



May 10, 2017

Via email: [lcjc@sen.parl.gc.ca](mailto:lcjc@sen.parl.gc.ca)

The Honourable Bob Runciman  
Chair  
Standing Senate Committee on Legal and Constitutional Affairs  
The Senate of Canada  
Ottawa, ON K1A 0A4

Dear Senator Runciman:

**RE: Bill C-16, An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity or expression)**

I write on behalf of the Canadian Bar Association (CBA) to urge Senators to pass Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*, without amendment. The CBA is a national association of 36,000 lawyers, Québec notaries, law professors and students, with a mandate to promote improvements in the law and the administration of justice.

The CBA has vigorously advocated for amendments to laws and policies to protect transgender people from discrimination and hate crimes. Indeed, in 2010, the CBA's governing Council urged the federal, provincial and territorial governments to amend laws to ensure equality for all regardless of gender identity or gender expression.<sup>1</sup>

### **Gender Identity and Gender Expression in Canadian Human Rights Law**

Bill C-16 represents a long overdue step to include these protections expressly in areas of federal jurisdiction. This is not a bold move, nor should it be controversial. The Canadian Human Rights Commission takes the position that "the Commission, the Tribunal, and the courts view 'gender identity' and 'gender expression' as protected by the *Canadian Human Rights Act*."<sup>2</sup> Statutory protections on one or both of these grounds are already available in all but one territory (Yukon).<sup>3</sup> In all jurisdictions, protections for transgender persons are implicit in the law.

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<sup>1</sup> Equality for All Regardless of Gender Identity and Gender Expression, [CBA Resolution 10-01-A](http://ow.ly/ItLy309KVzU) (<http://ow.ly/ItLy309KVzU>)

<sup>2</sup> [Chief Commissioner speaks on the inclusion of Gender Identity as a ground of discrimination](http://ow.ly/4SIZ309KVx0) (<http://ow.ly/4SIZ309KVx0>)

<sup>3</sup> On April 25, 2017, the Yukon government introduced legislation to include gender identity and gender expression as prohibited grounds of discrimination under the Human Rights Act.

Bill C-16 would amend the *Canadian Human Rights Act (CHRA)* to include gender identity or gender expression as prohibited grounds of discrimination. Although these rights are already acknowledged in Canadian law, the significance of this amendment cannot be understated. Human rights legislation is a powerful vehicle to guide understanding and education about the rights of all Canadians, to redress harms caused by harassment and discrimination on prohibited grounds, and to advance a culture of inclusion and respect. The *CHRA* is dedicated “to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices....”<sup>4</sup> The inclusion of gender identity and gender expression in the Act will send an important signal to all that transgender persons are an integral part of our vision for a more tolerant and inclusive society.

### **Hate Crimes and the Transgender Community**

Bill C-16 would also amend the *Criminal Code* to include gender identity or gender expression in the definition of hate crimes and as an aggravating factor in sentencing. Hate crimes target both individuals and their communities. Canada does not track crimes targeting transgender persons. What we do know is that hate crimes motivated by sexual orientation are more likely than other hate crimes to be violent.<sup>5</sup> The Toronto Police report that hate crimes against the LGBTQ community increased in 2015 to make up 22% of all occurrences.<sup>6</sup> The effects on the transgender community are pernicious, contributing to widespread fears of safety in public places and devastatingly high rates of depression and suicidal ideation. Amending the *Criminal Code* will not, on its own, put an end to hate-mongering, although we expect it will have some deterrent effect. It will send an important signal to the transgender community that Canadians are committed to building a safer society for all.

The substance of Bill C-16 has been debated in Parliament for far too long.<sup>7</sup> Members of Parliament, Senators and dozens of witnesses, including the CBA, have all had opportunities to be heard in the long saga of parliamentary efforts to provide legal protections for transgender persons. There are two arguments against these legislative proposals we would like to specifically address:

- The Bill will further endanger women and children
- The Bill will impede freedom of expression

### **C-16 Will Not Further Endanger Women and Children**

From the time these or similar amendments were first proposed it has been argued that they would undermine the security and privacy of women and children in public toilets, locker rooms or women’s shelters. The issue has been fully explored in Parliament. It has no legal, scientific or factual foundation.

Violence against women and girls remains a serious problem in Canada. Most (84%) police-reported violence against women is committed by men known to them (intimate partners, acquaintances and friends, and family members).<sup>8</sup> Of the many risk factors identified by research, using a public washroom is not one of them. The same is true for girls. Most (90%) police-reported violence against girls is committed by family members, acquaintances, friends and authority figures.<sup>9</sup>

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<sup>4</sup> R.S.C., 1985, c. H-6, s. 2.

<sup>5</sup> Mary Allen, “[Police-reported hate crime in Canada, 2013](http://ow.ly/9yMw309KVEt)” (<http://ow.ly/9yMw309KVEt>) *Juristat*, 35:1.

<sup>6</sup> [Toronto Police Service 2015 Annual Hate/Bias Crime Statistical Report](http://ow.ly/CD8e309KVMF). (<http://ow.ly/CD8e309KVMF>). This report aggregated occurrences based on sex and sexual orientation; occurrences against transgender persons are included in the “sex” category.

<sup>7</sup> Julian Walker, *Legislative Summary of Bill C-16*, (<http://ow.ly/Q6Pd309KVUF>). Library of Parliament, 2016.

<sup>8</sup> [Measuring violence against women: Statistical trends](http://ow.ly/pIdL309KW0v) (<http://ow.ly/pIdL309KW0v>)

<sup>9</sup> *Ibid.*

Sadly, not all violence against women and girls is reported. This problem resonates with the transgender community, where fear of harassment by law enforcement is significant. Important research on trans-Ontarians by Trans Pulse found that two-thirds avoided public spaces, with washrooms being the most commonly avoided.<sup>10</sup> The vulnerable people this Bill will protect are the transgender individuals who fear for their safety in public spaces because of the way they are perceived by others. The Senate has heard compelling testimony about the deeply harmful, lifelong effects of actions based on perception, unfounded fears and stereotypes.<sup>11</sup>

### **C-16 Will Not Impede Freedom of Expression**

Recently, the debate has turned to whether the amendments will force individuals to embrace concepts, even use pronouns, which they find objectionable. This is a misunderstanding of human rights and hate crimes legislation.

### **Hate Crimes and Freedom of Expression**

For hate crimes, Bill C-16 adds “gender identity or expression” to the identifiable groups protected from those who advocate genocide, publicly incite hatred likely to lead to a breach of the peace or wilfully promote hatred against them. The Supreme Court of Canada found subsection 319(2) (wilful promotion of hatred) to be

...a narrowly confined offence which suffers from neither overbreadth nor vagueness.... the provision possesses a stringent *mens rea* requirement, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such, and is also strongly supported by the conclusion that the meaning of the word “hatred” is restricted to the most severe and deeply-felt form of opprobrium. Additionally, however, the conclusion that s. 319(2) represents a minimal impairment of the freedom of expression gains credence through the exclusion of private conversation from its scope, the need for the promotion of hatred to focus upon an identifiable group and the presence of the s. 319(3) defences.<sup>12</sup>

For those compelled to speak and act in truth, however unpopular, truth is included in those defences. Nothing in the section compels the use or avoidance of particular words in public as long as they are not used in their most “extreme manifestations” *with the intention* of promoting the “level of abhorrence, delegitimization and rejection”<sup>13</sup> that produces feelings of hatred against identifiable groups.

Those concerned that they could be criminalized for their repugnant or offensive ideas fail to understand a crucial distinction in the law. As the Supreme Court of Canada has explained:

The distinction between the expression of repugnant ideas and expression which exposes groups to hatred is crucial to understanding the proper application of hate speech prohibitions. Hate speech legislation is not aimed at discouraging repugnant or offensive ideas. It does not, for example, prohibit expression which debates the merits of reducing the rights of vulnerable groups in society. It only restricts the use of expression exposing them to hatred as a part of that debate. It does not target the ideas, but their mode of expression in public and the effect that this mode of expression may have.<sup>14</sup>

<sup>10</sup> [Trans-PULSE-E-Bulletin-8](http://ow.ly/S5xV309KW7S) (<http://ow.ly/S5xV309KW7S>)

<sup>11</sup> [Bill to Amend—Second Reading—Debate Continued](http://ow.ly/JMsg309KWbs) (<http://ow.ly/JMsg309KWbs>)

<sup>12</sup> [R. v. Keegstra, \[1990\] 3 SCR 697 at 785-86, 1990 CanLII 24 \(SCC\)](http://canlii.ca/t/1fsr1) (<http://canlii.ca/t/1fsr1>)

<sup>13</sup> [Saskatchewan \(Human Rights Commission\) v. Whatcott, \[2013\] 1 SCR 467, 2013 SCC 11 \(CanLII\)](http://canlii.ca/t/fw8x4) (<http://canlii.ca/t/fw8x4>) at para 57.

<sup>14</sup> *Ibid*, at para 51

The purpose of hate propaganda laws is to give voice to those who have been silenced.

[H]ate propaganda opposes the targeted group's ability to find self-fulfillment by articulating their thoughts and ideas. It impacts on that group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the group so that their reply will be ignored: it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.<sup>15</sup>

### **Human rights legislation and freedom of expression**

For human rights legislation, the CHRA prohibits denying or differentiating adversely in the provision of goods, services, facilities or accommodation customarily available to the general public, commercial or residential accommodation, or, employment on the basis of a prohibited ground of discrimination. The Act applies to federal and federally regulated entities.

The amendment to the CHRA will not compel the speech of private citizens. Nor will it hamper the evolution of academic debates about sex and gender, race and ethnicity, nature and culture, and other genuine and continuing inquiries that mark our common quest for understanding of the human condition. The amendment will, however, make explicit the existing requirement for the federal government and federally regulated providers of goods and services to ensure that personal information, like sex or gender, is collected only for legitimate purposes and not used to perpetuate discrimination or undermine privacy rights. In federally regulated workplaces, services, accommodation, and other areas covered by the *CHRA*, it will constrain unwanted, persistent behaviour (physical or verbal) that offends or humiliates individuals on the basis of their gender identity or expression.

### **C-16 Advances Equality in Canada**

Bill C-16 will provide tangible protections for one of Canada's most vulnerable minorities. It will contribute to broader public awareness of gender diversity issues. It will advance equality in Canada.

Former Supreme Court of Canada Justice, the Hon. Peter Cory, noted:

Difficult as the goal of equality may be it is worth the arduous struggle to attain.... It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned.<sup>16</sup>

The CBA believes there is a compelling need to bring clarity and public acknowledgement of transgender rights to federal legislation. We encourage Senators to pass this Bill without amendment.

Sincerely,

*(original signed by René J. Basque)*

René J. Basque, c.r./Q.C.

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<sup>15</sup> *Keegstra*, at 763.

<sup>16</sup> [Vriend v. Alberta, \[1998\] 1 SCR 493, at para. 68-69, 1998 CanLII 816 \(SCC\)](http://canlii.ca/t/1fqt5) (<http://canlii.ca/t/1fqt5>)