

## **Assistive Guide in the Adjudication of Allegations of Sexual Assault**

The following is intended to assist a Senate Hearing Board panel (the “Board”) empanelled to hear evidence and adjudicate an allegation of sexual assault. This document is intended to be provided to a panel well in advance of a hearing as it provides suggestions which may require additional planning with respect to what happens during a hearing, but also how to appropriately prepare for a hearing.

At the same time, it is important to recognize and realize that this is only a guide – not a set of rules.<sup>i</sup> The rules and procedures set out in *The Standard of Student Conduct in Non-Academic Matters and Regulations and Procedures for Resolution of Complaints and Appeals* (the “Standard”) and *The University of Saskatchewan Act, 1995* govern the conduct of non-academic misconduct hearings.

### **Commitment to the Well-being of both the Complainant and Respondent**

The University of Saskatchewan seeks to reduce or remove barriers to justice for complainants who experience sexual assault or misconduct. To this end, there is a need to acknowledge and address the necessity for special sensitivity in hearings involving complaints of sexual assault or sexual misconduct. The University identifies there are competing rights and interests of the complainant and respondent and is focused on ensuring fairness for the complainant as well as the respondent and protecting the interests of both parties.

Throughout a hearing process, both the complainant and respondent are entitled to a fair opportunity to present their respective cases. The role of the Board is a neutral and objective review of that information in order to reach a decision. As such, both the complainant and respondent are entitled to respect, sensitivity, and appreciation for the difficulty of participating in a hearing.

Each hearing will have its own factual nuances and sensitivities. There is no “one-size-fits-all” approach to all hearings.

Suggestions:

- Be prepared to take frequent breaks and convey that option to the parties on a regular basis;
- Remain alert to situations where either party appears overwhelmed by their participation in the hearing, and consider whether a brief break would be appropriate;
- If the Board needs to deliberate on a procedural point, or talk amongst itself, do not hesitate to adjourn briefly for private discussions;
- The Board may want to have contact information for support services available for both parties.

### **Legal Orientation and Assistance**

Allegations of sexual assault are very serious for both complainants and respondents. In some instances, there may be parallel criminal proceedings. Often a respondent will have engaged legal counsel, and that legal counsel may seek to make evidentiary or procedural challenges leading up to and during the course of a hearing. Where legal counsel is not engaged for either the complainant or the respondent, or both, there is a risk that significant legal and evidentiary issues may arise. Unrepresented complainants and respondents may not understand these legal/evidentiary issues or how to respond to them. For instance, there are serious possible legal

and ethical objections around the hearing of evidence of a complainant's sexual conduct outside of the events in question, and unrepresented complainants and respondents may not be aware of these legal issues or how to deal with them.

In light of these possible issues, it may be appropriate for the Board to have legal counsel advising it throughout the process. Such assistance could come in the form of counsel advising before and during a hearing, or a preliminary session with the Board where the Board can ask questions and receive guidance on how to proceed.

It may also be helpful to seek legal orientation for Senate hearing board members in regard to the hearing of sexual assault allegations. This could assist in clarifying such concepts of legal and/or perceived consent, as well as what may be relevant evidence, or evidence which should not be considered.

The Office of the University Secretary will coordinate the delivery of such legal assistance for hearing boards.

### **Privacy and Confidentiality**

While all discipline matters attract a high level of confidentiality, the nature of sexual assault allegations attract even greater levels of sensitivity to preserving the privacy of all parties. The details of the allegations, the testimony of all participants, and physical evidence provided must all be protected.

Confidentiality and privacy extends beyond simply not repeating what is heard in the course of a hearing. The Board will want to turn its mind to careful distribution of information to parties and participants. This may mean providing physical copies of documents, rather than providing electronic copies.

The Board, however, must be careful to ensure that the scope of the confidentiality obligation is not misunderstood by the parties. This confidentiality obligation relates to what is learned in the hearing process, and it requires individuals present at the hearing to respect the privacy/confidentiality of *what they hear from others*. It is not intended to prevent individuals from speaking about their own experiences outside the hearing process, and it is not intended to prevent a party from exercising any legal rights they may have outside of the hearing process.

#### **Suggestions:**

- At the outset of the hearing, and the conclusion, remind all parties, support people, witnesses or other participants that they are obligated to keep the information arising in the hearing process confidential. It is important, however, that the Board explain that this confidentiality obligation is intended to relate to the hearing process and what occurs in the hearing process. It is not intended to silence the parties from speaking about their own experiences;
- Remind all parties at the outset of each hearing session that recording of the hearing is not permitted;
- Avoid creating additional electronic copies of explicit material, by providing physical copies rather than e-mailing information;
- Ensure that materials are secured at all times – do not leave material unattended in an unlocked office, car, briefcase, etc.;
- Do **NOT** discuss the details of the hearing with anyone other than your fellow members of the Board.

## **Scheduling**

Boards typically are surprised at how long it takes to hear all evidence. The increased likelihood for the need to take breaks, and recognition of the emotional impact prolonged hearings may have on the parties, suggests that hearings relating to allegations of sexual assault may require more time.

An important aspect of procedural fairness is ensuring parties have an appropriate opportunity to present their case. This includes their opportunity to prepare for the hearing. Often after a hearing date is set, one or both parties will request an adjournment. Typically it is advisable to honour such a request in the first instance, however a Board can use its best judgment with respect to subsequent requests for adjournments (by the same party). The appropriate opportunity to prepare needs to be balanced against inappropriate delay.

Suggestions:

- If legal counsel is involved for the parties, ask them how long they think they will each need to present their case;
- Be conservative in estimates of time – expect it to take longer than anticipated;
- Consider how long may be “too long” for a session of the hearing – it may be necessary to break the hearing into more manageable sessions;

## **Hearing Location and Rooms**

Often it is advisable to have as minimal contact as possible between a complainant and respondent in and around the hearing. In addition to a location where the hearing room will be held, it is advisable to have specific meeting/waiting rooms for each party to go to before the hearing, afterwards, and during breaks.

Suggestions:

- Consider whether different arrival times will assist in shepherding parties to their respective meeting rooms;
- Determine the order of who will enter/exit the hearing first (including for adjournments);
- Be aware of “bottlenecks” such as hallways, doors, or elevators which may unintentionally force contact between the parties;
- Task someone with air-traffic control – managing getting parties to and from the hearing room;
- Where the parties have counsel, the Board may want to enlist their assistance in managing this process.

## **Physical Layout of the Hearing Room**

It is considered a foundational aspect of procedural fairness that a party have the opportunity to “face their accuser”. An extension of that principle is being able to observe the complainant while they testify, and have the Board do the same, in order to assess the credibility of the complainant’s testimony.

At the same time, a complainant need not be pitted against the respondent at all times during the hearing. Nor is it strictly necessary for the complainant to remain in the room for all portions of the hearing. The complainant will likely need to be present for presenting direct evidence, but

may be represented by an advocate for the balance of the proceeding. However, there are times when it may be advisable for the complainant to remain present in order to hear all evidence, and advise their counsel.

Suggestions:

- Preferably the layout of the room would avoid the parties having to stare at each other from across the room;
- At the same time a suitable layout would ensure there is appropriate distance between the parties and ideally create a buffer;
- In some instances it may be appropriate to video-conference a party into the hearing – this would require a situation where Board/opposing party can still assess credibility, but may not require the party to be facing the opposing individual;
- Have tissue paper and water available for participants.

Note: With respect to video-conferencing, there may be additional nuances that should be understood; if the Board is considering this option it is recommend that discussions take place with legal counsel.

### **Presence of Support Individuals for Complainant and Respondent**

Both parties may request support individuals (in addition to an advocate) be present. It is important that a support person/observer is not a witness; witnesses that are not the complainant or respondent are typically excluded from a hearing except for the portion of the hearing where they are providing testimony.

The discipline policies limit the number of observers each party may have. If either party requests additional numbers, the Board may want to invite the opposing party to indicate if they have any concerns about extending that number. The balance to strike is a recognition of the need for privacy/confidentiality (and not creating an “audience”), but ensuring that both parties have the necessary support they require for the hearing.

Suggestions:

- For the most part requests to have support people present will be governed by the observer provisions in the relevant discipline policy;
- Remind support individuals that they are not participants in the process, and that if they are disruptive they will be asked to leave;
- Remind support individuals that they are equally bound by principles of privacy and confidentiality (and should not be recording the proceeding);
- Typically observers sit apart from the parties, however if closer proximity will be of assistance that may be considered on a case-by-case basis.

### **Conduct During the Hearing**

It is difficult to present a general guide which addresses all possible scenarios of what may occur during the course of a hearing. These are some general areas of concern, however as allegations of sexual assault are nuanced and legally complicated, a Board may want to engage legal advice throughout the process.

*Onus of Proving the Allegation/Evidence*

The presumption of innocence governs any disciplinary hearing. As such, it remains the obligation of the complainant to establish on the balance of probabilities that the alleged inappropriate conduct occurred. Further they have to establish each element of the alleged conduct. The term balance of probability typically means more likely than not, however the courts have indicated that the evidence required to meet the standard may increase depending on the significance of the allegation. An allegation of sexual assault is very serious.

Beyond a reasonable doubt is the highest standard at law, and is **not** the standard for student discipline.

The respondent is **not** obligated to lead evidence or testify. It remains the complainant's obligation to prove the claim, not the respondent's burden to disprove the claim.

The Board is not bound by the strict rule of evidence which govern the courts. As such a Board may hear second hand evidence (known as hearsay evidence), where Individual A relays information told to them by Individual B, but Individual B does not directly testify at the hearing. However, Boards typically prefer and give greater weight to direct testimony than hearsay. Often there is competing testimony and where that testimony is inconsistent, the Board will have to determine which party they accept testimony from, if any. The Board does not have to accept all testimony from any party, but can determine what parts of testimony they accept.

Testimony and evidence should relate to the specific complaint advanced; it is not appropriate to introduce suggestions of other alleged misconduct as a means of suggesting that the respondent committed the inappropriate conduct directly referenced in the complaint.

Suggestions:

- The Board cannot force any individual to testify, including the respondent or potential witnesses – it does not have subpoena powers;
- The Board may want to encourage all parties to provide firsthand witnesses wherever possible;
- The Board will want to ensure wherever possible that they can view a witness giving testimony;
- Where copies of electronic documents (such as texts) are advanced, the Board may want to encourage parties to bring the electronic device to the hearing to confirm the copies provided;
- In a long hearing, or a hearing extended over multiple dates the Board may want to take notes regarding key evidence/testimony;
- The Board should keep an open mind until it has heard **all** evidence;
- Avoid interim deliberation discussions – it is easy to want to discuss what the Board heard at the end of a session, but it is better to wait to engage in such discussions until after all evidence has been presented.

### *Objections*

During the course of a hearing either party may object to testimony being heard, questions being asked or evidence being admitted. The Board decides what it will consider. If an objection is raised, it is appropriate to hear the reason for the objection, and to invite a response from the opposite party. If the Board must “rule” on the objection, it may want to briefly adjourn the hearing in order to confer in private.

## Questioning

Questioning witnesses and specifically cross-examining a complainant are sensitive issues in the course of allegations of sexual assault. Issues such as consent may require direct questions of the complainant. At the same time, either party's sexual history, or unrelated sexual conduct, is not relevant or an appropriate line of questioning. Similarly, questions of the respondent (if any and if they choose to testify) should relate to the specific complaint, and not to the respondent's conduct (sexual or otherwise) which does not form some part of the complaint.

The balance that must be struck is allowing the respondent to defend themselves on the allegation, but ensuring the proceeding remains within the four corners of the complaint. It is entirely appropriate for a Board to be sensitive to the discomfort of the complainant, however it should also be aware that failing to allow a respondent (or their counsel) to question a complainant has resulted in a Board decision being overturned (with the need for the whole hearing process to be redone).

### Suggestions:

- Typically it is the role of the Chair of the Board to manage the hearing;
- If the Chair feels a question is inappropriate they should intervene before the witness responds (if the panel has legal counsel, the chair can seek legal advice on when to intervene);
- The Board can ask the questioning party why the question is relevant, before allowing it to be answered;
- Typically Boards restrain aggressive cross-examinations while ensuring that the respondent is able to mount a proper defence by asking appropriate questions;
- Be sensitive to the need for breaks – usually this will not happen before a party answers a question that has been asked, but it may be possible to ask the questioning party if there is a natural opportunity to take a break before resuming.

## General Process

Subject to the specifics of the *Standard*, the Board has the ability to govern its process. This includes allowing the parties to make suggestions which are agreed to by both parties. Generally, where there is legal counsel for both parties, those counsel will attempt to identify areas of agreement and cooperation to expedite the process.

A Board is empowered to demonstrate flexibility to accommodate what is a serious, stressful, and difficult process for both parties.

---

<sup>i</sup> This document should not be referenced in a decision as it is not binding on the adjudicating bodies or the hearing.