



**Joint Submission to the
Standing Committee on Social Policy**

Re:

***Bill 168, the Occupational Health and Safety
Amendment Act (Violence and Harassment in the
Workplace), 2009***

November 24, 2009



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Joint Submission regarding Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009

Introduction

We are writing to you on behalf of the Ontario Public School Boards' Association (OPSBA), the Ontario Catholic School Trustees' Association (OCSTA), Association des conseils scolaires des écoles publiques de l'Ontario, (ACÉPO), l'Association franco-ontarienne des conseils scolaires catholiques (AFOCSC), and the Ontario Association of School Business Officials (OASBO).

We represent the interests of school boards and school business officials across all regions of Ontario.

We are pleased to have the opportunity to provide a written submission to the Standing Committee on Social Policy regarding Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009.

Our Associations fully support ensuring that schools are safe places for students to learn and staff to work including through measures that address issues of workplace violence and harassment.

It's important to note that many school boards have policies and procedures in place already that address violence and harassment. Boards also provide regular training to employees and work to implement preventative strategies.

We also note that there are many other pieces of legislation (see Appendix A) such as the *Safe Schools Act* that deal with these subjects. It is essential that there is a clear consistency between and among them. Coupled with this, we also encourage more inter-ministerial collaboration to ensure consistent, yet age appropriate messaging. Within the education sector, children are first under the Ministry of Children and Youth, then Ministry of Education, followed by Ministry of Colleges and Universities. Our workplaces are students' places of learning. When the students enter the workplace, they have rights under the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code*.

While we generally support the amendments to the *Occupational Health and Safety Act* (OHSA) as a means to prevent workplace violence, a number of aspects of Bill 168 need to be amended in order to apply in the education environment and to be consistent with legislative requirements in other statutes.

Comments on Specific Provisions of Bill 168

Definition of Workplace Harassment

Bill 168 proposes to add a definition of “workplace harassment” that is overly broad and could be interpreted to include an employer’s decision to administer proper employment sanctions or discipline a worker.

Harassment related to race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status, disability, gender, sexual orientation or gender identity is currently covered by the Ontario *Human Rights Code*.

As well, harassment is already addressed under Codes of Conduct established pursuant to Part XIII of the *Education Act* and local policies of the school boards. Harassment is addressed by school boards through internal complaint processes, which may include discipline of an employee who has harassed another employee, up to and including termination by the school board. Third parties who harass an employee may be excluded from school board property.

Moreover, harassment, either criminal or Code related, is contrary to school boards’ codes of conduct and students may be disciplined for such behaviour, up to and including expulsion pursuant to Part XIII of the *Education Act*. School boards consider the responses that currently exist to protect employees from work related harassment to be appropriate and sufficient.

For this reason, we believe that Bill 168 should focus only on Workplace Violence.

Recommendation: Bill 168 focus only on Workplace Violence and remove Workplace Harassment as it is well addressed in other legislation.

Definition of Workplace Violence

Bill 168 proposes to amend OHS/A to define “workplace violence”. Workplace violence would be defined as the exercise or attempt to exercise physical force by a person against a worker that causes or could cause physical injury. The definition of “workplace violence” is extremely broad to include any person that causes or could cause an injury including a student with a disability.

It is important that Bill 168 take into consideration the unique nature of workplaces such as schools and other learning facilities. We know that some students with special needs may not be capable of controlling their behaviour and/or may not know their behaviour could cause an injury. Because of their disabilities, these students may hit, kick, push or bite. School boards have resources, strategies and accommodations to address these behaviours. These students have the right to equal treatment in obtaining an education as guaranteed by the *Charter of Rights and Freedoms* and the Ontario *Human Rights Code*.

Most recently, Bill 212 and regulation 472/02 requires principals to consider “mitigating factors” and “other factors” when a student behaves inappropriately. Mitigating factors include the student’s age, the circumstances of the behaviour (i.e. did they have the ability to control their behaviour and/or understand the foreseeable consequences?), and the student’s history before determining the most appropriate way to respond to each situation.

Recommendation: That students with special needs be excluded from the provisions of Bill 168 and that the Bill recognize that school boards currently follow regulations that focus on Progressive Discipline and Promoting Positive Student Behaviour.*

* Please note: When we refer to students with special needs in this submission, we are referring to those students with behavioural, communicational, intellectual, physical or multiple exceptionalities which may prevent them from forming intent or knowing the consequences of their actions. We know that not all special needs students act out aggressively.

Disclosing A Person with a History of Violence

Bill 168 would require employers to provide information to a worker about a person with a history of violent behaviour, including personal information, if:

- (a) the worker can be expected to encounter that person in the course of his or her work; and
- (b) the risk of workplace violence is likely to expose the worker to physical injury.

The Bill limits the disclosure of information that is reasonably necessary to protect workers from physical injury.

We believe that school should be a place to learn and that educators assist children and youth not only to obtain an education but also to learn appropriate behaviours to become productive members of society.

We agree that staffs who work with a person who is known to engage in violent behaviour have the right to be trained on how to address the behaviour and be provided with assistance or personal protective equipment, where appropriate.

Students with special needs throughout the province receive special education programs and services. Students may receive an Individual Education Plan (IEP) that incorporates recommendations from Identification, Placement, and Review Committee (IPRC) meetings as well as having specific Behaviour Management Plans and Safety Plans. All include a strategy to address current and potential violent behaviour. We understand that those who do need to know such information are identified through these plans and that it is shared with all appropriate staff who are involved in the child's education. This is to ensure that all appropriate persons receive and have access to the consistent messaging/vocabulary and potential triggers that may cause a child to become aggressive or violent as well as information on how to diffuse potentially violent situations.

We also have concerns about accessing information that may reveal previous incidents of violence. School boards do not have access to criminal records of students. In fact, section 118 of the *Youth Criminal Justice Act* restricts access to criminal records that may identify a person under the age of eighteen. What obligation does the school board have to determine whether there is a "history of violence"?

Further, Section 266 of the *Education Act* provides that a student's record (Ontario Student Record or OSR) is privileged information to be used to improve the instruction of the

student. The OSR can only be used as directed by the *Education Act*. If information were contained in the OSR that indicated for example that a student had a history of hitting because of a disability, this information would be used to develop the appropriate behavioural plans for the student. It would be improper to disclose information in the OSR or the Individual Education Plan to all workers who may encounter the student or to use the information from the OSR to label the student as violent.

With respect to staff, a criminal reference is required for all workers. Generally, however, the disclosure of the information collected is limited based on the purpose of its collection and the signed authorization for the release of such information.

In addition, school boards will often receive medical documentation from workers in need of accommodation or in need of disability leaves. A health information custodian may retain records of this information. Under the *Personal Health Information Protection Act*, the use and disclosure of personal health information is prohibited. Specific language in Bill 168 would be required to use such information that has been collected for a different purpose to now determine whether a person has a history of violence.

Also of concern to our Associations is that Bill 168 does not define what “a history of violence” is. Does a “history of violence” require a criminal record? Is one minor incident enough to create a “history of violence”? Is a minor assault from 25 years ago a “history of violence?”

Recommendation: History of violence should be clearly defined. The definition should include the word “current”, i.e. a current history of violence and a time parameter (i.e. four years.) The section should also specify whether information collected under other statutes such as the Education Act or Personal Health Information Protection Act may be used to determine whether a person has a history of violence. The Legislature should reconsider whether children, youth and persons with special needs or disabilities should be exempt from this provision.*

(*Please see clarification provided on page 4)

Summoning Immediate Assistance

Bill 168 proposes that a workplace violence prevention program include the ability to summon immediate assistance when workplace violence occurs or is likely to occur including when a threat of workplace violence is made.

While school boards agree that all staff should be able to immediately contact help if needed, this requirement may be difficult in schools that are not equipped with panic buttons, walkie-talkies, telephones or other alarms in each and every classroom. To upgrade all schools is a significant undertaking and would be costly.

School boards should be given the appropriate funding and sufficient time to implement the required upgrades to the schools.

Our schools have indicated to us that aside from fixed classroom communication (telephone or PA system), walkie-talkies are the most effective device for providing emergency communication. Moreover, it is worthwhile to mention that in addition to a traditional school setting, there are many different kinds of learning environments (administration sites, etc.)

where programming is provided. These too should be provided with the appropriate communication equipment.

It should be noted that no communications system is effective unless resources are in place to answer the call for help. We would encourage that there be consideration given to this as well.

Recommendation: That appropriate funding be given by the province to enable boards to provide schools with equipment and personnel needed to ensure that immediate assistance can be summoned when workplace violence occurs or is likely to occur.

Risk Assessments and Re-Assessments

In addition to doing an initial risk assessment, Bill 168 would require an employer to reassess the risk of violence and update its policies as often as necessary to protect workers.

The Bill does not define how often is necessary or what will constitute a circumstance that requires a reassessment. It would be impractical to engage in a reassessment every time the staff or student body change in the schools. Students and staff mix could change a number of times in the course of a school year.

We see risk assessments as an ongoing process and believe that schools and the JHSC would re-assess as needed and when necessary. We suggest the two groups work together to determine appropriate timeframes.

Recommendation: That workplaces should have the flexibility to determine their own assessment and reassessment timeframes. Assessments should focus on the workplace and not the worker.

Domestic Violence

Bill 168 would require an employer to take all reasonable precautions in the circumstances for the protection of the worker if a domestic violence situation would likely expose a worker to physical injury in the workplace and the employer becomes aware or ought to reasonably be aware of the situation.

Unfortunately, domestic violence is under reported in our society. It is often difficult for victims to seek help. An employer may not be aware of a situation unless it is directly reported to a supervisor or human resources.

With respect to Bill 168, we are concerned about the absence of a definition for “domestic violence”. The term “domestic violence” is not always commonly understood. Would only spouse-to-spouse violence be considered domestic violence? Abuse between siblings or cousins? We recommend “domestic violence” be defined and limited to circumstances the employer is made aware of by the worker or another person.

Recommendation: 1) That the definition of domestic violence be included in Bill 168.

2) *That the need for an employer to take all reasonable precautions for the protection of the worker be regulated only in circumstances in which the employer has been notified by either the worker or another person that a domestic violence situation exists.*

Work Refusals

The Bill would permit a worker to refuse to work or do a particular task where he or she has reason to believe that workplace violence is likely to endanger him or herself.

OHSA currently prohibits certain workers such as police officers, firefighters, correctional officers and hospital employees from refusing work when the unsafe condition is inherent in the work or is a normal condition of employment. Under OHSA Regulation 857, teachers are prohibited from refusing work where the circumstances are such that the life, health or safety of a pupil would be put in imminent jeopardy.

OHSA does not prohibit educational assistants (EAs) or child and youth workers assigned to a student from engaging in work refusals if the worker has reason to believe the circumstances are likely to endanger him or her.

We concur with the Ontario Principals' Council that "EAs should be moved into the same category as teachers, having a limited right of work refusal." Further, we recommend that the limitation on work refusals be continued and expanded to include educational assistants and child and youth workers or similar workers.

Further, work refusals should be limited where the work refusal involves a student with special needs* and/or a behavioural disability and staffs have been trained to address outbursts such as hitting, biting or kicking.

(*Please see clarification provided on page 4)

Recommendation: Educational assistants, child and youth workers and any other employees that have similar responsibilities should not be able to engage in work refusals where a student's life, health or safety would be put in jeopardy.

We note that the Bill provides the authority to make regulations that specify the situations in which a danger to health or safety is inherent in the worker's work or a normal condition of employment. We would expect that provisions would be made in the regulation to take into consideration the unique nature of the school environment.

Reporting requirements

Bill 168 would require an employer to report and provide prescribed information on a violent workplace incident to the joint health and safety committee within four days of it occurring.

As noted above, the reporting should be limited to intentional incidents of violence. Further, most school boards have multi-site joint health and safety committees. It would not be feasible to bring all incidents of violence from every school (including every hit or kick) to the attention of the committee within four days.

Recommendation: Bill 168 be amended to require that the incident be recorded by the school and reported to the local worker representative within four days.

Funding

Bill 168 provides no government funding for the creation, implementation or communication of the policies proposed and their requirements (i.e summoning assistance.)

School boards spend significant amounts of money on training for staff to improve student educational outcomes.

School boards do not receive provincial funding to provide regular harassment and violence prevention training for workers. The costs of training for the many thousands of school board employees would be significant, and if required, must be borne by the provincial government through the allocation of a specific grant recognizing release time for teachers and support staff, as well as the costs of training facilities and trainers.

Recommendation: The Ministry of Education fund programs to prevent workplace violence and that resources be available to School Boards to comply with Bill 168 requirements.

Final Recommendation: *On behalf of the education partners represented today, we recommend that the Ministry of Labour create a separate and distinct Education Sector Regulation under the Occupational Health and Safety Act, similar to what currently exists for the Health sector (Ontario Regulation 67/93 Health Care and Residential Facilities).*

We believe that the school learning environment is a unique workplace that needs to be considered on its own when implementing such a broad piece of legislation as this. School boards have many different types of “workplaces” (not just schools) where programming takes place serving a wide range of students with diverse learning needs.

This would be further supported due to the number of current pieces of legislation that schools boards must adhere to regarding harassment and violence. There must be clear and consistent messaging.

We are very interested and prepared to participate in any consultation in the development of this proposed regulation.

Conclusion

We believe that preventing workplace violence is an important initiative. However, Bill 168 needs to be amended as noted above in order to apply in the education environment. While workers have the right to a safe workplace, students equally have the right to an education and to learn in an environment that does not place their lives, safety or health at risk. The right to refuse work needs to take into account not only the safety of the worker but also the safety of our students.

In addition to providing funding and resources to address the Bill 168 requirements, we encourage the Government to create a separate Education Sector Regulation under the OHS Act so that the safety of workers and students is consistently and appropriately addressed.

Thank you for the opportunity to provide our comments on Bill 168.

Sincerely,



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Bill Blackie, Executive Director
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Appendix A

Legislation that considers Harassment and Violence, as well as the right to an education and use of personal information in which school boards must abide by:

Education Act, R.S.O. 1990, c.E.2

- Recent amendments through Bill 212 (Progressive Discipline and School Safety) in 2007 and Bill 157 (Reporting of Incidents and Notification) in 2009
- Part XIII of the *Education Act* requires every board of education to implement a Code of Conduct that would address the safety of people in schools and encourage students to use non-violent means to resolve conflict. The *Act* also provides principals and teachers with authority to suspend and expel students where the student has engaged in bullying or uttering a threat to inflict serious bodily harm on another person. However, that authority must be balanced against the right of a student to an education and other prescribed mitigating factors.
- Section 315 allows the collection of personal information (e.g. criminal background check of board employees and service providers at a school) to ensure the safety of pupils or to administer programs for pupils' suspended or expelled.
- Ontario Regulation 474/00 *Access to School Premises*, s.3(1) provides: *A person is not permitted to remain on school premises if his or her presence is detrimental to the safety or well-being of a person on the premises, in the judgment of the principal, a vice-principal or another person authorized by the board to make such a determination.*

Occupational Health and Safety Act, R.S.O. 1990, c. O.1.; Regulation 857

- Section 25(2)(h) requires the school board to take all reasonable precautions in the circumstances for the protection of a worker. Training, instruction and supervision must also be provided to workers to ensure their safety at the workplace.
- Workers have the right to refuse unsafe work. A teacher's right to refuse work is limited "where the circumstances are such that the life, health or safety of a pupil is in imminent jeopardy"

Ontario Human Rights Code, R.S.O. 1990, c. H.19

- Section 1 of the *Code* provides: *Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.*
- Section 5(1) of the *Code* provides: *Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.*
- Section 5(2) of the *Code* provides: *Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.*

Criminal Code R.S.C. 1985, c. C-46

- Section 264(1) "*No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the*

circumstances, to fear for their safety or the safety of anyone known to them. Section 264(2) provides: The conduct mentioned in subsection (1) consists of

- *repeatedly following from place to place the other person or anyone known to them;*
- *repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;*
- *besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or*
- *engaging in threatening conduct directed at the other person or any member of their family.*
- *Section 264.1 provides: Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person; (b) to burn, destroy or damage real or personal property; or (c) to kill, poison or injure an animal or bird that is the property of any person.*

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Sch. B to Canada Act, 1982 (U.K.), 1982, c. 11

- *Section 15(1) of the Charter provides: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”*

Youth Criminal Justice Act, S.C. 2002, c. 1

- The Act governs the application of criminal and correctional law to those 12 and older but younger than 18 at the time of committing the offence.
- Section 110 of the Act outlines privacy in relation to the identity of young offenders, limits access to their criminal records, and restricts disclosure of their personal or trial information.

Child and Family Services Act, R.S.O. 1990, c. 11

- The Act addresses the rights of a child and provides that a child has a right to receive an education that corresponds to the child’s aptitudes and abilities, in a community setting whenever possible.

Personal Health Information Protection Act, S.O. 2004, c. 4, Sch. A

- The Act addresses the collection, use and disclosure of personal health information in the custody of a health information custodian. Permitted use and disclosure of such health information is restricted by this Act.



ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION

Leading Education's Advocates

The Ontario Public School Boards' Association represents public district school boards and public school authorities across Ontario, which together serve more than 1.3 million public elementary and secondary students. The Association advocates on behalf of the best interests and needs of the public school system in Ontario. OPSBA is seen as the credible voice of public education in Ontario and is routinely called on by the provincial government for input and advice on legislation and the impact of government policy directions.

www.opsba.org



Ontario Catholic School Trustees' Association

Founded in 1930, the Ontario Catholic School Trustees' Association (OCSTA) represents the province's 29 English-language Catholic district school boards. Collectively, these school boards educate over 600,000 students from junior kindergarten to grade 12. Inspired by the Gospel, the Mission of OCSTA is to provide leadership, service and a provincial voice for Catholic school boards in promoting and protecting Catholic education. The Association works to protect the mission of Catholic boards, which is to create in every Catholic school a faith community where religious instruction, religious practice, value formation and faith development are integral to every area of the curriculum.

www.ocsta.on.ca



L'Association des conseils scolaires des écoles publiques de l'Ontario (ACÉPO) représente les quatre conseils scolaires publics de langue française de l'Ontario qui ont été créés en 1998, lorsque l'Ontario a accordé la gestion scolaire aux Francophones.

www.acepo.org



L'Association franco-ontarienne des conseils scolaires catholiques agit en tant que porte-parole des huit conseils scolaires catholiques de langue française et des 5 administrations scolaires du Nord de la province qui desservent plus de 70 000 jeunes franco-ontariennes et franco-ontariens.

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