

**SCHOOL BOARDS' OBLIGATIONS UNDER BILL 101**  
**- *THE STUDENT PROTECTION ACT, 2002***

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## INTRODUCTION

The highly anticipated Bill 101 came into effect on September 3, 2002. The bill was created in response to former Justice Sydney Robins's report, "Protecting Our Students", prepared in 2000<sup>3</sup>, known as the "Robins Report." The Robins Report made a series of recommendations for reducing sexual misconduct in schools. Bill 101 implements some of these recommendations and imposes new obligations on school boards with respect to teacher misconduct.

Bill 101 removes the requirement by teachers to notify a fellow teacher when preparing an adverse report about the teacher concerning sexual misconduct. Bill 101 also increases reporting requirements by school boards to the Ontario College of Teachers ("the College") and imposes a duty on school boards to remove teachers from contact with students in certain circumstances. The bill also implements a broadened definition of sexual abuse under the *Ontario College of Teachers Act, 1996* and increases information sharing between the College and school boards.

Bill 101 applies in respect of all College of Teachers members who teach or provide services to persons under 18 years old, or 21 years old in the case of special needs persons.<sup>4</sup> The legislation does not apply to teachers employed at independent schools who are not qualified by the College.<sup>5</sup>

While many have commended Bill 101 as a good start at reducing sexual misconduct in schools, there has been criticism that the legislation fails to go far enough to protect students in the education

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<sup>2</sup> Many thanks to John Bell, senior partner, Shibley Righton LLP, for listening and sharing his views with me in preparation of this paper.

<sup>3</sup> The report was prepared by Justice Robins at the request of the Ontario government after the discovery of abuse by a Sault Ste. Marie teacher of several females for over 20 years. (Published by the Ontario Ministry of the Attorney General, Queen's Printer for Ontario, 2000)

<sup>4</sup> "Special needs" is defined as a person who by reason of a physical or mental disability is particularly vulnerable to sexual abuse. School boards should err on the side of caution if in doubt as to whether an individual has special needs, as the definition also extends to persons about whom an employer (exercising reasonable diligence) should have formed the opinion that the person meets the definition of having special needs.

<sup>5</sup> This is the case despite the fact that pleas have been made by various organizations (including the Ontario Catholic Teachers Trustees' Association in their Submission to the Standing Committee on October 30, 2001) that the legislation be extended to apply to all teachers.

setting. This paper will briefly discuss the impact of the bill on school boards and some of its shortcomings.

## **PART I - REMOVAL OF ADVERSE REPORTING REQUIREMENTS**

Bill 101 amends the *Teaching Profession Act* to provide that when a member makes an adverse report about a fellow member regarding suspected sexual abuse of a student, the reporting member need not provide the other with a copy of the report or any information regarding the report.<sup>6</sup> This change is intended to encourage teachers to report suspected sexual misconduct on the part of fellow teachers without concerns about notifying the teacher of the complaint. We view this as a significant development, which in our experience will remove "pressures" on teachers not to report actions of this nature. Accordingly, we foresee that the teaching profession will be a source of increased reporting of these types of cases to school boards and other appropriate officials.

## **PART II - INCREASED REPORTING REQUIREMENTS OF SCHOOL BOARDS**

One of the most substantial changes effected by Bill 101 is the increased reporting requirements by school boards to the College. Prior to Bill 101, school boards were required to report to the College in the following circumstances:

- When school boards became aware that a present or past teacher had been convicted of a *Criminal Code* offence involving sexual misconduct and minors;<sup>7</sup>
- When school boards became aware that a present or past teacher had been convicted of another *Criminal Code* offence which, in the opinion of the board, indicated that students may be at risk of harm or injury;<sup>8</sup> and
- When the school board believed that the conduct of an employee (past or present) should be reviewed by a committee of the College.<sup>9</sup>

These requirements remain in the new legislation but the following additional reporting requirements have been added:

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<sup>6</sup> Section 12, *Teaching Profession Act*.

<sup>7</sup> Formerly subsection 47(2)(a) of the *Ontario College of Teachers' Act, 1996 ("OCTA")*, and now sub section 43.3(1)(a).

<sup>8</sup> Formerly subsection 47(2)(b), *OCTA*, and now subsection 43.3(1)(b).

<sup>9</sup> Formerly subsection 47(3), *OCTA* and now subsection 43.3(1)(c).

**(A) NEW REPORTING REQUIREMENTS**

In short, the new reporting requirements can be separated into two categories: (1) requirements relating to employees under investigation by a board for professional misconduct, regardless of whether the employee left the employ of the board before the investigation was completed; (2) employees charged with one of the *Criminal Code* offences mentioned above.

**(i) Employees under investigation for Professional Misconduct**

*Termination / Conditions Imposed on Employment for Professional Misconduct*

- If an employee is terminated or restrictions are placed on employment for reasons of professional misconduct, a school board must notify the College by a written report, with reasons, within 30 days of the termination or restriction.<sup>10</sup>

*Resignation Pending Conclusion of Investigation*

- If a board intends to terminate the employment of a member or impose restrictions on the member's duties due to professional misconduct, but the employer was unable to do so because the employee resigned, the school board must provide a written report to the College within 30 days of the resignation, setting out the reasons upon which the school board had intended to act.<sup>11</sup>
- If a member resigns pending the investigation by a school board of an act or omission of the member which would, if proven, have caused the employer to terminate the member's employment or impose restrictions on the member's duties by reason of professional misconduct, the school board must provide a written report to the College within 30 days, which states the nature of the allegations being investigated.<sup>12</sup>

In respect of the above reporting requirements, the College is required to report back to the school board as soon as reasonably practicable in respect of action taken regarding the member.<sup>13</sup>

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<sup>10</sup> Subsection 43.21, *OCTA*.

<sup>11</sup> Subsection 43.2(2), *OCTA*.

<sup>12</sup> Subsection 43.2(3), *OCTA*.

<sup>13</sup> Subsection 43.2(4), *OCTA*.

**(ii) Employees Charged with Criminal Offences**

- In addition to a school board's duty to report a teacher who has been **convicted** of the *Criminal Code* offences specified above, school boards are now required to report when they become aware that teachers have been **charged** with such *Criminal Code* offences.<sup>14</sup>
- Further, when a school board has made a report in respect of criminal charges, the board must promptly report in writing if it becomes aware that the charge has been withdrawn or stayed, or the member was discharged or acquitted.<sup>15</sup>

The requirement for school boards to report to the College when a teacher is charged with an offence will result in much earlier involvement by the College than has previously been the case. This early involvement may result in three overlapping investigations regarding a teacher's conduct (by the police, the College and the school board). Issues will likely arise as to whether and how information can be shared between the different investigating parties and what use can be made of such evidence in the respective proceedings.

**(B) CONSEQUENCES OF FAILING TO REPORT**

Prior to Bill 101, the reporting requirements were only enforceable by application through the court for an order directing compliance.<sup>16</sup> By contrast, anyone who breaches the new reporting requirements is guilty of an offence and upon conviction may be liable to a fine up to \$25,000.<sup>17</sup>

**PART III - SCHOOL BOARD'S DUTY TO REMOVE TEACHER FROM DUTIES WITH STUDENTS**

School boards are now required to ensure that teachers who are charged or convicted of the specified *Criminal Code* offences do not perform duties in a classroom or other duties involving contact with pupils pending a withdrawal or stay of the charge or discharge or acquittal of the teacher.<sup>18</sup>

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<sup>14</sup> Subsection 43.3(1)(a) and 43.3(1)(b), *OCTA*.

<sup>15</sup> Subsection 43.4, *OCTA*.

<sup>16</sup> This definition was borrowed from the *Regulated Health Professions Act*. It has been criticized for failing to reflect the unique nature of the teaching relationship.

<sup>17</sup> Subsection 48.1, *OCTA*.

<sup>18</sup> Subclause 12.1 of section 170(1) of the *Education Act*. This section replaces the predecessor requirement that a school board promptly notify the Minister of Education when it becomes aware a teacher has been convicted of such an offence.

Bill 101 does not deal with cases where a teacher is alleged to be guilty of professional misconduct, but no criminal charges are laid. In practice, school boards will often remove a teacher from the classroom in these circumstances pending the outcome of the school board's internal investigation into the allegations. To ensure the safety of students, school boards should continue such practices. This gap in the legislation should be addressed and supplemented by school board policy and procedures.

Further, Bill 101 does not require the removal of a teacher from duties when a school board reports to the College that it believes that a teacher's conduct should be reviewed by the College (which may overlap with the scenario in the above paragraph). Presumably, the requirement to report is predicated on a concern for the safety of students which should be addressed by the same preventative measures.

Again, this gap in the legislation may be supplemented by school board policies and procedures. As a general rule, if a school board is of the opinion that the safety of students may be at risk, the school board must take steps to reduce the safety risk as much as possible.

Bill 101 also implicitly reflects an expectation that the teacher may be returned to duties involving students subsequent to the withdrawal or stay of the charge or discharge or acquittal of the teacher. A school board should not rely on an acquittal or stay of a charge when making determinations regarding potential discipline of teachers. A school board must instead consider the evidence in the case at hand and make an informed determination as to whether, on a "balance of probabilities", there is evidence to establish that a teacher has committed an act of professional misconduct requiring appropriate discipline.

In cases where a suspension or dismissal is warranted, it would not be appropriate to return the teacher to duties involving students. This possibility should also be addressed by school board policy.

Bill 101 does not specify whether the teacher is to be removed from duties with or without pay. As a result, it is left to school boards to determine on a case-by-case basis whether to suspend a teacher with or without pay. We urge the reader before making that decision to take appropriate legal advice in this regard. We note the increasing practice of school boards (particularly in cases involving sexual abuse) to suspend without pay without awaiting the outcome of the criminal proceedings. In those cases, a board should be in possession of and be prepared to adduce sufficient evidence at an arbitration hearing to establish a *prima facie* case of sexual abuse.

#### **PART IV - BROADER DEFINITION OF SEXUAL ABUSE**

In his report, Justice Robins criticized the use of the term "sexual abuse" as being "under-inclusive" and failing to capture the "full range of sexual misconduct" which may properly be the subject of disciplinary proceedings by an employer or the College. Instead, Justice Robins suggested that the term "sexual misconduct" be utilized in legislation, and it should be defined as "offensive conduct

of a sexual nature which may affect the personal integrity or security of any student or the student environment."<sup>19</sup> Although it was suggested by the College<sup>20</sup> that this definition be adopted in Bill 101, this suggestion was rejected. Instead, Bill 101 amended the *Ontario College of Teachers Act, 1996* to provide that the term "professional misconduct" includes the "sexual abuse of a student by a member." The term "sexual abuse" is defined<sup>21</sup> to include:

- (a) sexual intercourse or other forms of physical sexual relations between the member and the student,
- (b) touching, of a sexual nature, of the student by the member, or
- (c) behaviour or remarks of a sexual nature by the member towards the student.

This definition was borrowed from the *Regulated Health Professions Act*. It has been criticized for failing to reflect the unique nature of the teaching relationship.

The College has also criticized the definition as not broad enough to capture various forms of misconduct by teachers called "grooming behaviour", which is commonly used by abusers to involve students in a relationship intended to lead to sexual abuse. Examples of this type of conduct were set out by the College in its Brief to the Standing Committee as follows:

- 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 the 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.); and
- sexual harassing remarks not directed "towards the student" but to other students, to colleagues, or to an entire classroom.<sup>22</sup>

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<sup>19</sup> Recommendation 6.2 of the Robins' Report (p. 202).

<sup>20</sup> Ontario College of Teachers Brief to Standing Committee, *supra*, at p. 6.

<sup>21</sup> Section 1, *OCTA*.

<sup>22</sup> See the Ontario College of Teachers' Brief to the Standing Committee on Justice and Social Policy, dated October 30, 2001, at p. 5.

The College noted that although it did not believe all such activities constitute professional misconduct *per se*, a pattern of this conduct "could be a factor in the deliberations of a panel of the Discipline Committee of the College."<sup>23</sup>

Although the new definition of sexual abuse is more broadly construed than the previous reference in the *Ontario College of Teachers Act, 1996*,<sup>24</sup> it may not be broad enough to adequately protect students in the education setting.

Additionally, school boards may have difficulty applying the new definition of "sexual abuse." The three categories of behaviour can be broadly construed and must be interpreted subjectively. It may be difficult to determine whether conduct falls into these categories, especially with respect to "behaviour or remarks." A more precise definition with examples of such conduct would likely be easier to apply and more effective.

School boards must, at a minimum, apply the same definition of "sexual abuse" as contained in Bill 101. Further, in light of the above, it is recommended that school boards further utilize an expanded definition of "sexual abuse" which would include the consideration of the "grooming" type of behaviours set out above.

## **PART V - INFORMATION SHARING**

Bill 101 provides for increased information sharing between the College and school boards. The amendments require the College to share certain orders, decisions and documentation with school boards when various steps are taken by the College in disciplinary proceedings.<sup>25</sup> Previously, there was no authority for the College to advise school boards of the outcome of disciplinary proceedings.

Where school boards receive new information from the College about a teacher under the provisions for information sharing, they may need to take further steps in respect of their internal investigation regarding a teacher.

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<sup>23</sup> See the Ontario College of Teachers' Brief to the Standing Committee on Justice and Social Policy, dated October 30, 2001, at p. 5.

<sup>24</sup> Section 1 (7.) of Regulation 437/97 provides simply that "Abusing a student physically, sexually, verbally, psychologically or emotionally" constitutes "professional misconduct".

<sup>25</sup> See subsection 43.4, *OCTA* for details in this regard.

## CONCLUSIONS

Bill 101 makes a number of significant changes to the legislation which governs sexual misconduct in schools. The new reporting requirements create increased obligations on school boards and stricter penalties for a breach of these obligations. The bill requires school boards to report to the Ontario College of Teachers, teachers who have been charged with certain offences, as well as those convicted of the same offences. School boards are further required to remove these teachers from duties with pupils.

The bill also requires school boards to report teachers under investigation by the board for professional misconduct even if the teachers left the employ of the board before the investigation was completed. Bill 101 also removes the adverse reporting requirement for teachers alleging sexual misconduct in respect of a fellow teacher and broadens the definition of "sexual abuse" to include "behaviour or remarks of a sexual nature".

While the Bill 101 changes are a step toward Justice Robins's goal of reducing sexual misconduct in schools, there exist gaps in the legislation which should be supplemented by school board policy and procedures, in order to adequately protect students. For example, there is no requirement to remove teachers from contact with pupils in all circumstances where there is a safety concern. Further, the bill does not specify whether a teacher is to be removed from duties with or without pay. Appropriate legal advice should be sought prior to making this determination, but in short, a board should be in possession of sufficient evidence to establish a *prima facie* case of sexual abuse in order to suspend without pay.

Although the legislation implies that a teacher may be returned to duties subsequent to a withdrawal or stay of a charge, a school board should not rely on a criminal court disposition when making determinations regarding potential discipline. A board must instead consider the evidence on a case-by-case basis to make an informed decision as to whether there is evidence that a teacher committed an act of professional misconduct.

School boards should, at a minimum, apply the new definition of "sexual abuse" to all circumstances, and expand the definition to include conduct of the "grooming" type of conduct described above.

The removal of the adverse reporting requirement and the amendments to the definition of "sexual abuse" should lead to an increase in reporting of sexual misconduct in the education setting. Bill 101 will also result in earlier involvement of the College of Teachers, which means an overlap of investigations of the school board, the police, and the College (requiring increased co-operation between these organizations).

School boards must be extremely diligent in their efforts to prevent sexual abuse in schools. This bill not only reduce the heightened risk of legal liability to school boards but, more importantly, will help to provide students with a safe and healthy learning environment which is integral to their education experience.

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**TABLE SUMMARIZING SCHOOL BOARD'S DUTIES UNDER BILL 101**

CIRCUMSTANCES	REQUIREMENT OF SCHOOL BOARD
<b><i>Termination/ Restrictions on Employment for Professional Misconduct:</i></b>	
○ Teacher terminated or restrictions placed on employment for professional misconduct.	Written report with reasons for termination or restrictions within 30 days. [43.2(1)]*
<b><i>Resignation Pending Result of Investigation:</i></b>	
○ Board plans to terminate teacher or impose restrictions for professional misconduct but teacher resigns prior to termination.	Written report within 30 days of resignation with reasons upon which Board intended to act. [43.2(2)]
○ Teacher resigns pending investigation by Board into act or omission of teacher which if proven would have led to termination or restrictions imposed on employment for professional misconduct.	Written report within 30 days stating nature of allegations. [43.2(3)]
<b><i>Criminal Charges:</i></b>	
○ Board becomes aware present or former teacher charged with or convicted of <i>Criminal Code</i> offence involving sexual conduct and minors.	Board must promptly report. [43.3(1)(a)]
○ School Board becomes aware former or present teacher charged with or convicted of <i>Criminal Code</i> offence which in Board's opinion indicates students may be at risk of harm or injury.	Board must promptly report. [43.3(1)(b)]
○ Board who made a report under 43.3(1) becomes aware charge is withdrawn or stayed or teacher was discharged or acquitted.	Board must promptly report. [43.3(2)]
<b><i>Conduct Which Should be Reviewed:</i></b>	
○ Teacher engaged in conduct or took action which in Board's opinion should be reviewed by a Committee of the College.	Board must promptly report. [43.3(1)(c)]

***Removal of Teacher from Duties Involving Children:***

- School Board becomes aware teacher has been charged with or convicted of *Criminal Code* offence involving sexual misconduct of minor or other offence which in Board's opinion indicates that students may be at risk. Board must take prompt steps to ensure that teacher performs no classroom duties or duties involving pupils pending withdrawal or stay of charge, or discharge or acquittal of teacher. [170(12.1)]\*\*

\* Unless otherwise specified, sections referenced are from the *Ontario College of Teachers Act, 1996*.

\*\* *Education Act*.