SFUFA Response to SFU's Draft Sexual Violence and Misconduct Policy

Overview

The writing of institutional policy is a complex process at the best of times, let alone within changing political and cultural contexts that are not yet fully understood. Policy is even more difficult to write when it is intended not only to codify norms but also to articulate new and still-aspirational expectations. In the development of the draft Policy on Sexual Violence and Misconduct, the Working Group and the Advisory Group have had to address political and cultural demands for change, requirements for transparency of procedures and due process involving multiple unions and employee groups, and concerns of student organizations. There has been an expectation that the policy speak to an educational mission and an aspirational culture while also meeting labour relations obligations and protecting student, staff and community rights, all within the constraints of the University's resources and authority. It was no small task, and those involved have clearly taken all of these demands seriously, and have given extensive thought to the careful balancing act this work demands.

In considering SFUFA's response, we too have tried to take into account the range of factors and to avoid as much as possible looking only to narrow legal responsibilities at the expense of the broader social and educative import of a free-standing sexual violence policy. We have discussed the policy in detail as an Executive and consulted widely through a number of means including: the solicitation of feedback from members; meetings with representatives of Academic Women, the SFU Women's Centre, and campus unions and employee groups; attendance at the University's public fora; organization, with Academic Women, of our own discussion panels; and submission of the draft policy for review by our own legal counsel and by the Ending Violence Association of BC (EVA). Following all of this, we have a good many positive comments, but also some significant concerns and suggestions to address gaps, inconsistencies, or imbalances where they exist in this first draft.

Policy Strengths

There are a number of strengths to the draft policy, and we are pleased to see SFU move towards a survivor-centred and consent-driven approach. We are heartened, too, to see some commitment to a new office dedicated to providing information and assistance to the community in a broad range of areas related not only to the draft policy but also to sexual health and well-being. We begin, then, with what we believe to be general strengths of the policy, and features that ought to remain in any further iteration.

- The draft policy clearly states that sexual violence and misconduct will not be tolerated or condoned by the University and that the University will investigate and discipline where appropriate;
- It clearly differentiates "disclosure" and "reporting", providing support services and resources to

Survivors independently of any formal investigative procedure;

- It balances the importance of treating and supporting Survivors with compassion, dignity, and respect and the importance of upholding procedural fairness and natural justice in investigations and discipline;
- It recognizes that the SFU community is diverse and that community members may experience sexual misconduct in different ways because of their gender, sexual orientation, race/ethnicity, immigration status, and other demographic characteristics;
- It recognizes that sexual misconduct is contextualized by broader systems of oppression and that it may be sexist, racist, homophobic, transphobic, or otherwise discriminatory;
- It clearly states that those who are impacted by sexual misconduct regardless of the time at or place in which it may have occurred will be provided with accessible and timely confidential assistance, trauma-informed support, and accommodations based on their needs.
- It balances sexual misconduct reduction and prevention measures with a commitment to education about healthy and consensual sexual practices and relations, and indicates that coordinated and comprehensive reduction and prevention training for all SFU community members will be strongly encouraged;
- It articulates a robust understanding of consent;
- It stipulates that data concerning sexual misconduct will be systematically collected;
- It establishes a Central Resource Office (CRO) using current best practices in education, training, and support.

Opportunities for Improvement

Despite these substantial strengths, there are two major areas of concern that we believe need to be addressed in the next draft of the policy:

1) Clarity both of expectations and of investigatory and disciplinary protocols.

Certain aspects of the draft policy lack the clarity necessary for the document to function as a fair and transparent employment policy. That is, while we applaud the proactive, consent-driven approach, there is considerable lack of specificity in the document's treatment of disciplinary processes and the standards by which misconduct is determined. Insofar as the policy seeks to lay out the University's values and its educational aspirations, the language regarding Survivors and affirmative consent marks an important and positive step forward. However, as an employment policy, the

document must also be clear, internally consistent, and articulate standards for possible disciplinary action that are both reasonable and easily understood. In this regard, the current draft has a number of gaps.

2) Resourcing and administration of the CRO.

A policy is only as good as the resources allocated to fulfilling its spirit and purpose. Both the CRO and Health & Counselling must have sufficient resources to fulfill their obligations under the policy, and while good intentions are expressed within the document, there is a lack of specificity regarding staffing and services, and no mention of SFU's resource commitment. Moreover, there is little concrete information provided on the governance and administration or authority and autonomy of the CRO. There is also no delineation in the policy regarding the process for creating the governance structure, advisory body, or resource allocations. Additional information in these areas is important for the community to understand and interpret the University's intention regarding the policy. At the least the University should include guidance regarding its plans for next steps in implementation of this policy.

Specific Areas Requiring Amendment

There are a number of changes we recommend to add clarity and resolve gaps in the policy language. In general these changes are easily made without opening the policy to substantial edits.

Throughout - We recommend that the Policy is entitled the **Sexual Violence and Misconduct Policy**, and refers to Sexual Violence and Misconduct throughout as opposed to using misconduct as a synonym for violence.

Throughout - The terms 'Survivor' and 'Respondent' have particular meaning in the policy, associated with specific rights and obligations. Both terms ought to be capitalized throughout.

Preamble - We suggest that previous experience of trauma also be included as a factor that impacts how an individual may experience sexual violence or misconduct. Additionally, we suggest including the term "reported" in (g). We propose amending the Preamble as follows:

a) Recognize the diversity of our University Community and understand that each person will be differently impacted by **Sexual Violence and/ or Misconduct**, based on many factors such as their sex, sexual orientation, gender identity, ancestry, ethnicity, race, migration status, language, ability, faith, age, socio-economic status, **and/ or previous experiences of trauma**, and that acts of Sexual **Violence or** Misconduct may also be acts of sexism, racism, ableism, homophobia, and/or transphobia.

g) Investigate reported incidents...

Section 2.3 - If there is to be no explicit limit on the length of time between an alleged breach of the policy and the report/ investigation, the policy must at least stipulate that investigations will occur only when the evidentiary conditions (including timeliness) exist to ensure that a reasoned conclusion can be expected to be reached, and that Respondents can be assured a fair opportunity to defend themselves. We further suggest a slight amendment clarifying that in applying the provision regarding power differentials, the issue is any power or influence in play at the time of the incident. Finally, recognizing the concerns regarding scope and jurisdiction that have been raised by the community, we suggest additional sections (d) and (e) to cover online activities and extraordinary instances in which the University may need to act but which fall outside the strict letter of the draft as written. Suggested amendments to address the above concerns are as follows:

Section 2.3 c) When the respondent was in a position of power or influence over the survivor's academic or employment status **at the time of the reported incident**.

2.3 d) Online, where the behaviour breaches the substantive terms of this policy.

2.3 e) Where the reputation of the University may be reasonably expected to be impacted.

Section 3.1 c) - While appreciating the intent of this provision, the language on accommodations may be unreasonably restrictive. We suggest: "...will be provided in the form and manner that most minimally impacts the rights and interests of other members of the University Community."

Section 3.2 - The definition of consent is critical to the policy. It must both articulate consent as active and affirmative, and be expressed in language that is legally meaningful and easily-understood by the reader. As written, the definition achieves the former but not the latter; with minor adjustment, it could do both. Further, the Criminal Code requires a subjective rather than objective assessment of consent, recognizing that what consent looks like is not uniform, and specific contexts are critical in determining how and when consent is made or is violated. This policy, then, should either use the appropriate term or none at all. Our suggested language is the following:

Consent

means **affirmatively communicated**, ongoing and voluntary agreement to engage in sexual activities. Consent is freely given, and actively communicated as demonstrated by words or conduct. For clarity, consent:

- a. is a freely given "yes";
- b. cannot be given by someone who is incapacitated, asleep, or unconscious;
- c. can never be obtained through threats, coercion or other pressure tactics;
- d. can be revoked at any time, whatever other sexual activities have taken place;
- e. cannot be obtained if someone abuses a position of trust, power or authority; and

f. cannot be assumed from previous consent to similar activities.

Sections 3.6 and 3.7 - The policy can and should cover the range of behaviours articulated here, and should, as it does, address the full spectrum of misconduct rather than excuse certain behaviours as 'normalized' or 'gray areas'. In this we are pleased to see a more robust recognition of rape culture, though that term is not itself used. However, we do believe that the use of the term "synonymous" to define Sexual Violence and Sexual Misconduct is problematic. The policy should, as noted above, be called the Sexual Violence and Misconduct Policy, with this phrase used throughout, and the definitions amended so as to recognize the range of the behaviours and the role of contextual analysis in determining the severity of a breach of policy.

Section 4. The section on the CRO is not explicit on the matter of whether Respondents have access to advising or support services. Given that the CRO is not intended to be an advocate for any party, but a resource capable of offering support absent any particular finding, it must not discriminate in its availability to the community. A new clause (e) should be included to read:

e. inform Respondents about the resources available to them and assist them to make informed decisions

In operationalizing services to Respondents, it will be critical that the University do so in such a way as to maintain the CRO as a safe space for Survivors and others impacted by sexual violence or misconduct. We recommend a separate area with a separate entrance for provision of these services.

Section 4 should also set out in greater detail the following:

- a) The scope of the CRO's obligations, and ability to, maintain confidential the information provided to them by a Survivor or other impacted community member (including the Respondent);
- The scope of the CRO's obligation to communicate disclosures or other information communicated to it by a Survivor or other impacted community member (including the Respondent) to the University or other authorities;
- The CRO's responsibility for coordinating interim protection provisions to increase the safety of Survivors while the University responds to incidents of sexual violence;
- d) The CRO's reporting structure and any roles in it played by the University or community members;
- e) The roles of campus security upon receiving information from, or sending information to, the CRO or University.

Section 5.1 - We recommend mandatory consent/ sexual misconduct education for students entering university residence.

Section 5.2 - The CRO's educational role is a critical component of a proactive approach to consent and to sexual health generally. And it is the CRO that is best placed to produce and

disseminate educational materials, though it may work with individual faculty members or units to do so. Individual faculty members and units cannot be expected to have the expertise or experience to provide education in this area, and there may be serious consequences of such content being delivered improperly. We recommend adjustment of the provision to read:

5.2 The Central Resource Office will **produce educational materials** related to Sexual Misconduct **to be used in** student and employee orientation, **and be available to assist individual faculty members, departments and faculties (as appropriate) in the development of** course materials and program curriculum.

Section 6. Obligations upon those to whom disclosures are made may vary according to a number of things, such as the role of the individual to whom the disclosure is made, the age of the Survivor, and the nature of the misconduct. The policy must contemplate such differences, clarify obligations and liabilities where they exist, and explicitly offer advising and support resources to those to whom disclosures are made.

Section 6.3. The University cannot guarantee informed decision-making, but only access to information required for informed decision-making. We recommend amendments to (g) and (h) as follows:

- g. **be provided with resources to allow them to** make informed decisions about which services will be the most beneficial; and
- h. **be provided with resources to allow them to** make informed decisions about which of the options outlined in section 7 to pursue, if any

7.5 The policy makes no specific commitments regarding investigatory procedures, nor who will be responsible for an investigation. It is critical that the investigations be conducted by trained professionals given the possibility of re-traumatizing a Survivor through a mishandled process and considering the serious consequences on a Respondent if a process fails to fully comply with the principles of natural justice and due process.

Section 7.5 b). The policy does not indicate who is considered a "student conduct officer". This term needs to be clarified.

Section 7.6 Recognizing that the University must retain the right to initiate an investigation under certain circumstances, the language in this clause is unreasonably broad, and ought to be revisited to indicate the general circumstances under which such an extraordinary step would be contemplated. Furthermore, there must be an expectation of consultation with the Survivor prior to a decision being made. We would suggest an additional clause to read: *Wherever possible, such decisions will be made only after consultation with the Survivor*.

Section 9.1 We have serious concerns with the use of the Student Code of Conduct (Non-Academic) as the policy to govern student discipline pursuant to sexual violence or misconduct. Though we understand that the Student Code of Conduct is currently under review, as it stands, the University Board on Student Discipline (UBSD) is the body that would hear a

student appeal, which we believe entirely insufficient for a number of reasons, including the potential for conflict of interest, concerns regarding diversity of representation on the tribunal, and concerns that as it stands, the UBSD process is counter to Survivor-centric, trauma-informed processes that minimize the need for Survivors to recount their experience to multiple audiences. The University should develop a separate appeal process for breaches of this policy, with appeals to be heard by one or more individuals who can be expected to have sufficient expertise in the area.

Section 9.2. The policy should be clear that Reports produced by the University should be considered confidential except as allowed under British Columbia's *Freedom of Information and Protection of Privacy Act* or required to be released pursuant to a legal proceeding.

Section 11.1 Amend to include deferral of investigations, and to consult with Survivors where possible, as follows:

Where criminal, civil, or administrative proceedings are commenced in respect of allegations of Sexual Misconduct, the University reserves the right to proceed with, defer, or suspend its own processes. Wherever possible, such decisions will be made only after consultation with the Survivor.

Section 13 - **Collection**, Retention and Disposal of Records

13.1 Reference should include collection of personal information, i.e.:

Information and records created and received to administer this policy are evidence of the University's actions to respond to Sexual Misconduct education, reduction and prevention, support and investigation. Information and records must be collected, retained and disposed of in accordance with a records retention schedule approved by the University Archivist.

Section 14.1 Amend to include reference to developments in law, as follows:

The Central Resource Office will undertake a systematic approach to monitoring and evaluating this policy and its associated procedures and practices to ensure that they are responsive to evolving needs **and developments in law**.

Section 16.1 Amend to include an appeal mechanism that can be accessed by either Survivors or Respondents when there is disagreement about the assessment of the Executive Officer and the General Legal Counsel of the applicability and interpretation of the policy.

Finally, we see one substantial oversight in the policy. Currently missing from the policy is a clear statement prohibiting retaliation or reprisal against Survivors disclosing or reporting an experience of sexual violence or misconduct, or Respondents identified by Survivors. Such a statement should be added.

Resources and Administration

Resources, visibility, administrative commitment - these are the ways an administration signals the importance of an initiative. And while there are general references to all in the draft policy, there is little specificity provided.

Funding commitments, staffing levels, hours of operation of various CRO services, and concrete commitments from the University's central administration - these are the ways that policy becomes meaningful, and while we appreciate that the policy itself might not be the place to articulate all details, the policy can and must indicate the general levels of service that the community can expect, and an implementation plan, including funding commitments, must be developed and shared with the community as part of the policy development process.

More detailed staffing commitments must also be explicitly articulated. The kinds and levels of professional expertise to be assured in staffing is a notable absence. What is more, the need for clearly articulated service levels goes beyond the CRO itself. There is mention, for example, of the CRO working with the existing Health and Counselling Centre; however, Health and Counselling is severely under-resourced and not accessible to most members of the campus community. Specifics about what resources are to be available, funding commitments, and how non-student members of the campus community will be able to access these resources - all of these are necessary for the policy to function.

In addition to our concerns with resourcing, the CRO's level of authority and administrative portfolio are not discussed in the policy. Much more detail is required concerning its internal governance structure, administrative reporting, intended interactions with organizations representing various campus constituencies, and provision for an advisory board and the level of authority and autonomy such a board can expect to have.

Understanding that administrative re-organization is a complex matter, there are existing recommendations that could be reviewed to help move this along expeditiously. For example, the joint committee on salary equity, made up of SFUFA members and SFU administrators, recommended the establishment of a senior position to ensure an appropriate level of administrative attention to matters of equity (eg. Vice President, Human Rights and Equity). Such a position could also have administrative responsibility for the CRO and work with the CRO advisory board to facilitate integration of this work with the larger human rights portfolio.

Summary

In sum, the SFUFA Executive believes that the policy largely succeeds in articulating SFU's commitment to a progressive and proactive culture of consent, in placing support for Survivors at the centre of University approaches to sexual violence and misconduct, and in sending a clear message that we can and must do better as a community. To that end, the SFUFA

Executive recommends that SFU also develop a separate mission or vision statement regarding sexual violence and misconduct that would allow SFU to articulate its goals.

As the policy currently stands, there are a number of areas in which critical details are not spelled out if the document is to be fully understood and operationalized. Further, the draft requires work to achieve these goals without potentially impacting the rights of a diverse campus community regulated by a number of collective agreements and campus policies, particularly insofar as it sets standards of behaviour whose violation could lead to disciplinary action. In this regard, lack of detail and the use of terms that are not clearly understood or have no legal meaning are problematic. A policy must be a document that all members of the community can read and understand, and which can be expected to be implemented uniformly based on its plain language. Whether within the policy, or through a separate statement of policy guidance and interpretation, further clarification is necessary if the full potential of the policy is to be realized.

SFUFA believes that the draft policy is an excellent starting point, whose central features do indeed address the most critical areas. The amendments we suggest above are consistent with the general goals of the draft policy as written, but would make it stronger, more clearly understood, and more easily and consistently implemented across the range of constituencies, all without compromising the commitment to active and clear consent and to a policy framework that offers Survivors the respect, compassion, and institutional support they deserve.