

2017

# Canada and United States: Campus Sexual Assault Law & Policy Comparative Analysis

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## Recommended Citation

Aliza Lopes-Baker and Mathew McDonald, *Canada and United States: Campus Sexual Assault Law & Policy Comparative Analysis*, 41 *Can.-U.S. L.J.* 156 (2017)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol41/iss1/8>

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# Canada and United States: Campus Sexual Assault Law & Policy Comparative Analysis

**Erratum**  
article

# CANADA AND UNITED STATES: CAMPUS SEXUAL ASSAULT LAW & POLICY COMPARATIVE ANALYSIS

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## I. CANADA LAW & POLICY

### *A. Federal Canadian Campus Sexual Assault Legislation*

The Canadian federal government creates the offense of sexual assault in the *Criminal Code*.<sup>1</sup> However, there is no federal legislation in Canada that deals directly with the issue of combating sexual assault on university campuses. This is because legislation regarding post-secondary education in Canada is under the jurisdiction of the provinces.<sup>2</sup> Therefore, this issue is generally dealt with at the provincial level and through the policies of the universities themselves. Parts of the federal government, such as the Minister of Status of Women, work closely to support the provinces on this issue.<sup>3</sup> However, because post-secondary

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<sup>1</sup> Criminal Code, R.S.C. 1985, c C-46, § 271 (Can.).

<sup>2</sup> Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app II, no 5 (Can.) [hereinafter Constitution Act].

<sup>3</sup> Rosemary Westwood, *Campus sexual assault is a national problem, but no one's pursuing a national solution*, TORONTO METRO, (Oct. 4, 2016), <http://www.metronews.ca/features/unsafe-space/2016/10/04/campus-sexual-assault-is-a-national-problem-in-canada.html>.

education is a matter of provincial jurisdiction, there is no uniform national strategy to deal with campus sexual assault.

### B. Provincial Canadian Campus Sexual Assault Legislation

On March 8th, 2016, the Ontario Provincial Government launched Bill 132: The Sexual Violence and Harassment Action Plan.<sup>4</sup> A portion of Bill 132 is devoted to reducing sexual assault and violence on college and university campuses across the province of Ontario. Bill 132 requires every college or university that receives ongoing funding from the government to formulate a stand-alone sexual assault policy by January 2017.

#### 1. Bill 132: Requirements for On Campus Policies

Bill 132 imposes a series of requirements for newly developed policies by colleges and universities. Campus policies must identify the processes to be followed by administration when responding to, and addressing claims of, sexual assault or violence involving enrolled students.<sup>5</sup> Secondly, the Bill requires annual reporting from each college or university on a series of factors relating to sexual assault and violence on campus. These include, but are not limited to, any programs or initiatives established on campus to assist in either the promotion, awareness, or support of victims, and reporting the number of incidents and claims of sexual violence on campus with additional information of each incident provided.<sup>6</sup>

#### 2. Bill 132: Student Input and Review

Bill 132 demonstrates an effort by the Ontario Provincial government to include student input when developing those policies that seek to regulate, investigate, and punish instances of sexual assault and violence on Ontario campuses. The Bill requires that student input be considered in processes of development, amendment, and reviewing of implemented policies.<sup>7</sup> Furthermore, the time frame for a review of such policies is regulated by the Bill, and is set at once every three years.<sup>8</sup>

### C. Consent on Campus: Western University

Universities in Canada, even before Bill 132, implemented policies to avoid sexual assault and harassment on campus. Western University, located in London, Ontario, Canada, has a comprehensive structure which outlaws sexual violence on campus. The issue is regulated by an explicit, stand-alone document called “Western University’s Policy on Sexual Violence (1.52).”<sup>9</sup> It includes

<sup>4</sup> Bill 132, *Sexual Violence and Harassment Action Plan Act*, 1st Sess, 41st Leg, Ontario, 2016 (assented to on 8 March 2016) (Can.).

<sup>5</sup> *Id.* at cl. 17(3)(b).

<sup>6</sup> *Id.* at cl. 17(7).

<sup>7</sup> *Id.* at cl. 4.

<sup>8</sup> *Id.* at cl. 5.

<sup>9</sup> Western University, *Policy on Sexual Violence* (2017), [http://www.uwo.ca/univsec/pdf/policies\\_procedures/section1/mapp152.pdf](http://www.uwo.ca/univsec/pdf/policies_procedures/section1/mapp152.pdf).

procedures for responding and reporting sexual violence, the university code of conduct, and a non-discrimination and harassment declaration.

Western University's policy includes a broad interpretation of sexual violence and is defined as any violence which is conducted by sexual means or by targeting sexuality.<sup>10</sup> The policy also stresses the importance of consent, and lack thereof, in instances of sexual violence.

The most impressive part of Western's sexual violence policy are the procedural mechanisms in place to support victims of sexual violence. Western's policy lists support services, resources, and accommodation sources which a victim of sexual violence on campus can receive.<sup>11</sup> On-Campus support services include the Sexual Violence Prevention Education Coordinator and the Equity and Human Rights Services group.<sup>12</sup> There is also a distinction between disclosing an incident on campus and initiating a formal reporting process.<sup>13</sup> This distinction can promote disclosure since many victims of sexual violence are afraid of escalating the issue to protect personal or private interests.

Prevention is also emphasized in Western's policy. Education on consent and sexual violence is initiated during Orientation Week events and is supported by awareness programs throughout the school year. Additionally, a Sexual Violence Prevention Education Committee was created to organize training initiatives, response protocols, and awareness campaigns.<sup>14</sup> The group is comprised mainly of students from the university, which ensures that insights from the student body will inform future policy decisions on sexual violence.

Western has a robust structure which prevents and supports sexual violence on campus. However, formal reporting by the university could be improved. For example, in 2015 Western University reported just nine cases of sexual assault among a total student body numbering 28,864.<sup>15</sup> This raises speculation about the surprisingly low number. The total could point to the success of programs and education on campus, or alternatively, could be explained by sexual assault victims' reluctance to report incidents. Regardless of the reason, there is still more work that can be done to ensure instances of sexual violence are properly addressed and reported.

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<sup>10</sup> *Id* at 1.

<sup>11</sup> *Id* at 3.

<sup>12</sup> *Id*.

<sup>13</sup> *Id* at 4.

<sup>14</sup> Keith Marnoch, *Western supports Ontario government's action plan to eradicate sexual violence and harassment*, MEDIA & COMMUNITY RELATIONS (Oct. 28, 2015), <http://mediarelations.uwo.ca/2015/10/28/western-supports-ontario-governments-action-plan-to-eradicate-sexual-violence-and-harassment>.

<sup>15</sup> Western University, *Incidental Statistical Report: Annual Comparison for 2006 through 2016* (2016), <http://www.uwo.ca/police/pdf/Statistics.pdf>. For student enrollment see <http://www.uwo.ca/about/howweare/facts.html>.

## II. UNITED STATES LAW & POLICY

### A. Federal United States Campus Sexual Assault Legislation

In the United States, campus sexual assault is addressed at the federal level by federal criminal sexual assault legislation, Title IX of the 1972 Education Amendments to the *Higher Education Act* of 1965, and the *Violence Against Women Reauthorization Act* of 2013 amendment to the *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act* (Clery Act).<sup>16</sup> These measures both establish criminal liability of perpetrators and mandate on-campus sexual assault response and reporting structures.

United States federal legislation provides a basis for a parallel response to sexual assault charges on college campuses throughout the United States. A survivor of campus sexual assault who wishes to bring charges against their attacker may choose to bring criminal charges under federal or state law, pursue justice through a federally mandated on-campus response mechanism, or bring both criminal and on-campus charges concurrently.<sup>17</sup> With 11.7% of undergraduate students reporting being a victim of nonconsensual sexual contact (23.1% and 24.1% of undergraduate females and transgender, genderqueer or gender nonconforming, or questioning (“TGNOQ”) individuals reporting victimization respectively), and fewer than 5% of students reporting nonconsensual sexual contact to the police, on-campus reporting mechanisms provide an important recourse for survivors of campus sexual assault.<sup>18</sup>

Criminal sexual assault prosecutions face significant and unique hurdles, including continued reliance on the historic “force” requirement and the “beyond a reasonable doubt” standard.<sup>19</sup> Additionally, plea bargains and the filing of charges for lesser crimes than sexual assault, recoding of rape complaints as non-crimes, and the failure of law enforcement to process over 400,000 rape kits across the country, all contribute to the difficulty of attaining justice for sex-related crimes in the criminal justice system.<sup>20</sup>

Title IX, which prohibits gender discrimination in education, has been interpreted as creating a duty by schools to respond to and address complaints of

<sup>16</sup> 18 U.S.C. § 224; U.S.C. § 920, Art. 120; 20 U.S.C. § 1681 et seq.; Pub. L. 113-4.

<sup>17</sup> *Why schools handle sexual violence reports*, Know Your IX (Feb. 16, 2017), <http://knowyourix.org/why-schools-handle-sexual-violence-reports>.

<sup>18</sup> David Cantor, et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT, (Sept. 21, 2015), <http://www.upenn.edu/ir/surveys/AAU/Report%20and%20Tables%20on%20AAU%20Campus%20Climate%20Survey.pdf>; Rape, Abuse & Incest National Network, *The Criminal Justice System: Statistics*, <https://www.rainn.org/statistics/criminal-justice-system>, quoting Department of Justice; Office of Justice Programs, Bureau of Justice Statistics, *Rape and Sexual Victimization Among College-Aged Females: 1995-2013* (2014); Bonnie S. Fisher et al., *The Sexual Victimization of College Women*, U.S. DEPT. JUST. 23 (Dec. 2000), <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

<sup>19</sup> Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L. J. 1940, 1949 (2016) [hereinafter Anderson].

<sup>20</sup> *Id.* at 1958-61.

student-on-student sexual harassment.<sup>21</sup> In 2011, the Department of Education's Civil Rights Office issued a guidance letter instructing educational institutions to take immediate and effective steps to end sexual violence, provide adequate, reliable, and impartial investigation of complaints, afford complaints prompt and equitable resolution, disseminate a notice of nondiscrimination, adopt and publish grievance procedures, and designate a Title IX on-campus coordinator to process complaints and implement Title IX.<sup>22</sup> On-campus complaints of sexual violence are adjudicated under a "preponderance of the evidence" standard (as opposed to the "beyond a reasonable doubt" standard required by criminal law), and allow for remedies and protective measures such as expulsion of a perpetrator, changes in living situations and classes in order to reduce access of an alleged perpetrator to a complainant, prohibitions on an alleged perpetrator contacting a complainant, and prohibition of alleged perpetrators personally cross-examining complainants.<sup>23</sup> Under Title IX guidance by the Office of Civil Rights, on-campus sexual assault adjudications are required to provide both parties an opportunity to present evidence and relevant witnesses, timely access to relevant information, access to any appeals process, and allow lawyers for both parties if lawyers are allowed.<sup>24</sup>

According to regulations implementing the *Violence Against Women Reauthorization Act of 2013* (amending the *Clery Act*), colleges and universities are required to maintain statistics related to sexual assault and to disclose to the Department of Education the annual number of crime reports that have been identified as "unfounded."<sup>25</sup> The amendment requires schools to provide primary prevention and awareness programs to incoming students and employees, which must include a statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking. The primary prevention and awareness programs must also provide the definition of "consent" in relation to sexual activity, describe options for bystander intervention, offer information on risk reduction, and provide information on the institution's sexual assault complaint policies and procedures.<sup>26</sup> Colleges and universities are also required to list all available disciplinary proceedings they provide and all the possible sanctions, describe the manner in which a complaint may be filed, identify how the institution determines what type of proceeding to use, establish timelines, and

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<sup>21</sup> *Davis v. Monroe County Board of Education*, 526 U.S. 629, 649-51 (1999).

<sup>22</sup> Anderson, *supra* note 19, at 1973, quoting Office for Civil Rights, Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali, U.S. DEP'T EDUC (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter Russlynn Ali].

<sup>23</sup> *Id.* at 1973-5.

<sup>24</sup> *Id.* at 1975.

<sup>25</sup> Robin Hattersley Gray, *Dept. of Ed Releases Finalized Rules for College Compliance with the Violence Against Women Act*, CAMPUS SAFETY (Oct. 17, 2014), [http://www.campusafety.com/article/dept\\_of\\_ed\\_announce\\_final\\_violence\\_against\\_women\\_act\\_rules](http://www.campusafety.com/article/dept_of_ed_announce_final_violence_against_women_act_rules).

<sup>26</sup> *Id.*

describe the protective measures that the institution offers complainants.<sup>27</sup> Additionally, the amendment requires schools to provide prompt, fair, and impartial disciplinary proceedings overseen by trained officials who have no conflicts of interest or bias against the accuser or accused, with equal opportunity for both parties to have others present, simultaneous notice in writing of the result of the proceeding and available appeal procedures, and to be completed in a reasonably prompt timeframe.<sup>28</sup>

This recent evolution of federal education nondiscrimination legislation and regulations has resulted in universities and colleges frequently becoming the first-instance adjudicators of many on-campus sexual assault claims.<sup>29</sup> However, thorough enforcement of these new regulations has yet to be realized on many U.S. university campuses. In 2014, 91% of college campuses disclosed zero reported incidents of rape, a number starkly at odds with reports of the prevalence and incidence of sexual assault on college campuses.<sup>30</sup> According to a July 9th, 2014 report commissioned by Senator Claire McCaskill and prepared by the U.S. Senate Subcommittee on Financial & Contracting Oversight, forty-one percent of schools did not investigate a single sexual assault in the five years preceding the report.<sup>31</sup> Nine percent of universities nationwide, and twenty-one percent of the largest private universities, disclosed that they received more reports of sexual assaults than they investigated.<sup>32</sup> Of those complaints that were investigated, and where students were found responsible for sexual assault, schools frequently imposed relatively light penalties upon the perpetrators. A 2014 survey found that only thirty percent of students found guilty of sexual assault by way of university adjudication were expelled, forty-seven percent were suspended, seventeen percent received educational sanctions, and thirteen percent were put on probation.<sup>33</sup>

In response to persistently inadequate investigation and adjudication of sexual assault complaints by universities, the federal *Safe Campus Act* (“the

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Jed Rubinfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> (“... [A] ‘great majority’ of college students now choose to report incidents of assault to their school, not the police, because of anonymity and other perceived advantages”).

<sup>30</sup> Amy Becker, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (Nov. 23, 2015), <http://www.aauw.org/article/clery-act-data-analysis/>.

<sup>31</sup> U.S. Senate Subcommittee on Financial & Contracting Oversight, *Sexual Violence on Campus* (July 9, 2014), <http://www.mccaskill.senate.gov/imo/media/doc/SurveyReportwithAppendix.pdf>.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result In Expulsion*, THE HUFFINGTON POST (Sept. 29, 2014), [http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault\\_n\\_5888742.html](http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html).

Act”) was introduced in Congress in July 2015.<sup>34</sup> The Act, which is currently being reviewed by the House Subcommittee on Higher Education and Workforce Training, would amend the *Higher Education Act* of 1965 so as to prohibit universities from initiating concurrent disciplinary proceedings, except to impose interim sanctions, during a law enforcement investigation.<sup>35</sup> The Act would also require universities to report and refer any allegations of sexual violence that they receive, upon written consent from the victim, to law enforcement, and, if the victim provides written notification declining law enforcement involvement, the university would not be permitted to initiate any disciplinary proceedings, including to impose interim sanctions.<sup>36</sup>

The Act has been met with significant backlash from sexual assault survivor advocacy groups, which assert that rather than increasing protections for victims, the Act would limit opportunities for appropriate recourse, would fail to address the need for protective interim measures in the context of campus sexual assault, and would result in fewer victims reporting sexual assaults due to broad distrust of the efficacy of the criminal justice system in addressing sexual assault crimes.<sup>37</sup>

### B. State-Based Campus Sexual Assault Legislation

In addition to federal criminal sexual assault statutes, each state has state-level legislation criminalizing sexual assault. These statutes can differ in a number of ways, including how they define “rape” and “sexual assault”, what the statute of limitations for the crime is, whether or not the state has a consent law requiring “freely given” or “affirmative consent”, and what factors limit an individual’s ability to consent (e.g. age, disability, consciousness, etc.).<sup>38</sup> For example, Alabama state law defines first degree rape as:

Sexual intercourse with a member of the opposite sex and:

1. the actor uses forcible compulsion;
2. the other person is incapable of consent by reason of being physically helpless or mentally incapacitated;
3. or the actor is 16 years of age or older and the other person is less than 12 years old.<sup>39</sup>

<sup>34</sup> Rebecca McCray, *Sexual Assault Survivors Are Asking: Campus or Courtroom?* TAKE PART (Dec. 14, 2015), <http://www.takepart.com/article/2015/12/14/sexual-assault-campus> [hereinafter McCray].

<sup>35</sup> Safe Campus Act of 2015, H.R.3403, 114th Congress (2015).

<sup>36</sup> *Id.*

<sup>37</sup> McCray, *supra* note 34.

<sup>38</sup> Rape, Abuse & Incest National Network, *Rape and Sexual Assault Crime Definitions* (Feb. 5<sup>th</sup> 2016), <https://apps.rainn.org/policy/compare/crimes.cfm>.

<sup>39</sup> Ala. Code § 13A-6-61.

This definition of rape explicitly excludes rape occurring between members of the same sex, excludes sexual intercourse by threat of force upon a person not capable of consenting by reason of being physically helpless or mentally incapacitated, and does not include an exception for victims unable to consent due to intoxication or unconsciousness.

Conversely, California state law defines rape much more expansively in the following ways: (i) by not limiting the definition of rape to assaults against the opposite sex, (ii) by not limiting coercion of sexual intercourse to force through inclusion of coercion via duress, menace, or fear of immediate and unlawful bodily injury on the person or another, (iii) by including intoxication and lack of consciousness as circumstances which would preclude a victim's ability to consent, (iv) by excluding from the consent defense those circumstances in which a victim was not aware or cognizant of the essential characteristics of the act due to the perpetrator's fraud in the fact, (v) by excluding from the consent defense those circumstances in which the victim submitted under the belief that the perpetrator was someone they knew, other than the defender, as a result of the offender's artifice, pretense, or concealment that was intended to induce this false belief, and (vi) by excluding from the consent defense those circumstances in which a victim submitted under threats by the offender to use the authority of a public official to incarcerate, arrest, or deport the victim or another where the victim has a reasonable belief that the offender is a public official.<sup>40</sup>

As demonstrated, state criminal sexual assault statutes can vary widely from state to state, and protections afforded to victims fluctuate depending on the state in which the crime occurs. In order to address the epidemic of campus sexual assault, nine states have passed laws specifically aimed at defining "affirmative consent," clarifying the role of law enforcement in campus reporting and sexual assault investigations, requiring transcript notations for violations for student perpetrators of sexual assault, and addressing the role of legal counsel in the campus adjudication of sexual assault complaints.<sup>41</sup>

In Ohio, campus-specific sexual assault adjudication relies primarily upon federal legislation and regulation, and upon Ohio Revised Code § 3345.21, which mandates that the Board of Trustees of any college or university shall regulate the conduct of students, staff, faculty, and visitors by adopting rules such that "law and order are maintained" and "the college or university may pursue its educational objectives and programs in an orderly manner," and shall publish said rules so that they come to the attention of students, staff, faculty, and visitors.<sup>42</sup>

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<sup>40</sup> Cal. Penal Code §261.

<sup>41</sup> Andrew Morse et al., *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety*, NASPA (Dec. 4, 2015), [https://www.naspa.org/images/uploads/main/ECS\\_NASPA\\_BRIEF\\_DOWNLOAD3.pdf](https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf).

<sup>42</sup> Ohio Revised Code §3345.21.

*C. Case Western Reserve University Sexual Assault Policy*

Case Western Reserve University's (CWRU's) sexual conduct policy covers forced sexual intercourse (including the use of physical force, threat, intimidation, or coercion), non-consensual sexual intercourse, dating and domestic violence, forced sexual conduct or activity, non-consensual sexual contact or activity, sexual exploitation, sexual harassment, stalking, and unwelcome behavior (actions that are not solicited or invited and are undesirable or offensive to the recipient).<sup>43</sup> The university's student handbook defines "consent" as "the equal approval, given freely, willingly, and knowingly, of each participant to desired sexual involvement... [A]n affirmative, conscious decision – indicated clearly by words or actions – to engage in mutually accepted sexual contact."<sup>44</sup> In addition to the definitions outlining violations of the university's sexual conduct policy, CWRU identifies campus-specific considerations in the adjudication of sexual conduct violation complaints, including the existence of authority or power dynamics (e.g. students and teachers) and intent versus impact (e.g. "that someone did not intend to engage in sexual misconduct against an individual is not considered a sufficient explanation to a complaint of sexual misconduct").<sup>45</sup>

The Sexual Conduct Policy also addresses CWRU's federal obligations, including federal reporting obligations requiring "designated reporting representatives" who are required to report to CWRU police any sexual misconduct that constitutes a crime, and federal timely warning obligations requiring the university to take all necessary steps to protect the campus and the person who has experienced the misconduct, including by alerting the campus to crimes that pose a substantial threat of bodily harm or danger to the campus community.<sup>46</sup>

The CWRU Sexual Conduct Policy establishes both an informal and a formal investigative process.<sup>47</sup> Initial inquiry is conducted by a designated reporting representative or the Title IX coordinator, who conducts interviews with the complainant and respondent, and reviews relevant documents.<sup>48</sup> The designated reporting representative or Title IX coordinator then determines whether the case should proceed via the informal process, involving no hearing and focusing on joint resolution through facilitated discussion and education (this process is not generally used to resolve complaints of non-consensual or forced activity) or the formal process, involving a full administrative or Board hearing

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<sup>43</sup> Case Western Reserve University, *Sexual Conduct Policy: Definitions*, <https://students.case.edu/handbook/policy/sexual/definitions.html>.

<sup>44</sup> *Id.*

<sup>45</sup> Case Western Reserve University, *Sexual Conduct Policy: Considerations*, <https://students.case.edu/handbook/policy/sexual/relevantconsiderations.html>.

<sup>46</sup> Case Western Reserve University, *Sexual Conduct Policy: Notifications*, <https://students.case.edu/handbook/policy/sexual/notifications.html>.

<sup>47</sup> Case Western Reserve University, *Sexual Conduct Policy: University Complaint Process*, <https://students.case.edu/handbook/policy/sexual/process/>.

<sup>48</sup> *Id.*

of the matter.<sup>49</sup> CWRU aims to resolve complaints of sexual misconduct within sixty days of the filing, and to make appeal determinations within ten days of submission of an appeal.<sup>50</sup>

According to CWRU's 2015 "Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct," 20% of female undergraduates experienced victimization by physical force or incapacitation, 9.8% within the current year (figures on prevalence of victimization for male and TGNOQ students is not available).<sup>51</sup> Penetrative acts involving physical force or incapacitation were reported by 28.3-29.4% of victims.<sup>52</sup> Of those students that did not report sexual assaults to an agency, 29.4% stated that they did not report because they did not think that anything would be done about it, and 23.2% did not report because they feared that the report would not be kept confidential.<sup>53</sup> In the CWRU 2016 Annual Security Report, mandated by the *Save Campus Sexual Violence Elimination Act of 2013 (Clery Act Amendments)*, it was disclosed that six forcible sex offenses (including rape and fondling) were reported to CWRU agencies in 2015 among a total student body of approximately 11,340 students.<sup>54</sup>

These statistics demonstrate that, much like on other U.S. university campuses, CWRU's sexual assault policy and reporting structures have yet to create an environment that encourages victims of campus sexual assault to report the assaults to university agencies. Nor does the CWRU sexual assault policy establish trust within on-campus communities in the efficacy of the university's adjudication processes.

### III. COMPARATIVE ASPECTS

The greatest difference between Canadian and U.S. approaches to campus sexual assault legislation and policy is the governing entity tasked with passing legislation and promulgating regulations within this area of concern. As noted, although the Canadian federal government legislates the criminal offense of sexual assault through the *Criminal Code*, legislation related to sexual assault at post-secondary institutions is exclusively within the purview of the provincial governments, which pass directed legislation intended to reduce sexual assault and violence on college campuses.<sup>55</sup> Conversely, U.S. campus sexual assault

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: Case Western Reserve University*, 14 (Sept. 21, 2015), <https://case.edu/climatesurvey/cwru-results-2015.pdf>. For information on student enrollment see <http://case.edu/ir/media/caseedu/institutional-research/documents/students/FallEnrollSummary15.pdf>.

<sup>52</sup> *Id.* at 17.

<sup>53</sup> *Id.*

<sup>54</sup> Case Western Reserve University, *2016 Annual Security Report*, 30 (2016), <https://case.edu/publicsafety/media/caseedu/police/documents/crime-log/2016-Annual-Security-Report.pdf>.

<sup>55</sup> Constitution Act, *supra* note 2.

legislation and policy derives primarily from federal nondiscrimination law (Title IX), which has been interpreted to include the right to an education free from gender-based sexual harassment and assault.<sup>56</sup>

Despite different spheres of government promulgating regulations and legislation related to campus sexual assault, the legislation and policies that have been adopted within the United States and Canada share some key similarities. Both mandate annual reporting mechanisms by universities.<sup>57</sup> Additionally, both require universities to establish and publish sexual assault policies and reporting and adjudication procedures.<sup>58</sup>

The two approaches also differ. Bill 132, which was passed by the Ontario legislature in 2016, mandates student input in the design and review of campus sexual assault policies, a requirement not put forward by federal U.S. campus sexual assault legislation.<sup>59</sup> However, this difference does not appear to have resulted in significant deviations in the campus-level implementation of campus sexual assault legislation, as both Western University and CWRU sexual assault policies establish multi-level adjudication procedures for sexual assault complaints, support services for victims, and expansive interpretations of the types of sexual conduct covered by said policies.<sup>60</sup> Notably, the number of incidents of sexual assault disclosed by Western University and CWRU in 2015 were comparable, reporting nine and six incidents respectively.<sup>61</sup> As such, the issue of underreporting by victims of campus sexual assault appears to be a problem that has not yet been successfully addressed by either the legislative process in Canada or the United States.

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<sup>56</sup> Russlynn Ali, *supra* note 22.

<sup>57</sup> Pub. L., *supra* note 16 at 113-4; Bill 132, *supra* note 4.

<sup>58</sup> Russlynn Ali, *supra* note 22; Bill 132, *supra* note 4.

<sup>59</sup> Bill 132, *supra* note 4.

<sup>60</sup> Case Western Reserve University, *Sexual Conduct Policy: University Complaint Process*, <https://students.case.edu/handbook/policy/sexual/process/>; Western University, *supra* note 9.

<sup>61</sup> *Id.*