict confidence by the Parties. If requested by the Parties, and after the deliberative process noted in paragraph 8 is completed, the Investigator will provide a summary written report

[31] Appendix A of the TOR is identical to Appendix 1 (above).

to the Parties which may be circulated beyond the Parties if both Parties agree on the method and scope of distribution.

10. Upon receipt of invoice, McMaster University agrees to compensate the Investigator at the hourly rate of [REDACTED].

The Parties agree to these Terms of Reference.

[SIGNATURES]