

**Bill 37,
The Protecting Students Act 2016**

**Submission by the Ontario College of Teachers to
The Standing Committee on Finance and Economic Affairs**

October 27, 2016

Bill 37

The Protecting Students Act, 2016

Ontario College of Teachers

The Ontario College of Teachers licences over 243,000 teachers in good standing to work in publicly funded Ontario schools. It accredits the programs and courses that enable people to become teachers and to remain vital and current in their practice. The College is the profession's regulator and operates in the public interest. As such, the College establishes the ethical standards for the profession, the standards of practice for teaching and professional learning framework. And, the College enforces Ontario law with respect to matters of professional misconduct, incompetence and fitness to practise involving teachers.

According to the *Education Act*, to be a teacher is to be a member of the Ontario College of Teachers.

The College acts with the highest respect for student safety, for the fair, open, and timely treatment of its members and in appreciation of the public's right to know about matters that impact the students of Ontario.

In 2011, the College commissioned an independent external review by former Ontario Justice Patrick LeSage and asked him to report on our investigation and disciplinary processes. The College undertook this review to ensure our processes were transparent and accountable to both the public and members of the profession, and to identify where improvements could be made.

In June 2012, the College's Council adopted Justice LeSage's report. Of his 49 recommendations to improve our disciplinary processes and actions, the College immediately implemented 23 recommendations that were not dependent on legislative or regulatory changes. Bill 37 – *The Protecting Students Act*, 2016, addresses the remaining recommendations.

While the College welcomes the introduction of this Act, and shares a strong interest in ensuring that Ontario students are protected, there are specific areas of concerns that the College believes can be improved and seeks amendments in the following areas:

1. Posting and Availability of Disciplinary Decisions

The College's Council believes that Bill 37 should be amended to ensure that copies of all discipline decisions from hearings held in public are available to the public.

Legislative Reference – Bill 37

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

Removal of information

~~45.1 (7) If a notation of a decision or resolution is removed from the register, or other specified information is removed from the register under subsection 23 (2.3), the College shall remove the decision, resolution or other specified information,~~

~~(a) from its website; and~~

~~(b) from any other website on which it has published the information under subsection (4), if required by and in accordance with the regulations.~~

The public interest is served by ensuring transparent and full access to the College's discipline decisions, and the Council believes that the proposed bill should ensure that all discipline decisions remain on the College's website regardless of whether the corresponding notation on a member's public register page has been removed. The Council believes such an amendment would support and maintain the College's regulatory obligations of public transparency and accountability.

If Bill 37 is enacted without an amendment, discipline decisions dealing with suspensions, cancellation, revocation, withdrawals and not guilty verdicts would be the only decisions that would remain on the College's website indefinitely.

The bill currently proposes that disciplinary decisions imposing terms, conditions or limitations on a member's certificate would be removed from the website after a three year period. The College would no longer be able to make information about professional misconduct available to the public, despite the fact that misconduct decisions are a result of open and publicly held hearings.

The Council believes that decisions that come out of publicly held hearings should always be transparent, and as a professional regulator it is the College's responsibility to make such decisions readily available and accessible.

Justice LeSage also recommended that decisions must be published and available on the College's website with the name of the member. Further, he extended his recommendation to agreements arising from the College's complaint resolution process, a practice that is in place for other professional regulators in Ontario, namely the health professions.

Since 2012, and at the request of the then Minister of Education, the College posts all decisions arising from publicly held hearings on its website in both English and French. Of the 834 discipline decisions available on the College's website library, 376 would have to be removed if the bill passes without an amendment.

The College also shares its discipline decisions with Quicklaw and CanLII, legal research databases, accessible via the internet. Apart from making decisions available to the public, defence lawyers rely on these databases, particularly when researching penalties, while representing their clients.

The College's practice is consistent with most of Ontario's health regulators who, as of April 2015 and at the request of the Minister of Health, are providing pdf versions of all their discipline decisions and/or links to CanLII on their respective websites regardless of the penalty imposed.

The bill also proposes that the College remove its decisions from these websites. This is not practical and the College would be challenged to achieve this requirement.

Further, the College would not be in a position to make the full text of the decision available after a three-year period even though discipline decision summaries would remain archived in the College's back issues of its official publication, *Professional Speaking/Pour parler profession*, and available to parents online.

In theory, a third party website could also copy and maintain an online library of the College's discipline decisions while the regulator would be prohibited from doing so if the bill is not amended.

2. Removing Notations in Withdrawals and Not Guilty Findings

The College's Council believes that Bill 37 should be amended so that in cases where allegations have been withdrawn, and where the member has been found not guilty of professional misconduct or not to be incompetent, a notation on the public register would not be linked to the College's decision database on the website:

Legislative Reference – Bill 37

Section 27. The Act is amended by adding the following section:

Exception, unfounded allegations

45.1.(3) Despite paragraphs 1 and 2 of subsection (2), if the Discipline Committee determines, or adopts a resolution that provides, that an allegation of professional misconduct or incompetence was unfounded, the College shall only publish the summary described in paragraph 1 or 2 of subsection (2) in its official publication on the request of the member against whom the allegation was made.

Amend by addition

45.1.(3.1) Despite paragraphs 1 and 2 of subsection (2), if an allegation of professional misconduct or incompetence was withdrawn due to insufficient evidence to proceed to a hearing, the College shall not include a notation of the decision of the Discipline Committee on the public register.

- where the allegations have been withdrawn due to, for example, insufficient evidence to proceed to a hearing; and
- where the member has been found not guilty of professional misconduct or not to be incompetent, unless requested by the member.

In its current draft, Bill 37 would require the College to post every decision of the Discipline Committee together with a link on the public register to a decision. An exception is provided for decisions where the allegations are determined to be unfounded, but there is no similar exception for situations where the allegations have been withdrawn due to insufficient evidence.

The College believes that the explicit reference to these two exceptions would provide clarity and transparency to the disciplinary processes for College members, their legal counsel and the public.

3. Posting of Medical Information on Public Register

The College's Council recommends an amendment to Bill 37 that would provide the College with the discretion of whether or not to post explicit terms, conditions and limitations resulting from an order of the Fitness to Practise Committee decision on the College's public register.

Legislative Reference – Bill 37

Section 4.(2) Clause 23(2) (b) of the Act is repealed and the following substituted:

(b) the terms, conditions and limitations imposed on each certificate of qualification and registration, including terms, conditions and limitations resulting from a written undertaking or other agreement between the College and the member,

Amend by addition

“other than those ordered by the Fitness to Practise Committee unless it is in the public interest interest that the information be disclosed and not more than reasonably necessary”.

While the College supports the legislative requirement that the College's public register be posted on the College's website, an amendment is required to Bill 37 to prevent the mandatory posting of explicit information resulting from a Fitness to Practise Committee decision.

Fitness to Practise Committee hearings are not held in an open forum. The matters before this committee typically relate to confidential medical and sensitive personal issues.

The College's practice is not to place explicit details of the terms, conditions and limitations on the member's public register profile when they are health-related or highly personal. A notation is placed, however, on the public register profile indicating that the terms, conditions and limitations have been placed on the member's certificate as a result of a College committee decision. The full details are contained in the College's internal registry system but not on the public register.

As currently proposed, Bill 37 would remove the College's discretion in this regard and would appear to have a retroactive effect on terms, conditions and limitations ordered by the Fitness to Practise Committee that have already been placed on the College's internal registry system but not on the College's website. Depending on the terms articulated in each case, the current provisions could prove problematic.

The Regulated Health Professions Act's, *Health Professions Procedural Code*, provides that personal health information should not be disclosed to an individual or posted on a health regulator's website unless it is in the public interest to disclose.

The College would like to maintain its discretion to support its current practice not to post the full terms, conditions or limitations resulting from a Fitness to Practise decision on the website while still appropriately protecting the public interest.

4. Definition of Spouse

The College's Council believes that Bill 37 should be amended by deleting the spousal exemption.

Legislative Reference – Bill 37

Section 1. (2) Section 1 of the Act is amended by adding the following subsections:

Same, spouse

~~(4) For the purposes of the definition of "sexual abuse" and "sexual misconduct" in subsection (1), a reference to a student does not include the member's spouse.~~

Same

~~(5) For the purposes of subsection (4), unless otherwise defined in the regulations, "spouse", in relation to a member means:~~

- ~~(a) a person who is the member's spouse as defined in section 1 of the Family Law Act, or~~
- ~~(b) a person who has lived with the member in a conjugal relationship outside of marriage continuously for a period of not less than three years.~~

19. (1) Subsection 42 (1) of the Act is amended by adding the following clauses:

~~(0.a) defining "spouse" for the purposes of section 1 (5);~~

As proposed, the bill would add a definition of “spouse” to the College’s Act that would provide that a “student” does not include a member’s spouse for the purposes of the definitions of “sexual abuse” and “sexual misconduct.”

Although Ontario health regulators’ legislation contemplates spousal exemptions, the concept of a spousal exemption was not contained in Justice LeSage’s recommendations, nor had it been considered as a recommendation by the College’s Council.

The Supreme Court of Canada has ruled that teachers are teachers all the time. By virtue of their authority and the public trust placed in the members of the teaching profession, it follows that they should not develop personal relationships with students at any age and particularly students under the age of 18 or with those with special needs.

The proposed bill would exempt those who are married at the time of an alleged misconduct as opposed to spouses at the time of the hearing. If a member was criminally convicted of sexually assaulting a spouse, who may also be a member of the College, the College would have no recourse but to bring this matter before a disciplinary hearing under the authority provided in Bill 37.

The College’s Council, however, believes that the spousal exemption should be deleted, given the nature of teaching, the vulnerability of students and the level of public trust associated with the profession.

5. School Board as Complainant – Employer Report Deemed to be a Complaint

The College’s Council believes the provisions in the proposed bill should be amended so that school boards and other employers continue to “report” to the College rather than serve as a complainant.

Legislative Reference – Bill 37

Section 23. The Act is amended by adding the following section:

~~Employer report deemed to be a complaint.~~

~~s. 43.3.1—Where the Registrar refers an employer’s report filed under section 43.2 or 43.3 to the Council or a committee of Council established under section 15, then for the purposes of Parts IV and V,~~
~~(a) the report is deemed to be a complaint that was filed on the day the Registrar referred the report; and~~
~~(b) the employer is deemed to be a complainant~~

The current provisions in the College’s Act provide the College’s Registrar the authority to review the issue(s) reported by an employer about a teacher. Following a review of the

employer report, the Registrar has the discretion to file a complaint on one or more issues that are directly related to the College's mandate and authority. It should be noted that when an employer reports to the College, it is not unusual for the report to contain matters that are unrelated to the College's authority.

Under the current Act provisions, if the Registrar proceeds to initiate a complaint based upon an employer's report, the Registrar serves as the complainant. Like a public complainant, the employer is:

- provided with regular notifications about the investigation process;
- required to participate as appropriate in the process; and
- informed if the matter is referred to a disciplinary panel.

The College Council also considered the enhanced notification provisions introduced in Bill 37 that apply to employers and that will ensure employers are aware of each stage of the complaint process. As a result, it is considered unnecessary to specify that an employer is a complainant as they will continue to be regularly notified of the complaint process steps.

Further, the reporting employer is often concurrently involved in employment-related matters with the member who is the subject of the complaint, such as arbitration. If the employer is to be deemed a complainant, and the complaint moves forward, the onus on the employer to share information while also focusing on their employer relationship with the member can place the employer in an untenable position or possibly a conflict of interest.

The Council has previously asked for an amendment to the *Education Act* so that teacher performance appraisals (TPAs) would mirror other employer notification/reports which go forward as a College Registrar's complaint. Again, this request is based on streamlining the process and ensuring that employers are not placed in untenable circumstances.

In order to ensure timeliness, and uncompromised and efficient processes, the College Council believes that Bill 37 should be amended so that an employer continues to report to the College's Registrar and is not deemed to be a complainant.

The College Registrar should continue to initiate the complaint stemming from an employer's report.

6. Stay of Orders Pending Appeal

The College's Council believes Bill 37 should be amended, so that decisions of the College's Discipline Committee should take immediate effect in all cases where a member's teaching certificate has been revoked.

Legislative Reference – Bill 37

Section 15 - Section 35 of the Act is amended by adding the following subsections:

No stay of certain orders pending appeal

(5) The following orders directing the Registrar to revoke, suspend or impose terms, conditions or limitations on a member's certificate take effect immediately despite any appeal:

1. An order made by the Discipline Committee on the grounds of incompetence.
2. An order made by the Discipline Committee under subsection 30.2(1)

Note: (30.2 (1) refers only to sexual abuse and prohibited acts of child pornography)

Amend by addition:

2.1 An order of revocation made by the Discipline Committee on the grounds of misconduct

3. An order made by the Fitness to Practise Committee on the grounds of incapacity.

Orders where public at risk

(6) If the conduct of the member exposes or is likely to expose one or more students to harm or injury and urgent intervention is needed, the College may apply to a judge of the Superior Court of Justice for an order declaring that an order that was made by the Discipline Committee on the grounds of professional misconduct and that directs the Registrar to revoke, suspend or impose terms, conditions or limitations on the member's certificate shall take effect immediately despite any appeal and any other Act.

As written, the proposed bill would only apply an immediate effect to College decisions on the grounds of incompetence and in relation to sexual abuse or an act involving child pornography. While the College recognizes these circumstances are the most egregious, there are other circumstances where one or more students may be at risk. In these circumstances, ensuring that a revocation order of the Discipline Committee takes immediate effect may be paramount to student safety.

No decision taken by a College committee is regarded lightly. Discipline Committee decisions resulting in a revocation of a teaching certificate are based upon high standards of evidence and extensive consideration of the protection of students and the public interest.

Immediate effect of a revocation should apply in all instances and not just in relation to sexual abuse or child pornography.

7. No Further Action as a Complaint Resolution Disposition

The College's Council believes Bill 37 should be amended to provide for a disposition of "matter not be referred" in the Investigation Committee complaint resolution process.

Legislative References – OCTA and Bill 37

(8) Clause 26 (5) (d) of the Act is amended by adding "including issuing a caution, reminder, advice or admonishment" at the end.

25. (5) The Investigation Committee in accordance with the information it receives may,

(a) direct that the matter be referred, in whole or in part, to the Discipline Committee or the Fitness to Practise Committee;

(b) direct that the matter not be referred under clause (a)

(c) require the person complained against to appear before the Investigation Committee to be cautioned or admonished; or

(d) take such action it considers appropriate in the circumstances and that is not inconsistent with this Act, the regulation or the by-laws, **including issuing a caution, reminder, advice or admonishment. (as amended by Bill 37)**

Amend the Investigation Stage Complaint Resolution process

26. 1 (4) to include "direct that the matter not be referred to in whole or in part to the Discipline Committee of the Fitness to Practise Committee.

Bill 37 specifies that only matters which may end in a "caution, a reminder, advice or admonishment" may be referred to the complaint resolution process at the Investigation Committee level.

Currently, the option of "no further action" is used by the College in some agreements and mirrors the full range of the Investigation Committee's authority short of a referral to a hearing.

Council believes an amendment to the proposed Bill to add "matter not be referred" as a Investigation Committee complaint resolution disposition would be beneficial, reflect current College practice and align with the full dispositions available to the committee.

8. Use of Priors

The College's Council believes the proposed bill should be amended to provide a direct reference to the use of prior decisions, information about or obtained in concurrent proceedings and resolutions reached through the complaint resolution process at the Discipline Committee stage as well as at the Investigation Committee stage.

Legislative References – Bill 37

6. Part IV of the Act is amended by adding the following sections:

(5) Before taking action under subsection (4), the Investigation Committee shall consider

(a) any prior decisions of a committee established under this Act that relate to the member;

(b) any information about or obtained in concurrent proceedings before a committee established under this Act that relates to the member; and

(c) any resolutions adopted by a committee established under this Act that were reached through a complaint resolution process and relate to the member.

Same

(6) In considering prior decisions in accordance with clause (5) (a), the Investigation Committee shall not consider any decision made by the Investigation Committee to refuse to consider and investigate a complaint under subsection 26 (2).

Amend by Addition to provide the same provision for Discipline Committee.

As written, the proposed legislation is inconsistent as it requires the Investigation Committee to consider prior decisions, information and resolutions before making a decision, but the Discipline Committee is not similarly required to do so.

The proposed legislation may be interpreted to be “implicit” in that the Discipline Committee can consider prior decisions and any other information. However, the use of priors is clearly specified and is “explicit” in other areas of the proposed legislation. In order to avoid unnecessary legal challenges under the College’s confidentiality provisions a simple clarifying amendment would be beneficial.

The College’s Council believes that the bill should also provide the Investigation Committee with the option of not reviewing any prior decisions where the outcome of an investigation was a “refusal to consider and investigate a complaint” at the complaint resolution stage. This is helpfully now provided for in Bill 37.

Conclusion

In conclusion, the College appreciates the opportunity to present a written submission, to supplement our oral presentation to the Standing Committee with respect to Bill 37.

The amendments recommended by the College’s Council are few in number but they are important.

The College supports the much anticipated government changes to the College's Act that will enhance and improve the College's regulatory authority to oversee the investigation and disciplinary processes on behalf of the teaching profession in Ontario.

Should standing committee members or staff supporting the work of the committee require further information or clarification, the following College staff would be pleased to assist:

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