



**Submission to the
Ministry of Education's consultation
regarding school board governance**

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Introduction: The Ombudsman’s role in improving school board governance

The Ontario Ombudsman oversees the administrative conduct of more than 1,000 public sector organizations, including the province’s 72 school boards and 10 school authorities, as well as provincial and demonstration schools.

Complaints are confidential and the Ombudsman’s reviews and formal investigations are conducted in private. Through our review and investigation of complaints, we often identify best practices and suggestions to improve processes and strengthen local governance and accountability. Most school boards appreciate the information that we provide, and are happy to implement improvements locally.

Since gaining jurisdiction over school boards on September 1, 2015, my Office has received **4,601** complaints about school boards as of August 25, 2021, including **198** complaints related to boards of trustees. In addition to resolving individual complaints, my Office makes recommendations to systematically improve the administration of Ontario’s school boards.

In 2017, my Office investigated complaints about school busing in Toronto’s largest school boards and made 42 recommendations for improvements.¹ In 2019, my investigation into a board’s pupil accommodation review process resulted in 14 recommendations for improvement.² Regarding trustee code of conduct matters, in December 2017, my Office made submissions to the Ministry regarding proposals to strengthen school board governance and accountability as part of a previous consultation. These submissions called for mandatory codes of conduct and integrity commissioners, improved procedures for the handling and investigation of code of conduct complaints, and improved practices for holding closed meetings.

The province implemented some of these changes, including mandatory codes of conduct, but my Office continues to receive many complaints related to boards of trustees. Since December 2017, we have received a further 126 complaints, most of which related specifically to the conduct of trustees and concerns about how school boards investigated and imposed sanctions regarding alleged breaches of codes of conduct.

¹ *The Route of the Problem*, <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2017/the-route-of-the-problem>

² *Lessons Not Learned*, <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2019/lessons-not-learned>

For example:

- A trustee complained that the board's appointed integrity commissioner launched an investigation into her conduct without first attempting to resolve the matter informally, as set out in the board's code of conduct.
- Candidates running in trustee elections complained about incumbents' use of board resources in their re-election campaigns and that there was no effective mechanism to enforce rules against such conduct.
- A trustee complained that some members of the board of trustees failed to declare a pecuniary conflict of interest and continued to participate in discussions held *in camera*. The complainant noted that this was not within the scope of the appointed integrity commissioner's mandate and would require a costly court application to be initiated by an elector under the *Municipal Conflict of Interest Act*.
- Community members complained about trustees not disclosing conflicts of interest and voting on matters that affect them financially. For instance, this could include budgeting and labour relations matters where a family member is a teacher employed by the board, or voting on school boundary adjustments affecting the trustee's real estate holdings.
- Trustees from three different boards complained about being banned from attending board meetings. One complained that the school board had not complied with the *Education Act* when it barred him from board meetings indefinitely. The two others were barred from meetings for a six-month period.
- A trustee complained that a board's investigation of a code of conduct complaint was conducted by a subcommittee rather than by a neutral third party, which is at the board's discretion. Another trustee complained that the third-party investigator appointed by the board did not share adequate details of the code of conduct complaint against him or give him the opportunity to participate meaningfully in the investigation.
- Parents and community members complained about public comments made by a trustee that were widely perceived to be discriminatory. The complainants told my Office their concerns were inadequately investigated by the school board and that the process lacked clarity and transparency. We suggested that the board appoint an integrity commissioner and publicize the complaints process, which it did.

- Community members complained that members of the public were unable to make complaints about violations of the board's trustee code of conduct.

In light of these issues, I wish to highlight the following areas where the Ministry may wish to provide further guidance to school boards through legislation or regulation.

Mandatory integrity commissioners

Ethical conduct in decision-making is important for all governance bodies. Given the specialized role of school boards and the direct impact of their decisions on public education, ensuring trustees are accountable for their conduct is a matter of good governance and in the public interest.

Under the *Education Act*, school boards must adopt a trustee code of conduct. The Act also sets out certain code of conduct enforcement provisions.

As noted in the Ministry's consultation document, recent amendments to the *Municipal Act, 2001* that came into force on March 1, 2019 require municipalities to develop codes of conduct for members of councils and local boards. They are also required to appoint integrity commissioners or make arrangements with another municipality to access the services of an integrity commissioner.

Mandatory codes of conduct and integrity commissioners were introduced at the municipal level in recognition of the importance of holding local officials accountable for their conduct in the course of their public duties. They create a dispute resolution system that encourages impartial review of councillor conduct and conflict of interest concerns. Having an integrity commissioner available also enables elected officials to seek confidential advice proactively and avoid breaching applicable ethical rules.

I believe that a similar framework for school boards would be beneficial as a matter of good governance. Indeed, in my 2020-2021 Annual Report, I noted that my Office has suggested to several school boards that they retain an independent third party to act as an integrity commissioner for trustees. This prevents the perception of bias that can arise when an investigation is conducted by trustees into the conduct of one of their peers.

Proposal 1: School boards should be subject to code of conduct and integrity commissioner obligations similar to those set out for municipalities in Part V.1 of the *Municipal Act, 2001*, adapted as appropriate to Ontario's public education context.

Independence and qualifications of integrity commissioners

Independence is fundamental to the role of an integrity commissioner and encourages public confidence in the process.

Accordingly, integrity commissioners should not be current or former employees or members of the school board. School boards should avoid selecting individuals who are currently or have previously provided consulting, legal or other services to the school board. They may be perceived as too closely connected with the interests of trustees.

To reinforce their independence, integrity commissioners should be appointed for a set term and during that term should only be removable by their board of trustees for cause. This responds to expressions of concerns my Office received after a school board dismissed its integrity commissioner before an investigation had been concluded.

Proposal 2: The independence of integrity commissioners should be enshrined in law. The legislation or regulation should set out clear rules with respect to the appointment of school board integrity commissioners, including restrictions on who may fill the role, the limits of their term, and the ability of school boards to terminate them.

In the municipal sector, my Office has observed a wide range of skill and knowledge levels among individuals acting as municipal integrity commissioners. In some cases, appointed integrity commissioners lack familiarity with applicable legislation and case law, including with respect to procedural fairness. Mandated training and professional standards or accreditation for integrity commissioners could address this inconsistency and ensure that Ontarians have access to a fair and high-quality review of their complaints, regardless of where they happen to live and which school board they support.

Integrity commissioners and the school boards they serve would benefit from the establishment of core competencies for this role. Professional standards would also increase the public's confidence in the accountability framework, and would be helpful in my Office's reviews of complaints about integrity commissioners.

Proposal 3: The Ministry should establish professional standards and/or an accreditation process for integrity commissioners, including core competencies and a system of peer review.

Prescribing topics for codes of conduct

Each of Ontario's 72 school boards is required to establish a code of conduct for trustees. However, codes of conduct created by school boards vary in content and form across the province. As a result, the ethical standards that apply to elected trustees are unequal and inconsistent. Behaviour covered in one board's code of conduct might not be covered by the code of conduct in a neighbouring board. This inconsistency erodes public confidence in the ability to hold elected officials accountable.

The content of codes of conduct should be standardized to address this concern. Regulations under the *Municipal Act* require that municipalities address four subjects in their codes of conduct:

- Gifts, benefits and hospitality
- Respectful conduct, including conduct towards officers and employees of the municipality or local board, as the case may be
- Confidential information
- Use of property of the municipality or the local board, as the case may be.

School boards should also be required to address these topics in their codes of conduct. They should also be required to address such topics as conduct during meetings, conduct towards members of the public or on social media, and any remedial measures that may be recommended to address a breach of the code.

Proposal 4: School boards should be required to address prescribed topics within their codes of conduct.

Conflicts of interest

My Office has received several complaints about apprehensions of conflicts of interest in trustee decision-making, most often around pupil accommodation reviews, school boundary adjustments and where trustees' family members are employed by the board.

Under the recent amendments to the *Municipal Act*, municipal integrity commissioners are now able to consider alleged violations of the *Municipal Conflict of Interest Act*, i.e., where there is a pecuniary interest. This same power should be extended to school board integrity commissioners. However, conflicts of interest may also arise that do not relate to financial interests. For example, a conflict may arise where a decision-maker uses their status to influence someone else for private advantage. This can be addressed as an ethical conduct issue subject to the enforcement process set out in the

code of conduct, which should be accessible and encourage informal resolution wherever possible.

Proposal 5: Integrity commissioners should be empowered to consider alleged violations of the *Municipal Conflict of Interest Act*.

Proposal 6: Trustee codes of conduct should include provisions with respect to pecuniary and non-pecuniary conflicts of interest, as well as improper use of influence.

Adoption of a complaint protocol

In my Office's recent submission to the Ministry of Municipal Affairs and Housing, we observed that codes of conduct created by municipalities vary greatly in both content and form across the province, as do the processes and standards for integrity commissioners interpreting and applying those codes.³ We recommended that the Ministry assist municipalities by mandating the adoption of a complaint protocol and prescribing topics that the protocol should address.

Many of the complaints we receive about local accountability officers relate to the adequacy of their processes and could be addressed through the adoption of a robust complaint protocol. This would clarify how complaints can be submitted and how they will be reviewed, and provide detailed guidance to those tasked with investigating complaints, to ensure their processes are fair and consistent.

For example, a complaint protocol might specify that trustees who are the subject of a code of conduct complaint are entitled to be interviewed, and to review and comment on a preliminary version of a report that makes adverse findings under the code of conduct. It could also specify the timelines for reviewing and investigating complaints.

Proposal 7: School boards should be required to adopt a complaint protocol setting out details regarding how complaints made under the code of conduct will be reviewed and investigated.

³ *Submission to the Ministry of Municipal Affairs and Housing's consultation on strengthening accountability for municipal council members*, <https://www.ombudsman.on.ca/resources/speeches-and-articles/speeches/2021/submission-to-the-ministry-of-municipal-affairs-and-housing>

Sanctions and remedial measures

My Office has received complaints from trustees who received sanctions that appeared to exceed what is permitted by s. 218.3(3) of the *Education Act*. Under this section, a board can impose one or more of the following sanctions if one of its members is found to have breached the applicable code of conduct:

1. Censure of the member.
2. Barring the member from attending all or part of **a meeting** of the board or a meeting of a committee of the board [emphasis added].
3. Barring the member from sitting on one or more committees of the board, for the period of time specified by the board.

Although the Act refers to barring the member from “a meeting,” we have heard of a case where a trustee was barred from board meetings indefinitely, and of other trustees barred from board meetings for six months. If the intention is to permit boards to bar trustees from multiple board meetings, this should be clarified and subject to reasonable limits, given the potential impact on trustees’ abilities to fulfill responsibilities to their constituents as elected representatives.

Proposal 8: The Ministry should consider amending the Act to ensure consistency in sanctions applied for breaches of codes of conduct.

Accessibility of complaints process

Under the *Education Act*, only trustees may make complaints under a school board’s trustee code of conduct. This limitation is reflected in the trustee codes of conduct that have been adopted by most school boards across the province.

Given the legitimate interest that the public has in accountable and ethical local governance of the province’s education system, school boards should be required to set out a process whereby education stakeholders other than trustees may raise concerns about trustee conduct. Broader access to a trustee conduct complaints procedure would provide a meaningful mechanism for staff and the public to raise concerns about their elected officials.

Proposal 9: School boards should be required to have a process whereby stakeholders other than trustees may make complaints under a trustee code of conduct, and should be required to publicize this process.

My Office is aware of cases in the municipal sector where a fee is charged for the public to access the services of an integrity commissioner. Access to the conduct complaints process and integrity commissioner should be without charge. Fees can serve as a significant barrier to effective enforcement of a code of conduct, and integrity should not come at a cost to individual members of the public.

Proposal 10: School boards should be prohibited from charging fees for the public to make trustee conduct complaints.

Protection from reprisal

Those who make complaints about the conduct of trustees should be able to do so freely. Fears of reprisal for making complaints or for co-operating in a code of conduct enforcement process can undermine the effectiveness of the complaints process and negatively impact trust in the governance of the public education system.

Proposal 11: Trustee codes of conduct should specify that school board members should not engage in any reprisal or threat of reprisal against anyone for filing a complaint under the code of conduct, or co-operating with an integrity commissioner during a review or investigation. Members should also be prohibited from obstructing or attempting to obstruct investigations.

Informal complaints resolution

While it is important to have a formal code of conduct enforcement procedure, it is equally important to provide for the possibility of informal resolution of trustee conduct complaints even after a formal enforcement process has been initiated.

In one case that my Office reviewed, a school board had made unsuccessful attempts to informally resolve a conduct complaint. As the code of conduct did not specifically provide for the possibility of informal resolution once the formal process had been initiated, concerns were raised about the appropriateness of the informal resolution attempts. In that case, my Office suggested that the school board revise its code of

conduct to include the possibility of informal resolution at any point in the process, on the consent of the parties.

In other cases, my Office has received complaints about situations where a code of conduct contemplates informal resolution but complainants and respondents were unclear on whether it was a mandatory step in the process or would only be used on a discretionary basis. Boards should ensure their codes of conduct clearly set out the process that will be followed in resolving complaints and that this be communicated to all parties so they know what to expect.

Informal resolution of complaints should be encouraged wherever possible.

Proposal 12: Trustee codes of conduct should contain specific provisions with respect to informal resolution of complaints at any point in the enforcement process.

Alternative complaint mechanisms

Some complaints about trustee conduct may engage other available complaints and investigation mechanisms. For example, an allegation of harassment or discrimination may be made under both a trustee code of conduct and under relevant workplace health and safety policies.

My Office has received complaints about comments made by trustees during board meetings and on social media that were perceived to be discriminatory. We were also contacted regarding code of conduct complaints that were brought forward by a trustee on behalf of staff who had expressed concern about their work environment. Complainants were at times confused about which process was the appropriate way to address their concerns and how these processes intersected. School boards should revise their codes of conduct to account for the possibility of alternative or parallel processes, depending on the circumstances of the complaint.

Proposal 13: Trustee codes of conduct should contain specific provisions with respect to the manner in which other potential complaint mechanisms may affect the code of conduct complaint process.

Discretion to decline to investigate

As part of their role as independent and impartial officers, integrity commissioners need to have the discretion to decline to investigate a complaint in specified circumstances, such as if it is considered frivolous, vexatious, not made in good faith, or brought a significant time after the fact situation that gave rise to the complaint. This protects the complaint process from abuse and ensures a judicious use of resources. This discretionary authority should be set out in the code of conduct, along with any related procedural requirements, such as providing written reasons for declining to investigate a complaint.

In a recent case my Office reviewed, a former trustee raised a concern that a complaint under the code of conduct had been made in bad faith, in reprisal for his having raised concerns about governance. Our review of this complaint is ongoing. However, a mechanism for handling potential abuse of a trustee code of conduct is important to ensure the integrity of the code of conduct process.

Proposal 14: Trustee codes of conduct should provide for discretionary authority to decline to investigate a complaint in specified circumstances, and require that written reasons be given when this discretion is exercised.

Conclusion

I am encouraged by the Ministry's commitment to further consultation on these issues of school board governance. My staff would be pleased to provide further information and answer questions regarding these proposals.

For reference, all of the proposals made throughout this submission are compiled here as a list.

Proposals

- 1: School boards should be subject to code of conduct and integrity commissioner obligations similar to those set out for municipalities in Part V.1 of the *Municipal Act, 2001*, adapted as appropriate to Ontario's public education context.**

- 2: **The independence of integrity commissioners should be enshrined in law. The legislation or regulation should set out clear rules with respect to the appointment of school board integrity commissioners, including restrictions on who may fill the role, the limits of their term, and the ability of school boards to terminate them.**
- 3: **The Ministry should establish professional standards and/or an accreditation process for integrity commissioners, including core competencies and a system of peer review.**
- 4: **School boards should be required to address prescribed topics within their codes of conduct.**
- 5: **Integrity commissioners should be empowered to consider alleged violations of the *Municipal Conflict of Interest Act*.**
- 6: **Trustee codes of conduct should include provisions with respect to pecuniary and non-pecuniary conflicts of interest, as well as improper use of influence.**
- 7: **School boards should be required to adopt a complaint protocol setting out details regarding how complaints made under the code of conduct will be reviewed and investigated.**
- 8: **The Ministry should consider amending the Act to ensure consistency in sanctions applied for breaches of codes of conduct.**
- 9: **School boards should be required to have a process whereby stakeholders other than trustees may make complaints under a trustee code of conduct, and should be required to publicize this process.**
- 10: **School boards should be prohibited from charging fees for the public to make trustee conduct complaints.**
- 11: **Trustee codes of conduct should specify that school board members should not engage in any reprisal or threat of reprisal against anyone for filing a complaint under the code of conduct, or co-operating with an integrity commissioner during a review or investigation. Members should also be prohibited from obstructing or attempting to obstruct investigations.**

- 12: Trustee codes of conduct should contain specific provisions with respect to informal resolution of complaints at any point in the enforcement process.**
- 13: Trustee codes of conduct should contain specific provisions with respect to the manner in which other potential complaint mechanisms may affect the code of conduct complaint process.**
- 14: Trustee codes of conduct should provide for discretionary authority to decline to investigate a complaint in specified circumstances, and require that written reasons be given when this discretion is exercised.**



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