

6 February 2019

Hubert Lai
University Counsel
Office of University Counsel
Old Administration Building
University of British Columbia

SENT VIA EMAIL

Dear Mr. Lai,

Re: Proposed amendments to Policy 3 (*Discrimination and Harassment*)

The Faculty Association appreciates the opportunity to comment on, and seek clarification of, the proposed revisions to Policy 3, *Discrimination and Harassment* (hereinafter the "Policy"). In general, the Association supports the University's efforts to "identify and clarify the roles of those involved in receiving and responding to concerns of discrimination." However, we are concerned that the proposed amendments further confuse the complaints process and render opaque the scope of activity that the Policy seeks to address. Below we enumerate some of our specific concerns and those we have heard from Faculty Association members. This list is not exhaustive, nor is it in ranked order.

We would welcome the opportunity to meet with the Policy Committee to discuss the proposed changes and elaborate on our concerns.

Removal of the word "harassment"

The University has proposed removing the word "harassment" from the Policy as a means of avoiding potential confusion between conduct that would fall under the Human Rights Code and that which would not. As Code-based harassment is covered by the Policy, it makes little sense to remove this reference and simply subsume it under the more general term of "discrimination." This removal renders it more difficult for members of the UBC community to determine the appropriate venue for addressing their concerns.

We recommend that the University maintain the current title and provide a more robust definition of harassment so as to clarify the distinction between different types of harassment.

Omission of timelines for submitting complaints

The current version of Policy 3 includes a 1-year timeline for submitting complaints. The BC Human Rights Code has a stricter schedule of 6 months. The proposed Policy does not include any statute of

limitations. The Association is concerned by the prospect of leaving the submission process open for an indefinite period of time. The ability to accurately recall events diminishes greatly over time thereby affecting the likelihood that complaints will be correctly adjudicated. Moreover, policies, cultural norms, expected standards of conduct and laws change over time. Passing judgement on individuals' past actions under present contexts is potentially prejudicial in an employment setting.

The Association appreciates that there may be exceptional circumstances in which members of the UBC community are unable to raise their concerns within a year, however, these should be the exceptions to the process and not the rule.

The University is making this proposed change ostensibly to protect individuals who fear retaliation – something that is already clearly prohibited in paragraph 1.4. While the Association supports these ends, it is the responsibility of the University to have robust processes to prevent retaliation, rather than allowing delays that may jeopardize the integrity of an investigation and the natural justice rights of those involved.

In lieu of eliminating all notions of a statute of limitations or generally accepted timeline for submitting complaints, the Association recommends that the University continue to work to create an environment in which those who experience harassment and discrimination have the knowledge, tools and supports necessary to raise their concerns in a reasonable timeframe. We suggest that clarifying the proposed Policy and the processes set out therein, and articulating where and how individuals may seek necessary supports, would assist in this endeavor.

Confidentiality and Privacy

a) Disclosure of personal information: Paragraph 2.3.6 of the Procedures appears to grant the University leeway to disclose the personal information of individuals for reasons that have never been contemplated in any other policies and appears to serve only to protect the University's reputation against public claims. Specifically, the University proposes to permit University Counsel to authorize the disclosure of information pertaining to, or arising from, an investigation "to correct misleading or inaccurate information if necessary to protect the integrity of the process or UBC's investigatory processes." It is unclear how this corresponds to the responsibilities set out in the Freedom of Information and Protection of Privacy Act.

The Association seeks clarification on the circumstances envisioned that would trigger the need for such a disclosure and the intent behind its inclusion in the Policy. We also seek the removal of any notion that the University, and University Counsel, has the unilateral right to disclose the personal information of our members, except as permitted by law.

b) Informing Participants: Paragraph 2.4 provides that "To maintain the integrity of the process under this Policy, UBC must ensure that both Complainants and Respondents know the process findings and the evidence upon which these findings are based." We understand that this provision has been adapted from Policy 131. Based on the experience of the Faculty Association, the extent and type of disclosure varies depending on the investigation findings. Where complaints are upheld, Complainants do not have the same need for information to be assured

were handled appropriately. They do not need to know the findings in as much detail, nor do they have a need to know the evidence that was found to be compelling. Disclosure in such cases should be limited and measured against the potential harm caused to participants and the integrity of the process (and any appeal or grievance) should it be circulated widely through social media or other such venues.

When a complaint is dismissed or the alleged behaviours found, on the balance of probabilities, not to have occurred, the Association agrees that Complainants should be afforded a greater level of detail regarding the process and findings so that they can be confident that the University has fully considered their concerns and so that they may seek an appropriate avenue of appeal.

The Faculty Association recommends that paragraph 2.4 be amended to provide for the differential release of information depending on what is necessary to safeguard the privacy of the Respondent and assist in rendering the Complainant whole. Regarding the latter, the Association also recommends that, in lieu of releasing details that are unnecessary and have potentially significant long term impacts on the reputation and employment of Respondents, the University include in this Policy processes for assisting those who experience discrimination and harassment so that they are able to receive the supports they need to heal from these events.

Lack of Clarity in Investigations Process

Central to the Faculty Association's concerns with the proposed Policy is that there is no clear process set out for Complainants and Respondents to know what to expect in an investigation. Below we specify the areas of particular confusion.

a) Filing Complaints: As currently written, it is unclear whether there is an obligation on the part of Complainants to address their complaints through the Equity Office. Paragraph 1.2 states that "[c]oncerns regarding Discrimination brought forward under this Policy must be referred to the Equity & Inclusion Office..." (emphasis ours), whereas paragraph 3.1 of the Procedures allows Complainants to choose whether or not to consult with the Equity & Inclusion Office. The Procedures go on in paragraph 4.1 to "strongly encourage" Complainants to consult with the Equity & Inclusion Office. As a result, it is unclear what steps UBC members are required to take under the Policy when addressing potential concerns. Consistency in this regard should be of utmost importance given the University's stated goal to "more clearly identify and clarify the roles of those involved in receiving and responding to concerns."

b) Bifurcating Authority: In assigning responsibility for addressing and resolving complaints to two separate offices, the proposed Policy appears poised to replicate, rather than reduce, confusion over jurisdiction and responsibility. While the Association assumes that the intent is for the Equity & Inclusion Office and the Director of Investigations' Office to work collaboratively, the line between their respective authorities is ill-defined as is the manner in which information flows between their offices. Therefore, we are seeking clarification as to why the University has again chosen to bifurcate responsibility for such matters rather than streamlining the complaints process. It is our experience that the FA members who file such complaints are, more often than not, frustrated and disillusioned by the absence of a clear, centralized and transparent means of addressing their concerns.

c) Information flows: Paragraph 4.1 of the Procedures compels the Director of Investigations to advise the Equity & Inclusion Office when they are in receipt of a formal complaint and provide a copy or summary of that complaint. However, if the Director of Investigations chooses not to proceed with an investigation under Paragraph 4.8, they are not similarly compelled to advise that Office of their decision and the reasons for it. In fact, it appears that they are prevented from informing the Equity & Inclusion Office and the Respondent of their determination as they “will take no further action under these Procedures” except as articulated in paragraph 4.9. The Association is concerned that the proposed Policy creates the conditions for reputational damage to Respondents who have been wrongly accused. We strongly recommend that the University include provisions for the Director of Investigations to advise the Equity & Inclusion Office and Respondent and other such individuals who need to know, of the outcome of their initial inquiry.

d) The role of the Director of Investigations is ambiguous: According to paragraph 5.2, the Director of Investigations is given wide berth to determine how best to manage a complaint, including the collection of documents and statements from Complainants, Respondents and other individuals, which is tantamount to conducting an investigation or at least the preliminary aspects of one. The Association recommends this section of the Policy clearly articulate that the Director of investigations shall advise participants and any engaged representatives when they are gathering information for the purposes of determining the bona fides of a complaint and when the request for documentation and any interviews are conducted as part of a formal investigation.

Similarly, paragraph 6.1.4 appears to suggest that the Director of Investigations makes findings about whether the Respondent has violated the Policy. However, this determination is currently, and should be in future, the responsibility of the individual who investigates the complaint. It is unclear whether the University’s intent is to alter this long-standing practice and deviate from the norms of workplace investigations. The Association seeks clarity in this regard.

e) Limited transparency in decision making: Moreover, at their sole discretion, the Director of Investigations may decide whether a complaint should be investigated internally, sent to an external investigator for review, or managed through an alternative dispute resolution process. Unlike in Policy 131, there is no provision in the procedures that the Director advise the Complainant or provide any reasons for their decision. As the decision of how to address a complaint has significant impact on the participants, the Association maintains that the rationale for such decisions be clearly articulated to all parties.

If the Director of Investigations believes that an alternative dispute resolution process is desirable, the Faculty Association recommends that the University replicate the language in Section 3.5 of the procedures of Policy 131 to provide clear guidance on the steps involved in obtaining the consent of participants:

If the Director of Investigations believes that an alternative resolution process may be appropriate in the circumstances, they will discuss this option with the Complainant. If the Complainant agrees that an alternative resolution process may be appropriate, the Director of Investigations will contact the Respondent to advise them that a Report

was made, and will discuss this option with the Respondent. If the Respondent agrees to participate in an alternative resolution process and the Director is satisfied that an alternative resolution process is appropriate, then the Director of Investigation will explore the options available and, with the agreement of both parties, will refer the matter to that process for resolution.

f) Responsibility for Investigation Report: Paragraph 6.3 provides that the Investigation Report is prepared by the Director of Investigations, regardless of whether the Director is the investigator. We question why the individual who is responsible for completing the investigation is not responsible for drafting the report. It is also unclear whether the Director of Investigations has to prepare a report if they conduct the investigation.

Failure to inform FA members of representational rights

The Policy is virtually silent on the role of Unions and Associations in the investigations process. The Faculty Association has representational rights under the Collective Agreement and our members have the right to assistance from the FA in any investigation of workplace conduct. We maintain, therefore, that it behooves the University, through the Equity & Inclusion Office and/or the Director of Investigations, to advise Complainants and Respondents who are members of the Faculty Association that they may seek advice and representation from their Union. Moreover, once a member has elected to be represented by the Association, the University, including the Director of Investigations and any Third Party Investigators, must follow the labour relations processes set out in the Collective Agreement and developed through practice. In particular, once represented by the Association, all communication regarding the Investigation should be directed to our office. To be clear, nothing in this Policy supersedes the rights of the FA to be involved and represent our members.

Rights to discipline under the Policy

The Association understands that one of the University's intents in revising this Policy is to help Heads, Deans and other members of the University Community better understand their legal obligations to prevent and address discrimination and harassment. The Association supports and encourages this intent.

However, paragraph 2.6 of the proposed Policy is confusing and awkward as currently worded. We therefore recommend that this clause be amended to provide clear and concise language on its intent. It should be clear that disciplinary power remains in the hands of those individuals specified in the respective Collective Agreements and that no other individual, including the Director of Investigations, may recommend any such action during the course of an investigation.

Administrative Heads of Unit

The Association supports the University's proposal to relieve the responsibility of Heads to investigate complaints under Policy 3. However, paragraph 6.5 of the procedures provides a broad scope of disciplinary responsibility that includes Department Heads of Academic Units. We maintain that,

irrespective of the differential disciplinary powers vested in Heads, Deans and the President as set out in the Collective Agreement, in many cases it is preferable, owing to the circumstances, for Deans to address misconduct of this nature. We have heard from Department Heads and Directors that they often lack the training and expertise to render judgement in such circumstances. Our members have also expressed concern that their proximity to the collegial processes of the department, at times short tenure as Head/Director and ongoing need to maintain strong research and workplace relationships create barriers to effectively addressing challenging circumstances such Code-based discrimination and harassment.

The Association recommends that the Policy specify that any discipline arising out of an investigation will be imposed in accordance with the provisions of the relevant Collective Agreement and in keeping with the University Act. We also recommend that the Policy clarify that the University is committed to providing training, support and resources to Administrative Heads of Unit so that they are better able to confidently address and remediate problems in their Units.

Narrowing of Procedural Fairness

The Faculty Association seeks clarity on the intent of changing the context of procedural fairness from that of the University-sector writ large to UBC specifically (paragraphs 1.1 and 5.2 of the Procedures). We fail to understand what the University means by the term, "procedural fairness in the UBC-context," as it has only been introduced in this proposed Policy. Moreover, it is inconsistent with the manner in which these rights and responsibilities are set out in the Collective Agreement and other University policies.

The Association previously disputed the change from a standard of natural justice to procedural fairness in the University context when this was done in the review of Policy 85. At that time, we asked that the University define its understanding of the terms. We do so again. Policy 95 includes a basic definition of the responsibility of the University to disclose information, and the rights of faculty members to comment on evidence, that may be used in decision-making. We assume that this definition continues to apply for all investigations at the University.

Unrealistic Timelines

Paragraph 5.4 of the Procedures maintains that the complaints management process be completed in 90 calendar days unless there are "exceptional circumstances". In our experience, this is a wholly unrealistic timeline for the vast majority of cases involving faculty members. Despite similar efforts by the University to place tighter schedules in Policy 131, these investigations have generally taken far longer than 90 days, with some lasting upwards of 8 months. Including timelines that are unlikely to be met creates unrealistic expectations on the part of Complainants and Respondents. This, in turn, has detrimental impacts on the mental health of participants and on our members' confidence in the University's processes.

In conclusion, though we are largely supportive of the University's intent as set out in the "Description and Rationale" for the Policy amendments, we are concerned that the proposed changes do not achieve these ends. The process for reporting, investigating and addressing complaints remains opaque. The roles and responsibilities are unclear, confused and contradictory. We are concerned that, if

implemented as written, the University will create a system where information and Complainants fall through the cracks and Respondents are subjected to unfair and unnecessary exposure of sensitive and private information. The Association looks forward to receiving the Committee's response to our questions and concerns as well as continuing to work with the University to ensure a workplace free from discrimination and harassment.

While the Faculty Association appreciates the opportunity to provide feedback to the University on the proposed amendments to Policy 3, we wish to confirm that any comments and recommendations made by us are made on a without prejudice basis to any position we may take with respect to the Policy in the future. The Association therefore reserves our right to challenge the Policy and its application, in whole or in part, as we see fit, including through the grievance and arbitration process.

Respectfully yours,

A handwritten signature in blue ink that reads "Bronwen Sprout". To the left of the signature, there is a small blue mark that looks like the letters "fs".

Bronwen Sprout,
President