

**OCUFA and CAUT submission
regarding Bill 132,
Sexual Violence and Harassment
Action Plan Act**

January 2016



OCUFA and CAUT's submission to the Standing Committee on Social Policy regarding Bill 132,
Sexual Violence and Harassment Action Plan Act

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Ontario Confederation of University Faculty Associations (OCUFA) and Canadian Association of
University Teachers (CAUT)

The Ontario Confederation of University Faculty Associations (OCUFA) has been the provincial
voice of university faculty since 1964. OCUFA represents over 17,000 professors and academic
librarians in 28 faculty associations across Ontario.

Founded in 1951, the Canadian Association of University Teachers (CAUT) is the national voice
for academic staff. Today, CAUT represents 68,000 teachers, librarians, researchers, general
staff and other academic professionals across Canada.

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The Ontario Confederation of University Faculty Associations (OCUFA) and the Canadian Association of University Teachers (CAUT) welcome the opportunity to comment on Bill 132, Sexual Violence and Harassment Action Plan Act. Collectively, OCUFA and CAUT represent academic staff associations across Canada, comprising approximately 68,000 members. In Ontario, OCUFA represents 17,000 university professors and academic librarians at 28 member associations. Our academic staff members teach students at Ontario universities and engage in research to advance our collective knowledge.

Faculty and academic librarians across the province are encouraged by the Government of Ontario's efforts to address sexual harassment and sexual violence. Specifically, the recognition that these issues must be addressed at Ontario's university campuses is important.ⁱ In our view, Bill 132's requirement that all universities and colleges must have a sexual harassment and sexual violenceⁱⁱ policy is an important step towards combatting sexual harassment, sexual violence, and the rape culture and misogyny that underpin them at our institutions.

According to the Canadian Federation of Students, one in five women experience sexual assault while studying at a post-secondary institution.ⁱⁱⁱ Students have been calling for action on this issue for many years, so that every student is able to learn and pursue their education in a safe environment. Faculty commend students for their work on this issue.

Sexual harassment and sexual violence also affect faculty at Ontario's universities. Many faculty members who have experienced sexual harassment or sexual violence in the workplace – whether in the classroom or elsewhere on campus – report that the supports and processes they accessed were inadequate in terms of leading to appropriate recourse and accommodation. OCUFA and CAUT recognize that these challenges may be experienced disproportionately by faculty from equity-seeking groups and those teaching in particular fields, such as gender studies, women's studies, and sexuality studies. Recent incidents involving threats of violence against faculty working in gender and feminist studies at the University of Toronto have also prompted faculty to reflect on how well-equipped their universities are to deal with this type of situation.^{iv}

ⁱ "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment," *Government of Ontario*, March 2015, page 26-28. Available at: <https://www.ontario.ca/document/action-plan-stop-sexual-violence-and-harassment>

ⁱⁱ Schedule 3 of Bill 132 includes sexual harassment and other offences associated with violent sexual acts, such as sexual assault and sexual exploitation, under one overarching definition of 'sexual violence.' For the purposes of this submission, sexual harassment and sexual violence will be referred to separately throughout.

ⁱⁱⁱ "Turning the Page: A New Chapter for Post-Secondary Students," *Canadian Federation of Students – Ontario*, March 2015, page 10. Available at: <http://www.cfsontario.ca/downloads/CFS-2015.LobbyWeek-Web.pdf>

^{iv} "UTFA statement regarding threats of violence against feminist scholars at U of T," *University of Toronto Faculty Association*, September 11, 2015. Available at: <http://www.utfa.org/content/utfa-statement-regarding-threats-violence-against-feminist-scholars-u-t>

FILLING GAPS IN EXISTING PROCESSES AVAILABLE AT ONTARIO UNIVERSITIES

Existing processes available for faculty and students

In recent years, universities in Ontario have increasingly been moving towards developing sexual harassment or sexual violence policies. However, the landscape is uneven. Regardless of whether institutions have a policy on sexual harassment or sexual violence in place, collective agreements or memoranda of agreement will often provide faculty with access to processes for addressing situations involving sexual harassment and sexual violence. Where collective agreements and policies at institutions are silent regarding sexual harassment or sexual violence, faculty can file complaints under the Ontario Human Rights Code (the ‘Human Rights Code’) because of their status as employees.

Faculty also have protection under the Occupational Health and Safety Act (OHSA). The OHSA prohibits workplace harassment, and requires employers to develop policies and programs to address workplace violence and harassment.^v However, protections under OHSA are limited to determining whether an employer engaged in reprisal against an employee for exercising their rights and will not focus on the underlying allegations of harassment.^{vi} As a result, faculty are generally better served by pursuing the grievance and arbitration process, or by filing a complaint with the Human Rights Tribunal of Ontario (HRTO).

Legal recourse for students alleging sexual harassment and sexual violence is different. Unless a student is also working at the institution, they are not covered by the OHSA. Under the Human Rights Code, students are able to file a complaint against academic and non-academic staff at their institution. There is, however, a gap in the HRTO’s jurisdiction with regards to complaints between fellow students.^{vii} The HRTO does not have the general power to evaluate relationships between individuals that do not involve a service or employment relationship, or to inquire into all claims of unfairness or misbehaviour.^{viii} As a result, a student alleging sexual harassment or sexual violence against a fellow student would not be able to bring forward a complaint under the Human Rights Code. Absent a campus policy, recourse for a student alleging sexual harassment or sexual violence against a fellow student is limited to a civil action.

^v Section 32, *Occupational Health and Safety Act*, Government of Ontario. Available at: <http://www.ontario.ca/laws/statute/90o01>

^{vi} *Aim Group Inc.*, [2013] OLRB Rev Nov/Dec 1298

^{vii} *Peel Board of Education v Ontario (Human Rights Commission)*, (1990), 12 C.H.R.R. d/91 (Ont. SC)

^{viii} *Mehedi v George Brown College*, 2010 HRTO 1486

Filling the gaps

Bill 132 will help address existing gaps in two ways. First, the bill eliminates the limitation period with respect to proceedings based on sexual assault and other misconduct of a sexual nature in specified circumstances. This means that civil action could be pursued years after the incident, or in the case of students, after graduation at a time when they may have more resources available to them.

Second, and perhaps most importantly, new avenues for recourse will be available under newly required campus policies. While faculty currently benefit from existing collective agreements, Human Rights Code procedures, and protections under the OHSA regarding sexual harassment and sexual violence, OCUFA and CAUT welcome the new requirement in Bill 132 that all universities must have a sexual harassment and sexual violence policy that sets out processes for responding to and addressing incidents and complaints. We recognize that the implementation of these policies is particularly urgent for students, and could play a crucial role in filling the significant gaps in recourse available to them.

Overall, ensuring that every institution has a campus sexual harassment and sexual violence policy will help provide consistency and clarity for the university community. The development and implementation of these policies will also provide a framework for improving practices that address both individual incidents and systemic issues related to sexual harassment and sexual violence.

The requirement that all universities have a sexual harassment and sexual violence policy in place on campus will help to fill gaps in existing processes at Ontario universities.

Strengthening health and safety laws

Bill 132 proposes that ‘workplace sexual harassment’ is added to the OHSA alongside ‘workplace harassment’. The proposed legislation also expands employers’ duties regarding workplace harassment and violence policies, including a requirement to specify how an employee reports incidents of harassment when the supervisor is the alleged harasser. It also requires the policy to specify how incidents and complaints will be investigated and dealt with, as well as how the employee will be informed of results of the investigation. OCUFA and CAUT welcome these additions to Ontario’s health and safety law. Too often, however, investigations under the OHSA are dragged out or tainted with procedural unfairness while complainants do not have access to information about the status of their claim. Bill 132 should therefore also include measures to ensure investigations are effective and timely, and that they are conducted

in a reasonable manner. These amendments could significantly improve the quality of investigations that are carried out.

Bill 132 should require that all investigations under the OHSA be reasonably conducted, concluded in a reasonable timeframe, and that both complainants and respondents have access to reasonable information about the status of the investigation and the process being undertaken.

Reporting on implementation and progress

The disclosure of data and other information related to sexual harassment and sexual violence on campus is another positive step laid out in Bill 132. It is widely acknowledged that incidents of sexual harassment and sexual violence on campus are underreported. There are many possible factors that contribute to this underreporting on university campuses. Victims or survivors may not report incidents due to fear of reprisal, apprehension about the reaction of others, peer pressure not to report, previous experiences of discrimination, lack of awareness about available supports and services, and concerns about the effectiveness of the reporting process.^{ix} Universities themselves may also underreport incidents of sexual harassment and sexual violence due to concerns about protecting the reputation of the university and the impact on student recruitment.

OCUFA and CAUT welcome the measures in Bill 132 that would require the collection and provision of information to the provincial government about incidents and complaints of sexual harassment and sexual violence, the effectiveness and implementation of the sexual violence policy, and supports and services being promoted, obtained and requested. Any mandatory reporting requirement, however, must exempt information gathered for research purposes where confidentiality has been guaranteed. Overall, the reporting functions required in Bill 132 will help inform good policy and sound decision-making, as well as track progress in addressing sexual harassment and sexual violence on campus.

The requirement for universities to collect and provide data related to sexual harassment and sexual violence on campus will inform good policy-making and help track progress.

^{ix} “Developing a Response to Sexual Violence,” *Ontario Women’s Directorate*, January 2013. Available at: http://www.citizenship.gov.on.ca/owd/english/ending-violence/campus_guide.shtml

DEFINING SEXUAL VIOLENCE

Schedule 3 of Bill 132 introduces the term ‘sexual violence’ in the *Ministry of Training, Colleges and Universities Act* (MTCU Act). The duties imposed on institutions, including having a policy regarding sexual harassment and sexual violence, are all built around this definition of ‘sexual violence’. In our view, it is important that campus policies address both non-violent sexual harassment and sexual violence, but it would be more effective to provide separate definitions for each.

We recognize that there is a conceptual shift in some fields towards an overarching definition of sexual violence that includes a range of actions or behaviours. While all acts of harassment and violence exist on a spectrum, for the purposes of legislation it is helpful to make a formal distinction between the two. Doing so will improve consistency with current legislation, build on existing case law, and recognize the distinct legal implications of sexual harassment and sexual violence for respondents and complainants.

The inclusion of sexual harassment and sexual violence in one definition is a departure from current legal definitions in the OHS Act and Human Rights Code. Currently, under the OHS Act, workplace harassment and workplace violence are defined separately:

‘Workplace harassment’ is defined as engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.

‘Workplace violence’ is defined as: (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker; (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker; (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.^x

The Human Rights Code includes a definition of sexual harassment that parallels the OHS Act definition of workplace harassment.^{xi}

^x Section 1, *Occupational Health and Safety Act*, Government of Ontario. Available at: <http://www.ontario.ca/laws/statute/90o01>

^{xi} In the Human Rights Code sexual harassment is defined as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome... because of sex, sexual orientation, gender identity or gender expression”

Providing separate definitions for sexual harassment and sexual violence in Schedule 3 of Bill 132 would be more consistent with these existing definitions. Moreover, it would build on the recent landmark changes made to the OHS Act under Bill 168, which included expanding duties for employers and institutions, and new requirements for preventing and addressing violence and harassment in the workplace. Conversely, combining sexual violence and sexual harassment into one policy under the MTCU Act, but keeping the two concepts separate and distinct under the OHS Act and Human Rights Code, may lead to inconsistencies and confusion in the application of the resulting workplace and campus policies. Ultimately, this could render the legislation less effective at combatting both sexual violence and sexual harassment.

Furthermore, there is an extensive body of case law in human rights and employment law, which reflects the evolving complexity and nuance of sexual harassment, that should be drawn on.^{xii} Employers, workers and other groups have also developed a strong understanding of what constitutes harassment under the current definitional structure. Separate definitions in Bill 132 will help ensure this progress is built upon. Further clarity could be achieved by providing a more robust definition of sexual violence^{xiii} and harmonizing the definition of sexual harassment in Bill 132 with the definition of sexual harassment in the Human Rights Code.

Sexual violence and sexual harassment also have different legal implications. For the victim or survivor, sexual violence causes levels of trauma, harm and fear that may not be associated with sexual harassment. For the perpetrator, sexual harassment and sexual violence lead to various consequences ranging from corrective action, such as training, to serious disciplinary measures. Including harassment and violence in one definition may create concern for the victim about disproportionate consequences for the perpetrator, while at the same time trivializing the seriousness of sexual violence.

Schedule 3 of Bill 132 should be amended to include separate definitions of sexual harassment and sexual violence, and the definition of sexual harassment in Bill 132 should be harmonized with the Human Rights Code definition of sexual harassment.

^{xii} For example, see “Policy on preventing sexual and gender-based harassment,” *Ontario Human Rights Commission*, May 2013. Available at: <http://www.ohrc.on.ca/en/book/export/html/10245>

^{xiii} In particular, definitions should be provided for the terms ‘sexual act of a psychological nature’ and ‘sexual exploitation.’

CONSIDERATIONS FOR EFFECTIVE CAMPUS POLICIES

When sexual harassment and sexual violence policies are implemented on university campuses, it will be important to acknowledge the ways in which these policies interact with existing collective agreements and memoranda of agreement. Many faculty associations will have experience dealing with the interaction of university policies and collective agreements. All institutions should strive to develop clear and effective practices about how these new policies will complement existing policies and procedures. This should be considered in consultation with the campus community.

In addition, if a university's sexual harassment and sexual violence policy is extended to faculty, the policy should reference the foundational principle of academic freedom and its centrality at the institution. Academic freedom includes the right to teach, research, publish, and express one's opinions free from political and institutional censorship. Academic work addressing sexual violence, which might include research and teaching in fields such as sexuality studies or social work, should not be hindered by these policies. This type of research plays a key role in advancing knowledge and understanding of issues related to sexual harassment and sexual violence, and contributes to sound policy-making. More broadly, academic freedom ensures that universities can serve the common good of society through the pursuit and dissemination of knowledge, and through fostering independent thinking and expression.

As universities develop sexual harassment or sexual violence policies in consultation with the campus community, the centrality of academic freedom at the university must be recognized.

CONSULTATION REGARDING CAMPUS POLICIES

The meaningful participation of campus stakeholders in policy development, implementation and evaluation will be key to the effectiveness of campus sexual harassment and sexual violence policies. Not only will participation generate support for the policy and improve legitimacy, it will also help to ensure the policy is responsive to the needs of the campus community. In addition, consultation and collaboration will help foster a shared concern and responsibility for taking action to create a safe, respectful and inclusive campus.

Therefore, the requirement for student input into campus sexual harassment and sexual violence policies is a welcome step towards ensuring the campus community is involved in policy development. This commitment should be expanded to ensure that all campus groups

affected by the policy, such as academic and non-academic staff, also have the right and opportunity to be consulted in the development of the policy, and every time the policy is reviewed or amended.

In instances where faculty are affected by sexual harassment and sexual violence policies, their participation in consultations should be coordinated through local faculty associations. Many faculty associations have existing status of women committees and equity committees that are engaged on these issues. Other associations may be able to draw on the individual expertise of their members who teach and research in this field. Universities should be encouraged to work with their local faculty associations to establish a process for faculty input that works for their campus.

Bill 132 and accompanying regulations must require that all campus groups affected by the sexual harassment and sexual violence policy have the right and opportunity to be consulted in the development of the policy and every time it is reviewed or amended.

CONCLUSION

In conclusion, OCUFA and CAUT believe the measures in Bill 132 are positive steps towards ensuring individuals that have experienced sexual harassment and sexual violence are supported at Ontario universities. We are also encouraged that it provides a framework that will support university campus communities in challenging the underlying attitudes and behaviours that perpetuate sexual harassment and sexual violence, and enhance measures for prevention.