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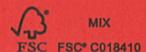


Submission
by the
Ontario Federation of Labour
to the
Standing Committee on Social Policy
Regarding
An Act To Amend
Various Statutes With Respect To Sexual
Violence, Sexual Harassment, Domestic Violence
And Related Matters (Bill 132)

January 22, 2016



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An Act to Amend Various Statutes With Respect To Sexual Violence, Sexual Harassment, Domestic Violence and Related Matters (Bill 132)

Introduction

The Ontario Federation of Labour (OFL) is the voice of Ontario at work and for social justice both at home and abroad. With 54 affiliated unions representing working people from all corners of the province, from all social, economic and ethnic groups, over half of whom are women. Our members live and work across this province, from Kenora to Cornwall and from Moosonee to Windsor.

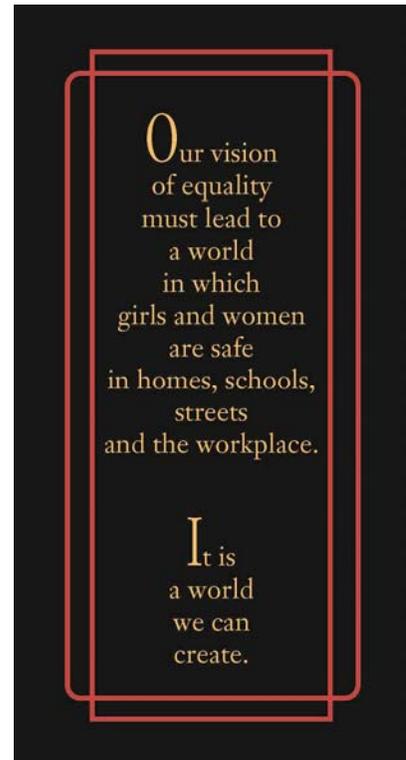
The OFL commends the government's commitment to end sexual violence and harassment. We welcome this opportunity to comment on *An Act To Amend Various Statutes With Respect To Sexual Violence, Sexual Harassment, Domestic Violence And Related Matters* (Bill 132).

Comprehensive changes such as these come along once in a generation. We have the opportunity now to provide workers with much better protection from harassment and violence. It is important that we get it right for all workers and in particular girls and women who have borne the brunt of sexual harassment and abuse.

We approach this bill from the perspective that diversity in our society must be protected, promoted and celebrated. As such, we view sexual harassment and violence as both a human rights and health and safety issue. A gender and equity intersectional lens must be employed by all involved to address the impacts of sexual harassment and violence for women because of other discriminatory factors, such as race, ethnicity, religion, disability, Indigenous status, migrant, sexual orientation/identity or age.

Aboriginal women and women of colour can face double jeopardy from both racial and sexual harassment. These women, along with immigrant or disabled women, may also suffer the additional stressors from isolation, poverty or difficulties in communication. The intersectionality of discrimination needs to be recognized and addressed.

Language, religion, sexuality, and traditional dress can also be factors in why certain people may be targeted for harassment. The LGBTQ¹ community faces discrimination, harassment and threats of violence in the community they live and the places they work. The same applies to



¹ Lesbian, gay, bisexual, transgender and queer.

individuals who are not gay or lesbian but because of their mannerisms and the way they dress are perceived by others as if they were.

Our own work with the LGBTQ community suggests that a high percentage of LGBTQ workers opt to stay “in the closet” and do not “come out” to their colleagues or employer for fear of being ostracized, demoted or fired. While the *Ontario Human Rights Code (OHC)* and the *Occupational Health and Safety Act (OHS)* explicitly prohibit harassment and discrimination, incidents too often go unreported, unacknowledged and unenforced.

While all of these issues and more will need to be addressed if the government is to achieve its’ goal, there are other organizations in a better position to discuss them in detail. Bill 132 amends a number of statutes with respect to sexual violence, sexual violence and domestic violence. We intend to focus our energies on the role of the workplace in this legislation.

The International Labour Organization /World Health Organization (ILO/WHO) defined occupational health in 1950. We have edited it as follows:

"Occupational health is the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations; the prevention amongst workers of departures from health caused by their working conditions; the protection of workers in their employment from risks resulting from factors adverse to health; the placing and maintenance of the worker in an occupational environment adapted to a workers' physiological and psychological capabilities; and, to summarize, the adaptation of work to people and of people to their jobs."

This is a definition that labour has long supported and is the goal we keep in mind as we push for better protections for workers.

Overview of the proposed amendments to the *Occupational Health and Safety Act*

Schedule 4 of Bill 132 amends the *Occupational Health and Safety Act*.

Definition of “workplace harassment” is amended to include “workplace sexual harassment.”

A new definition for “workplace sexual harassment” has been added. It includes a provision specifically aimed at people in positions of authority.

Added to section 1 of the *Act* is a clarification that reasonable actions taken by an employer to manage or direct workers is not harassment.

Amendments to 32.06 include the addition of several new clauses. These deal with:

Measures and procedures for workers to make complaints to someone other than the employer if the employer is the alleged harasser;

How information obtained during the complaint or investigation will be dealt with;

How the complainant and alleged harasser will be informed of the results of the investigation and any corrective action taken.

Sub-section 32.0.7 dealing with providing workers with information and instruction on the employer's policy and program regarding harassment is repealed and reintroduced as the new Sub-section 32.0.8.

An entirely new 32.0.7 is introduced which places additional duties on employers. These duties are tied to the responsibilities in 32.0.6. This requires that an employer shall ensure that:

Investigations conducted are appropriate in the circumstances;

Workers are given the results of the investigation and information on any corrective action in writing. The alleged harasser will get the same information if they are also an employee;

The program is reviewed at least annually;

Other duties as prescribed.

A new enforcement tool for inspectors has been added. An inspector can order that the investigation required by 32.0.7 be conducted by an impartial person, at the expense of the employer. The inspector can also specify the knowledge, experience or qualifications of the person and that a written report be provided by that person at the expense of the employer.

The results of investigations or reports required under these provisions are excluded as a report to the Joint Health & Safety Committee (JHSC) or a Health & Safety Representative (HSR) is entitled to under sub-section 25(2).

Employment Standards Act

The OFL welcomes the amendments to *Ontario's Residential Tenancies Act* to allow domestic violence victims to break a lease early and without penalty or to effectively remove an abuser's name from the lease.

A glaring omission is an amendment to the *Employment Standards Act* (ESA) to ensure women have the right to take time from work as they transition out of abusive relationships.

We do feel that Ontario must follow the Manitoba government's lead and amend Ontario's ESA to ensure that victims of domestic violence have financial security, job protection and flexibility to take time away from work to recover from violence.

“This includes up to 10 days of leave per year without penalty, including five days of paid leave and a period of leave of up to 17 weeks so they can, for example, move into a new home or take time to recover from a violent relationship.²”

Workplace Bullying and Harassment

In our submission on the “It’s Never Okay Action Plan”³ we raised some ideas regarding changes to legislation and regulations that can be made.

We feel that adding a provision to the section dealing with the Powers of the Minister should include the power to promote the prevention of workplace harassment and sexual violence.

According to information provided by the Canada Safety Council 72 per cent of workplace bullies are people in positions of authority. The victims tend to be the ones who lose their job with 64 per cent quitting or being terminated. Another 13 per cent are transferred out of that job. In only 23 per cent of the cases did the employer punish the bully.⁴

We need additions to the duties of employers and supervisors under the OHS Act to make it illegal for them to engage in harassment or sexual violence. Our proposed language is provided in the Appendix. Employers must have a clear duty to take steps to prevent harassment in the workplace.

Two decisions at the Ontario Labour Relations Board (OLRB)⁵ which dealt with reprisals due to harassment complaints covered this point. The decisions stated:

“In the case of an employee who complains that he has been harassed, there is no provision in the OHS Act that says an employer has an obligation to keep the workplace harassment free. The only obligation set out in the Act is that an employer have [has] a policy for dealing with harassment complaints. The legislature could very easily have said an employer has an obligation to provide a harassment free workplace but it did not.”

We have proposed that the language not be limited to workers but include other persons in the workplace. We are thinking of other situations where workers of other employers would enter a workplace. For instance, an office tower with many employers may have cleaning staff hired by the building company to clean the offices after business hours. One of the female cleaning staff is sexually harassed by a manager in one of the offices. The onus to ensure that the cleaning staff is protected should not rest entirely on her employer. We have proposed an additional duty on employers to ensure that the conduct of their supervisors does not harm workers or other persons.

² See <http://www.cbc.ca/news/canada/manitoba/domestic-violence-victim-benefit-manitoba-1.3336751>.

³ Prevent, Protect, Compensate; Response by the Ontario Federation of Labour; It’s Never Okay: An Action Plan to Stop Sexual Violence and Harassment; May 2015.

⁴ <https://canadasafetycouncil.org/workplace-safety/working-bully>.

⁵ OLRB Case No. 3990-10-OH and OLRB Case No. 0852-13-OH.

An employer can have the best harassment policy and procedure, but if it is the CEO of the organization that is the harasser, the policy and procedure will mean little to the workers being harassed. A worker could follow the complaint and investigation procedure but if it is the CEO that has the final say most workers will become one of the 64 per cent mentioned above. Unionized workers can file a grievance, but again if the employer is the harasser and has the final say on the grievance, the arbitration process can take a year or more leaving the victims to be targeted for further harassment.



Bad behaviour by employers and owners of companies is an issue we hear about all too often. One recent case before the OLRB⁶ dealt with the owner of a company who had humiliated and then fired a worker. The OLRB found that the owner:

“...throughout the dismissal process acted in a manner that was unfair and in bad faith, being both untruthful, misleading and unduly insensitive.”

Cease and desist orders may be effective for abusive managers who remain in the workplace. There is then the question of what to do about predators who go from workplace to workplace starting the cycle of abuse each time and leaving a trail of broken and psychologically damaged people behind them.

Harassment and abuse in the workplace creates a poisoned work environment for all workers who witness the actions. It does not just impact the target of the abuser.

Ontario Labour Relations Board

The role of the Ontario Labour Relations Board (OLRB) will also need to be expanded. Currently, if there has been a reprisal that did not involve financial loss by the worker(s), the OLRB is unable to provide a remedy. In dealing with a complaint by a worker who suffered a reprisal for making a complaint about harassment at work the OLRB stated the following:

“While the *Act* obligates employers to have a policy that enables workers to bring complaints forward, and the Board has the authority under section 50 to protect individuals who invoke that procedural right, the Board does not have any general authority to remedy the underlying workplace harassment that gave rise to the complaint in the first place.”⁷

⁶ OLRB Case No. 1560-13-OH.

⁷ OLRB Case No. 0852-13-OH.

Reprisal Protection

We feel that the reprisal protections as they exist currently in the OHSA would not adequately protect workers from reprisals if they reject sexual advances from employer representatives or others in positions of authority. The Ontario Human Rights Code has very good language on this issue (OHRC, 7(3)(b)). Similar language should be added to Section 50 of the OHSA.

Defining Sexual Violence

The definition under OHSA for workplace violence is restrictive and is limited to acts which causes or could have caused physical harm.

Incidents of sexual abuse in the workplace should become part of the mandatory reporting requirements under section 52 of the OHSA.

A definition for sexual violence is needed and should include sexual abuse that causes psychological harm and that is consistent across ministries. This should be added to the current definition of workplace violence.

One example provided to us on the inconsistent use of the term “sexual abuse” involves a long term care facility. The employer posted a notice for employees notifying them that sexual touching by a resident against another resident was considered sexual abuse but if the resident did the same acts to the staff it was not considered sexual abuse.

We have been advised by one of our affiliates that they had a situation where a Personal Support Worker (PSW) suffered psychological trauma when a man she was providing support for grabbed her and performed a sexual act on her. She was not physically harmed but the employer’s only response was to tell her to wash her clothing.

Then there are workers who face bad behaviour from the public. Retail workers who get yelled at for the store’s return policy, medical secretaries who are bullied because of long waits for the doctor or lab tests or social workers threatened by clients or the families.

What has really been getting media attention is a trend where men seem to feel that sexually harassing female TV news reporters is a new sport. These men are invading the workspace of these reporters, sexually harassing them and they think it is funny. Sexual harassment is no joke.

Many of these perpetrators are not juveniles. They are grown men some with good jobs and a university education. If they behave this badly in front of TV cameras, then we have a very long way to go before we can end sexual harassment in our workplaces.

Domestic Violence (DV)

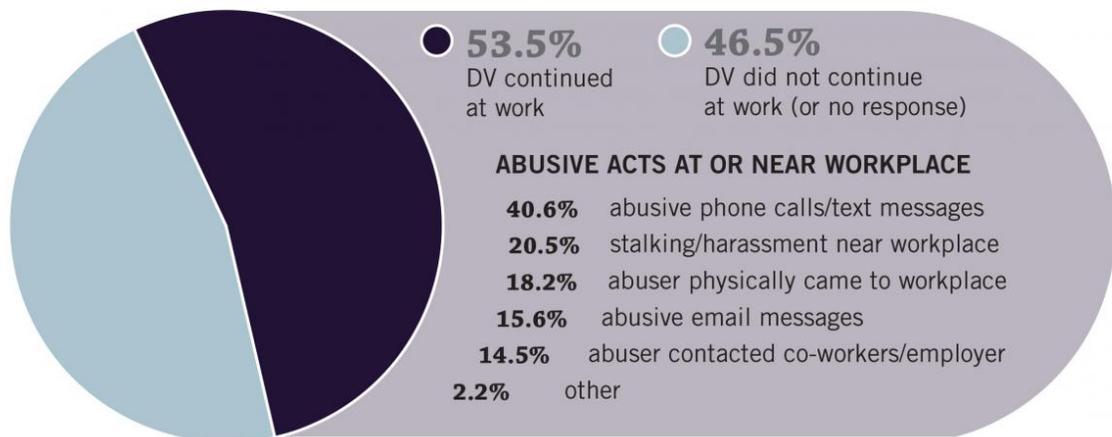
The term “domestic violence” is used in OHSA but is not defined. This gap needs to be addressed.

The Canadian Labour Congress (CLC) partnered with researchers at the University of Western Ontario and conducted the first ever Canadian survey on domestic violence in the workplace.⁸ They did this because there is almost no data on this issue in Canada and labour knows that women with a history of domestic violence have a more disrupted work history, are consequently on lower personal incomes, have had to change jobs more often, and more often work in casual and part time roles than women without violence experiences.

The definition they used for the survey was:

“domestic violence should be defined as any form of physical, sexual, emotional or psychological abuse, including financial control, stalking and harassment. It occurs between opposite or same-sex intimate partners, who may or may not be married, common law, or living together. It can also continue to happen after a relationship has ended.

FIGURE 3: DV in the Workplace



“Of those who reported DV experience, 38% indicated it impacted their ability to get to work (including being late, missing work, or both). In total, 8.5% of DV victims indicated they had lost their job because of it.

⁸ Wathen, C. N., MacGregor, J. C. D., MacQuarrie, B. J. with the Canadian Labour Congress. (2014). Can Work be Safe, When Home Isn't? Initial Findings of a Pan-Canadian Survey on Domestic Violence and the Workplace. London, ON: Centre for Research & Education on Violence Against Women and Children.

*Over half (53.5%) of those reporting DV experiences indicated that at least one type of abusive act occurred at or near the workplace. Of these, the most common were **abusive phone calls or text messages (40.6%) and stalking or harassment near the workplace (20.5%; Figure 3).***

The report also found that domestic violence has an impact on the workplace.

“Those who reported experiencing DV were also asked how it affected their work performance. Overall, 81.9% reported that DV negatively affected their performance, most often due to being distracted, or feeling tired and/or unwell.

Those experiencing DV are not the only ones affected by it; many (37.1%) reported that their co-workers were affected too. Of those who reported at least one impact on co-workers, the most common response was that co-workers were stressed or concerned about the abusive situation (28.9%).”

Temporary Foreign Workers Program

The migrant workers in this program are particularly vulnerable to abuse and exploitation. They are tied to one employer and cannot leave to seek employment elsewhere as this would violate their permit and they would be sent back to their home country. These workers typically owe fees to recruiters for the jobs. These fees are owed even if the worker loses their job. Recruiters use job blackmail to keep these workers from making complaints. If they complain they will not get to come back and their family may be black listed. Entire villages may be threatened with exclusion by the recruiters if just one worker is sent back. The employer can have a worker repatriated with little notice and without justification. Their housing is typically provided by the employer.

All of these conditions make women in the program especially vulnerable to sexual harassment and sexual violence by those in positions of authority in the workplace.

In a case at an Ontario food processing plant⁹ 42 female workers from the program came forward with complaints of sexual violence by the employer. The employer was charged with 23 counts of sexual assault and 5 counts of common assault. In a plea arrangement the employer plead guilty to common assault.



The fact that these workers were subjected to sexual abuse in this situation is not a surprise. What is surprising is that they had the courage to come forward. They had recently joined a union and the support from the union gave them the courage to speak out together.

⁹ Presteve Foods, Wheatly, Ontario.

This was an exceptional case which also makes the point of intersectionality of discrimination and abuse that needs to be recognized and addressed. It also demonstrates the importance of vulnerable workers understanding their rights and having opportunities for their voices to be heard.

Domestic Workers

Currently, the OHS Act excludes servants from the legislation. Domestic workers are vulnerable to harassment, sexual harassment and sexual violence. The government should remove this exclusion from the OHS Act. In 2010, an Expert Panel reviewing Ontario's prevention system¹⁰ suggested a review of this exemption.

Working Alone

Working alone or in isolation places workers – women workers in particular – at risk of sexual harassment or sexual violence. The OHS Act should include an enabling provision for the Ministry to prepare a working alone regulation. The Ministry of Labour should then work on developing the regulation.

Code of Practice

The action plan includes the use of codes of practice under the OHS Act. While Bill 132 does not address this, and we are not suggesting it should, we do want to reiterate our comments for the record.

The Canadian Standards Association (CSA) partnered with the Mental Health Commission of Canada to develop a standard on psychological health and safety in the workplace. Labour, employer and government representatives worked with professional mental health providers to develop this standard.¹¹

The CSA standard should be adopted by the Ministry of Labour as a code of practice under the OHS Act.

The CSA and Mental Health Commission of Canada has also developed a guide to implementing the standard. Both the CSA standard and the guide are available to the public free of charge. Another resource available to workers and employers is the Mental Injury Toolkit (MIT)¹² which was developed by the Occupational Health Clinics for Ontario Workers (OHCOW). This resource provides tools to measure stress in the workplace and provides possible solutions.

¹⁰ Expert Advisory Panel on Occupational Health and Safety, Report and Recommendations to the Minister of Labour, December 2010, Page 58.

¹¹ CAN/CSA-Z1003-13/BNQ 9700-803/2013 Psychological health and safety in the workplace – Prevention, promotion, and guidance to staged implementation.

¹² <http://www.ohcow.on.ca/en/MIT>.

MOL Inspectors

Inspectors will need comprehensive training on harassment issues. The MOL will also need to be sensitive to cultural and religious restriction which will prevent women from interacting with male inspectors during investigations. Women who have been harassed or suffered sexual violence in the workplace will need to be provided with the option of speaking to a female inspector. Inspectors will need to have additional training on interview skills and investigative techniques, etc.

Sexual harassment can be a complex issue and can also be multifaceted for women whose identities intersect in the workplace. We would suggest a special enforcement team of inspectors who would build up expertise.

We welcome the inspector's power to order an investigation by an independent investigator. However, we believe this will only be effective if the Ministry provides a roster of competent investigators or criteria for an investigator to be ruled competent.

As we have seen with other legislative and regulatory changes it is effective enforcement that will drive real change.

Elements of an effective enforcement system include:

- A highly visible inspectorate;
- Inspectors who are given a clear mandate to enforce the law and are supported to issue orders and penalties for violations.

Inspectors must be provided with the enforcement tools which have an immediate impact such as summons, offense notices and an administrative monetary penalty system. They should also have the power to order re-assessments for violence and harassment.

Section 57 of the OHS Act deals with powers of inspectors and should be amended so that the inspectors will have the authority to issue cease and desist orders. The OFL has provided suggested language for this in the Appendix.

An effective enforcement system is the best deterrent. There needs to be a strong deterrence so employers will live up to their duties to protect workers. In 2009, Malcolm K. Sparrow had this to say about deterrence:

“The magnitude of a deterrent effect depends, according to criminologists, on a potential perpetrator's assessment of three factors:

- (a) the likelihood of getting caught (i.e. the probability of being detected or reported),
- (b) the probability of being convicted once detected, and

(c) the severity of the punishment if eventually convicted.

This hearing clearly focuses on the third, and I certainly support the notion of effective punishment for white collar crimes, particularly those that involve an abuse of the public's trust and diversion of public funds.

But I would urge the committee in its deliberations to consider the first two factors equally seriously. The third—severity of punishment—can be set or altered by statute or by adjusting sentencing guidelines. The first two are harder to change, as they depend on the underlying capacity of the detection apparatus and the capacity of the criminal justice system to deal with cases that come to light. The most obvious weaknesses in health care fraud control lie with these first two. Criminologists argue, in fact, that the first two—the probability of detection and conviction—weigh more heavily in the calculus of would-be-perpetrators than the severity of sentences because (assuming a low enough probability of detection) criminals like to believe they will never face sentencing.¹³”

Mr. Sparrow spent 10 years in the British Police Service rising to the rank of Detective Chief Inspector before leaving to take a position at Harvard.

Employers are ultimately responsible for ensuring a safe and healthy workplace. Knowing that they will be held accountable and prosecuted for not maintaining a safe and healthy workplace will force employers to fulfil their responsibilities under the *Act*. It will also provide good reason for them to deal with the joint health and safety committees in good faith.

Health and Safety Committees and Representatives

The role of Joint Health and Safety Committees (JHSC) and Health and Safety Representatives (HSR) needs to be expanded. They need to have the right to investigate incidents of violence in the workplace and make recommendations to the employer. Currently, this right only exists if a worker is killed or critically injured. As previously mentioned, the definition of workplace violence should be expanded to include sexual violence and abuse. The OFL has proposed wording for expanding the right to investigate these incidents. It can be found highlighted in the sections which currently exist and is provided in the Appendix.

There should also be an obligation on the employer to consult with the committee and representative in the development of policies and procedures for the prevention of harassment and violence. This would mirror requirements in the colleges and university sector where students have legislated input. Why would worker representatives be treated differently?

¹³ Malcolm K. Sparrow, Professor of the Practice of Public Management, John F. Kennedy School of Government, Harvard University, Speaking to the Senate Committee on the Judiciary: Subcommittee on Crime and Drugs on May 20th, 2009 <http://www.hks.harvard.edu/news-events/news/testimonies/sparrow-senate-testimony>.

The JHSC should also receive anonymized information regarding the number and types of open, ongoing and closed investigations, the number of incidents and/or complaints, general outcome information, any initiatives or programs the workplace undertakes, harassment prevention controls, data about implementation and effectiveness of the policy and other relevant information for the JHSC/HSR.

Self-Directed Injury and Death in the Workplace

We have heard from a number of our affiliates about workers who attempted suicide or committed suicide in the workplace. Some of these injuries and deaths have had a workplace harassment or bullying component to the action.

The OHS Act is clear, JHSC and HSR have the power to identify situations that may be a source of danger to workers and make recommendations to the employer. OHS Act also says that JHSC and HSR have the right to:

“investigate cases where a worker is killed or critically injured at a workplace **from any cause** and one of those members may, subject to subsection 51 (2), inspect the place where the accident occurred and any machine, device or thing, and shall report his or her findings to a Director and to the committee.” (Emphasis added)

While there is sometimes reluctance from our members to get involved in something seen as very personal, those who have tried have been blocked either by the MOL or the police.

There are a number of examples where harassment or bullying have led to murder/suicides at the workplace.

The JHSC and HSR should have the right and support to investigate these injuries and deaths where workplace harassment, bullying or violence has contributed to the self-inflicted injury or death.

Administrative Monetary Penalties

The inspectors should also be provided with the authority to issue Administrative Monetary Penalties (AMPs). This enforcement tool will allow higher penalties than issuing tickets, is more cost effective than a prosecution and allows the MOL to keep the money paid. This will provide more resources to the MOL to do more training of inspectors and invest more in prevention. AMPs can also be set up to increase the penalty each day or week that the employer fails to come into compliance. The use of AMPs will provide a stronger deterrence.

The introduction of AMPs was one of the recommendations made by the Expert Panel.¹⁴ The government committed to acting on all the recommendations.

We are approaching the 5th anniversary of the release of the report and the government has yet to act on this and a number of other recommendations.

Educational Materials

Educational materials and training, in particular those that relate to the workplace health and safety, should be prepared and instructed by a recognized training provider as approved by the MOL. These must be developed in multiple languages and with cultural sensitivity.

Workers need to know their rights and how to access support. Employers will also need to understand their obligations. This should be mandatory training.

We would also like to recommend standards be developed on hazard/risk assessment. Many HSRs and employers do not know how to conduct an effective hazard/risk assessment and develop solutions. Also, conducting investigations is weak. Employers should be mandated to undertake training on these issues as well. This should be a part of the certification training for the JHSC/HSR.

Precautionary Principle

The precautionary principle is an approach to eliminating hazards before they cause harm. Simply put, the philosophy behind precautionary principle reads, *“when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.”*

The precautionary principle has been used internationally, primarily around issues of environmental concern. One of the most important times the principle was used was at the 1992 United Nations Conference on Environment and Development.

The precautionary principle was incorporated into a declaration passed at the conference which stated:

“In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”

¹⁴ Expert Advisory Panel on Occupational Health and Safety, Report and Recommendations to the Minister of Labour, December 2010, Recommendation 27, Page 44.

The principle of precautionary action has four parts:

- People have a duty to take action to prevent harm before it happens. If there is a reasonable suspicion that something bad may happen, then there is an obligation to try to prevent it.
- The burden of proof of harmlessness of a new technology, process, activity, or chemical lies with those who wish to use or introduce it, not with the general public.
- Before using a new technology, process, or chemical, or starting a new activity, people have an obligation to examine a full range of alternatives including the alternative of doing nothing.
- Decisions applying the precautionary principle must be open, informed, and democratic and must also include affected parties.

The precautionary principle is not really new. The essence of the principle is captured in common sense aphorisms such as *“an ounce of prevention is worth a pound of cure”*, *“better safe than sorry”*, and *“look before you leap”*.

Parents do not need to know with 95 per cent certainty that their child is going to be hit by a car when they tell the child “do not play in the street.” They just need to know there is a reasonable danger to that child. We, as a society, need to take precautionary action for prevention to keep people out of harm’s way.

Justice Archie Campbell headed the SARS commission. His number one recommendation was:

1. *That the precautionary principle, which states that action to reduce risk need not await scientific certainty, be expressly adopted as a guiding principle throughout Ontario’s health, public health and worker safety systems by way of policy statement, by explicit reference in all relevant operational standards and directions, and by way of inclusion, through preamble, statement of principle, or otherwise, in the Occupational Health and Safety Act, the Health Protection and Promotion Act, and all relevant health statutes and regulations.*

He called this his “take home” message.

This government has an opportunity to become proactive in the approach to protecting the health of working people and their families. This can be done by adopting the precautionary principle approach in occupational health and safety.

WSIB Coverage

In our submission to the It's Never Okay Action Plan we raised the issue that the Workplace Safety and Insurance Act (WSIA) prohibit claims due to chronic harassment including sexual harassment. This discriminates against workers who have developed gradual onset psychological injuries. The WSIB does provide compensation benefits to workers who develop gradual onset physical injuries such as Repetitive Strain Injuries (RSI).

This unequal treatment of work-related disablements has been found to be a violation of Canada's Charter of Rights and Freedoms by the courts in British Columbia and Nova Scotia.

In a ground-breaking decision, a Panel of the Workplace Safety and Insurance Appeals Tribunal (WSIAT) here in Ontario, refused to apply the legislation in a mental stress claim.¹⁵ They rightfully decided that the section of the WSIA which prohibited the WSIB from recognizing disablements resulting from chronic mental stress and the WSIB policies that supported the legislation were in violation of section 15 of the Charter.

A second panel at WSIAT has also made the same decision and allowed the claim.¹⁶ Both of these claims were disablements arising from workplace harassment. We understand there are a number of similar claims making their way to the Tribunal.

We should not have to wait for a legal challenge to strike down the discriminatory provisions of the WSIA. The government should act now to ensure workers who suffer a psychological disablement as a result of their working conditions are provided with benefits on a fair and equal basis as workers who suffer physical injuries.

Making this change will also shift the burden of medical treatment and counselling costs from our health care system to the WSIB. The WSIB is funded through employer premiums not from taxpayer revenues. The employers who are putting these workers in harm's way should not be allowed to continue to off load the costs on all of us.



¹⁵ Workplace Safety and Insurance Appeals Tribunal Decision No. 2157/09.

¹⁶ Workplace Safety and Insurance Appeals Tribunal Decision No. 1945/10.

It is the employers who pay for the administration of the OHS and Ontario's prevention system through their WSIB premiums. Many of the WSIB excluded employers are covered by the OHS but are not paying their fair share for prevention and enforcement.

On the issue of WSIB coverage: Generally, in Ontario according to the latest information available¹⁷ as of 2013, some 26.45 per cent of Ontario's workforce is not covered by the WSIA. So approximately one-quarter of Ontario's workers could be victims of harassment, including sexual harassment or sexual violence and are not entitled to benefits; and, if they lose time from work, their lost time injury statistics cannot be tracked by the WSIB.

Without reliable and complete data, how can the Ministry of Labour possibly determine the appropriate resources needed for enforcement and prevention? The government cannot know if the instances of work related sexual violence and harassment resulting in time off from work are decreasing as a result of these amendments and other actions.

Public Postings

Employers who are dealing with the public i.e., health care, retail, social services, etc., should be required to post a notice about how the staff should be treated. The notice should be required to be posted in a conspicuous location where it will come to the attention of the public, etc.

Cyber-bullying

The growth of social networking websites allows people and organizations to connect and communicate in many useful ways. Unfortunately, some individuals use the technology to cause harm to others. There has been much discussion in the media about students cyber-bullying other students. Children are not the only victims of this abuse. Workers can also be the victim of cyber-bullying. While anyone can become victimized, it is a serious problem in sectors where workers are dealing with the public, students, patients, clients, etc. Teachers and other education workers can be victimized by students. Workers in health care can be victimized by patients, clients or irate family members.

Where a worker is a victim of cyber-bullying as a result of their work, the employer has a duty to complain to the owners/operators of the website with the view of having the offending material deleted. All the social networking sites the OFL has reviewed have policies regarding abusive and harassing content. They make it clear that they can remove inappropriate content. Many site operators will scan their sites for content of a pornographic nature but rely on complaints to deal with cyber-bullying. Similar policies exist for Internet Service Providers (ISP). Where the abuse is taking place with e-mails the ISP should be contacted.



¹⁷ http://awcbc.org/wp-content/uploads/2013/12/Industries_Occupations_Covered.pdf.

Technology allows the bullying to reach beyond the workplace. E-mail allows those outside the workplace to reach into the workplace and abuse workers. There are no boundaries or borders to confine the abuse. The audience is not limited to the school yard or workplace. For cyber-bullying that takes place with the social networking sites the audience is global.

Home was once a safe haven for students and workers from bullying and abuse. Technology now reaches into the home. An employer who is also a bully can send a threatening e-mail to workers Friday evening and leave the workers stressed for the entire weekend.

Work is being done to address the issue of cyber-bullying. Unions and some employers are struggling to deal with the abuse. Websites have been established to provide assistance and information for those trying to address the issue or deal with specific cases. Two examples the OFL is aware of are provided below. There is information on these sites on how to track the source of the abuse when fake names or some information in an e-mail is forged in an attempt to hide where it came from.

The definition of bullying under the *Education Act* was amended in 2012 to include, “the use of any physical, verbal, electronic, written or other means.” Electronic means, also identified as “cyber-bullying,” includes posting to a website or the internet with material that could be accessible by others. (*Accepting Schools Act, 2012, Bill 13*).

This issue will need to be addressed for all workplaces before the government can reach the goal of eliminating harassment.

<http://www.cyberbullying.ca/>

<http://www.abuse.net/>

Conclusion

The OFL welcomes the opportunity to provide further information and clarifications on our recommendations and looks forward to playing a meaningful role in assisting the government in their goal to stop sexual violence and harassment.

For more than 30 years, JHSCs and HSRs have been the cornerstone of improving health and safety in the workplace but they need strong laws and strong enforcement to back them up. Preventing harassment and violence of all types in the workplace is a priority. Protecting those who are becoming victims will require new enforcement tools for the Ministry of Labour inspectors. Compensation for workers who have been psychologically harmed is a right that must be recognized.

As we have done for a century-and-a-half, we will continue working to improve the living standards of our members and society as a whole. As trade unionists we are proud of our history. We have worked to stop the exploitation of women and children, protect workers from death and injury on the job, improve social conditions and had a hand in winning virtually every social program and benefit that exist in our province. We have earned a respected place in our common history here in Ontario. We look forward to a proud future where respect and civility in our workplaces and our communities is the norm.

Recommendations:

1. Amend the Employment Standards Act (ESA) to ensure that victims of domestic violence have financial security, job protection and flexibility to take time away from work to recover from violence.
2. Add a provision to the OHSA so the Powers of the Minister include the power to promote the prevention of workplace harassment and sexual violence.
3. Add to the duties of employers and supervisors under the OHSA to make it illegal for them to engage in harassment or sexual violence.
4. Amend the OHSA so employers have a clear duty to take steps to prevent harassment in the workplace.
5. Amend section 57 of OHSA so that the inspectors will have the authority to issue cease and desist orders.
6. Expand the role of the OLRB to allow remedy in reprisal cases where there was no financial loss by the worker(s).
7. Expand the reprisal protections to include reprisals if workers reject sexual advances from employer representatives or others in positions of authority.

8. Incidents of sexual abuse in the workplace should become part of the mandatory reporting requirements under section 52 of the OHSA.
9. Definition for sexual violence needs to include sexual abuse that causes psychological harm and that is consistent across ministries. This should be added to the current definition of workplace violence.
10. Define domestic violence in the OHSA.
11. Remove the exclusion of servants from OHSA.
12. Enabling provision for the Ministry to prepare a working alone regulation.
13. Canadian Standards Association (CSA) standard on psychological health & safety in the workplace should be adopted by the MOL as a code of practice under the OHSA.
14. Comprehensive training on harassment issues for inspectors.
15. Women who have been harassed or suffered sexual violence in the workplace to be provided with the option of speaking to a female inspector
16. Inspectors to receive additional training on interviewing skills and investigative techniques, etc.
17. A special enforcement team of inspectors who would build up expertise.
18. Ministry provide a roster of competent investigators or criteria for an investigator to be ruled competent.
19. Expand the role of JHSC and HSR to include the right to investigate incidents of violence in the workplace and make recommendations to the employer.
20. A duty on the employer to consult with the committee and representative in the development of policies and procedures for the prevention of harassment and violence.
21. JHSC should also receive anonymized information regarding the number and types of open, ongoing and closed investigations, the number of incidents and/or complaints, general outcome information, any initiatives or programs the workplace undertakes, harassment prevention controls, data about implementation and effectiveness of the policy and other relevant information.

22. Include a right of the JHSC/HSR to investigate cases of self-directed injury and death in the workplace, where there was a work place harassment or bullying component to the action.
23. Amend the OHSA to include the power to issue AMPs.
24. Educational materials and training in particular those that relate to workplace health and safety should be prepared and instructed by a recognized training provider as approved by the MOL. These must be developed in multiple languages and with cultural sensitivity.
25. Mandatory training of workers on their rights and how to access support.
26. Mandatory training for employers to understand their obligations, conducting investigations and assessments.
27. MOL to develop standards on hazard/risk assessment.
28. Include modules on violence/harassment assessments and investigations as part of the certification training for the JHSC/HSR.
29. Adopt Justice Archie Campbell's recommendation on the precautionary principle.
30. Amend WSIA to allow benefits for psychological disablements.
31. Amend WSIA to expand coverage.
32. Require public postings in workplaces dealing with the public, etc.
33. Expand protection for workers from cyber-bullying.

Respectfully Submitted by,

The Ontario Federation of Labour

Appendix

Occupational Health and Safety

Legislative amendments OH&S Act

Current

Powers of Minister

4.1 (2) In administering this *Act*, the Minister's powers and duties include the following:

1. To promote occupational health and safety and to promote the prevention of workplace injuries and occupational diseases.
2. To promote public awareness of occupational health and safety.
3. To educate employers, workers and other persons about occupational health and safety.
4. To foster a commitment to occupational health and safety among employers, workers and others.
5. To make grants, in such amounts and on such terms as the Minister considers advisable, to support occupational health and safety.

Proposed

6. To promote the prevention of workplace harassment and sexual violence.

Duties of the employer and supervisor

Duties of the employer

Proposed

25 (2) Without limiting the strict duty imposed by subsection (1), an employer shall,

(n) not engage in harassment or sexual violence against a worker or another person in a workplace.

Duties of the supervisor

27 (2) Without limiting the duty imposed by subsection (1), a supervisor shall,

(d) not engage in harassment or sexual violence against a worker or another person in a workplace.

Additional duties of employers

Proposed

Additional duties of employers

26(1) In addition to the duties imposed by section 25, an employer shall,

(m) establish procedures to ensure that the conduct of its' supervisors do not negatively affect the mental or physical wellbeing of a worker or another person in a workplace.

Notice of accident, inspection by representative

8(14) The health and safety representative may, where a workers is,

(a) killed or critically injured at a workplace from any cause and subject to subsection 51(2), inspect the place where the accident occurred and any machine, device or thing, and shall report his or her findings in writing to a Director and the trade union if any;

(b) disabled from performing his or her usual work or requires medical attention because of an accident, explosion, fire or incident of workplace violence at a workplace, but no person dies or is critically injured because of that occurrence, inspect the place where the accident, explosion, fire or incident of workplace violence occurred and any machine, device or thing, and shall report his or her findings in writing to a Director, if an inspector requires notification of the Director and to the trade union if any.

Joint Health and Safety Committee

9(31) The members of a committee who represent workers shall designate one or more such members to investigate cases where a worker is,

(a) killed or critically injured at a workplace from any cause and one of those members may, subject to subsection 51 (2), inspect the place where the accident occurred and any machine, device or thing, and shall report his or her findings to a Director, to the committee, and to the trade union if any,

(b) disabled from performing his or her usual work or requires medical attention because of an accident, explosion, fire or incident of workplace violence at a workplace, but no person dies or is critically injured because of that occurrence, inspect the place where the accident, explosion, fire or incident of workplace violence occurred and any machine, device or thing, and shall report his or her findings in writing to the committee, a Director, if an inspector requires notification of the Director and to the trade union if any.

Current

Orders by inspectors where non-compliance

57. (1) Where an inspector finds that a provision of this *Act* or the regulations is being contravened, the inspector may order, orally or in writing, the owner, constructor, licensee, employer, or person whom he or she believes to be in charge of a workplace or the person whom the inspector believes to be the contravener to comply with the provision and may require the order to be carried out forthwith or within such period of time as the inspector specifies.

Proposed

57.1 In the case of a contravention of 25(2)(n) or 27(2)(d) the inspector may order the employer or supervisor to cease and desist.

VE/CAS/LH/ss

Cope343
January 22, 2016

Notes

Notes



Our vision
of equality
must lead to
a world
in which
girls and women
are safe
in homes, schools,
streets
and the workplace.

It is
a world
we can
create.

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