THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

Office of the President
Cabinet de la présidente

March 11, 2015

Via email: claude.carignan@sen.parl.gc.ca; jim.cowan@sen.parl.gc.ca; joan.fraser@sen.parl.gc.ca; martin@sen.parl.gc.ca; elizabeth.marshall@sen.parl.gc.ca; jim.munson@sen.parl.gc.ca

The Honourable Claude Carignan, P.C.
Leader of the Government in the Senate

The Honourable James S. Cowan
Leader of the Opposition in the Senate

The Honourable Joan Fraser
Deputy Leader of the Government in the Senate

The Honourable Yonah Martin
Deputy Leader of the Opposition in the Senate

The Honourable Elizabeth Marshall
Government Whip

The Honourable Jim Munson
Opposition Whip

Dear Senators:

Re: Reject Amendment to Bill C-279, *An Act to amend the Canadian Human Rights Act* and the *Criminal Code* (gender identity)

I am writing on behalf of the Canadian Bar Association (CBA). The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students, across Canada. Our primary objectives are to uphold the Rule of Law, improve the administration of justice, and promote equality in the law.

I am writing to express the CBA's dismay and concern with an amendment to Bill C-279 passed by the Senate Committee on Constitutional and Legal Affairs and reported on February 24, 2015.[1] We oppose this amendment because it undermines the Bill's intent to create greater awareness of and compliance with the right of all people in Canada to be free from discrimination, harassment, and violence because of gender identity. It threatens the human rights of all people using sex or gender specific services, spaces and institutions in federal jurisdiction. We urge you to reject the amendment adding a new sub-section 15(1)(f.1) to the *Canadian Human Rights Act*.

Background

Bill C-279 would add explicit reference to gender identity as a prohibited ground of discrimination in the *Canadian Human Rights Act* and to the hate crimes provisions of the *Criminal Code*.

In its current and prior iteration (Bill C-389), the bill has been passed by the House of Commons twice. It was reported by the Senate Standing Committee on Human Rights in June 2013, without

1 Twenty-Fourth Report of The Standing Senate Committee on Legal and Constitutional Affairs, February 24, 2015, www.parl.gc.ca/Content/SEN/Committee/412/lcjc/rep/rep24feb15-e.htm retrieved March 2, 2015.

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

amendment. Parliament's most recent prorogation necessitated the bill's reintroduction at first reading in October 2013.

The CBA recognizes the pervasive discrimination, harassment and hate-based violence that trans (transgender, transsexual, two-spirit, and gender non-conforming) people in Canada are subjected to because of their gender identity and its expression, and has strongly supported Bill C-279. This support has taken the form of:

- CBA Resolution 10-01-A - Equality for All Regardless of Gender Identity and Gender Expression,[2]
- Resolution 11-04-A - Action to End Homophobic and Transphobic Bullying,[3]
- a Feb 2013 letter to MPs[4] in support of the bill,
- a September 2012 submission to Passport Canada on gender recognition on ID for trans people,[5]
- a March 2012 submission to the Minister of Public Safety to address restrictions on trans travellers,[6]
- and testimony before the Senate Committee on Human Rights.[7]

Problematic Amendment to C-279

On February 25, 2015, the Senate Committee for Legal and Constitutional Affairs passed an amendment, moved by the Honourable Senator Plett, on a slim 6-4 vote:

> 3. New Clause 2.1, page 2: Add after line 14 the following:
>
> "2.1 Subsection 15(1) of the Act is amended by striking out "or" after paragraph (f) and by adding the following after that paragraph:
>
> (f.1) in the circumstances described in section 5 or 6 in respect of any service, facility, accommodation or premises that is restricted to one sex only — such as a correctional facility, crisis counselling facility, shelter for victims of abuse, washroom facility, shower facility or clothing changing room — the practice is undertaken for the purpose of protecting individuals in a vulnerable situation; or"[8]

Senator Plett's rationale for this amendment[9] positioned trans people (and trans women in particular) as a threat to others in sex segregated spaces, and users of sex segregated spaces as

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2 www.cba.org/CBA/resolutions/pdf/10-01-A.pdf

3 www.cba.org/CBA/resolutions/pdf/11-04-A.pdf

4 www.cba.org/cba/submissions/pdf/13-15-eng.pdf

5 www.cba.org/CBA/submissions/2012eng/12_53.aspx

6 www.cba.org/CBA/submissions/2012eng/12_18.aspx

7 Manitoba, Nova Scotia, Newfoundland & Labrador, Northwest Territories, Ontario, Prince Edward Island and Saskatchewan have explicit human rights protections for gender identity (and gender expression in some cases). For over 20 years courts and tribunals in all provinces and territories and at the federal level have consistently recognized implicit human rights protections for gender identity.

8 See footnote 1, above.

9 http://senparlvu.parl.gc.ca/Guide.aspx?viewmode=4&categoryid=-1&eventid=15979&Language=E#

being vulnerable. Senator Plett described trans women as biological males, which erases and delegitimizes their gender identity and expression. Sadly, this delegitimization is at the root of the discrimination, harassment and violence that trans people face, not only in sex segregated spaces, but in employment, housing and in the community. This is illustrated in the Ontario Human Rights Tribunal decision of *XY v. Ontario*:[10]

> [171] First, giving transgendered persons an official government document with a sex designation which is dissonant with their gender identity conveys the message that their gender identity in and of itself is not valid. This message, in turn, is the very same message that lies at the root of the stigma and prejudice against transgendered persons. As the applicant stated during her testimony, this official government document tells the transgendered person, "You are not who you say you are." This might not be the aim of the law. As the applicant points out, however, it is the effect of the law on transgendered persons who receive birth certificates with sex designations that are not aligned with their own sense of who they are. Moreover, I find that this has the potential to worsen a transgendered person's situation even if the message is not conveyed to anyone other than the transgendered person him or herself. As the Supreme Court stated in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 S.C.R. 429 at para. 122, substantive equality can be infringed "even if the 'message' is conveyed only to the claimant". It need not be a message sent to the community at large.
>
> [172] Having said that, I do think that the legislative scheme conveys the message to the community at large that a transgendered person's gender identity is not "legitimate" in and of itself. Section 36 of the VSA in particular perpetuates disadvantage and prejudice against transgendered persons because it gives force to the prejudicial notion that transgendered people are not entitled to have their gender recognized unless they surgically alter their bodies. The message conveyed is that a transgendered person's gender identity only becomes valid and deserving of recognition if she surgically alters her body through "transsexual surgery". This reinforces the prejudicial view in society that, unless and until a transgendered person has "transsexual surgery", we as a society are entitled to disregard their felt and expressed gender identity and treat them as if they are "really" the sex assigned at birth. After all, if the law says that a transgendered woman is not "female" until she has had and proved that she has had "transsexual surgery", how can we expect more from citizens at large? In this way, the legislative requirement for "transsexual surgery" in s.36 of the VSA promotes the view that transgendered persons who, for whatever reason, do not have surgery are less deserving of respect, in sense that they are less deserving of having their gender identity respected; and thus reinforces the notion at the very core of the prejudice against transgendered persons in our society."

Senator Plett also suggested that the inclusion of gender identity as an explicitly prohibited ground of discrimination would shield individuals posing as transgender and allow them access to sex segregated spaces in order to victimize vulnerable persons.

Opposition to Bill C-279 appears to rest primarily on a misapprehension of existing human rights law and criminal provisions. Assertions that legal protections for trans persons would allow male sexual predators to invade women's washrooms and change rooms wilfully ignores the fact that

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[10] *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 (CanLII), http://canlii.ca/t/fqxvb retrieved March 4, 2015, cited with approval by the Alberta Court of Queens Bench in *C.F. v. Alberta (Vital Statistics)*, 2014 ABQB 237 (CanLII), http://canlii.ca/t/g6ll9 retrieved March 4, 2015.

nothing in the proposed legislation would detract from existing criminal prohibitions against voyeurism and sexual assault. **Prevalent discriminatory mischaracterizations of the proposed legislation provide further compelling evidence for why it should be passed**.

Amendment Impacts on Human Rights Grounds Unrelated to Gender Identity

In addition to reproducing, and attempting to enact, the kind of discrimination that the bill was introduced to combat, the amendment as adopted has unanticipated negative impacts.

By including the amendment in the exemption section of the *Canadian Human Rights Act*, with no qualifiers on grounds of prohibited discrimination covered by the exemption, it allows discrimination on any prohibited ground in any sex segregated "service, facility, accommodation or premises" to "protect vulnerable persons" without the need to demonstrate any bona fide occupational requirement (BFOR) or bona fide justification (BFJ). Additionally, the amendment does not require any accommodation of individuals effected by an otherwise discriminatory practice, as required, to the point of undue hardship, where the BFOR/BFJ test is met.

Rather than creating clarity, the amendment will create significant confusion about the operation of human rights law in a wide range of federally regulated services and institutions.

Section 15(1)(g) of the *Canadian Human Rights Act* already provides:

> Exceptions
>
> 15. (1) It is not a discriminatory practice if…
>
> (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.
>
> Accommodation of needs
>
> (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.[11]

The Supreme Court of Canada has set out three requirements to invoke the BFJ exemption for a public service provider:

> 20…In order to establish this justification, the defendant must prove that:
>
> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
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> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
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> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

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11 *Canadian Human Rights Act*, RSC 1985, c H-6

> 21 This test permits the employer or service provider to choose its purpose or goal, as long as that choice is made in good faith, or "legitimately". Having chosen and defined the purpose or goal – be it safety, efficiency, or any other valid object – the focus shifts to the means by which the employer or service provider seeks to achieve the purpose or goal. The means must be tailored to the ends…[12]

Legitimate, good faith, and reasonably necessary measures should be taken to protect the safety of vulnerable people, and it is a fundamental principle in *Charter* and human rights jurisprudence that rights are not unlimited. The BFOR/BFJ requirement provides a necessary and clearly defined test to ensure that BFORs/BFJs are the exception and that human rights protections are the rule.

It is possible that courts and tribunals would read in BFOR/BFJ requirements to the exemption extended by the amendment. Without BFOR/BFJ requirements, the amendment is unlikely to pass *Charter* muster.[13] These outcomes would render the amendment moot, as the resulting exemption would be equivalent to that already provided for in s. 15(g) of the *Canadian Human Rights Act*.

If, however, the amendment functions as conceived, giving a complete human rights exemption in sex segregated facilities such as prisons or shelters, the human rights of trans persons, persons with disabilities, racialized persons, or persons from particular religious groups would be at risk, at the suggestion that they posed a risk to a vulnerable person.

Conclusion

The current BFOR/BFJ provisions of the Act provide the appropriate framework to integrate rights and balance rights in rare cases where rights genuinely conflict. The CBA urges the Senate to reject the amendment.

Yours truly,

(original signed by Michele H. Hollins)

Michele H. Hollins, Q.C.

Cc. Randall Garrison, M.P. (Randall.Garrison@parl.gc.ca)
The Honourable Grant Mitchell, Senator (grant.mitchell@sen.parl.gc.ca)

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12 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868

13 *Charter* protections for transgender people have been found in a number of cases including, most recently, the case of *C.F. v. Alberta* cited at footnote 10, above.