CCLISAR

realizing law's potential to respond to sexualized violence

November 22, 2022

Standing Committee on Social Policy
Whitney Block
Room 1405
99 Wellesley Street W
Toronto, ON M7A 1A2

Attention: Vanessa Kattar, Committee Clerk
Goldie Ghamari, MPP for Carleton, Committee Chair
France Gélinas, MPP for Nickel Belt, Committee Vice-Chair

Dear Chair Ghamari, Vice-Chair Gélinas and Committee Members,

RE: Submissions on Bill 26, Strengthening Post-Secondary Institutions and Students Act, 2022

We write with submissions on Bill 26 and, in particular, on proposed sub-section 16.1(5) of Schedule 1 and sub-section 32.0.1(5) of Schedule 2, both of which aim to legislatively restrict non-disclosure agreements ("NDAs"). Overall, we commend this first step to limit, by statute, the use of NDAs in Ontario.

The Canadian Centre for Legal Innovation in Sexual Assault Response

The Canadian Centre for Legal Innovation in Sexual Assault Response ("**CCLISAR**") is a charitable and non-partisan organization that seeks to better understand the gap between Canada's laws and policies and its effects on the social problem of sexual harm and the experiences of survivors of sexualized violence. This includes research into the barriers and perceived barriers to reporting sexual assault and effective mechanisms and design frameworks

for adjudicating claims of sexualized violence. CCLISAR as an organization has engaged in research and education with respect to NDAs, which has included assessing problems associated with their use in Canada, the legislative efforts to date in this country and elsewhere in the world to restrict them, and the risks and benefits of prohibiting NDAs. A year ago, prompted by Prince Edward Island's then emerging legislation on NDAs, CCLISAR convened a cross-country panel of legal experts to consider the nature and scope of NDAs in Canada and how to craft solutions to the problems posed by NDAs. For the Committee's review and consideration: CCLISAR's recent *Position Statement on Legislation Prohibiting Non-Disclosure Agreements* is available online at https://www.cclisar.ca/programs-1.

Joanna Birenbaum is CCLISAR's Director of Capacity Building and **Elizabeth Grace** is a member of CCLISAR's Advisory Committee. We are also both legal practitioners in Ontario with many decades of collective experience in the areas of civil litigation and administrative/regulatory processes and remedies for sexual abuse and violence, which include investigations into sexualized misconduct allegations in contexts like the post-secondary educational sphere. Joanna (called to the Ontario bar in 1998) is a litigator with expertise in multiple areas of law related to sexualized violence, including representing survivors in civil sexual assault claims, anti-slapp applications, and sexual history and records application in criminal proceedings. She prosecutes sexual abuse discipline hearings for a regulated health college and has been the chair of three CCLISAR Independent Review Panels of University sexual violence policies and practices (the reports from these reviews are available at https://www.cclisar.ca/programs). She is also the co-author of the recent book, *Achieving Fairness: A Guide to Campus Sexual Violence*

Complaints (2020). Elizabeth (called to the Ontario bar in 1995) is a partner of the law firm Lerners LLP, an experienced civil litigator in the sexual abuse field on behalf of plaintiffs and defendants, and an author and co-author of multiple publications in the abuse area, including the seminal book *Civil Liability for Sexual Assault and Violence in Canada* (2000). In May 2015, she participated in making written and oral submissions for law reform to Ontario's Select Committee on Sexual Violence and Harassment.

Scope of submission

This submission addresses only the NDA-related proposed amendments to the *Ministry of Training, Colleges and Universities Act, 1990* (Schedule 1) and the *Private Career College Act, 2005* (Schedule 2) regarding sexual abuse at post-secondary educational institutions, as outlined in Bill 26.

Generally, we welcome legislative amendments that enhance protections for post-secondary students who are subject to sexual abuse by employees of post-secondary institutions and we support the NDA-related aspects of Bill 26. We are also heartened to see that Ontario is taking a first step to prohibit NDAs, since these are often used as a tool to silence survivors of sexualized violence and to prevent accountability by institutions and (alleged) abusers. The fact Ontario has chosen to start by introducing legislative reform in the post-secondary context, where there is a pronounced power-imbalance between students and employees like professors and instructors, is a positive development. We trust this important initiative will be followed by consultation with stakeholders and, ultimately, further legislated restrictions on NDAs in other contexts.

Consistent with CCLISAR's attached Position Statement, we support a nuanced approach to NDA prohibitions. We believe parts of Bill 26 should be revised to improve access to justice for post-secondary student survivors of sexual abuse and to promote institutional and (alleged) abuser accountability, and in this connection make the following observations and recommendations.

1. **The word "investigator" is missing and should be added.**

   The proposed amendments at sub-s. 16.1(5) in Schedule 1 amending the *Ministry of Training, Colleges and Universities Act, 1990* and at sub-s. 32.0.1(5) in Schedule 2 amending the *Private Career College Act, 2005* provide that agreements between an institution and "any person" shall not contain any term that prohibits the institution from:

   > "disclosing the fact that **a court, arbitrator or other adjudicator** has determined that an employee of the institution has committed an act of sexual abuse of a student of the institution…" [emphasis added].

   This provision does not explicitly include an internal or external investigator and the determinations resulting from their investigation. Presumably an "adjudicator" would include an adjudicative body like the Human Rights Tribunal of Ontario, but it is unclear whether it would extend to an investigator who is tasked with assessing credibility, applying legal principles, and making findings. The term "adjudicator" is not defined either in the proposed amendments or in the legislation being amended. This leaves ambiguity as to whether an "investigator" under a post-

secondary institution or private career college sexual violence policy will be captured by this language.

This apparent oversight is of concern given that a large number of sexual abuse complaints arising in post-secondary educational contexts are resolved by way of internal and/or external investigations, often followed by settlement agreements between the institution, the (alleged) abuser and/or the complainant. These investigatory and resolution processes often do not escalate to the level of involving courts, grievance or other forms of arbitration, or formal adjudications by administrative tribunals. Without the explicit inclusion of "investigators" in the proposed amendments, survivors may be left without the protections the legislation seeks to introduce, sexual abuse that has been determined to have occurred may continue to be concealed through the tool of NDAs, and institutions and abusers may not be held accountable.

Recommendation: We therefore recommend that sub-s. 16.1(5) in Schedule 1 and sub-s. 32.0.1(5) in Schedule 2 be revised to include explicit reference to "investigator".

2. **Provisions preventing disclosure of the student-survivor's identity and accounting for the student-survivor's NDA preference should be added.**

Bill 26 marks a first step in Ontario to addressing NDAs in the context of sexual abuse. This follows other legislation passed in Prince Edward Island and introduced in Nova

Scotia and Manitoba that prohibits settlements that silence survivors from speaking about their experiences related to sexualized violence. Bill 26 instead prohibits institutions from insisting on, or agreeing to, confidentiality as a term of settlement. This is a good and valid approach that we support. However, we recommend revisions to expand the proposed language, as follows.

First, Schedules 1 and 2 should include explicit language stating that institutions and persons related to the institution, including the individual employee found to have committed sexual abuse, must not disclose the student's name or identifying information, except with the student's express and informed permission.

Second, the proposed legislation applies to "[a]n agreement between an institution and **any person**", including the student-survivor. This would mean that where a survivor declares an intention to bring, or brings, a claim against an institution following a finding of sexual abuse by an investigator or other adjudicator, the institution may not commit to keeping the fact of this finding and the identity of the perpetrator confidential. However in narrow and defined circumstances, a survivor-complainant should be allowed to have their preference for a NDA respected. In this connection, we note other jurisdictions in Canada with actual or proposed legislation restricting NDAs have provisions that carve out exceptions to NDA prohibitions, where it is the express wish and preference of the survivor-complainant and not contrary to the public interest. This exception is missing from Bill 26. A blanket prohibition of the kind found in Bill 26 does not consider the varying circumstances and needs of survivors. There are numerous reasons why a survivor of

sexual abuse may wish to enter into an NDA, including but not limited to reputational, safety, reprisal and professional concerns.

Third, given that sexualized violence is fundamentally about the abuse of power, it is essential that where a determination of sexual abuse is made following a complaint by a student, the student-complainant not have more power taken from them. They should have a say and be given a reasonable opportunity to obtain independent legal advice (ILA) via Ontario's existing and government-funded ILA program for sexual abuse or other means. In this way, they can make an informed decision without risk of undue influence or coercion about their position regarding disclosure of their own identity and the potential advantages and disadvantages of a NDA in their particular situation.

Recommendation: We therefore recommend that language be added to Schedules 1 and 2 to prohibit the institution and any person related to the institution, including the individual employee found to have committed sexual abuse, from disclosing the student-survivor's name or identifying information, except with the student's express permission. We also request the addition of an exception that allows for NDAs in circumstances where it is the express wish and preference of a complainant-survivor whose allegations of sexual abuse have been determined to have merit by an adjudicator or investigator. Lastly, we favour explicit reference in the legislation to (i) a survivor's right to obtain independent legal advice should they wish their identity to be disclosed or want a NDA, and (ii) a requirement that institutions advise survivors of this right and of the availability of government-funded ILA to assist them in their decision-making.

While we do not endorse specific language of any particular or proposed legislation in Canada, we emphasize the importance of an approach that promotes greater access to justice for survivors of sexualized violence and greater accountability by those who have been determined to have committed sexual abuse and, where applicable, the institutions which have employed or otherwise facilitated the commission of the abuse.

Finally, we would be remiss if we did not comment on the narrow scope of Bill 26. NDAs should be regulated beyond the post-secondary educational sphere. We strongly encourage the Government of Ontario to introduce legislation, after consultation with stakeholders including legal practitioners and organizations that work with sexual assault survivors, that restricts the use of NDAs in respect of claims of sexualized violence in all contexts (for example, in institutional settings beyond the post-secondary education sphere).

Thank you for this opportunity to have input into Bill 26.

The Canadian Centre for Legal Innovation in Sexual Assault Response

Per:

Joanna Birenbaum, Director of Capacity Building

Per:

Elizabeth Grace, Advisory Committee member