

**Review of the
Harassment/Discrimination Complaint Policy and Procedure
of
Queen's University
at Kingston, Ontario**

REPORT TO SENATE

Submitted by
Keith C. Norton, QC

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1. Introduction

Under Section IV, the Harassment/Discrimination Complaint Policy and Procedure¹, which was approved by the Senate of the University on March 30, 2000 and ratified by the Board of Trustees on May 6, 2000, provides for a review of the Procedure and its operation five years after its coming into force and for a report to the Senate with any recommendations for change.

In 2006, the Senate was preparing for the periodic review and acted on a suggestion from the Vice Principal (Human Resources) that an external (third party) review of the policy would be a useful first step. In December of that year, the Principal invited Keith Norton to undertake the external review.

This external review did not expressly include policies and processes beyond the Harassment/Discrimination Complaint Policy and Procedure itself. For example, the review did not include consideration of the University's Educational Equity Report and Policy Statement² or complaint processes which exist as part of collective agreements.

It was agreed that the review, which began in early 2007, would go beyond a review of the Policy and Procedure document as written, to include a broadly based consultation with interested stakeholders within the university community. As a result, the Review included:

- A review of background documentation on the Policy and Procedures document (historical information and reports to Senate)
- A review of the Policy and Procedure document itself
- An open meeting for the university community (Feb. 13, 2007)
- A review of 19 submissions from members of the university community
- Fourteen meetings with individuals and groups making submissions.

On at least two occasions, e-mail notices were sent to the entire university community inviting submissions and four days were selected during which oral submissions would be received.

The review was undertaken with the assistance of Kathy Wood and the support of the office of the University Secretary. To ensure the opportunity for confidential discussions, the office of the University Secretary scheduled but did not attend these meetings.

The University would like to thank those who took the opportunity to contribute to the Review process --- either through written or oral presentations. The review heard from members of the administration, faculty, staff, student body, Director and staff of the Human Rights Office, Respondent Advisors, Faculty Association, unions, the University Student Appeal Board and the Senate Education Equity Committee. In addition, Mr. Norton appreciates the contributions of an Executive Director of the Community Legal Clinic which has been involved with the Human Rights Office, and a Director and a Policy Analyst at the Ontario Human Rights Commission who reviewed the Policy and offered helpful comment.

¹ <http://www.queensu.ca/secretariat/senate/policies/harass/index.html>

² <http://www.queensu.ca/secretariat/senate/policies/EDEQ.html>

2. Review Conclusions and Recommendations

The following recommendations are based upon a review of the Policy and Procedure document itself, input from the consultations on campus, the written submissions received from individuals and groups who did not speak to their submissions in meetings, some limited consultation with external experts and a review of the background documentation provided. Some proposals, while not without merit, were found to be outside the scope of this review and some of the recommendations come not from submissions but from our own observations and experience. References to specific sections and paragraphs in this report are references to the existing Policy Statement.

During the review process, it was clear that the staff of the Human Rights Office (HRO) and the volunteer advisors are truly dedicated to their work and are widely respected for the work they do. That should be borne in mind when reading the following material since none of the criticism of process is intended to be critical of individuals. Dedicated staff and volunteer advisers have worked with limited resources in an attempt to achieve just results.

Recommendations Related to Existing Section A - Policy Statement:

1. Independence of Process:

It is important that accountability of the policy and process is ultimately to a body outside the administration in order that the process be independent of those against whom complaints can be made. While we considered the suggestion that the Senate was no longer the appropriate body to which the process is accountable, we concluded that the Senate is indeed the most appropriate body to which the process be accountable. This policy is now and remains a policy of the Senate and the Senate has the responsibility for the “welfare” of those on campus albeit with changed responsibility in some respects as a result of the collective agreements. [See existing policy document, section A, paragraph one]

One suggestion that is worth consideration is that reports go to both the Senate and the Board of Trustees since the Board ratified the policy. However, given the nature of the responsibilities of the two bodies, if this should be considered, primary accountability ought to remain with the Senate.

The most obvious and logical way to convey reports is by way of the Principal since she/he is the Chair of the Senate and also a member of the Board.

Recommendation A-1: This policy statement should remain a policy of Senate with a reporting relationship to Senate through the Principal, who will also be responsible for conveyance of reports to the Board of Trustees.

2. Awareness of The Policy:

In some meetings, it was suggested that there is a lack of awareness of the policy and the procedures set out in it. This lack of awareness extends to some degree to faculty, staff and students. While the HRO staff does engage in public education, their resources simply do not permit them to reach the whole university community.

In addition, to assist those who wish to access the procedures set out in the policy or those who wish to respond to a complaint, we would recommend that an attempt be made to set out in either electronic or hard copy form (for instance on the University website or in pamphlet form), possibly with a diagram/flow chart, a simplified outline of the process and a very brief description of the essential parts of the policy. These could be made available across the campus as part of a public education or awareness plan. These materials could also be used as part of orientation programs for new students, faculty and staff.

Opportunities could be identified to reach key leaders within the student body who would have opportunities to increase awareness among others. Such persons would include those in charge of orientation programs for students, Dons in residence and certain key people in student government. It might be worthwhile for the HRO to invite these individuals to an awareness/training session at or before the beginning of each school year.

Recommendation A-2: Given the responsibilities outlined in paragraph 3 above to make the campus community aware of the Policy, the University should create and broadly disseminate a simplified outline of the essential elements of the Harassment/ Discrimination Policy and Procedure.

Recommendation A-3: That opportunities be identified to provide awareness and training among key students, faculty and staff who might be responsible for dissemination of this information to their peers.

3. Clarity of the Policy:

Based upon the submissions referred to in point number 2 above and our own observations, we would recommend that consideration be given to redrafting the policy with a view to developing a more user-friendly format. Also, it might be a more inviting document if the definitions were more succinct and moved to the end or placed in an appendix.

For example, a review of Section A (Policy) and Section B (Definitions) of the existing policy document reveals an inconsistency in the enumerated grounds cited in each. The sections should be harmonized to avoid confusion. Further, in the provincial legislation (to which the University is subject), mental illness and mental

disability are deemed to be covered under the general ground of ‘disability’. This inclusion could be reflected in amendments to the definitions section of the policy. [See Section B, part 1 of this report for further recommendations on definitions of enumerated grounds.]

Recommendation A-4: That consideration be given to reorganizing and redrafting the policy into a more user-friendly format. This would include making the definitions more succinct and placing them at the end of the document.

4. Centralized Procedure:

Paragraph 5 of Section A of the existing policy statement refers to the assumption that a “centralized procedure is necessary to assure uniformity and fairness”. As was evident in the presentations and documentation, there are a number of different processes which address human rights related disputes across the university community. In some instances, the body addresses other non-human rights disputes as well. However, there is a lack of central coordination of these processes with a resultant inability to monitor for consistency of application of the policy and due process. [See Section C, part 9 of this report for further recommendations on centralized procedures.]

5. Informal Resolution:

Paragraph 6 of Section A of the existing policy statement refers to an “emphasis on informal resolution, using facilitation/negotiation, save where the nature of the matter necessitates a more direct process.” [For specific recommendations, see Section 8 under C of this document.]

Recommendations Related to Existing Section B - Definitions:

1. Alignment of Enumerated Grounds:

Part of the first paragraph of Section B is a list of prohibited grounds. A similar but not identical list is presented in Section A –Policy Statement (paragraph one). If presented more than once, these lists should be identical.

One suggestion from a lawyer in administration was adopting accepted definitions from legislation as applied by the courts and tribunals.

Recommendation B-1: That particular attention be given to aligning the enumerated grounds in the policy to reflect the existing grounds in the legislation of Ontario and Canada and ensure that the definitions section (B.1) is harmonized with the enumerated grounds in Section A of the policy statement (for example, age discrimination, disability). Further, the term ‘handicap’ should be removed from the policy statement.

2. Scope of Policy:

With the harmonization of the sections of the policy and the clarification of definitions in place, we support the current reference in the policy (Section B, paragraph 1 part three) which notes that personal/workplace harassment which is not based on one of the grounds enumerated above is not covered by the procedure. Non-code harassment would be better dealt with under different mechanisms such as codes of conduct or general management practice.

Recommendation B-2: That the application of the policy to harassment continue to be restricted to harassment on the basis of enumerated grounds.

Recommendations Related to Existing Section C - Procedure:

1. Applicability of Procedure:

In setting out who may utilize the procedure, the second paragraph of C.I of the existing policy (Applicability of Procedure), suggests that harassment occurring off campus during or outside working hours would be subject to the policy and procedure. In addressing complaints from non-community members, the fourth paragraph restricts the application of the policy to conduct occurring on campus or at “any Queen’s University sanctioned event” whether on or off campus.

With respect to paragraph two, the question arises as to how Queen’s can assert jurisdiction under this policy in the case where the conduct occurs off campus in a private home or in a facility open to the general public? It seems doubtful whether jurisdiction exists over conduct occurring off campus in a private or public place where anyone else in that setting would be subject to the civil authority. This prompts the recommendation that the same restriction ought to be included in the second paragraph as in the fourth and make such conduct subject to the civil authority where it appears to be beyond the jurisdiction of the University.

Recommendation C-1: That paragraphs two and four in section C-I of the existing policy be reviewed and consideration be given to harmonization so that paragraph two has the same restrictions as paragraph four.

2. Employment in Related Corporate Entities:

A related issue is the applicability of the policy to individuals working for organizations other than the University itself but within university-related environments (for example, individuals working for non-university organizations within Queen's facilities or for Queen's faculty or staff operating other organizations at arms length from the institution). With respect to this issue, we make the following recommendation.

Recommendation C-2: That for employment situations, the applicability of the Senate Harassment/Discrimination Policy be limited to individuals with direct employment relationships with the University. Where an individual is working in association with a member of the university community in a relationship that is not expressly part of the academic, research or operational functions of the university (example a private corporation owned by a member of the University), this policy ought not to apply. These sorts of situations should be dealt with under the Ontario or Canadian Human Rights Code.

3. Limitation Period:

In Section C-I and related sections, there is no apparent time limitation for lodging a complaint. This leaves open the possibility of delays of up to many years in initiating a complaint, which could be unfair to respondents by compromising their ability to mount a defence.

Recommendation C-3: That consideration be given to including a limitation period of one year during which complaints can be initiated with a provision for flexibility where a reasonable explanation for the delay is provided.

4. Reprisals:

Under reprisals on C-I-6 of the policy, it is clear that any "reprisal, or expressed or implied threat of reprisal, for making and pursuing a complaint" is to be considered a breach of the policy.

In the meetings, presenters told us of instances where the respondent was placed at a disadvantage by having the notice period abbreviated or was denied the particulars of the complaint until the first meeting took place because of concerns about reprisal. Especially in the residence setting, it would be helpful to expand this section to emphasize the seriousness of such conduct by indicating some range of consequences.

While this would not eliminate the need for emergency action in the most serious cases (for instance by finding alternative accommodation or arranging a change in thesis advisor, if possible), it might reduce the need to bypass due process in some cases.

We would recommend that some range of consequences be set out in reference to reprisal in the hope that this might reduce the need to compromise due process except in the most serious cases.

Recommendation C-4: That Section C-I-6 on page 6 of the existing policy be amended to include a range of consequences depending on the severity of the conduct constituting reprisal activity up to and including dismissal or expulsion from the University.

5. Hearings without Cooperation of Complainants:

Section C-III-4 on page 8 of the existing policy statement (Responsibilities of Supervisory Personnel) provides for a complaint to be taken as far as a formal hearing without the consent of the person(s) allegedly harassed in circumstances where the interests of the University and the protection of the members of the community require it. In our view, a preferred approach in these circumstances would be to initiate an investigation as an alternative to a formal hearing.

Recommendation C-5: That the University give consideration to making provision in the policy that complaints, the pursuit of which do not have the consent of the complainant(s), be subject to investigation with the possibility of an administrative solution to the problem as opposed to a hearing process, unless natural justice requires a formal hearing.

6. Perceived Imbalance of Representation: (existing policy reference for representation: C-II-5)

Several presenters, including volunteer advisers, raised concerns about a perceived imbalance of representation for complainants and respondents:

- In situations where the Complainant is represented by a professional working full time in the human rights field (as a staff member of the HRO), the respondent is represented by a volunteer who has other full-time responsibilities within the university.
- The Complainant is represented by a human rights professional, who may also be responsible for controlling the process. The Respondent Advisor has no such responsibilities.
- The Complainant is represented by a staff member who may also have general advocacy responsibilities for human rights issues on campus. The Respondent advisor has no such responsibilities. (As a result, Respondents generally see the HRO as a “Human Rights Advocacy Office” for Complainants.)

All three of these factors can result in the respondent perceiving him/herself as being at a disadvantage.

There was a consistent view among those who raised this issue that this perceived imbalance ought to be addressed. We would recommend that steps be taken to change this perception. One step would be to secure the services of at least one full-time trained human rights officer to assist and advise respondents, and work with the dedicated volunteer advisers, providing them with ongoing support. While this person could work with the staff of the HRO on a variety of matters, their responsibilities ought to be kept separate from the HRO.

Recommendation C-6: That at least one full-time human rights officer (separate from the coordination role) be assigned to assist and advise respondents and to provide ongoing support to volunteer advisers.

Recommendation C-7: That professional development program(s) be executed on at least an annual basis for those individuals who are in advisory or decision-making roles with respect to this policy. These programs would help to ensure consistent understanding of due process/natural justice and alternative dispute resolution.

7. Adherence to Due Process:

A concern was expressed that the procedure to be followed in processing a complaint should be set out in detail and with greater clarity. It should be emphasized that the rules of natural justice must be observed. There were anecdotal reports of at least a few situations in which this appears not to have been the case:

- An example was given of a situation in a residence where a respondent was not advised of the nature of the complaint nor the name of an adviser until arriving at the initial meeting (rather than when invited to attend the meeting) and had only a few minutes to speak with the advisor before entering the meeting. In some cases – particularly in residence settings – we were told of situations where a respondent only learned of the details of the complaint within the meeting itself. Clearly this could put a respondent at a great disadvantage.
- Another case was cited where the representative of the HRO who was assisting the complainant in circumstances that arose in a residence setting went into a private meeting with the decision-maker. The Respondent Advisor was not invited. At the conclusion of the private meeting, the decision-maker announced a decision. The respondent and his adviser were not privy to what took place in the meeting. This sort of incident is a serious breach of natural justice.

Recommendation C-8: That the services of someone from the law school be secured to provide training on due process to all appropriate parties including decision-makers and advisors.

8. Fact-Finding and Investigation:

We are aware that the Human Rights Office deals with approximately 150 cases and consultations per year, and that the majority of these complaints are dealt with through informal dispute resolution. It is not clear how many complaints are dealt with informally within academic or administrative departments before a complaint is lodged with the HRO. The University Student Appeal Board handles approximately 10 cases per year while the Harassment/Discrimination Complaint Board handles far fewer as almost all cases are resolved through informal mechanisms.

Discussions with knowledgeable individuals suggest that the University's capacity to undertake fact-finding or investigations related to human rights/harassment or discrimination matters is limited. Fact-finding is normally undertaken early in a complaint process to determine if there is a body of facts associated with the complaint to which the parties can agree. Therefore, fact-finding is an important first step in the process of exploring the possibilities for resolution.

Recommendation C-9: The more extensive use of neutral fact-finding meetings at the beginning of the process would enhance the perception of fairness and the possibilities for successful resolution.

Recommendation C-10: Unless there are clear indications to the contrary, in all cases, an early attempt ought to be made to resolve a dispute using an alternative dispute resolution mechanism such as mediation.

9. Multiplicity of Procedures:

There is considerable confusion about the overlap of jurisdiction among the various processes across the university community which may from time to time deal with issues involving harassment, discrimination or human rights. These include the HRO, the processes internal to the residences, the informal dispute resolution processes within faculties and departments, the University Student Appeal Board (USAB) and the Collective Agreements.

Several very experienced people indicated that there was confusion about how these processes related to one another. For example:

- A complaint dealt with in the residence system might involve harassment or discrimination and might or might not be brought to the attention of the HRO. If dealt with exclusively within the residence system, the matter could end up before the USAB on appeal, whereas if the issue were dealt with under the Harassment/Discrimination Policy there is an express exclusion of the matter from the jurisdiction of the USAB in Section 18 (b) of Senate Policy on Student Appeals, Rights and Discipline. Thus, depending upon where the matter was initiated, the same issues could be determined through a very different process with the possibility of a very different result.
- Matters dealt with internally within faculties or departments could involve similar issues and not come to the attention of the HRO at all.

It would seem to be desirable to have some broader supervisory authority to which all bodies dealing with human rights related disputes would be accountable on those specific matters. Given the University Secretariat's role with respect to Senate, we believe that the Secretariat is the most appropriate home for this new authority.

Recommendation C-11: That the University create a central authority through which to effect alignment of various campus processes to avoid duplication and ensure consistency.

Recommendation C-12: That the University give consideration to the possibilities of moving to a single tribunal for resolution of disputes covered by the Harassment/Discrimination Complaint Policy and Procedure and the Senate Policy on Student Appeals, Rights and Discipline.

Recommendation C-13: That the University establish a central record of the resolution of cases by the HRO, the residences, the internal processes within faculties and departments, and the tribunals in order to review the consistency of the outcomes in similar situations.