Ontario Nurses' Association

Submission to the Ministry of Labour

On *Code of Practice* and *Workplace Violence and Harassment: Understanding the Law Guideline* Drafts Consultation

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ONTARIO NURSES' ASSOCIATION
85 Grenville Street, Suite
400 Toronto, ON M5S 3A2
Phone: (416) 964-8833
Fax: (416) 964-8864
Website: www.ona.org

INTRODUCTION

The Ontario Nurses' Association (ONA) is the union representing 62,000 front-line registered nurses (RNs) 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.

Regulation vs Code of Practice

In previous ONA submissions, we said a responsibly enforced regulation detailing measures and procedures to protect workers from harassment, and to prevent harassment from escalating to violence, is needed. The Ontario government chose instead to draft a practice code. Because of continuing gaps in legislation, it is all the more important for vulnerable victims of workplace harassment, including sexual harassment, and potentially affected co-workers, that the *Code of Practice* not mislead employers to believe the amendments and the code remove their legislated duties. Workers are still legally required to report hazards, and all workplace parties must take every precaution to protect workers from hazards like harassment, including sexual harassment, and escalating harassment.

While we do not agree that the government should endorse an unenforceable Code of Practice, we have reviewed the draft Code and the Guide, and have made comments in red attached, with some additional explanation below.

Bill 132 Amendments to the *Occupational Health and Safety Act (OHSA)*

As we explained in previous submissions, the vast majority of ONA members are women who work in the health-care sector, where more than 80 per cent of workers are female. The health-care sector is a workforce leader in violence incidents and injuries, with ONA's predominantly female membership at high risk of exposure to repeated violence over the course of their careers. (Appendix 1)

We all learned from Lori Dupont's horrific workplace murder that harassment can be a precursor to predictable, preventable workplace violence. Expert witness Dr. Peter Jaffe testified at the Dupont inquest about "84 missed opportunities" for preventative intervention as the harassment towards Ms. Dupont escalated in gravity and frequency. The behaviour of Ms. Dupont's murderer, as it escalated from harassment to violence, not only posed a risk for Ms. Dupont, but also for her co-workers, some of whom were also harassed and some injured. Ministry of Labour (MOL) material, and even these latest drafts, acknowledge that harassment and sexual harassment can be the beginning of a continuum of behaviours escalating to actual workplace violence. Clearly, prevention is key.

The new *OHSA* amendments enhance 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, in consultation with the Joint Health and Safety Committee (JHSC), development and maintenance of a harassment program with at least an annual review and information and instruction for workers.
- Empowering an inspector to order an employer to pay for an investigation by a qualified impartial person.

We are disappointed because we had hoped to see an emphasis on prevention in the final amendments. We recommended legislation that would reflect the need to take clear steps to prevent escalation from harassment to actual workplace violence that can cause serious physical and psychological harm. Instead, the provisions remain silent with respect to the very real *mental* injuries that result from workplace harassment and violence, and the new provisions do not remind employers of their obligations to make workers aware of specific harassment hazards and take every reasonable precaution to protect workers from such hazards.

Complaint-driven vs Hazard-based

Unlike the *Ontario Human Rights Code*, the *OHSA*, until now, has not been "complaint-driven." Instead, the employer duties to take preventive measures are objectively driven by evidence of the existence of hazards. Employers are required to take action to eliminate or control a hazard, whether or not a worker has the confidence or ability to drive that action. While the new amendments may seek to protect workers from harassment and in particular sexual harassment, they may actually have the effect of shifting a significant burden onto victims of harassment and sexual harassment. The amendments and the draft Code lead employers to think they control any investigation, and the complainant is left alone to trust the employer's selection of investigator.

The employer's investigation is shielded from review and places too much burden on the victim in an investigative process into which they have no input. (And while labour in previous consultation suggested that inspectors have access to a roster of qualified, impartial investigators, that didn't materialize.) This, while failing to remind the employer to ensure that a worker who has the courage to make a complaint is kept safe for the duration of the investigation, and to take measures to ensure that the worker will not be subject to reprisal.

While Ontario has legislated JHSCs, a proven structure to assist workers in securing resolution of occupational health and safety concerns, the new amendments virtually ignore that existing support structure and set up victims to deal with a hazard quite independently, without clear access to usual worker health and safety supports. Isolating a worker, and failing to share investigation *results* with the JHSC, is reactive, contrary to the legally implicit philosophy of cooperation in matters of health and safety, and not helpful in preventing hazards. In fact, this setup may discourage vulnerable sexual harassment victims in particular from coming forward with their complaint.

And, inserting this complaint-driven mechanism into hazard-based legislation that has an evidence-driven compliance and enforcement regime, will confuse employers, workers and enforcement officers. Will the complainant who is told to keep matters confidential, and not offered the support of the JHSC/union, have carriage of the complaint? If the process becomes too onerous, and the complainant opts to drop the complaint, what are the implications for the employer, other potentially affected workers and enforcement officers? During the inquest into Lori Dupont's case, we learned she repeatedly shunned help or attention to her situation. While it is apparent the government sought, with these amendments and Code, to expeditiously protect sexual harassment victims, this legislation may instead be conducive to an opposite effect, isolating workers from well-established supports and placing too much onus on them to independently drive and trust someone else's process.

Code of Practice needs to close gaps

As stated, ONA is disappointed the government opted not to enact an enforceable regulation to detail what compliance should look like. Now, if a Code of Practice is endorsed, the Minister must ensure it closes legislative gaps, details a process where a complainant is kept safe, given access to proven workplace supports such as the JHSC and/or union, and not isolated and further burdened. And, when evolving evidence substantiates a hazard, especially harassment that is escalating along the acknowledged continuum to violence, the Code needs to be clear

that workers have a right to know and a duty to report, and employers need to advise workers of the hazard and take every precaution to protect workers. The current draft Code intimates, and in places demands, a guaranteed confidentiality that may not, in fact, be possible.

The amendments do not help clarify that while victim confidentiality for the complainant and respondent is important, it cannot be maintained at the expense of the safety of workers. The new legislation and the draft Code might lead an employer to think a complaint of harassment, including sexual harassment, is a private matter. The Code needs to be clear that information should only be released on a need-to-know basis, while acknowledging that workers have a right to know and a duty to report. The amendments don't nullify the workers' legal duty to report hazards, and employers still need to advise workers at risk of exposure to a hazard such as harassment, including sexual harassment, especially if that behaviour is escalating along the acknowledged hazard continuum toward violence.

Conclusion

There is wide acknowledgement that workplace harassment, including sexual harassment, is a hazard that can be a precursor to escalating behaviour that can become violence in its most extreme form. The memory of ONA member Lori Dupont, and the lessons learned from her inquest, must not be lost. The amendments place too much onus on vulnerable victims. And aside from being unenforceable, the draft *Code of Practice* and the *Guide* are in need of key amendments (some attached) to ensure employers properly treat harassment, including sexual harassment, as a workplace hazard covered by the *OHSA.*