The Evangelical Fellowship of Canada
Centre for Faith and Public Life
ottawa@theEFC.ca www.theEFC.ca

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**THE EVANGELICAL FELLOWSHIP OF CANADA**

**is the national association of evangelical Christians, gathered together for influence, impact and identity in ministry and public witness.**

# FALLING SHORT:

## Manitoba's Bill 18, the Safe and Inclusive Schools Act

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## Introduction

There has been significant concern expressed by many Manitobans regarding the introduction of Bill 18, the *Safe and Inclusive Schools Act*. The Bill is part of anti-bullying action plan put forth by the Manitoban NDP government.

Bill 18, if passed, will have a significant and negative impact on religious schools, boards and faith-informed families. The bill would set a new, lower standard in the province of Manitoba, for respect of its citizens' constitutional rights to religious and associational freedoms, as well as parental authority. It would also likely lead to years of costly, tax-payer funded litigation as parents and schools fight to regain lost ground and reclaim their rights.

In the name of diversity and respect for others, Bill 18 proposes that the Government of Manitoba enforce select perspectives and belief systems, seeking to render the school system increasingly homogenous, rather than encouraging proper respect for each Manitoban child and the unique cultural and religiously informed perspective and up-bringing chosen for them by their parents.

For this reason, The Evangelical Fellowship of Canada has prepared the following commentary and analysis of Bill 18. The document attempts to cut through the political rhetoric and set out in plain language the ramifications and implications of the proposed anti-bullying and equity policies.

For more information, please contact the EFC's Centre for Faith and Public Life at ottawa@theEFC.ca.

"Bill 18, if passed, will have a significant and negative impact on religious schools, boards and faith-informed families."

## A. Bill 18, the *Safe and Inclusive Schools Act*

### 1. What is Bill 18?

Bill 18 is a government bill introduced by Minister of Education Nancy Allan. Its full name is Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*[1]. According to the explanatory note, it seeks to amend *The Public Schools Act* in order to reflect the realities of bullying and respect for human diversity.[2]

The Bill addresses four issues in particular: it defines bullying; it requires schools to develop "respect for human diversity" policies which include accommodation of Gay-Straight Alliance clubs; it amends the pre-existing reporting requirements for witnessed acts of bullying or "unacceptable conduct;" and it requires boards to expand and develop their policies on social media and internet use.

Minister Allan announced that this legislation would be introduced on December 4, 2012.[3] The bill was included in an announcement about a broader provincial anti-bullying action plan. This strategy includes three core components:

- "help for teachers including expanded training supports, workshops and other professional learning opportunities, and ongoing support for the Respect in School initiative;
- help for parents including new online information and resources online on how to recognize, deal with and report bullying; and
- help for students including strengthened anti-bullying

legislation and the Tell Them From Me Survey to allow schools to hear directly from students about bullying."[4]

## 2. How is education governed in Manitoba?

Given Canada's constitutional designation, education in Canada is regulated provincially, with the public school curriculum decided by each province's Ministry of Education.[5] In Manitoba, education is regulated principally by two laws, *The Public Schools Act* and *The Education Administration Act*.[6]

Students can be educated by being taught at a public school, at an independent school that receives provincial funding, at a non-funded independent school, or by home schooling.[7]

## 3. Does Bill 18 apply to all schools?

Bill 18, if passed, will apply to both public schools and publicly-funded independent schools, religious or otherwise. It will not apply to independent non-funded schools or homeschooling families.[8]

Some educators have asked the Minister of Education for exemptions for religious schools. Some reports have indicated that the Minister would review requirements placed on independent religious schools. However, statements made by the Minister are clear that no exemptions provisions are intended to be included in Bill 18.[9] In comments to one media outlet, she said that "[a]t the end of the day, I'm not going to let faith-based schools opt out of providing a safe and caring environment for their students."[10]

## 4. What are the legal challenges associated with Bill 18?

There are constitutional and human rights issues apparent on a surface reading of the bill.

It will likely violate the individual religious freedom of families and the institutional religious and associational freedoms of religious schools and boards. This is discussed in detail later in this paper.

Unless the bill is amended, there is a high likelihood that the province will have years of expensive, tax-payer funded litigation ahead of it as religious parents, schools and boards seek to have their constitutionally enshrined rights and freedoms recognized and respected by the government.

While this anti-bullying legislation is tied up in courts, it will likely be unavailable to assist in reducing bullying behaviours. It might be wiser for the government to amend the legislation and remove the sections that will likely be found to infringe the religious freedoms of religious institutions. These potentially rights-violating provisions are unnecessary additions to the bill and will not, in effect, reduce bullying in Manitoba's schools.

This opinion is shared by Canada's Public Safety Minister Vic Toews, MP (Provencher), a constitutional law lawyer, who stated that Bill 18's provisions "involve an unconstitutional infringement upon the freedom of religion." He added that "[i]f the provincial legislature does not amend Bill 18 to address concerns of faith-based

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organizations, schools and communities, the only remedy may be an application to the courts to decide if the legislation is compliant with Canada's *Charter of Rights and Freedoms*."[11]

If the government insists on using additional legislation to address this issue, such legislation should be introduced in a way that carefully and clearly defines bullying behaviours while also acknowledging and recognizing the diversity of cultures and beliefs of the students and families within its school system, ensuring that its very legislation doesn't violate their constitutional rights.

## B. Defining Bullying

### 1. How does Bill 18 define 'bullying'?

Bill 18 amends section 1 of *The Public Schools Act*, the Interpretation provision, to include the new term "bullying" and its meaning.[12]

**Interpretation: "bullying"**

1.2(1) In this Act, "bullying" is behaviour that

(a) is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property; or

(b) is intended to create, or should be known to create, a negative school environment for another person. [13]

**Characteristics and forms**

1.2(2) Bullying

(a) characteristically takes place in a context of a real or perceived power imbalance between the people involved and is typically, but need not be, repeated behaviour;

(b) may be direct or indirect; and

(c) may take place

(i) by any form of expression, including written, verbal or physical, or

(ii) by means of any form of electronic communication — also referred to as cyberbullying in section 47.1.2 — including social media, text messaging, instant messaging, websites or e-mail. [14]

**When does a person participate in bullying?**

1.2(3) A person participates in bullying if he or she directly carries out the bullying behaviour or intentionally assists or encourages the bullying behaviour in any way.[15] [our emphasis added]

"Of great concern is Bill 18's definition of 'bullying'...[which] will likely lead to significant interpretational and application challenges."

### 2. What are the difficulties with this definition?

***i) "Intended to cause, or should be known to cause fear, intimidation, humiliation or harm"***

Of great concern is Bill 18's definition of 'bullying,' which includes the terms such "intended to cause" or "should be known to cause"; "intended to create" or "should

be known to create"; and "real or perceived power imbalance." These terms will likely lead to significant interpretational and application challenges.

The terms "intended to cause [or create]" or "should be known to cause [or create]" are troubling. Parents, educators and academics can attest that each child varies greatly in his or her level of development, understanding and maturity. Therefore, what each child "should have known to cause" will also vary substantially and it is precarious to qualify what any child should have known, in any given circumstance.

While it is adults' natural inclination to project our understanding and level of maturity onto children, it is best not to do so. Who will determine what a child ought to have known? Further, children do not understand the sometimes fraught terrain of political correctness, and what is unacceptable to an adult may be a child's innocent expression.

***ii) "real or perceived power imbalance"***

Another term of concern is "a real or perceived power imbalance". Who perceives the power imbalance? From whose perspective? And are power imbalances consistent? They may change from day to day. Who accounts for that? This is a very subjective test that administrators will be left to attempt to implement in their schools.

***iii) "negative school environment"***

This is not a term that has been defined jurisprudentially or legislatively in Canada. Effectively, the Manitoba government is introducing a new term into its legislation, and leaving school officials to attempt to implement this legislation without guidance. Administrators may have to wait several years before this provision is assessed and defined by a court.

***iv) Vagueness of the definition***

Parents with a faith background are concerned that certain religious beliefs and/or religious texts in regard to sexuality and marriage may be captured by the vague language "should be known to cause…other forms of harm to another person's… feelings" or "should be known to create, a negative school environment for another person."

Will a child be penalized for behaviour that is not bullying behaviour or has not caused any harm, fear or distress, but may potentially cause harm, fear or distress of "feelings" in the estimation of one school official?

School officials themselves have expressed concern about the difficulty of applying this definition to children's behaviours. One said, "[w]e feel that there's hardly a day that goes by where someone's feelings aren't hurt. And it would make it very difficult to discern between what's real bullying and what's unintentional feelings being hurt."[16]

Others have expressed concern that mundane interactions between students and school officials could be captured by this vague definition, such as the jeering of an opposing team's players.[17]

Additionally, the definition does not require repeated behaviours, which would otherwise prevent off-hand comments or unfortunate, though unintentional statements from being captured by the definition of bullying.

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***v) Generalized treatment of student behaviours***

The definition of bullying appears to consider a wide-range of behaviours as being equally serious and requiring administrative intervention, from the off-hand, innocent comment to intentional physical abuse. The definition considers a wide range of intentional and unintentional behaviours as bullying and, in doing so, trivializes true cases of bullying.

Some student behaviours are more serious and egregious than others. The law should reflect this reality.

***vi) Lack of consideration for free expression rights***

The definition of bullying in Bill 18 does not appear to take into consideration freedoms of religion and expression.

Given the vagueness of the definition and the lack of exemptions for free expression rights, there is concern that expression of faith-informed positions on sexuality or marriage might be considered a form of bullying by Bill 18. Should Bill 18 not be amended to remedy these inherent problems, its proclamation will likely cause a chill effect on religious expression.

All government legislation must be consistent with the Canadian *Charter of Rights and Freedoms*. As Minister Toews has recently pointed out, concepts similar to those used in Bill 18's definition of bullying have recently been deemed by the Supreme Court of Canada in the *Whatcott* decision as unconstitutional for violating freedom of expression rights.[18]

In *Whatcott*, the Supreme Court ruled that a portion of the Saskatchewan *Human Rights Code* section 14 which addressed hate speech should be struck out – the terms "ridicules, belittles or otherwise affronts the dignity."[19] While language that ridicules or belittles others could be hurtful to others, this restriction on speech was found to be a violation of free expression rights.[20]

The Court also stated that Canadians "are free to preach against same-sex activities, to urge its censorship from the public school curriculum and to seek to convert others to their point of view" as long "they not be conveyed through hate speech."[21]

Granted, the Court was tasked with determining if such speech could be considered hate speech, and Bill 18 does not address that issue; rather, it addresses bullying. However, the legislature is urged to reconsider Bill 18 in light of this new decision and ensure that it is clear and specific in its intentions and application and that it does not unduly restrict the ability of students and families to express their views on marriage and sexuality, or other topics, without fear of those expressions being considered bullying behaviours. The standard for bullying may differ from hate speech, but must be adequately defined.

There must be space for differing opinions and expression, while more narrowly defining "bullying" than has been done in Bill 18.

"The [bullying] definition considers a wide range of intentional and unintentional behaviours as bullying and, in doing so, trivializes true cases of bullying."

### 3. Does Bill 18 include provisions relating to cyberbullying?

Yes, Bill 18 addresses cyberbullying in its definition of bullying. The Bill also amends the Board Duties section of *The Public Schools Act* in relation to internet and social

media policies. Bill 18 further clarifies what should be included in the policies, such as policies on the proper use of the internet, social media, text messaging, email, digital cameras and cell phones.[22]

The Bill also amends the *Act* to add a new provision which sets out that the internet policy may include provisions "the accessing, uploading, downloading, sharing or distribution of information or material that the school board has determined to be objectionable or not in keeping with the maintenance of a positive school environment."[23]

The Bill includes amendments that will clearly state requirements for schools' Codes of Conduct on internet and social media use.[24]

### 4. Will Bill 18 require schools to police student behaviours which occur off school property and outside of school hours?

The language of the cyberbullying provisions appears to require schools to discipline students for communications made off school property and outside school hours.

Cyberbullying is a serious matter; and has been tied to some of the most recent cases of teen suicide. However, the question to be asked is whether school administrators should be taking on the additional responsibilities of monitoring behaviours that happen outside the school's traditional geography and timeframe of jurisdiction, or whether other community members, such as parents and, when necessary, the police should be undertaking the outside of school hours responsibility.

Could existing *Criminal Code* provisions be used to address cases of bullying or cyberbullying that happen off school property, such as in regard to harassment, the utterance of threats? Or perhaps there should be consideration of defamation, libel or slander in the civil law context?[25]

Parliament is currently considering amending the *Criminal Code*'s section on Criminal Harassment "in order to clarify that cyberbullying is an offence."[26] Such an amendment, within the constitutional jurisdiction of federal government, would further define such criminal acts as outside the jurisdiction of the provincial legislator or school administrator.

While the *Criminal Code* is generally applied to those who are over 17 years of age, the *Youth Criminal Justice Act* governs the conditions for persons between the ages of 12 and 17 years of age having been accused of breaking criminal law.[27] *Criminal Code* provisions may be applied to that age group but do not apply to children under the age of 12.[28] The distinction in application between the YCJA and the *Criminal Code* is often based on the severity of the crime.

While we are not suggesting that cyberbullying become solely the federal government's responsibility as a criminal matter, to address incidences of bullying or cyberbullying, there are already a variety of means available, and additional means are under consideration in Parliament. We are saying that the solution proposed in Bill 18 may be neither appropriate nor practical.

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## C. 'Respect for Human Diversity' Policies and Gay-Straight Alliances

### 1. What does Bill 18's 'Respect for Human Diversity' policies require?

Bill 18 would require Boards to develop policies concerning "respect for human diversity, and ensure that the policy is implemented in each school in the school or school district." [29]

The purpose of the policy is twofold – the first is to promote and enhance a safe and inclusive learning environment, the acceptance of and respect for others, and "the creation of a positive school environment." The second is addressing teacher and staff training on bullying prevention and strategies for "promoting respect for human diversity and a positive school environment.[30] [our emphasis]

The Bill also includes a new requirement in the *The Public Schools Act* – that in preparing the diversity policy a school board "must have due regard for the principles of *The Human Rights Code*.[31]

"Will the philosophical framework of the school or board leadership on issues such as multiculturalism, pluralism and diversity shape a uniquely different understanding of what is a positive school environment in each school and board?"

### 2. What is a "positive school environment"?

Like the bullying definition, the sections which address the drafting and implementation of the Respect for Human Diversity policies include vague and undefined terms.

Foremost is the use of the term "positive school environment." This is a term that has not been defined in Canada either jurisprudentially or legislatively. What is a positive school environment? How will teachers and schools administrators determine what characterizes a positive school environment?

Will the philosophical framework of the school or board leadership on issues such as multiculturalism, pluralism and diversity shape a uniquely different understanding of what is a positive school environment in each school and board? The debate surrounding Bill 18 has clearly demonstrated that in the province of Manitoba alone, there are varied and conflicted understandings of this philosophical and societal notion.

### 3. What does it mean that school boards must have "due regard" for *The Human Rights Code*?

Bill 18 requires school boards to have "due regard for the principles of *The Human Rights Code*." The implications of this requirement are unclear.

The *Code* prohibits discrimination on the basis of a number of characteristics, including ancestry, nationality, ethnic background, religion or creed, or religious belief, religious association or religious activity, age, sex, gender identity, sexual orientation, political belief and marital status among others.[32]

In its preamble, the *Code* states that "Manitobans recognize the individual worth and dignity of every member of the human family." It also addresses a number of principles:

> AND WHEREAS Manitobans recognize that
>
> (a) implicit in the above principle is the right of all individuals to be treated in all matters solely on the basis of their personal

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merits, and to be accorded equality of opportunity with all other individuals;

(b) to protect this right it is necessary to restrict unreasonable discrimination against individuals, including discrimination based on stereotypes or generalizations about groups with whom they are or are thought to be associated, and to ensure that reasonable accommodation is made for those with special needs;

(c) in view of the fact that past discrimination against certain groups has resulted in serious disadvantage to members of those groups, and therefore it is important to provide for affirmative action programs and other special programs designed to overcome this historic disadvantage;

(d) much discrimination is rooted in ignorance and education is essential to its eradication, and therefore it is important that human rights educational programs assist Manitobans to understand all their fundamental rights and freedoms, as well as their corresponding duties and responsibilities to others; and

(e) these various protections for the human rights of Manitobans are of such fundamental importance that they merit paramount status over all other laws of the province; [33]

"Will it be argued that the teaching from a Biblical perspective may be discriminatory on certain topics if found inconsistent with the 'principles' in the Code?"

Will it be argued that the teaching from a Biblical perspective may be discriminatory on certain topics if found inconsistent with the "principles" in the *Code*? Or will this section be understood as supportive of religious families and schools that want to exercise their rights to freedom of conscience, religion, expression and association by teaching their children from their faith inspired perspective? The lack of clarity is troubling.

### 4. Is the implementation of Gay-Straight Alliances mandatory?

Yes, Bill 18 states that students who want to establish a gay-straight alliance within their schools must be accommodated.

**Student activities and organizations**

41(1.8) A respect for human diversity policy must accommodate pupils who want to establish and lead activities and organizations that

(a) promote

(i) gender equity,

(ii) antiracism,

(iii) the awareness and understanding of, and respect for, people who are disabled by barriers, or

(iv) the awareness and understanding of, and respect for, people of all sexual orientations and gender identities; and

(b) use the name "gay-straight alliance" or any other name that is consistent with the promotion of a positive school environment that is inclusive and accepting of all pupils.[34]

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While in one provision Bill 18 requires "due regard" for the principles of *The Human Rights Code*, which prohibits discrimination on a number of grounds, including religion, age, nationality and ancestry, in this provision, the Bill mandates that only a select group of student organizations be supported by school boards. These are organizations or activities related to the promotion of gender equity and antiracism, or awareness for people disabled by barriers or people of all sexual orientations and gender identities.

In singling out some groups of students for special status, Bill 18 inherently creates a second class of students – those who are bullied for reasons other than those identified in the legislation. And this is within the provision which implements Respect for Human Diversity and seeks to create an "inclusive learning environment."[35] These measures are divisive rather than inclusive.

Rather than permitting students to learn about their differences and recognize their commonalities in equity clubs, this Bill specifically sets out to isolate students into issue-specific groups. As such, students, teachers, principals, and families do not have the ability to form groups based on their intimate knowledge of their communities' demographics, history and challenges.

"In singling out some groups of students for special status, Bill 18 inherently creates a second class of students - those who are bullied for reasons other than those identified in the legislation."

It does appear as though schools will be given some discretion in how they choose to name the clubs that "promote the awareness and understanding of, and respect for, people of all sexual orientations and gender identities." Schools can choose to name the groups either "gay-straight alliances" or "any other name that is consistent with the promotion of a positive school environment that is inclusive and accepting of all pupils."[36] However, it remains that legislating select clubs hinders schools from broader equity or anti-bullying clubs where all students may participate and learn from each other.

The lack of trust the Government of Manitoba is displaying in regard to schools and communities to establish or customize groups and activities according to their contexts may in fact increase the frequency of bullying in Manitoba by isolating and segregating students – sending them to separate corners, as it were.

### 5. Do the student organizations mandated by Bill 18 reflect Canadian bullying trends?

The four student organizations mandated by Bill 18 do not reflect the groups of students who are most often bullied, which begs the questions as to why these groups are singled out for special legislative status.

As explained in the EFC's report, *By the Numbers: Rates and Risk Factors for Bullying in Canada*, it can be difficult to compare bullying statistics to identify trends, as each polling company or organization uses slightly different terms or markers.[37] However, two different Canadian studies, one addressing generalized bullying trends and another examining cyberbullying behaviours came to very similar conclusions. What their data reveal should be carefully considered.

The Toronto District School Board Research Report, which surveyed approximately 105,000 students in 2006, revealed that the children who most frequently face bullying attacks are targeted because of their physical appearance (38%) or their grades and marks (17%). Equally tragic, but at a much lower frequency are children who are bullied because of their cultural background (11%) or gender (6%).[38]

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The University of Toronto's 2008 Cyber Bullying Survey found similarly proportional trends.[39] Students were most frequently victims of cyberbullying because of their physical appearance or race (17%) or performance in school (5%). A smaller percentage of students were bullied because of their gender (3%) or sexuality (2%).

Why then would children be separated into these four government-mandated groups? And why would some groups of children receive board support for their clubs and not others? This is not an inclusive response to a divisive behaviour.

A thoughtful and more constitutionally-sound alternative to these clubs are generalized equity or 'respecting difference' clubs. A model was proposed in the Ontario Catholic School Trustees' Association's *Respecting Difference* policy paper.[40] The flexible and inclusive approach proposed respects the religious and conscience rights of schools and families by permitting customization of the clubs to reflect schools' and communities' beliefs and cultures. Their detailed and thoughtful guidelines could be considered and adapted by schools looking to shape clubs that reflect their own administrative policies, guidelines and their schools' and communities' circumstances.

"'[i]f the provincial legislature does not amend Bill 18 to address concerns of faith-based organizations, schools and communities, the only remedy may be an application to the courts to decide if the legislation is compliant with Canada's Charter of Rights and Freedoms.'"

### 6. How could these mandatory policies and organizations potentially violate the rights of religious families and schools?

It is likely that courts will find that this mandatory implementation of certain activities and policies will violate the rights of religious schools and families as well as parents' right to parental authority. Bill 18 requires schools to promote activities and principles that may be contrary to their faith principles.

Vic Toews, the Minister of Public Safety and a constitutional law lawyer, shared this opinion, stating in a letter to constituents that Bill 18 represents an "unconstitutional infringement upon the freedom of religion."[41] He also said that "[l]egal authority for this position is based on the recent unanimous decision of the Supreme Court of Canada in the *Whatcott* decision."[42]

He added that "[i]f the provincial legislature does not amend Bill 18 to address concerns of faith-based organizations, schools and communities, the only remedy may be an application to the courts to decide if the legislation is compliant with Canada's *Charter of Rights and Freedoms*."[43]

The following is a brief analysis of how Bill 18 may violate the rights noted above.

***i) Parents' right to determine the education of their children***

Canadian and international law recognize that it is the right of parents to determine the education of their children. While it is acknowledged that the state has a significant interest in education, the Supreme Court of Canada has affirmed that parents have had and retain primary authority over their children.[44]

Section 2 of the Canadian *Charter of Rights and Freedoms* assures both freedom of religion and conscience in regard to government action – from school boards to Parliament.[45] Additionally, there are a number of cases from the Supreme Court of Canada which support and describe this right, including: *R. v. Big M Drug Mart Ltd., (B.) R. v. Children's Aid Society of Metropolitan Toronto, The Queen v. Jones.*

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An important component of freedom of religion is the freedom to instruct one's children in a manner consistent with their faith.[46] Since the enactment of the *Constitution Act, 1867,* the precept of religious education being determined by parents has been maintained and upheld within Canada.

For example, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto,*[47] the Supreme Court recognized that parents have the right to rear their children according to their religious beliefs, as a fundamental aspect of freedom of religion, guaranteed by s. 2(a)[48]:

> The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being […] The parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.
>
> […] [I]t would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or which school he or she will attend[49]. [emphasis added]

"An important component of freedom of religion is the freedom to instruct one's children in a manner consistent with their faith."

In *R. v. Jones*[50] this Court held that freedom of religion included the right of parents to educate their children according to their religious beliefs:

> While a religious belief that a person has the right to educate his own children is not as strongly asserted nowadays, it is really not that unusual. It would be to negate history to fail to recognize that for many years the individual and the church played a far more significant role in the education of the young than the state. And when the state began to take the dominant role, it had to make accommodations to meet the needs and desires of those who had dissentient views. The provisions regarding separate schools in the Constitution are an example.[51] [emphasis added]

There are also a number of international human rights instruments that support broad parental authority, including *The Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* which states that,

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religion and moral education of their children in conformity with their own convictions.[52]

While religious instruction has been a controversial issue in Canada, it has been consistently held to be the right of parents to decide, and not to be imposed by the state through the public education system without parental agreement. In addition, the Supreme Court of Canada has held that parents are presumed to be acting in the best interest of their children unless there is a finding to the contrary.[53]

Parents choosing to have their children instructed at institutions that teach their religious beliefs is an expression of religious freedom, and not an insignificant one. They often send their children to these schools because they believe they have a religious obligation to do so. Therefore religious schools and their autonomy are a vehicle by which parents express their right to parental authority and religious freedom. To limit the capacity of religious schools to teach and administer their

schools in a manner consistent with their religious beliefs would seriously infringe on the parents' freedom to educate their children according to the tenets of their faith.

***ii) Collective aspect of freedom of religion***

The Supreme Court of Canada has recognized in the seminal decision in *Big M Drug Mart* that freedom of religion protected by s. 2(a) of the *Charter* encompasses not only the right to hold and declare religious beliefs and values openly, but also the right to "manifest religious belief by worship and practice".[54] It is primarily characterized by "the absence of coercion or constraint" imposed by the state on a course of religious action and specifically protects against direct and indirect coercion to act or refrain from acting and includes freedom from indirect forms of control which would constrain the right to manifest religious belief and practices.[55]

Freedom of religion is not only expressed by an individual, but also includes a collective aspect. In the 1986 Supreme Court of Canada decision, *R. v. Edwards Books*, then Chief Justice Brian Dickson, writing for the majority of the court, stated that "freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects."[56]

"Freedom of religion is not only expressed by an individual, but also includes a collective aspect...This collective right affirms that people gather together to share their faith and pass on their beliefs to the next generation."

This collective right affirms that people gather together to share their faith and pass on their beliefs to the next generation. The Supreme Court of Canada recently expanded on this principle in the 2009 decision, *Alberta v. Hutterian Brethren of Wilson Colony.*

And while cases like *R. v. Jones* have established that even religious schools must conform to the educational requirements of the state, those requirements should be respectful of religious beliefs, including differing beliefs on sexuality, recognizing that the goal of the instruction is acceptance ("love your neighbour") but does not require agreement ("your neighbour is right and you – or your religious beliefs – are wrong").

***iii) Freedom of association***

Section 2(d) of the *Charter* provides that everyone enjoys the right to freedom of association. The scope of that freedom includes a broad range of activity. The purpose of s. 2(d) is to protect the collective action of individuals in pursuit of their common goals as well as, in some circumstances, the collectivities themselves. Freedom of association affords a significant protection for religious organizations, such as schools, in the practise of their faith in Canadian society. The Supreme Court recognized this in stating:

> Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.[57]

As the Court has recognized, freedom of association protects the "associational aspect of the activity" as opposed to the nature of the activity itself.[58]

The independent schools seeking to maintain the integrity of their faith-inspired policies and curricula are also an association of administrators, teachers, parents and families seeking to associate in order to practice their faith in Canada. To require them

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to adopt policies inconsistent with their beliefs is to advance a shallow understanding of the right to freedom of association.

Before superseding the choices parents make in education, legislators are cautioned that these are not rights to be overridden casually. There is an obvious constitutional violation in forcing religiously based schools to establish policies not endorsed by the faith community, parents or students, or to implement a curriculum that disrespects their beliefs.

### 7. What does Bill 18 require when it legislates "respect for" one another?

There is concern about the use of term "respect for" in subsection 41(1.8)(a)(iv)[59] as its use is vague and unclear. As Dr. John Stackhouse explained in a recent article:

> Clause (a)(iv) carries the loaded term "respect for." There is widespread and dangerous confusion in Canada today about what "respect" entails. In classic terms of liberal democracy, I can think you are badly wrong about an important issue. I can say so. I can campaign to have your wrong views replaced in law by my own.
>
> And I can do all that while respecting you as a person (in terms of your civil rights) and as a fellow citizen (in terms of co-operating with you as you participate similarly in public debate).
>
> What I do not have to do is respect your actual views. I can think they are silly, stupid, or even harmful, and that is perfectly all right. We guard free speech precisely so that public discussion can sort out bad ideas from good ones, and we have schools precisely so that students learn to subject all ideas to rational scrutiny.
>
> So if Bill 18 merely means students must respect each other as fellow human beings, fellow citizens, and fellow participants in the educational enterprise, that's fine. But Bill 18 might entail that "respect" includes speaking and acting as if all "sexual orientations and gender identities" are equally good, and that any moral or psychological questioning of them would be disrespectful and therefore forbidden.[60]

"There is an obvious constitutional violation in forcing religiously based schools to establish policies not endorsed by the faith community, parents or students, or to implement a curriculum that disrespects their beliefs."

If Bill 18 stands, this section should be amended to clarify what the legislator intends to mean and what it requires of students.

### 8. Political mandate and purpose of Gay-Straight Alliances

Gay-Straight Alliances have an inherently political nature to them. As has been pointed out in the media, subsection (b) of the Student Activities and Organizations amendment "does not discuss a 'gay-straight dialogue group' or a 'gay-straight mutual education society,' but a 'gay-straight *alliance*.'"[61]

There are conceptual and inherent differences between these three types of student associations. "Alliances are formed in order to press political agendas, and a 'gay-straight alliance' exists for the single purpose of normalizing homosexuality."[62]

As noted on the GSANetwork website, one of the primary purposes of GSAs are to "educate the school community about homophobia, transphobia, gender identity,

and sexual orientation issues."[63] Teaching students about respecting each other based on their inherent dignity and value as human beings, as well as about sexuality, can and should be taught by schools, at age appropriate times and based on the values or beliefs of their tradition. Teaching students to respect each can be done without violating the religious freedoms of schools and families.

As noted by one academic,

> Requiring a conservative Christian school to accept such a group with such a purpose is like forcing them to allow a Buddhist-Christian Alliance that would declare the equal religious worth of Buddhism and Christianity. Some people might think that such would be a very good thing, but one can hardly expect traditional Christians (or Buddhists) to welcome it. In fact, this legislation amounts to compelling these schools to allow "Anti-Mennonite Alliances" to form.[64]

Further, legislating specific groups that must be part of the school environment prohibits schools and boards from using their discretion to determine which activities take place on school property and during school hours. What legal liability will accrue to schools, boards or the ministry should a mandated club – or a club for which the administration is convinced it has no option but to permit – encounters a problem that engenders potential legal consequences?

## D. Duty to Report Bullying and "Unacceptable Conduct"

### 1. How does Bill 18 change existing staff reporting requirements?

Bill 18 amends the definition of "unacceptable conduct" in the Reporting section of the *The Public Schools Act*. Subsection 47.1.1(1) of the Act sets out that staff or persons who have care of pupils must "if they become aware that a pupil of a school may have engaged in unacceptable conduct while at school, at a prescribed school-approved activity or in other prescribed circumstances, report the matter to the principal of the school as soon as reasonably possible…" [our emphasis][65]

Section 6 of Bill 18 amends the following definition:

| Current definition of "unacceptable conduct" | Bill 18 amended definition of "unacceptable conduct" |
|---|---|
| 47.1.1(6) In this section, "unacceptable conduct" means | 47.1.1(6) In this section, "unacceptable conduct" means |
| (a) abusing another pupil physically, sexually or psychologically, verbally, in writing or otherwise; or | (a) abusing another pupil physically, sexually or psychologically, verbally, in writing or otherwise; or |
| (b) repeated or deliberate bullying of another pupil that is of a serious nature, including cyberbullying as defined in subsection 47.1(2.1).[66] | (b) bullying by another pupil. [67] |

Bill 18 strikes out subsection (b), replacing it with simply "bullying by another pupil." This is a significant amendment as it removes the requirement that acts become 'bullying' only when they are repeated, deliberate or of a serious nature. The current

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definition prevents one-off comments, and likely unintentional behaviours, from being captured as bullying.

There is also a new reporting requirement for awareness of pupils engaged in cyberbullying or of pupils negatively affected by cyberbullying.[68]

### 2. What about reporting to parents of children exhibiting bullying behaviours?

Bill 18 appears to miss an opportunity to actually improve current reporting requirements. As *The Public Schools Act* currently stands, only parents or guardians of bullied students are notified.[69] Parents of the child exhibiting bullying behaviours should also be notified. This type of amendment was made in Ontario, via Bill 13, the *Accepting Schools Act*.[70]

Parents of children exhibiting bullying behaviours should have a right to be notified of bullying events, in order to discuss the circumstances and behaviours with their children and address them as appropriate.

## E. Suspension and Expulsion

### 1. How have the suspension and expulsion provision of the Act been amended?

In a minor amendment, the suspension and expulsion provision would state that a board may suspend or expel a student who is found "guilty of conduct injurious to the school environment."[71] The provision currently reads "guilty of conduct injurious to the welfare of the school."[72] [our emphasis]

As already noted above, the term "school environment" is not defined in *The Public Schools Act*, nor has it been defined legislatively or jurisprudentially. What is intended by the legislator with this amendment is unclear.

## F. Bullying Education and Prevention

### 1. Alternatively, how could the issue of bullying be addressed in schools?

The remedy for bullying in schools is not Gay-Straight Alliance clubs, but rather proper character formation. Educators can't do it alone, and their role is necessarily limited, and secondary. Parents, churches and community members need to be engaged. The foundation of our free and democratic society includes respect for all persons. This foundation needs to be present in our education system.

It is not just respect for LGBT students that needs to be part of a character education in Manitoban schools. Instruction and modelling of respect for all students is required of the curriculum and the classroom environment. This does not mean all students must be forced to be friends, or agree with one another on all points. And, it does not mean that there can't be debate or constructive disagreement.

It does mean that bullying students on the basis of sexual orientation, race, religious beliefs, national or cultural origin or the several other prohibited grounds of discrimination under the *Charter* or the *Human Rights Code* should not be permitted, either by other students, teachers, administrators or those developing the curricula.

"This foundation of our free and democratic society includes respect for all persons. This foundation needs to be present in our education system."

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### 2. Won't teaching children about sexuality and bullying from a faith-based perspective lead to discrimination?

No, and history proves otherwise.

Canada has developed with a unique cultural and constitutional context. Constitutional protection was given to minority Protestant schools in Quebec and minority Catholic schools in Ontario. In Ontario, Protestant schools were made available for attendance by any student. Our strong heritage as a pluralist democracy, grounded in Christian principles and practices, has created a society of acceptance – and tolerance in disagreement – that is the envy of much of the world and has made a home for people with a variety of religious beliefs and expressions.

Canada's longstanding tradition of education from a Judaeo-Christian foundation has bred a vibrant, multicultural nation known for its acceptance of others and tolerance for differing opinions and religious beliefs. Religious schools can be trusted to put the best interest of their students first, in the context of a plural society of individuals who live peaceably and espouse a variety of beliefs.

## G. Position of the EFC

### 1. What is the EFC's position on Bill 18, The Safe and Inclusive Schools Act?

The purpose of the bill is laudable. Attempting to address an issue as complex as bullying by legislative force is debatable. And the approach adopted by Bill 18 lacks sensitivity, flexibility, and a full consideration of proper application of the Canadian *Charter of Rights and Freedoms* and the Manitoba *Human Rights Code*. Unless the bill is amended, it is likely that the province will have years of expensive, tax-payer funded litigation ahead of it.

Since Bill 18 was introduced, it has been criticized by many Manitobans, including members of the Jewish, Muslim, Sikh, Coptic, Evangelical Christian and Catholic communities.[73] This should give reason to pause. Manitoba is a diverse province, and each citizen – and identifiable minorities that have suffered discrimination and bullying themselves – deserves to have their concerns heard and addressed by their elected officials. To attempt to force beliefs upon one group or any group is contrary to the very spirit of pluralism and multiculturalism.

Many families feel as though the proposed policies are being legislated and implemented in a public relations campaign that leaves no room for their input or consideration for their constitutional rights to individual and corporate religious belief.

A more democratic and inclusive solution, one that invites conversation with representatives from a number of cultural, religious and other identifiable groups, should be pursued.

Manitoban children, parents and teachers expect to live in a peaceful, tolerant province that respects their sincerely held beliefs, their inclusion in a plural, multicultural society and to have hard-earned tax dollars spent in the most appropriate and considerate fashion possible. They deserve nothing less.

"A more democratic and inclusive solution, one that invites conversation with representatives from a number of cultural, religious and other identifiable groups, should be pursued."

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