



Education in Ontario

Submitted to: The Honourable Lisa
Thompson, Minister of Education

Submitted by: Ontario Bar Association

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Introduction

The Ontario Bar Association (the “**OBA**”) welcomes the government’s consultation on Education in Ontario (the “**Consultation**”).¹

The Ontario Bar Association

Established in 1907, the OBA is Ontario’s largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA provides input and expert advice on a broad range of topics in the interest of the profession and in the interest of the public.

This response has been developed primarily by the OBA’s Education Law section, with input from the Sexual Orientation and Gender Identity Law Section (“SOGIC”), the Constitutional, Civil Liberties and Human Rights Section, the Women Lawyers Forum, and the Child and Youth Law Section. Collectively, our members regularly represent the broadest possible range of clients in relation to Ontario’s education system, including children, parents, educators, and school boards.

The Consultation

The Government’s consultation consists of eight questions posed in an online forum, as well as in moderated telephone town halls held in several regions across Ontario.

Our comments focus on questions relating to health and physical education and a parents’ bill of rights. Before responding to those questions, we provide some general feedback.

The 2015 Curriculum Had Many Positive Attributes

The health and physical education curriculum that was in place prior to this consultation (the “**2015 Curriculum**”) has been replaced while consultations are underway. In the view of our members, the 2015 Curriculum had many positive attributes:

¹ Ontario, Ministry of Education, [Consultation: Education in Ontario](#), (Toronto: Ministry of Education, 2018).



- the 2015 Curriculum reflected the right to equality of every person in Canada under the *Charter* and the *Human Rights Code*. That curriculum made it clear that, LGBTQ+ students, families, and indeed, everyone, is entitled to respect. An important aspect of that focus was the role of consent in all relations.
- the 2015 Curriculum addressed those topics directly, sending the message that all students are in all respects equal, and supported the principle of substantive equality. In the view of our members, the right to equality not only requires availability of opportunity, but also prevents the violation of essential human dignity and freedom.
- the 2015 Curriculum balanced the need to protect parental rights and/or religious freedom with the rights of students and other stakeholders in the education system. In the view of our members, existing legislative, regulatory, and policy requirements and case law provide a robust framework with which to balance rights of parents with both the duties of publicly funded school boards and the rights of other stakeholders.
- the 2015 Curriculum replaced a curriculum that was widely recognized as being out of date with one that compared reasonably against the curricula in other provinces.
- the 2015 Curriculum permitted accommodation of parents' and students' religious rights on a case-by-case basis as necessary without undue hardship.

Concerns with the Consultation Questions

In addition, our members noted that many of the questions that were posed as part of this consultation, online and by telephone, are 'leading questions.' They were presented without context, background or evidence to support some of the propositions advanced. For example, one of the questions seeks feedback on how standardized testing can be improved. The question assumes that standardized testing is an appropriate part of the curriculum without presenting evidence to support that proposition to the public for consideration, discussion and/or debate. This approach is applied to the rest of the questions in the consultation. While we do not take a view on the efficacy of standardized testing, in our view it would be appropriate for the Ministry to provide the public with the background details and evidentiary basis for its questions and approach as part of the consultation.



Question 6 – Health and Physical Education

How can we build a new age-appropriate Health and Physical Education curriculum that includes subjects like mental health, sexual health education and the legalization of cannabis?

1. Ontario should use evidence-based decision-making

The OBA encourages the government to employ evidence-based decision making to determine the best way to deliver an age-appropriate curriculum for students in the public education system.

2. The elementary school curriculum should lead to the high school curriculum

The Ministry must take care to ensure that any new curriculum that is introduced links seamlessly with the curriculum set for prior and future age groups. Clearly, the Ontario education curriculum should form a coherent whole, and therefore the curriculum set for kindergarten to grade 8 should lead directly into the Ministry's curriculum for high school. In addition to promoting a strong public education system and maintaining public confidence in the public education system, the purposes of the *Education Act*,² the Ministry has stated that:

Ontarians share a belief in the need to develop students' character and to prepare students for their role in society as engaged, productive, and responsible citizens. Active and engaged citizens are aware of their rights, but more importantly, they accept responsibility for protecting their rights and the rights of others.³

3. Any new curriculum must support a positive and inclusive school climate

Any new curriculum must respect Canada's *Charter of Rights and Freedoms*,⁴ Ontario's *Human Rights Code*,⁵ and Ontario's *Education Act*. Each of these set out rights held by students in the education system which must be respected. Indeed, the *Education Act* states that school boards have duties to their pupils including section 169.1(1)(a.1) which states that:

² R.S.O. 1990, c. E.2 s. 0.1.

³ Ministry of Education, Policy/Program Memoranda No. 119: Developing and Implementing Equity and Inclusive Education Policies in Ontario Schools (Toronto, April 22, 2013), ("PPM No. 119").

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁵ R.S.O. 1990, c. H.19.



Every board shall promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability;

Any new curriculum must reflect the current state of the law in the recognition of equality rights. It is not appropriate to rely on a curriculum drafted in a previous decade, since that curriculum would undoubtedly fail to reflect advancements in the law since that time. By way of example, the equality rights of the LGBTQ community have been recognized in several significant court decisions since 2001 including:

- *Reference re Same-Sex Marriage*,⁶ in which the courts recognized the rights of people in same-sex relationships to legally marry;
- *Rutherford et al v. Ontario (Deputy Registrar General)*:⁷ in which the courts recognized the rights of both same-sex parents to be included on a newborn's Statement of Live Birth;
- *A.A. v. B.B.*:⁸ in which the courts recognized that adoptive same-sex parents as well as the biological parents may be declared a child's parent under the *Children's Law Reform Act*; and,
- *X.Y. v. Ontario (Government and Consumer Services)*⁹ in which the court recognized that the requirement for transsexual people to have "transsexual surgery" in order to change their sex designation on birth certificates is contrary to the *Ontario Human Rights Code*.

It is also worthwhile to note that the *Human Rights Code* was amended in 2012 to formally add gender identity and gender expression as prohibited grounds of discrimination.¹⁰

In developing a new curriculum, the Ministry must recognize the statutory duties of boards and other stakeholders in education system, particularly teachers who have legal, ethical and professional obligations to their students under the *Education Act*, the *Ontario College of Teachers Act, 1996* (the "**OCT Act**")¹¹ and the Ethical Standards and Standards of Practice

⁶ 2004 SCC 79.

⁷ 2006 CanLII 19053, 81 OR (3d) 81 (SCJ).

⁸ 2007 ONCA 2.

⁹ 2012 HRTO 726.

¹⁰ *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*, 2010, S.O. 2012, c. 7.

¹¹ S.O. 1996, c. 12.



established by the Ontario College of Teachers.¹² Any new curriculum must put these stakeholders in a position to carry out their statutory responsibilities, with a view to protecting student safety and providing the best possible learning environment for students.

4. Any new curriculum must include facts and information to keep children safe and healthy

Student safety is an important factor that must be considered in developing the curriculum. As set out in the *Education Act*, all partners, including the Minister, Ministry and the boards, have a role to play in enhancing student achievement and well-being.¹³ In addition, the *Education Act* and other Ministry policies set out specific duties and objectives for education sector in respect of creating schools that are safe, inclusive and accepting of all pupils, and provide pupils with a safe learning environment.¹⁴

Although the health and physical education curriculum is only one aspect of the broader curriculum, it is an important one because children are inherently vulnerable.

The Ministry, educators and school boards need to ensure no child is deprived of facts and information that could keep them safe and healthy. Different children will have different experiences, backgrounds and needs.

- Some children will benefit directly from learning the rights that they have in respect of their personal autonomy, against those who would seek to abuse them. It has been the experience of our members that many children, including younger children, do not know the rights that they have in these situations.
- Other children will benefit from information that allows them to engage in safe and consensual relationships with their peer group.

Importantly, it is up to the adults involved in the education system, put a system in place to let these children learn the information they need to learn to promote their safety, but also promote equity and inclusion and respect for others. As a result, there is a need to provide information to students at a stage that will promote their safety, and permit the education system to fulfil its obligations to students.

¹² See, for example, section 264 of the *Education Act*.

¹³ *Education Act* s. 0.1(1).

¹⁴ See, for example, *Education Act* s. 300.0.1 and PPM No. 119, supra note 3.



5. Teaching consent is crucial

With regard to student safety, one specific element that our members have indicated should be addressed is for elementary-level sexual health education on the concept of “consent” in sexual touching and sexual relations. This is crucial for two reasons.

First, the current interim curriculum contains no mention of “consent”, even though the absence of consent is the cornerstone of the legal definition of sexual assault under the *Criminal Code*. Sexual activity that occurs without voluntary, active, ongoing agreement between both parties is unlawful. Sexual touching is only lawful if a person affirmatively communicated their consent, whether through words or conduct. Silence or passivity has been repeatedly held to not be consent. Anecdotal and large-scale data collections, such as the recent survey by the Globe & Mail of sexual assault victims’ experiences of reporting their assaults to police, suggest that even adults remain confused about what “consent” and “capacity to consent” truly look like.¹⁵ According to the leading Supreme Court of Canada case on the topic of consent, *R v. Ewanhuk*,¹⁶ there are many myths and misunderstandings that surround consent. Canadian law expects consent at an affirmative standard, whereby there must be a clear, active, ongoing “yes”.

Educating children early on as to the meaning of consent in a relationship or in sexual encounters is critical. A curriculum with no mention of consent directly conflicts with the level of understanding of consent that the law expects in sexual assault cases. If the new curriculum does not meaningfully address the concept of consent, and what does and does not qualify as consent under the law, students will not be equipped to understand what the law requires. In a system where approximately 20% of all reported sexual assault cases are dismissed as “baseless”, a lack of information can lead to a lack of justice for both complainants and accused persons.¹⁷

Secondly, understanding consent from Grade 6 onwards is critical given the availability of exemptions to offences in the *Criminal Code* for certain persons who engage in sexual relations with children between the ages of 12 and 15, when the child consents to that activity. The age of consent to sexual relations as an adult in Canada is 16. Any person who engages in sexual relations with a minor under 16 can be found guilty of an indictable

¹⁵ *Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless*, Globe & Mail, February 3, 2017. Accessible at < <https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/>>.

¹⁶ *R v. Ewanhuk*, [1999] 1 SCR 330.

¹⁷ *Unfounded*, supra note 15.



offence. An accused cannot use that minor's consent as a defence unless one of the following situations occurs¹⁸:

- The minor consented, is aged between 12 and 13, the accused is less than two years older than the minor, and there is no relationship of trust or dependency between them;
- The minor consented, is aged 14 or 15, and is less than five years younger than the accused, with no relationship of trust or dependency between them; or
- If the accused is five years or more older than a 14 or 15 year old consenting minor, and has been cohabiting with the minor in a conjugal relationship for a period of less than one year and they have had or are expecting to have child as a result of the relationship.

In other words, a person as young as 12 years old must have the ability to understand consent in sexual relations. Legally, a child's consent can be used as a defence to a child sex offence for an offender less than two years older than them. The failure to adequately inform children regarding consent could negatively impact their legal position, particularly in criminal matters.

6. Mental health is an important topic a new curriculum should address

Our members note that the 2015 Curriculum includes building blocks for a mental health curriculum at early stage. That curriculum addresses concepts such as the invisible differences between people, which start as a foundation for discussions between students and teachers around mental health. As noted by the Ministry, "it is now recognized that such factors as race, sexual orientation, physical or mental disability, gender, and class can intersect to create additional barriers for some students."¹⁹ Our members note that the 2015 Curriculum goes into more detail at all ages when compared to the previous curriculum, in which mental health is not absent, but is less pronounced. In our view, a new curriculum should reflect the 2015 Curriculum's relative emphasis on this important topic.

¹⁸ *Criminal Code*, RSC 1985, c. C-46, ss. 150.1(1) – 150.1(2.2).

¹⁹ PPM No. No. 119, *supra* note 3.



Question 7 – Parents’ Bill of Rights

What elements should be included in a Ministry of Education Parents’ Bill of Rights?

Our members noted that the Consultation materials do not provide an outline of the goals or purpose of a Parents’ Bill of Rights (a “**BoR**”), nor is an example or draft provided for consideration by stakeholders. In this regard, we would request further consultation be conducted on a draft Parents’ BoR before that document is finalized.

Similarly, it is not clear from the consultation how a Parents’ BoR might be implemented. It is unclear from the consultation what force or effect that any such document is intended to have, how violations of and conflicts with the BoR are intended to be resolved, and it is not possible to speculate on whether those intentions have been achieved until the Ministry provides details on the implementation of the Parents’ BoR.

Although we acknowledge that parents have rights in respect of the education of their children, a significant concern raised by our members is the need for any of a parent’s rights suggested to be listed in the document to be appropriately reconciled with other rights. The rights of students in schools include *Charter* rights, *Education Act* rights, rights under the *Human Rights Code* and other rights, such as the right to privacy. Children also have certain rights to autonomy and self-determination. We would note that these rights apply to other parts of the proposed curriculum in addition to any potential Parents’ BoR.

The Ministry has not indicated a clear mechanism by which it will determine what happens if and when a child’s rights (such as the rights set out under the statutes above) conflict with any of the rights listed in the Parents’ BoR. In particular, the Ministry must consider and provide guidance on instances when a student’s rights may conflict with that of a parent, and even situations where a student’s rights conflict with that of a parent who is not that parent’s child. The rights in the Parents’ BoR may also conflict with the rights and responsibilities of other education stakeholders, including school boards and teachers. It is unclear how these conflicting rights will be reconciled, as in the experience of our members these questions often require a complex, contextual and fact-specific analysis.

Our members further note that parents have existing rights in respect of their children under the *Education Act*, the *OCT Act* and its associated regulations, the *Child, Youth and Family Services Act, 2017*²⁰ and other Ontario legislation. If a Parents’ BoR were to be

²⁰ S.O. 2017, c. 14, Sched. 1.



developed, care must be taken to ensure that the Parents' BoR complies with a student's rights under the *Charter*, the *Human Rights Code*, and the *Education Act*, acknowledging the appropriate relationship between the parent(s) and the student(s). Indeed, a Parents' BoR would need to consider the duties and obligations of teachers, school boards and other educators and the impact that such a document would have on the classroom environment, including consideration of the broader labour and employment environment. In the likely scenario that educators will be called on to apply the BoR in a school environment, care must be taken to ensure that it can be clearly understood without causing confusion or otherwise contradicting existing rights, duties or standards, such as those set out in the OCT Act, its regulations and by-laws.

Question 8 – Other Feedback

Do you have any other feedback or ideas?

Government requests for input should not disrupt the normal mechanisms for parents and teachers to directly discuss concerns. Our members noted that during the consultation, the Ministry provided the public with three options on which they could provide input:

- [Curriculum feedback](#) - I want to express concerns about the curriculum currently being taught in my child's classroom.
- [Teacher excellence](#) - I want to share a story about an educator who has gone above and beyond to support student performance.
- [Other feedback](#) - I have another issue I want to address.

The first and second links direct the person to the Ministry of Education website. The third link directs the person to the Ontario College of Teachers website.

These links, however, do not respect the regular communications protocol in place in Boards across the province that places an emphasis on direct contact between parents and teachers at first instance, and a protocol for escalating unresolved questions to senior decision makers as required. For example, if a parent has a question or concern about what is being taught in a class, they first contact the teacher, then the principal, and so on. It is not clear why the Ministry has chosen to direct this feedback through new channels which may upset the normal methods of communications and problem-solving between schools and parents, and ultimately reduce the ability of schools to respond to parent concerns on a timely basis.



Conclusion

Once again, we thank you for considering these comments and would be pleased to answer any questions that may arise.