

Ontario College of Teachers



Brief to Standing Committee on Justice and Social Policy Re: Bill 101, *Student Protection Act*

October 30, 2001

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The Council of the Ontario College of Teachers would like to thank the Standing Committee on Justice and Social Policy for this opportunity to comment on Bill 101, the *Student Protection Act*. We are pleased that the issue of children's safety in school is part of the Ontario government's legislative agenda and we welcome this initiative. The College does have specific concerns about this legislation as currently written. These concerns are outlined in this brief.

Background and role of the College

The College is the regulatory body of the teaching profession in Ontario, created by an act of the Legislature in 1996. It is the largest regulatory body in Canada, with the authority and the responsibility to regulate the profession of teaching and to govern its 183,000 members. The College sets professional and ethical standards for the teaching profession, and is responsible for ensuring that teachers are appropriately qualified and competent.

The College also has an important duty with respect to public and professional safety: we receive and investigate complaints against members of the College and deal with issues of discipline and fitness to practise. This means it is our job to respond when somebody complains that a teacher's conduct is unprofessional, which includes responding to allegations of professional misconduct of a sexual nature.

Only the College has the power to issue and revoke a teacher's Certificates of Qualification and Registration. Only the College can make sure a teacher found guilty of serious misconduct cannot hold a licence to teach in a publicly funded school in Ontario, and we share records of professional discipline with education authorities across Canada. The Minister of Education does not have the authority to revoke a certificate of qualification, nor does Cabinet, nor the Premier. Children's aid and police services do not have this authority, though of course the work of these professionals is vitally important. The teaching profession is very serious about the safety of children in our care, which is why we are greatly interested in ensuring that our legislative and regulatory framework gives us the tools we need to do our job.

The Professional Misconduct Regulation made under the *Ontario College of Teachers Act* (OCTA) requires more from a teacher than merely not breaching the Criminal Code. Because teachers are responsible for supervising our children and because teachers occupy a position of trust and moral authority over children, the law holds a teacher to a higher standard of conduct than it would a private citizen. Professional status is a privilege, not a right. We urge the committee to keep this in mind and consider why it is appropriate to prohibit and to discipline certain teacher conduct not covered by the Criminal Code and not adequately addressed by Bill 101.

Helpful aspects of Bill 101

There is much that is valuable in this bill. We commend the government for addressing the extremely important issue of the safety of children in Ontario schools. For example:

- It is helpful to broaden certain duties to report to the College to include not only school boards but other employers of certified teachers, such as some private schools.
- It is helpful to report to the College not only a teacher's conviction but also a charge for certain offences under the Criminal Code.
- It is helpful to ensure employers are notified by the College of certain decisions and orders concerning teachers who work for them.
- It is helpful to create a provincial offence punishable by a fine of up to \$25,000 for employers who fail to report certain specified information to the College.

Concerns with Bill 101

This bill is the response of the government to a report by the Honourable Sydney L. Robins entitled, *Protecting our Students: a review to identify and prevent sexual misconduct in Ontario schools*. This legislation is welcome, and it is helpful, but our position is that unless changes are made before third reading, this bill falls significantly short of what is needed to **identify** and **prevent** sexual misconduct in Ontario schools.

Without amendments, this legislation is, at best, a missed opportunity. At worst, it will fail to make our children as safe as they could be if the recommendations of Justice Robins were implemented in full. This legislation also does not reflect all of the recommendations made by the governing Council of the College and submitted to the Minister of Education on March 26, 2001.

We would like to focus on three serious problems with this legislation. The single biggest problem is that the bill does not define "sexual misconduct" as recommended by Justice Robins. Therefore, some types of misconduct of a sexual nature are not clearly prohibited. If we are to place the emphasis on **prevention**, and enhance the ability of the College and of all teachers and education authorities to act **before** a child is harmed, we need a broader definition as has been recommended to the government.

Second, the bill leaves a loophole for suspected sexual predators who are simply moved from one school to another by an employer, as opposed to being fired or having their duties restricted. Our reading of the legislation is that there is in fact no duty under Bill 101 to report such a transfer to the College, though there should be.

Third, the bill leaves another loophole for suspected sexual predators who resign during an employer's investigation into their conduct. Our reading is that there is in fact no duty under Bill 101 to report such a resignation to the College, though there should be.

These circumstances – resignations under a cloud of suspicion, or a decision to shuffle an alleged sexual predator from one school to another – are precisely those that Justice Robins sought to address in his report.

We remain confident that this committee and the provincial government are serious about the safety of children in our schools and will therefore amend this legislation rather than pass it with loopholes that we believe may permit sexual predators to evade detection and continue to harm children in Ontario schools.

Issue number 1: Defining “sexual abuse” instead of defining “sexual misconduct”

The College is concerned that Bill 101 defines “sexual abuse” instead of “sexual misconduct” and uses a definition that fails to include all professional misconduct of a sexual nature. This is contrary to recommendation 6.2 of the Robins report and also contrary to the recommendations submitted to the Minister of Education by the College.

By referring to “sexual abuse” the emphasis is placed on the victim, and the question of whether the victim did or did not suffer abuse or harm. This is not the appropriate focus. The proper emphasis must not be on the student but on the teacher, who is solely responsible for his or her professional conduct. That is why the College believes it is preferable to define “sexual misconduct”.

Justice Robins wrote in his report at page 184:

“I use the term ‘sexual misconduct’ to embrace the full range of offensive activities of a sexual nature that teachers could engage in. The term ‘sexual abuse’ is a narrower term which may not be suitable to describe some offensive conduct of a sexual nature which nonetheless should be proscribed.”

On pages 200-201 Robins states why “sexual abuse” is not an adequate term to define:

“The term ‘sexual abuse’ is understood by many to describe conduct that involves physical contact between abuser and victim that is criminal, and that involves a significant age differential between the parties...

“...while “sexual abuse” appropriately describes a sexual assault, the term may not be suitable to describe offensive conduct of a sexual nature which nonetheless should be proscribed. **Put simply, the term is under-inclusive and fails to capture the full range of sexual misconduct which may properly be the subject of disciplinary proceedings by an educator’s employer or by the College.** Its use may leave the erroneous message that only those forms of sexual misconduct which can be characterized as abuse should be regarded as professional misconduct.” (emphasis added)

“...misconduct of a *sexual nature* should be described as such. More to the point, the regulation should serve to inform and educate members. This means that not only should the term “sexual misconduct” be utilized, but that it should be defined.” (emphasis in original)

For your reference, here is the text of Recommendation 6 from the Robins Report:

- 6.1 Section 1 of the misconduct regulation under the *Ontario College of Teachers Act* should be amended to provide that professional misconduct includes “sexual misconduct.”
- 6.2 “Sexual misconduct” should be defined as “offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment.”

The College supports this definition with one change. We recommend reference to “educational environment” rather than “school environment.” This is to indicate that conduct of teachers must be professional even when they are not in a school building or on school property, such as during a school trip, sports tournament or extracurricular activity.

The Committee should also note that Justice Robins recommended the definition be placed in regulation, not in legislation, and the College agrees.

Grooming behaviour and the engagement phase of sexual misconduct

The College is concerned that the definition in Bill 101 may not cover what is known as “grooming behaviour.” This is a phrase used to describe a pattern of conduct by a sexual predator to select and prepare potential victims. It is a phenomenon that is particularly insidious and difficult to detect when the sexual predator holds a position of trust and moral authority over a young person, such as the role of a teacher. Understanding this phenomenon is crucial to preventing grave abuse before it happens. In his report, Justice Robins stated at pages 127-128,

“In cases of sexual abuse, the offender, using his position of power and authority, may employ various methods to induce a child to be compliant and silent. Frequently, raw force is unnecessary. Often, there is an engagement phase¹, during which the adult begins a period of grooming² to cultivate a special relationship with the child. Also part of the engagement phase may be opportunities to be alone with the child... These activities provide opportunities for prolonged or unmonitored contact with students...

“Grooming behaviours include efforts to form a special relationship such as providing treats, kind words, favours and attention; non-sexual touching to gauge the child’s reaction; and, perhaps, sexual comments and use of pornography.

“The intention of grooming is to test the secrecy waters so as to determine who among the chosen targets will be least likely to tell; to desensitize the child through progressively more sexualized behaviours; to forge a valued relationship that the child

¹ Robins’ reference is S. Sgroi, *Handbook of Clinical Intervention in Child Abuse* (Lexington, MA: Lexington Books, 1982).

² Robins’ reference is Singer, M.I., Hussey, D.L., Strong, K.J., “Grooming the victim: an analysis of a perpetrator’s seduction letter” (1992) 16 *Child Abuse and Neglect* 877 at 884.

will not wish to risk losing through disclosure; and to learn information with which to discredit the child should he or she tell.”

Some grooming behaviour could be sexual in nature, but clearly, some is not. If we want to **identify** and **prevent** sexual misconduct in Ontario schools, we need a broader definition that would allow the Discipline Committee of the College to identify a pattern of subtle, insidious but potentially dangerous grooming behaviour. We need to make it more difficult for a predator to isolate, manipulate and exploit a child under the guise of providing educationally appropriate support or assistance.

The definition in Bill 101 refers to “behaviour or remarks of a sexual nature by the member towards the student.” We believe this definition would not cover all conduct by a teacher intended to establish a sexual relationship with a student, which should be clearly prohibited. For example, the definition does not clearly prohibit conduct such as:

- invitations to a student to attend at the teacher’s home
- invitations to accompany the teacher on a social outing or “date”, or to spend the night at a teacher’s residence
- exchanging notes or e-mail messages of a personal nature with students
- gift-giving, favours, or other special attention
- touching that is not explicitly sexual in nature but which a reasonable observer would conclude is a prelude to sexual touching (for example, stroking the student’s hair, face, back, etc.)
- sexual harassing remarks not directed “towards the student” but to other students, to colleagues, or to an entire classroom

The College does not believe all such activities are automatically a form of professional misconduct. Every case is unique and must be considered based on specific evidence and circumstances. For example, a pattern of such conduct, rather than a single instance, could be a factor in the deliberations of a panel of the Discipline Committee of the College.

The teacher-student context and a teacher’s moral authority

Another problem with the definition proposed in Bill 101 is that it is essentially copied from the procedural code of the *Regulated Health Professions Act*. The decision to use this definition overlooks the fact that the interactions between a teacher and a student are quantitatively and qualitatively different than the typical interactions between a health professional and a patient. The amount of time a teacher can spend with a student is much greater, and therefore a sexual predator in a teaching role would have far more opportunity for grooming behaviour and a protracted engagement phase. Teacher-student interaction can include after-school activities when other students and teachers are not present. It can include travel to other communities and overnight stays, for example for sports tournaments or other school trips. Also, teachers supervise young children in the place of their parents, whereas a parent is likely present or close by for a child’s typical visit to the doctor or dentist.

Finally, part of the duty of a teacher is to instruct a student in values and to offer moral guidance and leadership. Sadly, research in this area and cases investigated by the College reveal instances in which this moral authority has been the pretext used by sexual predators to groom students for sexual interaction. A predator in a teaching role may gauge a child's resistance with probing questions the child may feel obliged to answer. The predator may erode a child's defences and reduce a child's willingness to disclose sexual misconduct by emphasizing that local authorities or parents will trust the teacher's word over that of the student. Parents have even been misled into encouraging their children to spend more time with teachers who were later proven to be sexual predators.

In such instances, "behaviour or remarks of a sexual nature" may not be evident to external observers, even though there are other indications to suggest sexual misconduct. A definition of sexual abuse copied from the regulated health professions simply does not address all the subtle ways a person in a teaching position can groom a student for a sexual relationship.

Some examples may be useful. The College's Discipline Committee heard a case involving a teacher who encouraged students to write highly personal observations in their journals. The prosecution contended this was a means by which the defendant subsequently identified potential psychological vulnerabilities of students as a prelude to sexual misconduct. We do not believe the definition proposed in Bill 101 would make it any easier to prosecute such misconduct.

In another case the evidence showed extensive communication between a teacher and a student via e-mail that was of a highly personal nature. The panel found this did not amount to sexual abuse, even though they made a finding of professional misconduct.

To repeat, we agree with Justice Robins that misconduct of a sexual nature should be defined and described as such. To do otherwise, and to find such misconduct merely to be "unbecoming" or "dishonourable", etc. may be to trivialize the offence. The result can be a failure to signal to other teachers the serious nature of such misconduct.

The College continues to receive complaints and gather evidence of what we believe is grooming behaviour by teachers. Our ability to protect children would be enhanced with a better definition of sexual misconduct that clearly prohibited this type of behaviour.

The definition proposed by Justice Robins would authorize discipline for "offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment." As Robins explained, this would cover any sexual relationship between a teacher and a student. Furthermore, if a reasonable observer would conclude that a teacher's conduct was intended to establish a sexual relationship with a student, this should be identified as a form of sexual misconduct. The definition of sexual abuse in Bill 101 does not go far enough to identify and prevent such misconduct.

Educating members of the profession about boundary issues

If the government were to follow Robins' advice, this would be helpful not only for the College discipline process, but also for teachers seeking guidance to govern their own conduct. Robins' definitions and related commentary provide useful insight into boundary issues, that is, understanding the boundaries of appropriate conduct between teacher and student. The broader definition of sexual misconduct would also strengthen the hand of school authorities to conduct preliminary inquiries into allegations at the local level.

For example, school officials should know they ought to question a teacher who repeatedly makes excuses to be alone with a student for no evident educational purpose. The regulatory framework should signal that it may be necessary to notify the College about this kind of behaviour. This is how we can move the focus to **prevention**.

This is why the College prepared a *Professional Advisory on Sexual Misconduct* that is based on the definition recommended by Justice Robins, and which includes commentary and examples drawn from his report. However Bill 101 complicates the task of issuing the advisory and following Justice Robins' advice on how to educate teachers. This is because the bill has ignored his advice on defining "sexual misconduct", and this definition is the basis for the professional advisory. A copy of the advisory is attached.

Issue number 2: Loophole re: teachers transferred from school to school

Bill 101 proposes to add a new section 43.2 (1) to the OCTA. This would require an employer to notify the Registrar of the College within 30 days if a member of the teaching profession is fired or if his or her duties are restricted for professional misconduct. Our concern is with the wording, "terminates the member's employment or imposes restrictions on the member's duties for reasons of professional misconduct". This wording may be interpreted to mean there is no reporting duty for an employer who chooses to respond to allegations by transferring the teacher to another school. Sadly, this phenomenon has been more common than one might think.

A "transfer" is not a termination, nor is it a restriction of duties. That is, the teacher may be certified to teach certain grades and subjects in one school, and be free to teach the same grades and subjects in another school. In our view, the proposed section 43.2 (1) would be of no avail in such a scenario.

This is contrary to recommendation 14.4 (a) of the Robins report and also contrary to the recommendations submitted to the Minister of Education by the College. The loophole can be closed by using the phrase preferred by Robins and the College, which would impose the duty if an employer "dismisses, suspends, or otherwise disciplines a member of the College" for professional misconduct. The phrase "otherwise disciplines" would leave no ambiguity with respect to reporting a transfer for reasons of professional misconduct.

Issue number 3: Loophole re: teachers who resign during employer's investigation

A similar loophole exists in the proposed new section 43.2 (2) that Bill 101 would create in the OCTA. The clause is intended to prevent a teacher from evading detection and discipline by resigning during an investigation by the employer into allegations of professional misconduct. It reads in part,

“If an employer of a member intended to terminate the member's employment or to impose restrictions on the member's duties for reasons of professional misconduct but the employer did not do so because the member resigned...”

Our concern is with the phrase “intended to terminate”. If the teacher resigns during an investigation, the employer may argue that no one had yet formed the intent to terminate or the intent to impose restrictions, and therefore there no obligation existed to report to the College.

As a result, a teacher could be the subject of repeated substantial allegations of sexual misconduct, and could move to another employer without any report having been made to the Ontario College of Teachers. This is contrary to recommendation 14.4 (b) of the Robins report and also contrary to the recommendations submitted to the Minister of Education by the College.

The committee should note that these two loopholes fail to address the very scenarios that were the focus of the Robins report. The danger of Bill 101 as written is that despite disclosure to local authorities of suspicious conduct, there may be no investigation of such conduct by the regulatory body of the profession. We cannot conduct an investigation if we are not informed. A sexual predator would then be free to move to another school or community and the abuse would continue, as it did for 21 years in the DeLuca case that led to Justice Robins' appointment and report.

Recommendations of the College

The text of resolutions of the Council of the College was included in correspondence from the Chair of Council to the Minister of Education on March 26, 2001. A copy of this correspondence is attached for reference.

Enclosures:

- Letter to Minister of Education from Chair of Council, March 26, 2001
- Professional Advisory on Sexual Misconduct

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