Faculty Association

UNIVERSITY OF MANITOBA ♦ 100-29 DYSART RD., WINNIPEG, MB R3T 2M7 ♦ PH - (204) 474-8272 ♦ FAX - (204) 474-7548 ♦ FAUM@UMFA.CA

April 4, 2019

Ms. Darlene Smith
Human Resources
Acting AVP (Human Resources)
Director of HR Client Services
310 Admin Bldg
University of Manitoba

Dear Ms. Smith,

Re: Revision of Behavioural Policies and Procedures (RWLE and Sexual Violence)

Thank you for your letter of February 1, 2019. We have reviewed the administration's draft Respectful Work and Learning Environment (RWLE) and Sexual Violence (SV) policies and draft Disclosures and Complaints (DC) Procedure and have significant concerns.

In an attempt to enable survivors of sexual violence to seek the support they need with dignity, privacy, and in the manner of their choosing, the administration has drafted policies and procedures that will create false expectations regarding the ability to disclose violations of the policies/procedures without the administration initiating its own response, contrary to the wishes of the complainant. If implemented as written and without the allocation of additional institutional support, complainants will quickly discover that even informally disclosing complaints following the processes outlined in these documents will undermine a desire for privacy and their ability to control how their disclosure is handled by the administration. The administration also appears to wish to continue to conduct in-depth investigations of formal complaints, which are problematic for both complainants and respondents. The Provincial Government has cautioned against this, stating that such intensive investigation is not necessary to provide accommodation and support to those affected by sexual violence.

In addition to the above, the draft policies exceed the requirements of the Workplace Safety and Health Regulation, Advanced Education Administration Act, and the Human Rights Code, and if implemented as written will encroach upon the University's academics' right to academic freedom. The imposition of an ill-defined notion of 'respect' on an academic workplace defined by the ability to freely and openly debate issues will chill speech and debate by inducing fear of discipline for expressing unpopular and potentially offensive ideas.

We address each of these issues in turn.

Those affected by sexual violence at the University or at University events should have access to University-supported resources for addressing their needs, and those supports should be provided

without requiring the affected person to make a formal complaint. Toward this goal, in the draft Sexual Violence Policy the administration makes a distinction between a "disclosure" and a "formal complaint." This is a positive step forward. The administration has also taken a positive step at section 2.7 of the Policy, stating that affected persons should have autonomy in decision-making, in particular with respect to "whom to Disclose, whether to make a Formal Complaint, whether to pursue recourse to the criminal or civil justice systems, and whether to access available supports and accommodations."

However, as the definition of "disclosure" and section 2.8 of the draft SV Policy make clear, "the University reserves the right to initiate a University Instituted Investigation" even when a disclosure is made rather than a formal complaint. At 2.17 of the Disclosures and Complaints Procedure it is even less clear that disclosures can in fact lead to formal investigations, as there it is stated that "A Disclosure is not a Formal Complaint and will not initiate an investigation." This undermines the administration's stated commitments to a "trauma-informed and intersectional approach" (section 2.2(d) of the SV Policy) and to allowing those affected by sexual violence to "determine whether or not to proceed with a Formal Complaint process" (2.2(g) of the SV Policy). Moreover, these contradictions will create expectations in those affected by sexual violence that could quickly be proven mistaken, thereby causing more damage. These aspects of the policy need to be addressed.

Similarly, reference to "privacy" in the SV Policy and section 2.64 of the DC Procedure is potentially misleading. Where the policy, at 2.2(i), states the administration's commitment to "respecting the privacy of those affected by Sexual Violence," the term "confidentiality" might be more appropriate as during the course of an investigation various pieces of information are revealed to a number of people. Where the University asserts its right to investigate information provided in a "disclosure," it is all the more imperative that those affected by Sexual Violence be given a clear picture of the limits the SV Policy and DC Procedure impose on their privacy. The use of "anonymity" at section 2.8 of the SV Policy is a problem for similar reasons.

These problems are compounded with the assertion at 2.1(f) of the SV policy that "disclosure means telling the Office of Human Rights and Conflict Management", and at 2.17 of the DC Procedures that "University Community Members impacted by Discrimination, Harassment, or Sexual Violence are encouraged to disclose their experiences to the Office of Human Rights and Conflict Management." The most easily foreseeable way that a disclosure would become a formal investigation against the wishes of the person making the disclosure is in the event that they disclose to an officer of the university who has the power to review the information and take steps to begin an investigation. <u>In support of those affected by sexual violence we strongly recommend that the administration establish and fully fund an arm's length organization dedicated to offering members of the university community trauma counselling and other supports, thereby increasing the ability to disclose instances of sexual violence without losing control of the process by which it is addressed</u>.

The Association continues to be concerned by the methods used by the administration to investigate complaints made under these policies and procedures. Based on the draft Sexual Violence Policy, it is clear that the University intends to continue conducting in-depth investigations of complaints of sexual violence and, in particular, complaints of sexual assault.

However, based on the wording of the Manitoba Post-Secondary Sexual Violence Policy Guide (see below), it is not clear that the University's present practices are those required or best suited to meet the University community's needs. Given the impact of these investigations on complainants and respondents, and the concerns we raise above, the administration must consider if its present methods are the most appropriate for the purposes of determining the extent of the need for accommodation and support of those experiencing sexual violence, and the need for corrective action in the workplace.

Further, in these new drafts, the administration is proposing changes to the confidentiality provisions at sections 2.64 and 2.89 of the Procedures, bringing to an end any confidentiality requirements once a report is delivered to those involved in an investigation. This requirement is replaced with a reference to obligations under the Freedom of information and Protection of Privacy Act. These obligations need to be made clear in the Procedures, for many of the reasons cited above.

Lastly, the administration currently has an informal policy of withholding the salary increments of UMFA Members accused of a breach of the current RWLE/SA policies. This means a Member's increment is not awarded until the matter is resolved, which often takes many months. This policy is applied not only to respondents of complaints made in good faith, but also to respondents of vexatious complaints, the latter of which are sometimes lodged against those who have disclosed instances of sexual violence. This policy should be rescinded as those respondents found to not be in breach of the policies suffer an unwarranted financial penalty for what can be months. If the administration thinks it appropriate to deny salary increments it should rescind them after a disciplinary decision has been made rather than withhold them before a matter is otherwise resolved.

We also have strong reservations with respect to the draft documents' treatment of academic freedom. These concerns can be addressed by reducing the scope of the Respectful Work and Learning Environment Policy to that intended by the relevant legislation: that of creating a harassment-free and discrimination-free workplace and learning environment, as well as creating policies and procedures to deal with discrimination and harassment when it occurs. Where the policies should provide guidance on these specific issues the administration has confused the issue by adding a third element, defining a "respectful work and learning environment" as one that is not only free of discrimination and harassment, but also "Collegial and conducive to early resolution of conflict between members of the University Community" (RWLE Policy, section 2.3 (c)). Here the term "collegial" is conflated with "respect", the latter of which is nowhere defined in the policy: it is not included in the list of definitions in section 2.1 of this draft policy nor in section 2.1 of the draft procedure. Similarly, the terms "collegial" and "climate of respect" (RWLE Policy, section 2.6) are themselves undefined.

Where these documents are to be a guide for members of the university community in regard to their rights and obligations under the Human Rights Code, the Workplace Safety and Health Regulation, and the Advanced Education Administration Act, closely associating 'harassment-free' and 'discrimination-free' with 'collegiality' and 'respect' will create confusion and lead to an increase in unfounded complaints and unnecessary investigations. Left undefined, members of

the university will default to a lay understanding of 'respect' that includes problematic assumptions regarding 'tone', 'appropriate language', and 'offensiveness'.

This confusion will be further exacerbated by including the term "offensive" in the definition of Personal Harassment, Human Rights Based Harassment, and Sexual Harassment as found in the draft Disclosures and Complaints Procedure (see 2.10(a)(i), 2.10(b)(i), and 2.15(b) and 2.15(f), respectively). While the term does appear in the relevant jurisprudence, the inclusion of "offence" is not justified by the Human Rights Code, the Workplace Safety and Health Regulations, or the Advanced Education Administration Act themselves, as they do not contain the term in their definitions of harassment. Where conducting academic work often means presenting ideas that may be perceived as offensive, conflating "offence" with harassment will have undesirable consequences. Given the particularities of the academic environment, and that the University's goals can be achieved without the word's inclusion, removing reference to "offense" in these definitions is advisable.

These conflations and unnecessary additions are all the more concerning given the assertion that in the course of debate at the University "Opinions must be expressed in a manner which is not in Breach of this Policy or the Procedure" (RWLE Policy, Section 2.18). Here, academics and students alike are expected to communicate in line with "the principles of respectful behaviour embodied in this Policy" (Ibid). Where the policy only makes explicit reference to a harassment-free and discrimination-free work and learning environment, this statement provides no guidance as to the meaning of "respectful behaviour" as independent of harassment-free or discrimination-free behaviour. It is clear, however, that the administration means something more, as it has included "collegiality", etc., at 2.3(c) of the draft Policy. Further, 2.7 (a) of the RWLE Policy suggests that the administration will at some point in the future "educate members of the University Community about: (i) the University's general expectations for respectful conduct; […]." <u>This is hugely problematic as the administration is not only creating a policy that it is not required to create, but also leaving any and all details about the actual content of a significant aspect of the policy to a future, undefined date</u>.

Our concerns are further heightened at 2.17 of the RWLE Policy, where it is stated that the administration will "vigorously defend bona fide academic requirements" when members of the university community raise breaches of the policy or the need for accommodation, but no corresponding promise is made regarding academic freedom at section 2.16. The administration must also commit to the vigorous defence of academic freedom, which includes not only the right to take a committed position on issues, but to do so "without deference to prescribed doctrine" (See article 37 of the UM/UMFA Collective Agreement).

To remedy these problems, the administration must strike sections 2.3(c) and 2.7(a)(i) of the draft RWLE policy, replace all references to 'respect' in all three documents with references to discrimination-free and harassment-free behaviour, and rename the policy to reflect the statutory requirements and stated purpose of the policy (e.g. "Harassment- and Discrimination- Free Work and Learning Environment Policy").

Finally, it is very important to note that labour unions like ours exist to advocate for the safe and healthy work conditions of their members, and union members can receive confidential advice

from their representatives on the options available to them in cases like those described in the policies. The administration should make clear in both their educational materials and the policies and procedures themselves that unionized employees at the University can and should disclose discrimination, harassment, and sexual violence to their union.

I trust these comments will aid in the improvement of these policies and procedures and you will share them with whomever you deem appropriate. We too will be sharing our comments with various constituencies.

Our further comments on particular sections of each of the draft documents are found below.

Yours,

Greg Flemming
Executive Director, UMFA

Draft Respectful Work and Learning Environment Policy

Section 1.1: Reason for Policy

The first sentence exceeds what is required by legislation and should be deleted. The words 'and respectful' should be removed from the final sentence: "The University of Manitoba is committed to an inclusive ~~and respectful~~ work and learning environment, free from […]"

The preamble should also make reference to academic freedom, as does the draft DC Procedure at section 1.2.

Section 1.2 (a)

This section is beyond the scope of what is required by the applicable legislation and should be deleted.

Section 2.3: Vision for the University Community

The term 'respectful' should be removed. Section 2.3 (c) should be deleted as it exceeds to scope of the applicable legislation.

Section 2.6

The first sentence should be deleted, as it is beyond the scope of the applicable legislation.

Section 2.7: Implementation of Vision

Sections 2.7 (a)(i) and (iii) should be deleted as they are beyond the scope of the applicable legislation. Section 2.7 (g) should be deleted for the same reason.

Sections 2.8, 2.12, and 2.13

"Respectful" should be replaced with "harassment and discrimination free" to be in compliance with applicable legislation.

Section 2.14: Annual Report

We ask that you please clarify what is meant by "Aggregate anonymized data on Complainant and Respondent roles at the University" at section 2.14(b), which is listed as an element of the annual report produced by the Office of Human Rights and Conflict Management.

We would be very concerned if this could include identifying a complainant or respondent as, for example, "An Assistant Professor in Architecture". In some situations, there may only be one or two people who hold a particular rank in a faculty, so it would become quite obvious as to which individual is being referred to in the annual report.

Sections 2.16 to 2.19: Balancing of Rights

Section 2.18 states that informed debate may be used to further scholarly pursuits "provided that the communication is compatible with the principles of human rights, the Criminal Code, and the principles of respectful behaviour embodied in this Policy".

The requirement that informed debate cannot be incompatible with the principles of respectful behaviour should be removed. This Policy is intended to meet statutory requirements to provide a workplace that is free of harassment and discrimination, and should be no broader than that. To include a vague reference to principles of an undefined term such as "respectful behaviour" goes too far in terms of scope, and could lead to a plethora of disputes over interpretation of the term.

Where Academic Freedom is core to the University's mission, at section 2.16 the administration must commit to defend it by adding the following: "… and the University will vigorously defend that freedom."

Where the policies are intended to apply to both the learning and work environment, section 2.19(a) must be broadened to state that the RWLE Policy and Disclosures and Complaints Procedure are not intended to regulate pedagogy, research and service. Pedagogy only covers the teaching duties of our Members, but a Member's duties encompass research and/or service duties as well.

Section 2.21 and 2.22: Additional Protections

We recommend that Sections 2.21 and 2.22 be moved to a more prominent place near the beginning of the draft RWLE Policy, as it is important for complainants to know that they have avenues other than the RWLE Policy and Disclosures and Complaints Procedure through which to file a complaint.

Section 7.1: Cross References

Section 7.1 should list all six of the collective agreements with Campus Unions its list of documents to be cross-referenced with the draft Policy. This should also be added into the Sexual Violence Policy at section 7.1.

Draft Sexual Violence Policy

General Comment: Investigating Complaints of Sexual Assault

We wish to draw your attention to the "Manitoba Post-Secondary Sexual Violence Policy Guide". At Page Three of the Guide, the following statement is made:

> The [Sexual Violence Awareness and Prevention] Act does not require institutions to investigate disclosures or reports of sexual violence. Institutions are strongly discouraged from establishing tribunals or quasi-judicial committees to make a determination as to the complaint's validity. It is not necessary to establish guilt/innocence in order to activate a response protocol and provide the complainant/survivor with reasonable accommodation. Quasi-judicial committees or investigative processes can be harmful to the complainant/survivor and should only be considered in extreme situations and should be developed with significant input from law enforcement and experts.

It is our position that the University and those it contracts are not the appropriate authorities to perform in-depth investigations of allegations of sexual assault or other sexual conduct that could be subject to criminal penalties. If the Winnipeg Police Service were to get involved in a sexual assault complaint there could be simultaneous investigations, and any documents or notes produced in the course of the University's investigation might have to be turned over to the police. This may prejudice the respondent and, given the concerns we raise above regarding disclosures, breach the privacy of the complainant and witnesses.

The University has a responsibility to provide victims of sexual assault with support and accommodation, and the draft Sexual Violence Policy should outline what support is available. However, it is not at all clear that the methods currently used to determine particulars are those best designed to address the requirements of the applicable legislation and the needs of the University community.

Section 1.1: Reason for Policy

Section 1.1(c)(iii) should make explicit mention of a community member's labour union as an available resource.

Section 2.2: University Commitments

At section 2.2(i) the administration should provide greater clarity on its intentions regarding the privacy of those reporting or disclosing acts of sexual violence.

Section 2.3: University Community Responsibilities

At Section 2.3(f) reference to 'respectful' should be removed. The term "consensual" or "healthy" would be more appropriate.

Section 2.5: Sexual Violence Steering Committee

Sexual violence is an issue that affects the safety and health of the University workplace and members of the University Community. As a workplace safety and health matter, any steering committee created to advise the University on issues related to sexual violence should include a representative of the Organizational Safety & Health Advisory Committee (OSHAC). We therefore recommend that the co-chairs of OSHAC be added to the Sexual Violence Steering Committee, as the University is obligated to consult with OSHAC on these types of workplace safety and health-related matters.

Section 2.6: Supports

We are concerned that the RWLE Policy, Disclosures and Complaints Procedure, and Sexual Violence Policy are too heavily focused on complainants, and do not give necessary attention to witnesses and respondents.

For example, section 2.6 states that "The University will communicate and provide resources to support those affected by Sexual Violence including online resources with links to on-campus and off-campus supports and resources that may be accessed by members of the University Community." Resources, however, should also be made available for witnesses and respondents to a sexual violence investigation. Other sections of the draft Sexual Violence Policy, such as section 2.2(h), do a better job at ensuring support for all participants to a complaint of sexual violence.

Section 2.8: Autonomy in Disclosure and/or Formal Complaints

Section 2.8 makes it clear that the "University reserves the right to initiate a University Instituted Investigation in accordance with the Procedure, and/or to report the incident to local police services, even without the consent of the Complainant…".

This is a very important piece of information that should be placed closer to the beginning of the draft Sexual Violence Policy, as complainants must know that they do not necessarily control their complaints, and that in the process of initiating a University Instituted Investigation or police report, the University will have to disclose their name and other personal information related to the complaint.

Further, creating an arm's length University body dedicated to confidential disclosure and support would help overcome this contradiction in the draft policies.

Section 2.9: Investigation

We are concerned that the use of the word "will" may be misleading in the context of the sentence "The University will investigate allegations of Sexual Violence in relation to a University Matter in accordance with the Procedure."

This section be interpreted to mean that the University will investigate any allegation of sexual violence. However, as the Disclosures and Complaints Procedure indicates, complaints (including those of sexual violence) must meet certain criteria before being investigated. Not all complaints will meet the criteria.

Draft Disclosures and Complaints Procedure

Section 1.1: Reason for Procedure

At section 1.1(a) reference to "respectful" should be removed.

At section 1.2 the University must state its commitment to vigorously defend academic freedom.

Section 2.1: Definitions

At section 2.1(x) reference must also be made to respondents, who may see reprisals when allegations are made against them.

Sections 2.7 and 2.8: Discrimination

Given some of the recommendations made by the University's past Vice Provost Indigenous Engagement, particularly in regard to scholarships for Indigenous students, greater clarity is needed in section 2.7 and 2.8 of the procedures. To reduce confusion section 2.8 in particular should be amended to harmonize with the language of Section 11 of Manitoba's Human Rights Code.

Section 2.10(a)(iii) and (b)(iii): Harassment

We recommend that section 2.10(a)(iii) and 2.10(b)(iii) be amended to harmonize the language around an objective assessment with that used in s. 2.10(a)(i) and (b)(i), which queries whether the conduct "objectively would have the effect", as follows:

(i) A severe single incident or a series of incidents of objectionable and unwelcome conduct or comments, directed toward a specific person or group, which does not serve a reasonable work or academic purpose, and objectively would have the effect of creating an intimidating, humiliating, hostile or offensive work or learning environment;

…

(iii) Objectionable and unwelcome conduct or comments that ~~objectively impacts~~ objectively would have the effect of impacting the mental or physical health of another person

The above amendment would ensure consistency on the objective standard/test that is to be applied under either ss. 2.10(a)(i) and (b)(i) or ss. 2.10(a)(iii) and (b)(iii).

Section 2.17: Disclosures

We note that the last sentence in this section, reading "A Disclosure is not a Formal Complaint and will not initiate an Investigation" is inconsistent with various provisions that provide that the University will initiate its own investigation or other action in response to a Disclosure, in certain circumstances. At minimum, this should be revised to read "A Disclosure is not a Formal Complaint and will not ordinarily initiate an Investigation. However, the University may initiate an investigation in response to a disclosure, per s. 2.1(h), 2.19, 2.26, 2.35 or 2.52 of these Procedures".

Section 2.29: re Informal Resolution

We request clarity on the caveat that such agreements will be placed in an employee's file "where necessary to enforce the terms of resolution". The University cannot negotiate binding and *enforceable* agreements on UMFA members without the participation of the Association. What measures will the University be undertaking to ensure that individual bargaining with employees about their terms and conditions of employment is not taking place under these Procedures?

Section 2.49-2.51: Interim Measures

We note that some additional guidance should be provided here to ensure that an individual affected by an Interim Measure is guaranteed a reasonable opportunity to be heard with respect to the "least impact" assessment under s. 2.50 and 2.51. This could involve an additional sentence at the end of s. 2.50 reading: "Prior to making its determination on interim measures, the University will undertake to solicit and consider representations by Complainants and Respondents."

Section 2.56: Investigator Powers

We note that s. 2.56(g) highlights limits on Third Party Data Access based on FIPPA and PHIA. However, Article 39 of the UM/UMFA Collective Agreement provides expansive rights to privacy protection to both digital and non-digital concerns. These Procedures cannot and should not appear to abridge those rights. The text should inform an Investigator that they are bound by privacy protections in any applicable collective agreement(s). For example, a paragraph could be added under the alphabetic sub-paragraphs in 2.56 to read: "The Investigator will adhere to any privacy protections afforded to Complainants, Respondents or Witnesses pursuant to any applicable collective agreement(s)."

Section 2.68 - Typo

Sentence includes a typo, reading "to the Complaint" where it should read "to the Complainant".

Section 2.87: Minimum disclosure

We note that privacy law would govern a "minimum amount as necessary" approach for many sections in addition to sections 3 and 2.86. Accordingly, it would appear prudent to amend this section to apply to "any proceeding section" in lieu of "under section 3 and 2.86 above".

Section 2.64 & 2.89 – Confidentiality Post Report

These provisions mark a substantial departure from past practice, eliminating any confidentiality obligations following the issuance of all or part of the Investigation Report to affected Parties. More specifically:

> 2.64 […] The confidentiality obligations in this section will continue until the Designated Officer has provided to the Complainant and the Respondent a summary of the Investigator's findings and/or the Investigation Report. [Emphasis added]

Section 2.89 also provides a basket clause for compliance with FIPPA thereafter:

> 2.89 Once the Investigation has been concluded, the Complainant, the Respondent, and witnesses involved in the Investigation remain subject to any confidentiality obligations as required by The Freedom of Information and Protection of Privacy Act.

It is unclear which obligations cease to pertain, which persist, and which arise pursuant to the completion of an investigation report. The administration must ensure that these obligations are made clear in the Procedures.