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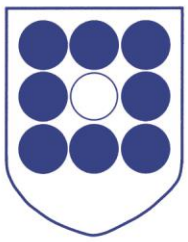

ASSOCIATION CANADIENNE DES LIBERTES CIVILES

Submission to the Committee on Institutions:

Special consultations and public hearings on Bill 59, *An Act to enact the Act to prevent and combat hate speech and speech inciting violence and to amend various legislative provisions to better protect individuals*

Canadian Civil Liberties Association
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Canadian Civil Liberties Association (CCLA)

The Canadian Civil Liberties Association (CCLA) is a national, non-profit, non-partisan, independent, non-governmental organization supported by over six thousand individuals and organizations from all walks of life. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties.

The CCLA's major objectives include the promotion and legal protection of individual freedom and dignity. For the past 51 years, the CCLA has worked to advance these goals, regularly appearing before legislative bodies and all levels of court. The CCLA has been a staunch defender of fundamental freedoms including freedom of expression, the right to equality, and the right to be free from discrimination. It is in this capacity that we make submissions to this Committee with respect to Bill 59. Our submissions below address the following two issues: (1) concerns with attempts to regulate and prohibit 'hate speech' based on the inherent vagueness of the concept; and (2) the impact of proposed amendments on educational institutions.

Part 1: Act to Prevent and Combat Hate Speech and Speech Inciting Violence

Part 1 of Bill 59 seeks to enact a new law targeting hate speech, and speech inciting violence. Some of the proposed measures raise significant civil liberties and human rights concerns, notwithstanding what may be an attempt to protect vulnerable and marginalized populations. In particular, the proposed legislation restricts freedom of expression and may chill vital discussion and debate on matters of public and political importance. Such restrictions are incompatible with democratic values and appear on their face to be in contravention of both the Québec *Charter of human rights and freedoms* ("*Charter")* and the *Canadian Charter of Rights and Freedoms ("Canadian Charter")*.

Concerns and Challenges with Restricting 'Hate Speech'

The Concept of Hate Speech is Subjective and Open to Varying Interpretations

Hate speech is already subject to legal restriction throughout Canada; there are *Criminal Code* provisions[1] that address the issue, as well as several provincial human rights statutes that allow for complaints and remedial action in the case of promoting hatred[2]. The CCLA has long expressed concerns about both of these approaches for dealing with the complex social problem

[1]Section 319(1) of the *Criminal Code,* RSC 1985, c. C-46, makes it an offence to incite hatred against an identifiable group, while s. 319(2) makes it an offence to willfully promote hatred against an identifiable group.

[2] Alberta, British Columbia, the Northwest Territories and Saskatchewan all have human rights codes that include a prohibition on the promotion of hatred or contempt against specific identifiable groups. See *Alberta Human Rights Act,* RSA 2000, c. A-23.5, s. 3(1)(b); British Columbia, *Human Rights Code,* RSBC 1996, c. 210, s. 7(1)(b); Northwest Territories, *Human Rights Act,* SNWT 2002, c. 18, s. 13(1)(c); *Saskatchewan Human Rights Code,* SS 1979, c. S-24.1, s. 14(1)(b). The *Canadian Human Rights Act,* RSC 1985, c. H-6, formerly contained a similar provision in s. 13, which was recently repealed (2013, c. 37, s. 2).

of hatred and discrimination. In our view, a mature democracy does not achieve equality by limiting freedom of expression.

The CCLA accepts that there should be legal consequences for speech that incites violence. While we must interpret this language narrowly to avoid unreasonably restricting free expression, incitement to violence provides a relatively concrete, reasonable, and tangible restriction on expressive activity. To reiterate, the CCLA does not generally oppose measures to curtail speech that incites violence, although it is worth noting that this activity is already restricted through the criminal law. The Committee and the National Assembly should consider whether a compelling case has been made establishing a need for the *Commission des droits de la personne et de la jeunesse ("Commission des droits")* to exercise jurisdiction over speech that incites violence, which already falls under the jurisdiction of law enforcement authorities. However, the CCLA's core concerns about Bill 59 revolve around the provisions as applied to 'hate speech'. These will be the focus of our comments.

In contrast to the tangible and concrete understanding of speech that incites violence, hate speech is notoriously difficult to define. The Supreme Court of Canada addressed the meaning of hate speech in the context of the *Canadian Human Rights Act's* hate speech provisions in 1990.[3] In *Canada (Human Rights Commission) v. Taylor*,[4] the Court attempted to define hate speech, referring to "unusually strong and deep-felt emotions of detestation, calumny and vilification".[5] Quite recently, the Supreme Court upheld a hate speech provision contained in the *Saskatchewan Human Rights Code*.[6] It is significant, however, that the Court read down the statutory definition and affirmed that the label of hate speech applies only to the most extreme and offensive types of expression – those which convey emotions of detestation and vilification.[7] The proposed legislation before this Committee contains no statutory definition of hate speech and it is likely that, in order to guard against potential inconsistency with constitutional standards, the *Whatcott* definition will be used in interpreting the relevant provisions.

The *Whatcott* standard holds that hate speech includes only the most extreme forms of expression that have "the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground."[8] The Court is clear that legislation prohibiting hate speech does not protect groups from expression that debates the merits of reducing their rights, but only expression that might expose them to hatred in the context of this kind of debate. The Court also noted that the relevant question in determining whether something constitutes hate speech is whether a reasonable person, aware of the context and circumstances of the case, would view the expression as exposing a protected group to hatred. Finally, courts or tribunals

[3] Recently repealed, *supra* note 2.
[4] [1990] 3 S.C.R. 892 [*Taylor*].
[5] *Ibid.*, p. 928.
[6] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [*Whatcott*].
[7] *Ibid.*, para. 41.
[8] *Ibid.*, para. 48.

tasked with adjudicating cases under hate speech provisions should be focused on the effect of the expression at issue, rather than the offensiveness of the content *per se.*

While the Supreme Court in *Whatcott* affirmed that some restrictions on hate speech do not violate the *Canadian Charter*, the CCLA does not believe that the Court's definition provides a clear rule that can be followed by individuals and interpreted consistently by our tribunals and courts. The judicial definition of hate speech is substantially unchanged 25 years post-*Taylor*, but there remains widespread disagreement by judges and tribunal members about when a particular instance of expression crosses the line.[9] Moreover, the breadth of prohibited grounds of discrimination and the public listing of those found to have contravened the provisions distinguish the proposed legislation from the Saskatchewan example and would likely be considered highly relevant factors in a Court's evaluation of any constitutional challenge.

The Ground of Discrimination on the Basis of Political Convictions is Open to Abuse

Problems of interpretation and application similar to those seen in other jurisdictions are very likely to be encountered with the new law proposed by Bill 59. Indeed, the concern that the hate speech provision might unintentionally capture valuable expressive activity is heightened in light of the breadth of groups that are protected against discrimination under s. 10 of the *Charter*. Under the *Charter*, political conviction is a prohibited ground of discrimination, but when applied to the prohibition on hate speech, this ground has significant potential to restrict and chill expression that may be vital to meaningful democratic dialogue and debate.

One academic who has examined the Bill notes that expressions of deep hatred for Nazis could run afoul of the provisions.[10] To take a more contemporary example, recent statements made by political leaders that denounce and comment on the evil of the group ISIS might also constitute hate speech under the provisions of Bill 59. Indeed, speaking out strongly against any group that has political convictions that are exclusionary, confined to a membership based on personal characteristics, or inherently discriminatory could itself be prohibited by the proposed legislation.

The ground of political conviction is not the only characteristic where the hate speech provisions could cause concern, but it shows starkly what might be restricted by this law for no compelling purpose. The ground of political conviction could easily be used to stifle and silence individuals critical of the s*tatus quo* or of mainstream political leaders. Even if the National Assembly

[9] It is significant, for example, that in the *Whatcott* matter the Tribunal that first heard the complaint found that all of the flyers that Mr. Whatcott had distributed violated the relevant provisions of the *Saskatchewan Human Rights Code.* The Court of Queen's Bench agreed, while the Court of Appeal found that none of the flyers were hate speech. Finally, the Supreme Court of Canada found that two of the flyers violated the law, while two did not. Similar disagreements arose among tribunals and courts in *Lund v. Boissoin*, 2007 AHRC 11, aff'd [1009] A.J. No. 1345 (Alta. Q.B.), aff'd [2012] A.J. No. 1036 (Alta. C.A.) and *Owens v. Saskatchewan (Human Rights Commission),* [2002] S.J. No. 732 (Sask. Q.B.), rev'd [2006] S.J. No. 221 (Sask. C.A.).

[10] Léonid Sirota, "The harm in Quebec's hate speech bill" (2015) National Magazine, online: <http://www.nationalmagazine.ca/Blog/June-2015/The-harm-in-Quebec-s-hate-speech-bill.aspx>.

chooses to proceed with enacting a prohibition on hate speech, it should have no application to speech addressing political convictions, and careful review should be undertaken in examining how the prohibition could be applied in the cases of other grounds of discrimination.

A Human Rights Tribunal is Ill-Suited to the Task of Policing Expression

As noted above, there are interpretive problems with hate speech provisions and the genuine risk that free expression will be unreasonably restricted. It is of no comfort that s. 2 of the proposed Act states that "the purpose of these prohibitions is not to limit the dissemination of such speech intended to legitimately inform the public". Even if expressive activity is ultimately found not to violate the law, the investigation and process associated with a hate speech complaint can have a significantly chilling impact. In a review of the regulation of hate speech under the *Canadian Human Rights Act*, Professor Richard Moon pointed out how time-consuming investigation of these alleged contraventions may be and the impact that even unsuccessful complaints may have in chilling expression.[11]

To provide but one example, in the *Whatcott* matter, the complaints initiated against Mr. Whatcott were made in 2001-2002, and the Tribunal's decision was not released until mid-2005. The Supreme Court of Canada's decision in Mr. Whatcott's case was released in 2013. After eleven years, and despite a Supreme Court decision that found some of Mr. Whatcott's flyers to constitute hate speech, the contents of those flyers were appended to a Supreme Court decision and available to anyone with an Internet connection. It is highly questionable whether this is an effective and efficient way of dealing with offensive and hateful speech.

The *Criminal Code* already prohibits the wilful promotion of hatred.[12] Although the CCLA does not support the use of the criminal law to deal with hateful expression, the most hateful and potentially harmful forms of expression can be dealt with through the *Criminal Code* if necessary. As long as this tool is available, creating provisions with lesser due process protections for those alleged to have engaged in hate speech is of significant concern.

The *Criminal Code* provisions restricting or limiting hate speech also provide significant procedural protections to help guard against their abuse or misuse. The consent of the Attorney General must be obtained to lay charges[13] and once an individual is charged, he or she obtains some of the procedural benefits of the criminal law including the right to silence, the right to be represented by counsel, the presumption of innocence, and the criminal burden of proof (i.e. proof beyond a reasonable doubt). There is also a *mens rea* or intent requirement that is part of the criminal provisions, and defences are available. By contrast, the proposed hate speech restrictions contained in Bill 59 would not be accompanied by these protections. The identity of

[11] *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights act and the Regulation of Hate Speech on the Internet*, Professor Richard Moon, October 2008 [the "Moon Report"], at p. 37-39.
[12] *Criminal Code*, R.S.C. 1985, c. C-46, s. 319(2).
[13] *Ibid.*, s. 319(6).

the complainant will be protected, the lower civil standard of proof will apply, and there appear to be no defences. Despite the lesser procedural protections, the Tribunal's powers are substantial and include some highly punitive aspects. Under the new regime, the Commission is tasked with publicly listing those who have been found to contravene section 2. This listing practice is novel and results in cascading consequences not only for the listed person, but for institutions with which s/he associates. The CCLA's significant concerns about the listing provision are addressed further below.

There is a strong argument that human rights commissions and tribunals are not well placed to address hate speech concerns. As Prof. Moon notes in his report, while human rights tribunals generally have to interpret rights broadly, to provide the greatest protection against discrimination, the interpretation of hate speech has necessarily been narrow, in order to meaningfully preserve free expression.[14] This can place tribunals in the awkward position of rejecting hate speech complaints brought by equality-seeking groups on the basis that the expression at issue, while extremely offensive and degrading, does not rise to the high threshold reserved for hate speech.

The CCLA's respectful view is that the new hate speech provisions are not necessary and could significantly – and negatively – alter the role currently played by the *Commission des droits.* We urge against enacting this legislation in its current form, but do support provisions that would allow the Commission to play a preventive and educational role with respect to speech that is discriminatory, demeaning or hateful. If the law is enacted in its current form, the CCLA also proposes that s. 18, which provides for inclusion of certain information in the report produced by the Commission under s. 73 of the *Charter,* also include the number of files submitted to the Human Rights Tribunal in which a contravention of section 2 has been found to have occurred, along with data related to any subsequent reviews or appeals by a court.

Part 2: Amendments to Better Protect Individuals

Part 2 of Bill 59 contains a number of amendments to existing legislation, including changes to the law related to child protection, marriage by minors and educational institutions. The CCLA's submissions before the Committee will be focused on the changes to legislation governing educational institutions.

As noted above, the CCLA is concerned about the public listing of those who have been found to breach the hate speech prohibition. While the CCLA believes firmly in the open courts principle, and that judgments coming from the Tribunal should presumptively be public, the bare listing of names seems to serve no purpose other than to humiliate, name, shame and engage in ongoing punishment. Shaming individuals for offensive or hurtful speech can be effective if it comes from the broader populace, but is problematic when mandated by the state. Furthermore, there is

[14] Moon Report, *supra* note 11 at 35-6.

a risk that individuals with the same or similar names may be negatively affected by the listing procedure.

Changes proposed to the *General and Vocational Colleges Act,* the *Act Respecting Private Education,* and the *Education Act* are linked with the hate speech provisions and, in particular, the listing requirement. Effectively, the changes allow inquiries by educational institutions into "any behaviour that could reasonably pose a threat for the physical or emotional safety of the students" and create a presumption that a person whose name is on the list maintained by the *Commission des droits,* is engaged in such behaviour.

The repercussions of listing for the individual (and any educational institution that they may attend) are staggering. In the case of a college, where the institution has "tolerated behavior that could reasonably pose a threat for the physician or emotional safety of the students," the Minister could assume administration of the College or could withhold or cancel a subsidy for the college. Similar rules are in place for private educational institutions. This suggests that students who are listed will no longer be permitted to attend educational institutions, unless the institution is prepared to put itself in a very precarious situation. This approach would deny educational opportunities to those who may be most in need of them. These provisions should be eliminated from the Bill.

Conclusion & Recommendations

The CCLA has serious concerns about Bill 59 in its current form, and recommends elimination of references to hate speech and listing. The restriction on hate speech risks chilling legitimate and valuable expression and listing provisions are punitive and counter-productive. While the prohibition on speech that incites violence is not problematic *per se,* the CCLA recommends that the Committee consider whether such a prohibition is necessary in light of existing laws that ban this kind of speech.