

Ontario Nurses' Association

Submission to the Standing Committee on Social Policy

**On Bill 132, An Act to amend Various Statutes with
respect to sexual violence, sexual harassment,
domestic violence and related matters**

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INTRODUCTION

The Ontario Nurses' Association (ONA) is a union representing 60,000 front-line registered nurses and allied health professionals and more than 14,000 nursing student affiliates across Ontario, providing care across the health sector in hospitals, long-term care facilities, public health, the community, clinics, and industry.

Statement of Beliefs: Occupational Health and Safety

ONA believes that all of its members have the right to work in a healthy and safe work environment. ONA further believes in the pursuit of the highest degree of physical, mental and social well-being of workers in all occupations. As the largest health-care union in the country, ONA exercises a strong leadership role in achieving progressively greater gains in the fields of occupational health and safety and human rights.

The Premier and the Government's Leadership

The vast majority of ONA members are women who everyday face increasingly difficult circumstances, as the province struggles to reorganize the health care system, where more than 80 percent of workers are female. Too often we receive reports of our members being kicked, punched, spat on and verbally abused. A sampling of reports includes: nurses beaten beyond recognition; one stabbed, narrowly missing her carotid artery; a nurse required to undergo a finger amputation due to a violent attack; sexual grabbing; sexual assault and other abuse as our members deal with challenging patients and client populations, the rising public anger with health-care system inefficiencies, as well as threats from other members of the health care team.

We are pleased to see that the Premier herself is taking leadership in this very important mission to eliminate misogyny, sexism, and its often devastating effects on individuals and society as a whole. And we are pleased that the Ministers of Labour and Health and Long-Term Care have also acted decisively by establishing the Workplace Violence Prevention in Health Care Leadership Table. We welcome this opportunity to offer our experience and expertise to help lead the province away from misogyny and acquiescence to harassment and violence, including sexual violence.

ONA's Proposed Legislative Amendments

In our submissions this past May to the Premier's Roundtable on Violence against Women, we reminded that it was more than 10 years ago, in November 2005, when ONA member Lori Dupont was horrifically murdered in what was one of the most dramatic examples of workplace sexual harassment in modern memory. In our submissions, we pointed out that the "Bill 168" amendments that followed the Lori Dupont Inquest were not enough to stem the rising tide of harassment and violence in our workplaces. Unfortunately, the experience of our members is a continuing story of growing and pandemic harassment and violence in our workplaces. As you can see from the attached infographic, the health care sector compares increasingly poorly to other sectors with respect to claims of physical injuries from workplace violence.

Our Prior Recommendations

To summarize, ONA submitted that the "Bill 168" amendments have been insufficient to protect workers. The weaknesses include the following:

- The violence sections of the *Occupational Health & Safety Act (OHSA)* are only explicit about the employer's obligation to prevent workplace violence that can have a *physical* impact on a worker. The provisions are silent with respect to the very real *mental* injuries that result from workplace violence.
- Similarly, while it is clear that employers need to *prevent* workplace violence, the "new" sections do not explicitly require employers to take reasonable precautions to *prevent* harassment, which can be and was, in the horrific Dupont case, a precursor to predictable, preventable workplace violence. As explained in expert testimony at the Dupont inquest (and since acknowledged on the **Ministry of Labour** website), harassment is often just the beginning of a full continuum of behaviours that can start with sexual harassment and culminate to horrific violence. Expert witness Dr. Peter Jaffe testified at the inquest about "84 missed opportunities" for preventative intervention as the harassment towards Ms. Dupont escalated in gravity and frequency.

We also pointed out that at the Minister of Labour's March Summit, Romeo Dallaire also spoke of the need to treat mental injuries as "honourable injuries." Despite evolving law, the Workplace Safety and Insurance Board (WSIB) has permitted employers to continue to discriminate against these "honourable injuries" and not compensate injured workers for preventable mental health illnesses from their work. As an example, ONA represented witnesses to the horrific murder of their colleague and friend, Lori Dupont, when WSIB challenged their WSIB claims.

We also cautioned against a separate definition of "sexual harassment."

- The current definition for workplace harassment in the *OHSA* is broad enough to include all types of harassment, including those instances that are of a sexual nature.
- Segregating one form of harassment from others will have the same negative impact as separating violence from harassment as was done in Bill 168. It ignores the continuum of harassment and would place an undue focus on the grounds for the harassment rather than the seriousness of the behaviour. It places an importance on the sexual nature of the harassment to the detriment of all other types, implicitly devaluing them.
- The grounds for harassment are equally and fully recognized under the *Human Rights Code*.

We recommended that inspectors be granted the power to order third parties to investigate.

We recommended a clear and explicit provision that the reprisals protections extend to workplace harassment complaints.

We advocated that the joint health and safety committee have a role in eliminating harassment in the workplace, which would include the following roles:

- The joint health and safety committee and/or health and safety representative should have a power to audit the harassment policy and program for effectiveness.
- The employer should have an obligation to report to the joint health and safety committee (JHSC) and/or health and safety representative and the respective trade union, if any, a high level report outlining the fact of a complaint, the investigation process used, and outcomes/recommendations from investigation reports.

ONA's Recommended Amendments for Bill 132

We appreciate the government's quick movement on this bill and it is to be commended in several respects. The bill enhances the current harassment provisions by:

- requiring the employer to investigate incidents or complaints of workplace harassment;
- requiring measures and procedures for the worker to report to a person other than the employer/supervisor if they are the alleged harasser;
- requiring at least an annual review of the harassment program;
- empowering an inspector to order an employer to pay for an investigation by a qualified impartial person.

However, there are a number of specific concerns that merit intervention through measured but precise amendments. While it is without doubt that ONA shares and is committed to the legislative objective to stop and eliminate harassment and violence, including sexual harassment in workplaces across Ontario, the legislation as currently drafted may result in unintended consequences that could defeat this important legislative objective.

The proposed amendments to the *OHSA* fall short in several areas as outlined below.

Prevention

While the legislation requires employers to investigate based on a complaints-driven process, there is no corresponding general duty on the employer to take preventative measures to deal effectively with real risks and hazards before workers are placed in harm's way.

Responding to incidents and reports of workplace harassment in an appropriate manner by imposing a duty to investigate has long been recognized under the *Human Rights Code*. It is a fundamental and important first step. However, responding to complaint and being reactive is not enough to truly eliminate harassment in workplaces.

We are long past the point where we need to impose a duty on the employer to take precautions to *prevent* harassment and its effects. The proposed section 32.0.7 begins with the phrase “To *protect* a worker from workplace harassment, an employer shall...” and then lists requirements for an investigation *after* an incident or complaint. To suggest an investigation after the fact protects a worker from harassment, is like saying an investigation of a traffic accident protects a driver from injury. The investigation may protect a worker from *further* harassment, but prevention is key.

To effect real protection from this hazard, the amendments should extend the general duties clause to harassment hazards. The *OHSA* requires employers to take every precaution reasonable in the circumstances to protect workers before they are harmed, for all other hazards including violence. Why not recognize the lessons from Lori Dupont's murder, and heed the advice of the expert who described a continuum of escalating behaviours from harassment to violence, and pointed out “84 missed opportunities” to **prevent** harm to her? The amendment should include a provision to require the employer and supervisor to take every precaution reasonable in the circumstances to protect a worker from harassment, including sexual harassment.

The irony of the present legislative amendments in Bill 132 is that the employer can complete a great investigation, outline findings of harassment, and take no corrective measures. The legislation does not police the employer's actions in any way. There is nothing in the legislation

that forces employers to act. The employer has unfettered discretion to choose to take corrective measures or not, as no obligation is imposed other than to inform the complaint under section 32.0.7(1)(b) if the employer chooses to take any action.

Program

There is no requirement to have a program with *written* measures and procedures for workplace harassment. Section 32.0.6(2) of the *OHS*A does not explicitly state the measures and procedures must be written. The *OHS*A is also not consistent when it comes to consultation of the Joint Health and Safety Committee (JHSC) when developing policies and programs. For the proposed amendments under section 32.0.6 (2) (b) to (e) to achieve its intent, employers should be required to consult with the JHSC and/or health and safety representative, and ensure all aspects of the workplace harassment program are *written* in the form of measures and procedures.

In regards to consultation, Bill 132 currently requires consultation in some cases but not others. For example in Schedule 3, colleges and universities are required to consult and seek student input in development of a sexual violence policy and every time it is reviewed and amended. Similarly, employers in Ontario governed under the *OHS*A should be required to consult with joint health and safety committees and draw on their expertise in developing policies and programs on workplace harassment.

The new legislation should also give inspectors at the Ministry of Labour the ability to review harassment policies and programs and write orders to employers for *effective* policies and programs where there are weaknesses that are putting the health and safety of workers at risk.

In terms of the Program Review under 32.0.7(1)(c), the proposed changes will not adequately protect workers as it currently only requires employers to ensure that the program adequately implements the policy, not that it adequately *protects* workers and/or continues to adequately *protect* workers from workplace harassment. If an employer policy is weak and ineffective but the program adequately implements the weak and ineffective policy, then an employer could successfully argue they have complied with the legislation, and that there is no requirement to ensure effectiveness of its program.

Mental Injury

The Premier and the Minister of Labour have publicly expressed concern for the mental health of workers. Curiously, the amendments to other Acts covered in Schedules 3, 5 and 6 in Bill 132, contain a proposed definition of “sexual violence,” which includes any sexual act or acts targeting a person’s sexuality, whether the act is physical or “psychological in nature.” Yet there is no similar suggested amendment to the *OHSA* to explicitly expand the scope of workplace violence beyond acts of “physical force” that “could cause physical injury.” Again, there is no reason for a different standard.

We know that the government has an equal concern for the mental health of a victim of sexual harassment or violence in the workplace as it does for any other contexts such as in a rental housing or in educational institutions. This needs to be reflected in the legislation. The same definition of sexual violence and any psychological harm caused from that violence or harassment must also be included in the definitions. As a recent example, a nurse who was recently sexually assaulted and made to perform a sexual act on the perpetrator in the workplace was not physically injured during the assault, however she experienced trauma, psychological harm, and was mentally injured. By excluding reference to psychological harm or injury in the *OHSA* or the legislative amendments, workers who are sexually assaulted will not get the same protection to a safe work environment as someone who was sexually assaulted and sustained a physical injury.

Definition and Notification

Bill 132 still does not acknowledge the continuum of behaviours that can be identified and for which preventive measures such as we outlined in our first written submission can be taken to prevent escalation. ONA is calling for a single comprehensive *OHSA* definition of harassment/violence invoking duties to prevent and respond to incidents at all points in the continuum as follows. In the alternative and at minimum:

- The definitions of workplace violence must also be amended to include psychological injury;
- The definition of occupational illness should also be expanded to include physical and psychological illness resulting from incidents of harassment and/or violence including sexual harassment and sexual violence.
- The language under section 52 should be expanded to include psychological illness from

harassment and violence.

Confidentiality

ONA understands and recognizes the importance of preserving confidentiality with respect to the investigation process to ensure that victims of harassment, including sexual harassment, feel comfortable to come forward and report incidents or file complaints. At the same time, there is a balancing of interests between confidentiality and privacy on the one hand, and ensuring an effective system of enforcement and limited disclosure on a need to know basis to prevent harm to other workers on the other hand.

Currently, the legislation tips the balance too far in one direction when it comes to confidentiality without factoring in other countervailing considerations. The key provisions are sections 32.0.6(2)(d), 32.0.7(1)(b), and 32.0.7(2). The combined effect of these provisions is to impose absolute confidentiality over the investigation process up to and including the final results, regardless of the risks or hazards presented to other workers. Further, Bill 132 prohibits any disclosure of information related to an incident or complaint of workplace harassment other than to the complainant and the harasser under section 32.

This causes the following problems:

1. The employer is not expressly allowed to warn other workers who are at risk of harm from a hazard or potential hazard such as posed by a person who has been found to have committed harassment.
2. The employer has no obligation to share the results of the investigation with a complainant's union in a unionized context or other representative in a non-unionized context. Arguably, the complaint could also be prevented from sharing information about an incident or complaint of workplace harassment with her union.
3. The prohibition on the employer to disclose any information related to incidents or complaints of workplace harassment, except in the narrow circumstances noted, and the obligation to only share the results of an investigation with the complainant and alleged harasser, shields the employer's investigation from review and places the entire burden of the enforcement of the new legislative provisions (including the new section 55.3(1)) on the victim.

The proposed amendments restrict access to the results of the investigation to only the

complainant and the alleged harasser. Furthermore, section 32.0.6(2)(d) casts a wide net by imposing a statutory privilege on any information about an incident or complaint of workplace harassment, including identifying information about any individuals involved.

ONA believes the government needs to strike the appropriate *balance* between protection of privacy and the right for workers to know about hazards in the workplace. We need to establish a safe environment for workers to step forward when harassment occurs. But we need to furnish sufficient information on a need to know basis to ensure the complainant and other workers are protected from any person who has been found to have committed harassment. To achieve this delicate balance, ONA is recommending the following measured amendments.

First, section 32.0.6(2)(d) should be amended to provide for an additional exception for disclosure when it is necessary to protect the complainant and other workers from workplace harassment. This would be akin to a “duty to warn” to only those workers or a subclass of workers who are at risk. This is consistent with the overarching duty on employers to advise a worker of the existence of any potential or actual danger to the health and safety of the worker of which the employer is aware.

So, for example, if harassment is found to have occurred on a particular unit or department in a health care facility and the harasser poses a risk not just to the complainant but to others, there needs to be allowance to disclose identifying information that is necessary to protect workers from hazards or potential hazards. As another example, if during the course of an investigation evidence is discovered that the alleged harasser has targeted or is planning to target other victims, those individuals should be made aware and measures such as a safety plan should be put in place. This could include the identity of the alleged harasser.

If an absolute bar is placed on disclosure about incidents of workplace harassment, then the employer may be prevented from advising workers of information that is relevant to their safety, when they know such workers are at risk. This could be catastrophic by putting workers in harm’s way when this could be prevented.

Second, the employer should be required to report the results of the investigation and any corrective action to not only the complainant but if the complainant is a member of a union, to his or her union. This ensures that the complainant alone does not have to enforce the

obligations placed on the employer under the new legislative provisions. Otherwise, we would anticipate that employers will rely on sections 32.0.6(2)(d) and 32.0.7(1)(b) to say that they are prohibited and cannot share any information with any other person save and except the complainant, including the complainant trade union. If read literally, section 32.0.6(2) appears to put a prohibition on disclosure not only on the employer but all individuals who participate in the investigation. Therefore, the complainant could not even disclose information about her/his own complaint to her/his union.

This would increase litigation in order for the union to obtain relevant information pursuant to the “required by law” exception and does not facilitate workplace solutions to harassment without resort to litigation. This also puts the entire burden of enforcement on the victim and shuts the union out from evaluating whether the employer has conducted a proper investigation and crafted an appropriate response.

Third, no information about harassment must be proactively reported by the employer to the Joint Health and Safety Committee. We recommend that the employer be required to report “big picture” information on violence and workplace harassment (including sexual harassment) and how it is being dealt with to the JHSC. This would be similar to the amendments contained in other schedules in Bill 132, which do not compromise confidentiality in any way. In particular, employers should be required to report similar information to Joint Health and Safety Committees as universities and colleges are asked to report to the Ministry of Training, Colleges and Universities under section 17(7) and 17(8) in Schedule 3 without disclosing personal information. This should include the following:

- The number of incidents and complaints of workplace harassment and violence reported by employees and information about such complaints and incidents;
- The number of open, ongoing, and closed investigations; and
- An overview of the results of these investigations and a summary of the types of actions taken to respond appropriately to complaints of harassment and to prevent further harassment against the complainant and/other workers.

Fourth, in respect of individual incidents and complaints of harassment addressed in the legislative amendments, the Joint Health and Safety Committee should be advised of basic and high-level information, which would not include identifying information, except if there was a risk to other workers as noted above. This would include the following:

- the fact that a incident of workplace harassment was reported to the employer or a complaint was filed;
- the fact that an investigation is taking place, the progress of the investigation, and when it is concluded; and
- the outcome of the investigation, including if there was a finding of harassment, whether any action was taken or not, and identification of the hazard, i.e., the alleged harasser only if there is any risk to other workers.

Investigation

The proposed amendments require the employer to “ensure an investigation is conducted.” It is important that this section specify the minimum requirements for an investigation, that the investigation be impartial and conducted by a qualified person.

Further, the employer should ensure that a worker who makes a complaint must be kept safe for the duration of the investigation, and take measures to ensure that the worker will not be subject to reprisal.

The Ministry is drafting an unenforceable, voluntary Code of Practice to accompany the legislation. Compliance with the Code of Practice will constitute compliance with the law, but non-compliance is not a violation. As explained in our prior submissions, enforcement of clear sections of law has proven to be a challenge. If the government is serious about making real change, we require enforceable regulation, not an ineffective code of practice, to specify steps the employer must take.

CONCLUSION

We applaud the spirit of the government’s commitment to eliminating misogyny and its manifestation in the form of harassment, including sexual harassment, in our workplaces. But to ensure the legislative objectives are achieved, the proposed amendments to the *OHS*A must be refined to provide for real prevention, address mental injury, balance the need for complainant privacy with the need to know necessary to protect workers and allow for unions to assist with enforcement, provide for effective investigations, and provide an enforceable regulation detailing measures and procedures an employer must take to remedy workplace harassment.

To do less puts at risk the laudable intent and goodwill that has been put into the drafting of Schedule 4 in Bill 132. We believe that by implementing the specific and measured amendments outlined in our submission, the legislative objectives can be actualized.

Thank you for considering our submission.

Appendix 1: ONA Amendments to Bill 132 - Schedule 4 - Occupational Health and safety Act

1. (1) The definition of “workplace harassment” in subsection 1 (1) of the Occupational Health and Safety Act is repealed and the following substituted:

“workplace harassment” means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace **whether the comment or conduct is physical or psychological in nature**, that is known or ought reasonably to be known to be unwelcome, or

(b) workplace sexual harassment; (“harcèlement au travail”)

(2) Subsection 1 (1) of the Act is amended by adding the following definition:

“workplace sexual harassment” means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace, **whether the comment or conduct is physical or psychological in nature**, because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance **whether the solicitation or advance is physical or psychological in nature**, where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome; (“harcèlement sexuel au travail”)

(3) Section 1 of the Act is amended by adding the following subsection:

Workplace harassment

(4) A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.

2. Clauses 32.0.6 (2) (b) and (c) of the Act are repealed and the following substituted:

In consultation with the Joint Health and Safety Committee or health and safety representative,

(b) include **written** measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;

(c) **include written measures and procedures** on how incidents or complaints of workplace harassment will be investigated and dealt with **by an impartial person with the appropriate knowledge, skills, and experience as per section 55.3 (1)**;

(d) include written measures and procedures on how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed, **except when it is necessary to protect the complainant and other workers from workplace harassment**, unless the disclosure is necessary for the purposes of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law;

(e) include written measures and procedures on how a worker who has allegedly experienced workplace harassment, **the complainant's union, if any**, and the alleged harasser, if he or she is a worker of the employer, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation; and

(f) include written measures and procedures on how and when the Joint Health and Safety Committee will be notified of the following information, which shall not contain identifying information except as specifically noted:

- the fact that a incident of workplace harassment was reported to the employer or a complaint was filed;
- the fact that an investigation is taking place, the progress of the investigation, and when it is concluded; and
- the results of the investigation and whether any action was taken or not, including only that identifying information necessary to protect the complainant and other workers from workplace harassment.

(g) include written measures and procedures on how and when the following information will be reported to the Joint Health and Safety Committee:

- The number of incidents and complaints of workplace harassment and violence reported by employees and information about such incidents and complaints;
- The number of open, ongoing and closed investigations;
- An overview of the results of these investigations and a summary of the types of actions taken to respond appropriately to incidents and complaints of workplace harassment and to prevent further harassment against the complainant and/other workers.

(h) include any prescribed elements.

3. Section 32.0.7 of the Act is repealed and the following substituted:

Duties re harassment

32.0.7 (1) To protect a worker from workplace harassment, an employer shall ensure that,0

(a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances **by an impartial person with the appropriate knowledge, skills, and experience as per section 55.3 (1)**;

(b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation

and of any corrective action that has been taken or that will be taken as a result of the investigation;

(c) the program developed under section 32.0.6 is reviewed as often as necessary, but at least annually, **in consultation with the Joint Health and Safety Committee**, to ensure that it adequately implements the policy with respect to workplace harassment required under clause 32.0.1 (1) (b); and

(d) such other duties as may be prescribed are carried out.

(e) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace harassment.

Results of investigation not a report

(2) The results of an investigation under clause (1) (a), and any report created in the course of or for the purposes of the investigation, are not a report respecting occupational health and safety for the purposes of subsection 25 (2).

Information and instruction, harassment

32.0.8 An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and

(b) any other prescribed information.

4. The Act is amended by adding the following section:

Order for workplace harassment investigation

55.3 (1) An inspector may in writing order an employer to cause an investigation described in clause 32.0.7 (1) (a) to be conducted, at the expense of the employer, by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector and to obtain, at the expense of the employer, a written report by that person.

Report

(2) A report described in subsection (1) is not a report respecting occupational health and safety for the purposes of subsection 25 (2).

Commencement

5. This Schedule comes into force on the later of,

(a) six months after the day the Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2015 receives Royal Assent; and

(b) July 1, 2016.