

# #MEDICINETOO

November 16, 2020

## Re: Policy Feedback from #MedicineToo

Thank you for inviting #MedicineToo to provide feedback on the CPSO's draft policy, *Professional Responsibilities in Medical Education*. #MedicineToo offers the following recommendations.

## Legal Framework

- An unlawful learning environment undermines patient care and erodes the public's trust in the medical profession. Medical education must be delivered in a manner that respects the full spectrum of legal protections guaranteed to learners under the law, including (as applicable):
  - Ontario Human Rights Code
  - Ministry of Training, Colleges, and Universities Act
  - Freedom of Information and Protection of Privacy Act
  - Occupational Health and Safety Act
  - Employment Standards Act
  - PARO-CAHO Collective Agreement
- Physicians who choose to participate in the delivery of medical education must fulfill their legal and professional obligations to learners. Compliance with institutional policies may be insufficient for this purpose and physicians may need to familiarize themselves with the aforementioned laws.
- Where university or hospital policy conflicts with protections guaranteed to learners under the law (or under the PARO-CAHO Collective Agreement), legal protections always prevail over policy.
- Reprisal, discrimination, and harassment of learners is **prohibited by law** — even if it takes place outside of the learning environment, or while the learner is on leave or away on elective.
- Harassment is defined as: *engaging in a course of vexatious comment or conduct against a learner that is known or ought reasonably to be known to be unwelcome*.
- Discriminatory harassment is: harassment that is in relation to one of the following **protected characteristics** (real or perceived): age, disability, family and marital status, race, religion, or sex.
  - Subjecting learners of a protected group (e.g. IMGs) to **stricter standards** is discriminatory harassment even if no discriminatory comments are made and certain members of the group are singled out for approval (programs where IMGs must "keep their head down" to succeed).
  - Discriminatory comments about patients create a **Poisoned work environment** for learners.
- Unlike other discriminatory harassment, sexual harassment can be non-vexatious in nature:
  - Hostile sexual harassment is: a course of vexatious comment or conduct on the basis of sex (i.e., biological sex, pregnancy, gender identity, gender expression, or sexual orientation).
  - Quid pro quo sexual harassment involves unwelcome (but not necessarily hostile) overtures in the context of a **power differential**: *making a sexual solicitation or advance where the person making it is in a position to confer, grant or deny a benefit or advancement to the learner and the person knows or ought reasonably to know that the solicitation or advance is unwelcome*.
- Discrimination is broader than harassment; it encompasses any **adverse effect** on the learner resulting from **differential treatment**, **failure to prevent and remedy harassment**, or **failure to accommodate** a trainee in connection with any of the aforementioned protected characteristics.
- Unlawful discrimination and harassment can be subtle, indirect, covert, and even **unintentional**.

- **Reprisal** is any action or threat intended (at least in part) as retaliation or punishment for a learner's (real or perceived) attempt to enforce their own or another's legal rights (e.g., disclose, discuss, report, publicize, advocate against, object to, or refuse to accept mistreatment of self or others).
- **Academic reprisal** typically involves undermining learners by way of the following **tactics**: forward feeding, excessive scrutiny, referral to "coaching" or "physician wellness" services, and spurious accusations of unprofessional, uncooperative, disruptive, or "defensive" behaviour.
- Imposing academic penalties may amount to unlawful discrimination or reprisal, even where it is approved by the RPC in accordance with policy and accepted by the learner without any appeal.
- **Any organization or individual found to have facilitated, permitted, or played a role in the reprisal may be held legally responsible for condoning discrimination** — blindly "following orders" to "implement decisions" by way of "routine procedures" is not a viable legal defense.

## Recommendations

- Paragraph 14 of the draft policy requires physicians to report learners to the medical school or hospital for failing to "behave professionally" in their interactions with senior physicians. Interestingly, the policy omits any requirement to report non-trainee physicians for unprofessional or inappropriate behaviour with colleagues, learners or patients. #MedicineToo warns the CPSO that this **double standard** reinforces the widespread impression among learners that senior physicians may misbehave with impunity, whereas learners are held to the strictest standards of professional behaviour. Moreover, senior physicians who harass learners often falsely accuse their victims of unprofessional behaviour to intimidate them into silence and/or to preemptively discredit them to administrators, who may be eager to facilitate such reprisal in their zeal to cover up the harassment and discourage other learners from "causing problems" in the future.
- Accordingly, paragraph 14 **exposes victims to further danger by inviting retaliation**. It is #MedicineToo's position that this problematic wording **must** be eliminated from the CPSO's Policy. At minimum, we **insist** that the following words be struck:
  14. Physicians (including MRPs, supervisors and **trainees**) involved in the education and/or training of medical students and/or trainees must report to the medical school and/or to the health-care institution, if applicable, when a medical student and/or trainee:
    - a. exhibits behaviours that would suggest incompetence, incapacity, or abuse of a patient;
    - b. fails to behave professionally and ethically in interactions with patients and their families, **supervisors, and/or colleagues; or**
    - c. otherwise engages in inappropriate behaviour.**
- Paragraphs 10-11 require trainee supervisors to intervene if they witness a senior physician mistreating another learner and provide "support and direction" to the learner victim. This **requirement to intervene exposes trainees to danger of violence, harassment, and reprisal from the senior physician** (and from university or hospital leadership). This is an unrealistic, unfair, and unsafe burden to place on medical residents and fellows, who may themselves be victims. #MedicineToo strongly suggests limiting this responsibility to non-trainee physicians and administrators. We also suggest striking the phrase "disruptive behaviour" from paragraph 11.
- We suggest adopting the IPCO's recommendations for paragraph 13 and specifying that no learner shall be penalized for failing to disclose a relationship of such nature with their supervisor.
- To protect the safety and dignity of learners, paragraph 12 must prohibit medical schools from investigating allegations of an intimate relationship between a supervising physician and a learner **unless the learner consents to the investigation**. Penalizing a learner for refusing to disclose information about their sexuality or sex life is unlawful even if the medical school finds out that the learner has been sexually harassed (in January 2017, O. Reg 131/16 granted Ontario students, including residents, special privacy protections in this regard) and soliciting such information from witnesses and/or disseminating it (even if only on a "need to know basis") may amount to sex-based discrimination and hostile sexual harassment of the learner by the medical school.