

**Title: Sexual Misconduct Policy**

**Effective Date:** [\_\_\_\_], 2011 [what was the original effective date of the policy?]

**Revision Date:** [\_\_\_\_], 2014

**Responsible Office:** Dean of Students/Compliance & Policy

**I. Scope**

This policy applies to the College of William & Mary, including the Virginia Institute of Marine Science (the university). It applies to all students as well as student organizations.

This policy applies to prohibited conduct that takes place on or off campus. This policy is not intended, and may not be applied, to abridge free speech or other civil rights of any individual or group.

**II. Purpose**

Our community of trust requires that its members treat one another with respect, dignity, and fairness. In an intimate relationship, these values are of paramount importance. This policy is designed to ensure a safe environment for the members of the William & Mary community.

This policy helps William & Mary comply with Title IX of the Higher Education Amendments of 1972,<sup>1</sup> which prohibits discrimination on the basis of sex in education programs or activities, the Violence Against Women and Department of Justice Reauthorization Act of 2005, the Higher Education Act of 1965, and the Clery Act, each as amended.<sup>2</sup> It also helps implement William & Mary's [Discrimination, Harassment and Retaliation Policy, by defining in detail sexual violence and other types of sexual harassment](#).

**III. Sexual Misconduct – Explanation and Definitions**

The university is committed to maintaining an environment that is free from sex-based violence and in which the freedom to make individual choices regarding sexual behavior is respected by all. Sexual misconduct by anyone is unacceptable and will be addressed in a prompt, timely fashion and with serious consequences by the university.

Sexual misconduct is a form of sexual harassment, which is prohibited under the university's Policy on Discrimination, Harassment, and Retaliation. Sexual misconduct, as defined by this policy, includes a broad range of behavior such as inappropriate physical touching, sexual exploitation, stalking, sexual intercourse without consent, and other forms of sexual violence. Sexual misconduct may be a crime. Sexual intimacy requires effective consent (as defined in Section IV).

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<sup>1</sup> 20 U.S.C. § 1681 et seq.

<sup>2</sup> Including the amendments made by the Violence Against Women Reauthorization Act of 2013.

**Sexual Misconduct** is a category of behavior that includes actual or attempted:

1. Non-consensual sexual contact;
2. Non-consensual sexual intercourse;
3. Sexual exploitation;
4. Domestic violence;
5. Dating violence; and
6. Stalking.

Sexual misconduct can occur between strangers or non-strangers, including people involved in an intimate or sexual relationship. Sexual misconduct can be committed by any person, and any person may be a victim of sexual misconduct, regardless of gender, identification, or orientation.

**Non-Consensual Sexual Contact** is either of the following without effective consent (see Section IV for the definition of consent):

1. Deliberately touching a person's intimate parts (including genitalia, groin, breast or buttocks, or clothing covering any of those areas); or
2. Using force or threat of force to cause a person to touch that person's own or another person's intimate parts.

**Non-Consensual Sexual Intercourse** is anal or vaginal penetration, no matter how slight, by a penis, tongue, finger, or inanimate object, without effective consent, or oral penetration by a penis, without effective consent.

**Sexual Exploitation** is taking sexual advantage of another person without effective consent and includes causing the incapacitation of another person for a sexual purpose; causing the prostitution of another person; electronically recording, photographing, or transmitting intimate or sexual utterances, sounds or images of another person; allowing third parties to observe sexual acts; engaging in voyeurism; distributing intimate or sexual information about another person; exposing one's genitals in non-consensual circumstances; inducing another to expose their genitals; and/or knowingly transmitting a sexually transmitted infection, including HIV, to another person.

**Domestic Violence** is a violent crime (either a felony or misdemeanor) committed by:

1. A current or former spouse or intimate partner of the victim;
2. A person with whom the victim shares a child in common;
3. A person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner;
4. A parent, child, step-parent or step-child, sibling (full or half), grandparent or grandchild of the victim;
5. The victim's mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law, if he or she resides in the same home with the victim; or
6. Any other person who cohabits or, within the previous 12 months, cohabitated with the victim.<sup>i ii</sup>

**Dating Violence** is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.<sup>iii</sup>

The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.<sup>iv</sup>

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts included under the definition of domestic violence.<sup>v</sup>

**Stalking** is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

1. Fear for the person's safety or the safety of others; or
2. Suffer substantial emotional distress. Such distress does not have to be severe enough to require medical or other professional treatment or counseling in order to be substantial emotional distress.<sup>vi</sup>

Stalking requires two or more acts, including but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates, to or about, a person, or interferes with a person's property.<sup>vii</sup>

#### **IV. Consent**

Members of the university community choosing to engage in any form of sexual activity – from touching or kissing to intercourse – must obtain consent from their partner(s) prior to engaging in such activity.

Consent for sexual activity can only be obtained in situations where all people involved have equal power and full awareness in deciding what sexual activity will and will not happen during an encounter. Getting consent is an active process that involves clearly communicating intentions and desires. Consent for sexual activity is based on the mutual understanding and respect of all people involved for the desires and wishes of their partner(s). Consent must be informed, with all people involved having the information relevant to the sexual activity in question. Consent:

1. Is mutually understandable when a reasonable person would consider the words or actions of the parties to have manifested an understandable agreement between them to do the same thing, in the same way, at the same time and with one another<sup>viii</sup>;
2. Is not merely the absence of a verbally stated "no";
3. Is never final or irrevocable;
4. Is time-limited and situation-specific; even if someone obtained consent from a partner(s) in the past, this does not mean that consent is automatically granted again;
5. Can only be given by someone who is free from verbal or physical pressure, coercion, intimidation, threat, or force; and

6. Is not valid if the party from whom consent is sought is incapacitated, as defined below. If a person knew, or, using a reasonable person standard, should have known that the other party was incapacitated, the first person will be responsible for failing to obtain consent.

The use of drugs or alcohol is not an excuse for failing to obtain consent for sexual activity.

**Incapacitation** is the physical and/or mental inability to make informed, rational judgments. One who is incapacitated cannot provide effective consent. States of incapacitation include sleep and blackouts. Where alcohol or drugs are involved, incapacitation is a state beyond mild intoxication, and is a continuum understood with respect to how the alcohol consumed impacts a person's decision-making capacity and awareness of the details of a sexual interaction (who, what, where, when, and how).<sup>ix</sup>

## **V. Resources for People Experiencing, Witnessing, or Affected by Sexual Misconduct**

The university has resources available for students who experience sexual harassment or misconduct or who have questions or concerns. Resources including counseling, medical services, academic accommodations, and changes to residence living situations. Information about resources for [students experiencing sexual violence](#) is provided by Student Affairs.

The university has several ways to report or file a complaint of sexual misconduct or harassment. A flow chart available at [http://www.wm.edu/offices/compliance/policies/discrimination\\_harassment\\_retaliation/DiscriminationResourcesandFilingOptions.pdf](http://www.wm.edu/offices/compliance/policies/discrimination_harassment_retaliation/DiscriminationResourcesandFilingOptions.pdf) shows the reporting options available to students, faculty, and others. Appendix B to the Policy on Discrimination, Harassment, and Retaliation provides a more thorough breakdown of the various resources, the services each resource offers, and a discussion of the confidentiality of the resources. This Appendix is available at [http://www.wm.edu/offices/compliance/policies/discrimination\\_harassment\\_retaliation/resources\\_and\\_reporting/index.php](http://www.wm.edu/offices/compliance/policies/discrimination_harassment_retaliation/resources_and_reporting/index.php)

## **VI. Reporting; Anonymity and Confidentiality; Amnesty; Retaliation Protections**

We encourage members of the campus community who experience any form of sexual misconduct discussed in this policy to contact the Director of Care Support Services or one of the other persons/offices listed in Appendix B – regardless of when or where the act occurred. These resources can assist the member of the community in recovering from the experience and in deciding what options may be available, such as the criminal justice system, university investigative and disciplinary processes, and the protective or remedial actions William & Mary can take.

Although the university encourages members of the community to use university procedures, they may also file a Title IX complaint with the Office of Civil Rights of the U.S. Department of Education.

[Detailed provisions about reporting](#) including issues of confidentiality and anonymity are found in the Policy on Discrimination, Harassment and Retaliation. That Policy also [prohibits retaliation](#) against anyone who reports sexual misconduct (or any other form of harassment or discrimination), as described under paragraph 3 below.

### **1. Anonymity and Confidentiality; Members of the Community Who Do Not Want to Take Formal Action or Pursue Conduct Charges**

Members of the community who are not sure whether they want to make a complaint should still seek help from Care Support Services or another completely confidential campus resource. These resources are provided to offer non-judgmental support and information to help the member decide what is best while the member recovers. Contacting the Dean of Students Office or another campus resource does not mean that the community member must file an official report with the university or report the assault to law enforcement.

The university makes every effort to protect the privacy and confidentiality of community members. Information reported will be shared only on a need-to-know basis. The university also takes steps to protect members of its community against further misconduct, including retaliation, as described below. If a person informs a campus resource of an incident of sexual violence or other form of sexual harassment, the university may need to investigate and take appropriate action to fulfill its Title IX obligation to provide a non-discriminatory environment, even if the reporting party wishes to remain anonymous or not to pursue a conduct charge.<sup>x</sup>

There are also anonymous reporting options for students. Students may submit an anonymous complaint to the Dean of Students, located in the Campus Center, or use the confidential dropbox at the Compliance (Title IX) Office, located in James Blair Hall outside suite 101.

### **2. Amnesty from Student Discipline for the Reporting Party**

Assisting students who are reporting sexual misconduct is the university's primary interest. In order to facilitate reporting, the Dean of Students generally does not charge students who report sexual misconduct and any material witnesses with Code of Conduct violations for behavior that would otherwise be considered violations (for example consuming alcohol underage or consuming illegal drugs).

### **3. Protecting Members of the Community Reporting Sexual Misconduct**

When a member of the community reports sexual misconduct to any campus resource, that resource will work with the Dean of Students Office to make sure the reporting party is protected (such as against further misconduct) in accordance with the Discrimination, Harassment, and Retaliation Policy and the Student Sexual Harassment and Sexual Misconduct Procedure. The appropriate official, depending on the office to which the matter is reported, will consult with the reporting party regarding protective measures such as changes to university housing and/or academic schedules, removing information from the university directory, or issuing a "no contact order." The Office of the Dean of Students will enforce protective measures under the Code of Conduct.

## VII. Examples of Sexual Misconduct<sup>xi</sup>

1. Jiang is a junior at the College. Beth is a sophomore. Jiang comes to Beth's room with some mutual friends to watch a movie. Jiang and Beth, who have never met before, are attracted to each other. After the movie, everyone leaves, and Jiang and Beth are alone. They hit it off and are soon becoming more intimate. They start to make out. Jiang verbally expresses his desire to have sex with Beth. Beth, who was abused by a baby-sitter when she was five, and has not had any sexual relations since, is shocked at how quickly things are progressing and says nothing. As Jiang takes her by the wrist over to the bed, lays her down, undresses her, and begins to have intercourse with her, Beth has a severe flashback to her childhood trauma. She wants to tell Jiang to stop, but cannot. Beth is stiff and unresponsive during the intercourse. Is this a policy violation? ***This is a violation of the Sexual Misconduct Policy. Jiang would be held responsible in this scenario for Non Consensual Sexual Intercourse. It is the duty of the sexual initiator, Jiang, to make sure that he has mutually understandable consent to engage in sex. Though consent need not be verbal, it is the clearest form of consent. Here, Jiang had no verbal or non-verbal mutually-understandable indication from Beth that she consented to sexual intercourse. Of course, wherever possible, students should attempt to be as clear as possible as to whether or not sexual contact is desired, but students must be aware that for psychological reasons, or because of alcohol or drug use, one's partner may not be in a position to provide as clear an indication as the policy requires. As the policy makes clear, consent must be actively, not passively, given.***

2. Sasha is dancing with Miguel, a co-worker she knows from her office, at a crowded party. After dancing for a while, Miguel kisses Sasha, and she kisses him back. A short time later, Miguel moves his hands to Sasha's buttocks. She tells him to stop, saying she doesn't want to be touched in that way and that he should have more respect for her. He laughs, tells her she takes herself too seriously, and again begins to grope her. ***This is a violation of the Sexual Misconduct Policy. Miguel touched Sasha in a sexual way without her consent, and continued to do so after she told him to stop. Even though Sasha appears to have consented to kissing, this consent does not extend to other sexual contact. This behavior is a form of non-consensual sexual contact.***

2. Kristen and Myra have been intimate for a few weeks. One night, Myra calls Kristen and asks her to come over. When she arrives, Myra kisses Kristen passionately and leads her into the bedroom. They each express their excitement and desire to "hook up," and are soon making out heavily in Myra's bed. After a while, Kristen tries to engage in oral sex with Myra. Myra tells Kristen that she really likes her, but that she doesn't feel ready for that. Kristen tells Myra she's just being shy, and ignores her when she repeats that she doesn't feel ready. Finally, Kristen threatens to reveal on the Internet that Myra is a lesbian. Because Myra has not yet come out to her friends and family, she becomes frightened and relents. Kristen proceeds with oral sex. ***This is a violation of the Sexual Misconduct Policy. Because of Kristen's manipulative and threatening arguments, Myra was afraid and unable to freely give her consent. Consent must be given freely and without undue pressure or threat. Kristen threatened Myra and therefore did not receive effective consent from Myra.***



4. Liz and Kwan have been together for six months. She often tells her friends stories of Kwan's sexual prowess, and decided to prove it to them. One night, she and Kwan engage in consensual sexual intercourse. Without Kwan's knowledge, Liz sets up her digital camera to videotape them having sex. The next evening, she uploads the video to an online video-sharing site and discusses it with her friends online. ***This is a violation of the Sexual Misconduct Policy. Kwan's consent to engage in sexual intercourse with Liz did NOT mean Liz had obtained his consent to videotape it. This is a form of sexual exploitation.***

5. Andrew and Felix have been flirting with each other all night at a party. Andrew notices Felix slurring his speech when he goes to the bathroom and wonders if Felix went there to vomit. When Felix returns, the two begin flirting more heavily, and as the conversation continues, the two become more physically affectionate. Andrew soon suggests they go back to his room, and Felix agrees. As they walk, Andrew notices that Felix looks unstable and offers his arm for support and balance. When they get back to his room, Andrew leads Felix to the bed and they begin to become intimate. Felix becomes increasingly passive and appears disoriented. Andrew soon begins to have sexual intercourse with him.

The next morning, Felix thinks they had sex but cannot piece together the events leading up to it. ***This is a violation of the Sexual Misconduct Policy. Felix was clearly under the influence of alcohol and thus unable to freely consent to engage in sexual activity with Andrew. Although Andrew may not have known how much alcohol Felix had consumed, he saw indicators from which a reasonable person would conclude that Felix was intoxicated, and therefore unable to give consent. Andrew in no way obtained consent from Felix for sexual intercourse.***

6. Denise is an undergraduate teaching assistant in Paul's economics class. She notes that he has not been performing well on take-home assignments and exams. Both of them have come to tailgate, each with their own group of friends. Denise has consumed one can of beer, while Paul is rather intoxicated. Denise sees Paul and approaches him. She flirts with him, telling him that she can help him improve his grades if he will hook-up with her. As Paul turns to walk away, Denise grabs his buttocks and squeezes them. ***This is a violation of the Sexual Misconduct Policy. Denise, in a position of power over Paul as his teaching assistant, attempted to arrange a quid pro quo sexual relationship. Additionally, she did not seek consent from Paul to touch him, even if a reasonable person could conclude that Paul was not too intoxicated in order to provide consent. Denise has sexually harassed Paul.***

7. Jeff and Michael are neighbors in their dorm. Michael soon realizes that Jeff is undergoing the transition from identifying as male to female and prefers to be called Becca. Becca begins wearing women's clothing and starts applying makeup on a regular basis. This is alien to Michael's experience and makes him uncomfortable. Michael begins muttering slurs whenever they pass each other in the dorm. Additionally, Michael starts telling his friends on other floors about the "freak living next door," and tells them to take a look for themselves. They do, a few individually, a few as groups that murmur and snicker to each other when they see Becca.

Becca begins to dread leaving or returning to her room and starts to isolate herself to avoid Michael and his associates. It gets to the point that Michael invites people to his room specifically for the purpose of showing them Becca when she passes by so they can have a laugh

at her expense. *This is a violation of the Sexual Misconduct Policy. Not only have Michael and his associates created a hostile environment for Becca based on her identification, they also have stalked her.*

## VIII. Enforcement

Any student who violates this policy is subject to discipline, up to and including permanent dismissal. Disciplinary action will be taken in accordance with the Student Code of Conduct available in the [Student Handbook](#).

## IX. Approval and Amendment

This document was amended effective [ \_\_ ], 2014 to: (1) separate the policy from the procedure; (2) incorporate new definitions of certain types of sexual misconduct to comply with the Violence Against Women Reauthorization Act of 2013; and (3) make other revisions and improvements to the definitions of consent and the examples of sexual misconduct.

*The language of this document was adapted with permission from the [University of Virginia's Policy and Procedures for Sexual Misconduct Complaints](#).*

## X. Related Documents, Policies, and Procedures

[Appendix A: Discrimination Poster \(Chart of W&M Resources and Reporting Options\)](#) (pdf)  
[Appendix B: Information on Campus Resources and Reporting Procedures Including Confidential Resources](#)

The [Sexual Assault Resources and Education website](#) has further information on sexual misconduct, as well as additional resources that serve a variety of needs and circumstances.

The [Discrimination, Harassment, and Retaliation Policy](#) contains more helpful information concerning sexual harassment and other forms of discrimination.

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<sup>i</sup> 34 C.F.R. § 668.46(a) (2014) (Pending; final consensus language).

<sup>ii</sup> Va. Dep't of Criminal Justice Servs., *An Informational Guide for Domestic Violence Victims in Virginia*, DCJS.VIRGINIA.GOV, available at <https://www.dcjs.virginia.gov/victims/documents/domviobr.pdf> (last visited June 2, 2014).

<sup>iii</sup> 34 C.F.R. § 668.46(a) (2014) (Pending; final consensus language).

<sup>iv</sup> *Id.*

<sup>v</sup> *Id.*

<sup>vi</sup> *Id.*

<sup>vii</sup> *Id.*

<sup>viii</sup> Sokolow, Brett A., *NCHERM The Sexual Conduct Judicial Training Manual*. 2001, p.55.

<sup>ix</sup> Sokolow, Brett A., Lewis, W. Scott, Shuster, Sandra K., *NCHERM Institute on Responding to Campus Sexual Misconduct*. 2010, p. 49. Adapted for purposes of this policy.

<sup>x</sup> Title IX requires the College to provide a non-discriminatory environment. Accordingly, if a reported act of sexual misconduct indicates that this environment may be compromised, the university may conduct a preliminary investigation into the alleged sexual misconduct and may weigh a request for anonymity against the following factors: the seriousness of the alleged conduct, whether there have been other complaints of sexual misconduct against the same student, and the right of the student alleged to have committed sexual misconduct to receive



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information about the allegations if the information is maintained by the College as an “education record” under FERPA. A Title IX Coordinator will inform the reporting party if the College cannot ensure absolute privacy.

<sup>xi</sup> Examples 1-6 are adapted with permission from Duke University’s Sexual Misconduct Policy.