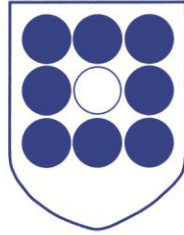


CANADIAN
CIVIL LIBERTIES
ASSOCIATION



ASSOCIATION
CANADIENNE DES
LIBERTES CIVILES

Brief to the Standing Committee on Justice and Human Rights, An Act to amend the Canadian Human Rights Act and the Criminal Code (Gender Identity and Gender Expression)

November 15, 2012

Nathalie Des Rosiers
General Counsel

Noa Mendelsohn Aviv
Director, Equality Program

Canadian Civil Liberties Association
506 – 360 Bloor Street West
Toronto, ON M5S 1X1
Phone: 416-363-0321
email: mail@ccla.org
www.ccla.org

Canadian Civil Liberties Association (CCLA)

The Canadian Civil Liberties Association (CCLA) is a national non-profit, non-governmental organization supported by thousands of individuals and organizations drawn from all walks of life. 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. CCLA's major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable invasion by public authority, and the protection of procedural fairness. For almost 50 years, CCLA has worked to advance these goals, regularly appearing before legislative bodies and all levels of court. It is in this capacity, as a defender of constitutional rights and an advocate for the rights and liberties of all individuals, that we strongly support the provisions put forward in this Bill.

Bill C-279

Bill C-279 would amend the *Canadian Human Rights Act* to include gender identity and gender expression as prohibited grounds of discrimination.¹ It would also amend the hate crimes provisions of the *Criminal Code* to include gender identity and gender expression as distinguishing characteristics protected from hate crimes and as aggravating circumstances to be taken into consideration at sentencing.²

CCLA's Support of Bill C-279

In CCLA's view, these amendments are long overdue.³ Given the particular vulnerability of trans⁴ peoples in Canada, it makes no sense that federal legislation not afford trans peoples explicit protection. In

¹ Bill C-279 would amend section 2 of the *Canadian Human Rights Act* with the following: "The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, 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 based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity, gender expression, marital status, family status, disability or conviction for an offence for which a pardon has been granted." It will also amend subsection 3(1): "For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity, gender expression, marital status, family status, disability and conviction for which a pardon has been granted."

² Bill C-279 would amend Subsection 318(4) the *Criminal Code* with the following: "In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, ethnic origin, gender identity, gender expression or sexual orientation." It would also amend Subparagraph 718.2(a)(i) with the following: "(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, gender identity, gender expression, sexual orientation, or any other similar factor."

³ Notwithstanding CCLA's concerns about the constitutionality of Canada's hate speech laws.

particular, Bill C-279 will act as an important deterrent against transphobic discrimination and hate crimes before they occur, and will ensure that the lived realities of trans people are adequately captured and protected under human rights and criminal law. The proposed amendments will also bring federal legislation in line with key developments in other jurisdictions and Canada's international commitments.

It is unfortunate that debates surrounding Bill C-279 have been mischaracterised by a number of opponents as being about who will have access to which washroom, instead of about promoting human dignity and equality.⁵ This discussion is based upon misinformation and prejudice and takes the focus away from the real issues surrounding the legislation.

Trans people in Canada are disproportionately subject to discrimination, prejudice, harassment and violence on a daily basis. As the United Nations Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment has noted, this group of individuals is often targeted by those who seek "to 'punish' them for transgressing gender barriers or for challenging predominant conceptions of gender roles."⁶ This victimisation takes place on our streets, in our workplaces, in our homes and in our schools. According to Egale Canada, 74% of trans youth report being verbally harassed as a result of their gender expression and 37% have experienced physical violence for the same reason.⁷

Given the prevalence of transphobic abuse in Canada, CCLA welcomes the amendments contained in Bill C-279. In CCLA's view, there are both compelling policy and legal arguments in support of the proposed amendments and we urge this Committee to provide its support for this Bill for the following reasons:

- 1) **Bill C-279 could deter transphobic hate crimes and discrimination before they occur.** Bill C-279 sends a clear and unambiguous message to all Canadians, including potential victims and perpetrators, about who is afforded protection under the law, and thus will function to deter

⁴ The term trans in this submission includes, but is not limited to, individuals who are: transsexual, transgender, agender, genderqueer, bigendered, gender-fluid, two-spirited, cross-dressing, androgynous, neutrois, and intersexed.

⁵ As the Canadian Bar Association has noted: "Assertions that legal protections for transgender persons would allow male sexual predators to invade women's washrooms and change rooms wilfully ignores the fact that 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." Canadian Bar Association, Submissions to the Standing Committee on Justice and Human Rights regarding Bill C-279, June 14, 2012, <http://www.cba.org/cba/submissions/pdf/12-37-eng.pdf>

⁶ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN General Assembly, 3 July 2001, A/56/156 at para. 17.

⁷ <http://archive.egale.ca/home.asp?lang=E&menu=1&item=1489>

such crimes and acts before they occur. In a democratic country such as Canada based upon the rule of law, citizens must be aware of what behaviour is permissible under the law.

- 2) **Bill C-279 will redress the invisibility of trans people in the current legislation.** Without explicit protection under anti-discrimination and hate crime laws, the unique experiences and lived realities of trans people in Canada are rendered invisible. As early as 2000, La Forest J. noted that excluding gender identity and expression from the Human Rights Act is an inadequate approach:

... to leave the law as it stands would fail to acknowledge the situation of transgendered individuals and allow the issues to remain invisible. While these issues are clearly related to sex, this ground may not cover all those encountered in the transgendered experience, especially in the decision to undergo a sex change and its implementation. To say transsexualism is a disability seems to make it a medical matter rather than a matter of life experienced in the opposite gender.⁸

The act of 'reading in' the term 'gender identity' in legislation on a case by case basis under different prohibited grounds such as sex and disability, mischaracterises the experiences of trans peoples.⁹ Explicit protection under Canadian human rights and hate crime laws will help to ensure that the lived realities of trans people are adequately captured and framed through the law. Bill C-279 will also clarify the mandate of the federal Human Rights Commission with respect to its educational functions and its initiatives for the prevention of discrimination.

- 3) **Bill C-279 would bring federal legislation in line with key developments in other jurisdictions.** Gender identity and expression have been included in human rights legislation in a number of provincial jurisdictions, including Ontario¹⁰ and Manitoba¹¹ and have been 'read in' in others. Gender identity is also covered under hate crime laws in a number of foreign jurisdictions, including the United States.¹² As mentioned above, reading in is not a substitute for explicit recognition.

⁸ Chapter 17(d), The Report of the Canadian Human Rights Act Review Panel. Promoting Equality: A New Vision (Ottawa: Canadian Human Rights Act Review Panel) 2000.

<http://www.collectionscanada.gc.ca/webarchives/20071115074808/http://www.justice.gc.ca/chra/en/frp-c17.html#d>

⁹ Human rights tribunals across Canada have already affirmed the rights of transgendered people to be protected from discrimination and harassment by reading in this protected ground in existing human rights legislation.

¹⁰ The Ontario *Human Rights Code* includes both the terms 'gender identity' and 'gender expression'. *Human Rights Code*, R.S.O. 1990, c. H. 19, s. 1.

¹¹ The Manitoba *Human Rights Code* includes the term 'gender identity'. *Human Rights Code*, C.C.S.M. 1987 c. H. 175, s. 9(2)(g).

¹² 18 USC § 249 - Hate crime acts.

- 4) **Bill C-279 honours our international commitments and obligations.** As a signatory to the *United Nations Statement on Sexual Orientation and Gender identity*,¹³ Canada has expressed its commitment to combatting violence and discrimination committed against individuals because of gender identity. In 2011, the United Nations High Commissioner for Human Rights issued a report calling upon member states to “[e]nact comprehensive anti-discrimination legislation that includes discrimination on grounds of ... gender identity among prohibited grounds and recognizes intersecting forms of discrimination”¹⁴ and to “[e]nsure that gender identity be included in the mandates of national human rights institutions.”¹⁵ The Yogyakarta Principles further affirm that everyone is entitled to enjoy all human rights without discrimination on the basis of gender identity and require that States enact legislation to give this effect.¹⁶ Bill C-279 is an important element in affirming these principles.

Conclusion

In light of the above factors, CCLA urges the Committee to provide its support for this legislation.

¹³ UN General Assembly, Resolution 17/19, *Statement on Human Rights, Sexual Orientation and Gender Identity*, A/HRC/RES/17/19, 14 July 2011. http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/19

¹⁴ Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*. A/HRC/19/41, at para 84 (e). http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf

¹⁵ *Ibid.*

¹⁶ **Principle 2**, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to the Sexual Orientation and Gender Identity* (March 2007). The Yogyakarta Principles are a set of principles which affirm the application of human rights law in relation to sexual orientation to which all States must comply. The Principles also set out detailed recommendations to States.

http://www.yogyakartaprinciples.org/principles_en.pdf