



West Coast Legal Education and Action Fund

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August 24, 2016

VIA EMAIL [[input@sfu.ca](mailto:input@sfu.ca)]

Dr. Jonathan Driver  
Vice-President, Academic and Provost  
Simon Fraser University  
8888 University Drive  
Burnaby, BC  
V5A 1S6

Dear Dr. Driver,

**Re: Post-Secondary Sexual Violence and Misconduct Policy**

I write on behalf of West Coast LEAF. We understand that Simon Fraser University is currently developing a policy on sexual violence and misconduct and write to add our perspective to the policy under consideration. While we are pleased that the government has passed legislation on this important issue, we encourage SFU to put in place a policy that reflects the reality of sexual misconduct and that provides an effective, comprehensive response to sexual violence. The legislation sets a low bar, which in some cases is a lower standard than the *Criminal Code*: we urge you to ensure that your policy creates meaningful protections for women and girls on campus.

West Coast LEAF is a non-profit organization that seeks to achieve substantive equality for women by changing historic patterns of discrimination through BC-based equality rights litigation, law reform and public legal education. We have particular expertise on the law of sexualized violence against women and girls. For over three decades, we have worked on developing just legal processes for survivors of sexual assault. In 2014, West Coast LEAF released a report titled *#CyberMisogyny: Using and strengthening Canadian legal responses to gendered hate and harassment online*.



**Implementing an effective, robust sexual misconduct policy is a good starting point, however the new legislation is a floor, not a ceiling.**

As you are aware, the provincial government recently passed Bill 23, the *Sexual Violence and Misconduct Policy Act* (“the Act”). The Act will come into force in May 2017. It requires public post-secondary institutions to establish and implement a sexual misconduct policy. The policy must address prevention of sexual misconduct and include procedures for complaint intake and response. Institutions will have one year to enact these policies on their campuses. We applaud SFU for having already taken steps to develop a policy.

Sexual violence on campus must be taken seriously. We know that, while sexual violence can affect anyone, women are at a higher risk of victimization.<sup>1</sup> Research suggests that 15% to 25% of post-secondary-aged women will experience sexual assault in their academic careers,<sup>2</sup> although we know that these numbers underestimate the prevalence of sexual violence on campus. Due to the stigma associated with sexual assault, these incidents are vastly underreported. Research suggests that only 10% of sexual assaults are reported to police.<sup>3</sup> While having institutional policies in place is an important step in supporting survivors of sexual assault, it is only a starting point to combatting the systemic issues underlying violence against women on campus.

The Act sets out only a minimum framework for addressing sexual violence on campus: it is the least SFU can do. There is still much more to be done to meaningfully protect your students from sexual misconduct. We call on you to ensure women’s safety with policies that reflect the reality of sexual violence on campus.

**Sexual misconduct should include recklessness in respect of consent to distribute.**

We are concerned that the definition of sexual misconduct included in the Act is too narrow. Under the Act, sexual misconduct includes “the distribution of a sexually explicit photograph or video ... without consent of the person in the photograph or video and with the intent to distress.” This definition is not in line with current *Criminal Code* provisions, nor does it adequately protect students from the realities of cyber misogyny.

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<sup>1</sup> METRAC, “Sexual Assault Policies on Campus” (2014) available online at [www.metrac.org/wp-content/uploads/2014/11/final.formatted.campus.discussion.paper\\_.26sept14.pdf](http://www.metrac.org/wp-content/uploads/2014/11/final.formatted.campus.discussion.paper_.26sept14.pdf).

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*



The definition of sexual misconduct provided for in the Act sets a high bar to attract liability: the distribution of intimate images must be done so with the intent to distress. This is a higher bar than even the *Criminal Code*, which creates an offence under section 162.1(a) for the publication of an intimate image without consent where the distributor of the image was reckless about consent.

Recklessness covers situations where an individual is aware that there is a danger that his conduct could result in a criminal offence, but nevertheless persists despite that risk.<sup>4</sup> Thus, sharing an intimate photo without taking steps to determine whether there is consent for it to be shared is punishable under the *Criminal Code*. For instance, if a woman shares an intimate photo of herself with her partner, it would be a crime for her partner to forward the image to another, her consent being limited to sharing the photo with her partner not to the image being shared with others. It does not matter that her partner did not intend to cause her distress. He was reckless about whether she consented to further distribution.

Because the definition of sexual misconduct under the Act does not capture circumstances where an image is recklessly distributed without intention to distress, it has created a higher standard for sexual misconduct than the *Criminal Code*. Absurdly, it will be more difficult to establish sexual misconduct under the Act than to find criminal conduct.

### **An intent to distress requirement does not align with the reality of cyber misogyny.**

Sexual misconduct policies on campus must be alive to the changing ways in which violence and harassment are perpetuated. Our 2014 report on cyber misogyny found that the increasing use of web-based platforms has allowed perpetrators of gender-based harassment to not only remain anonymous, but also reach a wider audience than ever before.<sup>5</sup> Given the ubiquity of social media and technology, the promotion of hate and violence through online means is of increasing concern. The requirement that there be an intent to distress before a finding of sexual misconduct around distribution of intimate images is woefully out of touch with the instantaneous and often spontaneous ways in which intimate images are distributed online.

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<sup>4</sup> *Sansregret v The Queen*, [1985] 1 SCR 570 (SCC)

<sup>5</sup> West Coast LEAF, “#CyberMisogyny: Using and strengthening Canadian legal responses to gendered hate and harassment online” (June 2014) at 6. Canada is recognized as one of the most “wired” countries in the world: Canadian Internet Registration Authority, “Factbook 2015: The Canadian Internet” (2015) online: <https://cira.ca/factbook/current/the-canadian-internet.html>



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**Sexual misconduct policies must avoid moving one step forward, two steps back.**

Bill 23 is an important step to protect and support students in British Columbia. Without a broader definition of sexual misconduct – one that more closely aligns with the *Criminal Code* and appreciates today’s evolving technological landscape – SFU risks taking one step forward and two steps back with its sexual violence and misconduct policy.

West Coast LEAF welcomes the opportunity to discuss our concerns with you further.

Yours truly,

Kendra Milne  
Director of Law Reform  
West Coast LEAF