CANADIAN CIVIL LIBERTIES ASSOCIATION

ASSOCIATION CANADIENNE DES LIBERTES CIVILES

# SUBMISSION TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS REGARDING BILL C-63, *AN ACT TO ENACT THE ONLINE HARMS ACT, TO AMEND THE CRIMINAL CODE, THE CANADIAN HUMAN RIGHTS ACT AND AN ACT RESPECTING THE MANDATORY REPORTING OF INTERNET CHILD PORNOGRAPHY BY PERSONS WHO PROVIDE AN INTERNET SERVICE AND TO MAKE CONSEQUENTIAL AND RELATED AMENDMENTS TO OTHER ACTS*

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## INTRODUCTION AND EXECUTIVE SUMMARY

The Canadian Civil Liberties Association ("CCLA") is an independent, national, non-governmental organization that was founded in 1964 with a mandate to defend and foster the civil liberties, human rights, and democratic freedoms of all people across Canada. Our work encompasses advocacy, research, and litigation related to the criminal justice system, equality rights, privacy rights, and fundamental constitutional freedoms. Working to achieve government transparency and accountability with strong protections for expression, personal privacy, and principles of fundamental justice lies at the core of our mandate.

While legislation aimed at protecting against the harms of online discourse serves an important purpose, particularly for vulnerable users, CCLA submits that any attempt at regulating online discourse by Parliament must give careful and meaningful consideration to the fundamental rights and freedoms enshrined in the *Canadian Charter of Rights and Freedoms*[1] ("*Charter*") – and to the values that emerge from it. As digital technologies evolve and grow increasingly pervasive in our lives, the importance of securing core individual rights grows as well.

In that respect, important aspects of Bill C-63, *An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service and to make consequential and related amendments to other Acts* ("Bill C-63" or "Bill") raise serious issues relating to freedom of expression, privacy rights, democratic accountability, and principles of fundamental justice.

**Part 1 of the Bill** proposes to create the new *Online Harms Act* ("*Act*"). This *Act* would regulate 7 categories of content qualified as harmful through various statutory duties imposed on social media operators ("operators") and powers granted to new regulatory bodies, including the Digital Safety Commission ("Commission").

Unfortunately, some of the statutory duties imposed on operators are vague and broad, and fail to give due consideration to users' rights to freedom of expression and privacy. In absence of adequate safeguards within the *Act* and given the stratospheric amount of content posted on social media platforms, there is ample reason to believe that operators will seek to fulfil their broader statutory duties in a way that would unjustifiably limit users' rights.

[1] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

For instance, under the *Act*, operators would have the statutory obligations (i) to mitigate the risks that users will be exposed to "harmful content" and (ii) to have a process in place when content is flagged by users. Operators could attempt to fulfill these obligations by using artificial intelligence to assess flagged content without any human intervention, and without adequate transparency. In many circumstances, operators could also delete flagged content without even reviewing it.[2] The *Act*, as it currently stands, does not prohibit or properly limit these practices. Nor does it ensure that the Commission would act on these practices on the basis that they unduly limit users' rights.

Our first set of recommendations should result in a revised approach that would allow operators to address categories of harmful content that are objectively identifiable, while giving due consideration to freedom of expression and privacy. However, these recommendations do not resolve the issue arising from the regulation of notoriously subjective content such as hate speech. CCLA's position is that this type of content – which is already partly included under another category of harmful content, i.e. "content that incites violence" – should not be a standalone category within the *Act*.

The *Act* should also be revised to expressly require compliance with privacy laws and users' privacy rights. This includes making clear to operators that they cannot indefinitely and indiscriminately retain personal information.

The CCLA welcomes the Minister of Justice's recent announcement that he will table a motion separating Parts 2 and 3 from the rest of the bill. By acceding to civil society's call to split the bill, the motion will hopefully ensure this Committee's pre-study of Part 1 is not overshadowed by controversial changes to the *Criminal Code* (Part 2) and the *Canadian Human Rights Act* (Part 3).

**Part 2 of the Bill** introduces several amendments to the *Criminal Code*, none of which should be enacted.

The new "offence motivated by hatred" proposes a significant departure from how hatred is currently treated in criminal law while irrationally increasing the maximum sentence associated with *any* offence in Canada to life imprisonment, if the commission of such offence was motivated by hatred. This judicial discretion paves the way to disproportionate sentencing, a chilling effect on free speech, and an unwarranted increase in plea bargaining from innocent and vulnerable defendants.

[2] Except for the 2 categories for which such conduct is prohibited (see the *Act*, s. 68).

CCLA also opposes the new “fear of hate propaganda offence or hate crime” provision, pursuant to which a judge can order a defendant to enter into a recognizance to keep the peace (which may include stringent conditions) if there is a *fear*, on reasonable grounds, that the defendant will commit any offence motivated by hatred, including hate propaganda (hate speech). Criminal law should be a means of holding individuals accountable for what they have done, not for what others fear they might do. Imposing deeply invasive conditions on an individual who is not even suspected or accused of having committed any crime, let alone convicted, unreasonably and unjustifiably infringes on several *Charter*-protected rights.

**Part 3 of the Bill** proposes to amend the *Canadian Human Rights Act* (the “CHRA”) to add as a discriminatory practice the communication of hate speech by any means of telecommunication (including the Internet), if the speech in question is likely to foment detestation and vilification of an individual or group of individuals on the basis of a prohibited ground of discrimination.[3]

The proposed amendments would also allow the Canadian Human Rights Commission (“CHRC”) to deal with a complaint in relation with a discriminatory practice without disclosing to anybody, including the person against whom the complaint was filed, the identity of the complainant.[4]

While CCLA understands that these proposed amendments attempt to combat discrimination and promote equality, we believe that the Canadian human rights framework is an improper and ineffective mechanism for addressing the problem of hate speech in our modern society. We therefore do not support these amendments.

[3] Bill C-63, s. 34.

[4] Bill C-63, s. 36(2).

## RECOMMENDATIONS SUMMARY

### Part 1: *Online Harms Act*

**Recommendation 1:** Amend s. 55(3) of the *Act* to prohibit operators from implementing measures that unjustifiably limit users' expression on a regulated service. This amended provision should be repositioned within the *Act* so it applies to all operators' statutory duties under the *Act*, and not only to the s. 55(1) duty.

**Recommendation 2:** Amend s. 7 of the *Act* to provide that an operator will not be deemed to have satisfied any of its statutory duties under the *Act* by *proactively* searching and/or taking down content – beyond proportional measures necessary to fulfill s. 7(2).

**Recommendation 3:** Amend s. 62 of the *Act* to require that the Commission (i) review digital safety plans annually, and (ii) require modifications to such plans if they are found to unjustifiably limit users' rights and freedoms, including freedom of expression and privacy rights.

**Recommendation 4**: Amend s. 2(1) to remove "content that foments hatred" from the categories of harmful content.

**Recommendation 5:** Revise the *Act* to expressly require compliance with privacy laws. This includes making clear to regulated entities that they cannot indefinitely and indiscriminately retain personal information.

### Part 2: *Criminal Code* Amendments

**Recommendation 6:** Remove Part 2.

### Part 3: *Canadian Human Rights Act* Amendments

**Recommendation 7:** Remove Part 3.

## ANALYSIS

### A. PART 1: THE ONLINE HARMS ACT

#### I. Freedom of Expression

The *Act* proposes to regulate, mainly through statutory duties imposed on social media operators ("operators"), 7 categories of "harmful content" described under s. 2(1). While some of the statutory duties provided for under the *Act* are very specific,[5] other obligations are more general in nature, leaving room to uncertainty in their implementation.

*a. Freedom of Expression Must Be a Key Consideration for Operators*

Operators' main general duty with respect to all 7 categories of harmful content arises from s. 55 (1) of the *Act.* Pursuant to this subsection, operators, acting responsibly,[6] must "implement measures that are adequate to mitigate the risks that users of the service will be exposed to harmful content on the service".

This duty includes the obligation for operators, under s. 56 of the *Act*, to "implement any measures that are provided for by regulations". Since such regulations have yet to be drafted, we currently do not know what this risk mitigation exercise entails, let alone how it will be implemented by operators.[7] Not only does this approach contravene the principle of democratic accountability, it also falls short from enjoining operators to give meaningful consideration to users' freedom of expression.

S. 55 (3) of the *Act* does provide that subsection (1) "does not require the operator to implement measures that unreasonably or disproportionately limit users' expression on the regulated service". However, strikingly, this subsection does not *prohibit* operators from unreasonably or disproportionately limiting their users' expression – it merely informs them that such limits are not statutorily *required.*

Similarly, s. 7(1) of the *Act* provides that an operator is not *required* "to proactively search content on a regulated service that it operates in order to identify harmful content", instead of stating that engaging in mass surveillance (and potentially even deletion) of users' posts would be an *invalid* way for operators to attempt to fulfil their statutory duties.

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[5] See for instance *Act*, s. 68.

[6] *Act*, s. 54.

[7] While s. 27 (a) of the *Act* provides that, when making regulations, the Commission must "take into account" freedom of expression, this provision fails to address the issues raised here, pertaining to the scope and parameters within which the operators might choose to fulfil their risk mitigation duty.

The other main general duty of operators relating to all 7 categories of harmful content is provided for under s. 59 of the *Act.* This section requires that operators implement tools allowing users to flag content that they view as "harmful content", and allowing operators to process such flags.

There again, despite tasking the operators with the statutory duty of regulating speech on behalf of the state, the *Act* fails to give meaningful consideration to users' freedom of expression and to due process in this context. Except for two categories of harmful content,[8] the *Act* implicitly allows operators to process flags without even giving the author of the flagged content the opportunity to present their point of view. Except for the two same categories of harmful content,[9] the *Act* also fails to prohibit operators from using an overly cautious approach when processing flags, for instance by automatically deleting flagged content without determining whether it does fall under a category of harmful content.

As the *Act* also fails to give users the right to appeal an operator's action or decision to remove content before the Commission or any tribunal, the potential consequences of the abovementioned gaps for freedom of expression cannot be overstated.

*b. The Commission Must Be Under the Obligation to Act if Operators Unduly Limit Users' Free Speech*

Given the wide scope of the statutory duties discussed above, and the stratospheric amount of content posted on social media platforms, there are reasons to fear that operators will seek to fulfil their statutory obligations in the most cost-efficient and expeditious manner – for instance, by deleting users' posts by relying on artificial intelligence, potentially without any direct human involvement. As mentioned, Bill C-63, as it currently stands, does not prohibit or limit this practice by requiring adequate transparency. Nor does the *Act* ensure that the Commission would act on a problematic practice on a timely basis if it were to unduly limit users' free speech.

S. 62 of the *Act* does require operators to submit a digital safety plan to the Commission reporting, inter alia, on the manner in which they are complying with their risk mitigation duty and their duty to process harmful content flagged by users. However, the Commission is under no obligation to review, seek modifications and approve such plans

[8] *Act*, s. 68, referring to content that sexually victimizes a child or revictimizes a survivor; and to intimate content communicated without consent.

[9] *Ibid.*

(i) based on compliance with *Charter*-protected rights such as free speech, and (ii) within a specific timeframe.

*c. First Set of Recommendations*

For most categories of "harmful content", the abovementioned concerns can be addressed through the following recommendations:

> **Recommendation 1:** Amend s. 55(3) of the *Act* to prohibit operators from implementing measures that unjustifiably limit users' expression on a regulated service. This amended provision should be repositioned within the *Act* so it applies to all operators' statutory duties under the *Act*, and not only to the s. 55(1) duty.
>
> **Recommendation 2:** Amend s. 7 of the *Act* to provide that an operator will not be deemed to have satisfied any of its statutory duties under the *Act* by *proactively* searching and/or taking down content – beyond proportional measures necessary to fulfill s. 7(2).
>
> **Recommendation 3:** Amend s. 62 of the *Act* to require that the Commission (i) review digital safety plans annually, and (ii) require modifications to such plans if they are found to unjustifiably limit users' fundamental rights and freedoms, including freedom of expression and privacy rights.

*d. The Act Should Not Include "Content that Foments Hatred" as a Standalone Category of Harmful Content*

CCLA submits that Recommendations 1 to 3 should result in a revised approach that allows operators to address *objectively* identifiable categories of harmful content,[10] while giving due consideration to *Charter* rights and interests.

However, these recommendations do not resolve the issue arising from tasking operators with the duty of regulating notoriously *subjective* content, such as hate speech. For the reasons detailed below, CCLA's position is that this type of content should not constitute a standalone category of harmful content within the *Act*.

CCLA does agree that some extreme forms of speech should be prohibited in our society, for instance speech that incites imminent violence against an identifiable group. This type of speech, which qualifies as "content that foments hatred", is already captured by another

[10] For instance, "content that sexually victimizes a child or revictimizes a survivor".

category of harmful content under the Bill – "content that incites violence".[11] The question is thus: what additional content is captured by "content that foments hatred", and how easily objectifiable is it?

"Content that foments hatred" is defined under the *Act* as "content that expresses detestation or vilification of an individual or group of individuals on the basis of a prohibited ground of discrimination…and that, given the context in which it is communicated, is likely to foment detestation or vilification of an individual or group of individuals on the basis of such a prohibited ground".[12]

This definition draws almost word-for-word from the Supreme Court of Canada ("SCC")'s guidance in *Canada (Canadian Human Rights Commission) v. Taylor* and *Saskatchewan (Human Rights Commission v. Whatcott*.[13] In line with the SCC's teachings, the definition also specifically excludes speech that solely "expresses disdain or dislike or…discredits, humiliates, hurts or offends."[14]

Drawing the line between speech that "foments detestation or vilification" and speech that solely "expresses disdain or dislike", "humiliates, hurts or offends", is often easier said than done. The answer to this question will vary from one individual to the other, based on their respective backgrounds, lived experiences, and values, among other considerations. This is evidenced by the fact that, even after the SCC's attempted clarifications in *Whatcott*, decision-makers have struggled with determining whether a specific speech qualified as "hate speech" or not.[15]

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[11] *Act*, s. 2(1). **With respect to the definition of "content that incites violence", CCLA agrees with and endorses Recommendation #2 of International Civil Liberties Monitoring Group's "Brief on Bill C-63" dated December 3, 2024.**

[12] *Act*, s. 2(1), "content that foments hatred" and "harmful content".

[13] *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892*; Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467.

[14] *Act*, s. 2(3), "For greater certainty – content that foments hatred".

[15] In *R v. Whatcott*, 2023 ONCA 536, the Court of Appeal allowed an appeal from the trial judge's acquittal of Mr. Whatcott on charges under s. 319 of the *Criminal Code* on the basis that the trial judge had improperly excluded expert evidence regarding the discriminatory impact of the impugned speech. At paras. 60-82, the Court of Appeal analyzed how the exclusion might have impacted the trial judge's conclusion that the expression fell short of hate speech, including by disagreeing with the trial judge's method of analyzing whether expression constitutes hate speech.

In *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154, the Court of Appeal upheld an administrative decision that a proposed advertisement was likely hate speech within the meaning of s. 319 – or, at least, that the administrative determination was reasonable. In reaching that decision, the Court of Appeal referred to the "very imprecise boundary" between "hateful speech" and "hard-hitting public debate" (at para 67).

Leaving it to operators' employees (who are not required to have a legal education or training), or to artificial intelligence, to draw that line on social media platforms is inadequate, and likely to severely affect free speech. As mentioned, there is reason to believe that operators will seek to fulfil their statutory obligations in the most cost-efficient and expeditious manner. They are also likely to err on the side of caution. These motivations are inconsistent with the careful consideration for the subjective nature of alleged hate speech that users' right to freedom of expression commands.

> **Recommendation 4**: Amend s. 2(1) to remove "content that foments hatred" from the categories of harmful content.

## II. Privacy Rights and Interests

Some provisions in the *Act* also threaten the privacy interests of regulated services' users and operators.

### *a. Privacy Issues Arising from Enforcement Provisions and Regulators' Powers*

Numerous enforcement provisions implicate not only information belonging to the operator itself, but also the information of its users, compelling the operator to both retain that information and release it on the Minister's request. For example, as an accompaniment to the Governor in Council's power to make regulations designating a particular social media service as a "regulated service" under the *Act*, the operator "must provide to the Commission any information provided for by regulations".[16]

Many of the privacy-related concerns about the operators' information-providing obligations arise with the Commission's power as well. Section 86 lacks an express requirement that the Commission consider users' privacy rights and interests when carrying out its obligations. Sections 74 and 117 raise additional concerns regarding, respectively, the protection of privacy rights when the Commission enables accredited persons to access electronic data, and when the Commission requires persons of interest to share information.

Under subsection 91(4)(a), an inspector, designated by the Commission, can "examine any document or information that is found in the place, copy it in whole or in part and take it for examination or copying" if they determine the information is needed to verify compliance or prevent non-compliance with the *Act*. Similarly, under section 93, an inspector can require "any person" who possesses such documents to provide the

[16] *Act*, s. 4.

document or information. These sections should be improved by adding some limitations or safeguards to protect users' privacy rights and interests, especially since the inspector can copy such documents.

> **Recommendation 5:** Revise the *Act* to expressly require compliance with privacy laws so that, in the event of a conflict between disclosure and access provisions of the *Act* and federal privacy laws, the latter shall prevail. This includes making clear to regulated entities that they cannot indefinitely and indiscriminately retain personal information.

*b. Privacy Issues Arising from Operators' Statutory Duties*

Under subsections 55(1) and (2), the operators' obligation to implement certain measures to mitigate the risk that users will be exposed to harmful content does not require any consideration of users' privacy rights, including protection of personal information. The same goes for s. 62, which fails to require that the Commission review digital safety plans for compliance with users' privacy rights. Recommendations 3 and 5 both address this issue.

In addition, the operators' obligation under s. 72 to keep records to ensure compliance with the *Act* risks driving them to take an overly cautious approach to compliance by retaining indefinitely all content from any of their sites. This section is not qualified by any requirement to consider users' privacy interests, or the operators' obligations under data protection laws, which permit the retention of personal information only so long as is necessary for the purposes for which it was collected. This problematic can be addressed through Recommendation 5.

## B. PART 2: AMENDMENTS TO THE CRIMINAL CODE

### I. New "Offence Motivated By Hatred"

Proposed new section 320.1001(1) of the *Criminal Code* would create a new offence pursuant to which anyone who commits any offence while motivated by hatred is guilty of an indictable offence and liable to imprisonment for life. Hatred may be based on race, ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity.[17]

This provision proposes a significant departure from how hatred as a motivation for an offence is currently treated in criminal law. This new offence requires the police, at the

[17] Bill C-63, Part 2, s. 15.

earliest stage of a criminal proceeding, to opine as to whether an individual was arguably motivated by hatred when they allegedly committed an offence. This provision also drastically increases the maximum sentence associated with all offences in Canada, by providing that *any* offence may be punishable by life imprisonment if the commission of such offence was motivated by hatred.

CCLA opposes both aspects of this new offence and submits that it should be removed from Bill C-63 entirely.

*a. Hatred Should Only Be Considered at the Sentencing Stage*

The fact that the commission of an offence was motivated by hatred against an identifiable group is currently considered as an aggravating factor in sentencing under s. 718.2(a)(i) of the *Criminal Code*. This allows sentencing judges to take hatred into consideration *after* conviction. As mentioned, the proposed offence changes how hatred would be treated by requiring the police, at the earliest stage of criminal proceedings, to make a subjective call as to whether they have reasonable grounds to believe that an individual was motivated by hatred when allegedly committing an offence. The CCLA disagrees with this proposed shift.

At the sentencing stage, the defendant has already been convicted, and has had the opportunity of presenting all relevant evidence with respect to their conduct. This process allows a judge to take the most enlightened decision possible before labelling a defendant's criminal conduct as having been motivated by hatred.

This evidence-based approach is particularly needed in the context of hatred, which is a profoundly subjective concept. Outside of obvious cases, it is illusory to believe that police officers will be in a position to accurately and objectively identify whether someone allegedly committed an offence, for instance assaulting another person, out of hatred against an identifiable group or because of anger or personal resentment. In many cases, the police's decision-making process will inevitably be influenced by their own personal biases, and, when in doubt, they might be tempted to include such a charge out of caution.

Of course, under the new scheme, the Crown would still need to administer evidence that the alleged offence was indeed motivated by hatred. But even after an acquittal, the label and social stigma associated with a "hate crime" accusation would be difficult, perhaps impossible, to shake off. We thus believe that this "hate crime" provision risks further stigmatizing members of marginalized communities instead of protecting them. Maintaining the current practice of only considering hatred at the sentencing stage avoids unduly imposing a social stigma on a defendant who is still presumed – and may very well turn out to be – innocent of the crime of which they are accused.

*b. Hatred Should Not Automatically Expose the Defendant to Potential Life Imprisonment*

CCLA is also opposed to the sentencing proposed under the new hate crime offence. This new scheme provides that *any* offence would be punishable by up to life imprisonment if the commission of the offence is found to have been motivated by hatred. This possibility of extreme severity gives rise to several concerns, particularly when one considers the breadth of offences covered by this proposed provision. These concerns include gross disproportionality, chilling effects on free speech, and adverse effects on plea bargaining.

i. Principles of Sentencing and Disproportionality

S. 718 of the *Criminal Code* states that the "fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions."[18] In order to fulfill that purpose, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[19] Sentences that are not proportionate can undermine public confidence in the administration of justice.[20]

The quest for proportionality does not begin in the courtroom. It must also guide law makers. This demands a careful analysis of how a statutory sentence – including maximum sentences – is proportionate to the gravity of a given offence and the degree of responsibility of the offender. Instead of engaging in this exercise, Bill C-63 adopts a sweeping and careless approach to sentencing, based on the ill-guided assumption that life imprisonment is a justifiable possibility for *any* offence if the commission of such offence was motivated by hatred.

The CCLA disagrees with this assumption. For many offences, particularly those of low to mid severity, the fact that the defendant was motivated by hatred could never justify life imprisonment, regardless of the circumstances. For instance, the maximum sentence for having committed mischief in relation to property of less than $5,000 is imprisonment for a term not exceeding 2 years.[21] In our view, even if such a mischief were to have been committed out of hatred, life imprisonment would never be a justifiable and proportionate sentence.

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[18] *Criminal Code*, R.S.C. (1985) c. C-46, s. 718 (« ***Criminal Code*** »).

[19] *Id.*, s. 718.1.

[20] *R v. Lacasse,* 2015 SCC 64 at para 12

[21] *Criminal Code*, s. 430(4).

Yet, under Bill C-63, such a sentence would be possible. The proposed amendment would thus grant a judicial discretion over the sentencing of mischief to property that simply could not be exercised to its full extent by judges without resulting in disproportionate sentences that could be challenged pursuant to s. 12 of the *Charter* – the constitutional protection against cruel and unusual punishments.

Arguments raised in the media highlight that the sentence of life imprisonment would not be mandatory, but simply a possibility. This suggests that the judiciary would act as a safeguard to ensure the proportionality of the sentences. This answer not only abdicates the legislature's role in prescribing appropriate parameters within which judges should exercise their role – it also eludes the unescapable truth that sentencing and appellate judges, like all humans, do not have infallible judgment.

Most importantly, this answer fails to take into consideration the chilling effect on free speech that the mere possibility of life imprisonment creates. It also ignores the risk that this possibility of life imprisonment will lead innocent defendants to accept a plea bargain. We address these two concerns below.

ii. Chilling Effects on Free Speech

As mentioned, the proposed hate-motivated offence applies to any existing criminal offence, including hate propaganda offences provided under ss. 318 and 319 of the *Criminal Code*. While hate speech is certainly hurtful and repugnant, the possibility of being sentenced to life imprisonment for having engaged in it is deeply troubling in a free and democratic society. That is particularly the case because this type of speech is notoriously subjective, and therefore difficult to identify.

In *Keegstra,*[22] Justice McLachlin (as she then was) warned against the breadth of the term "hatred", which carries different interpretations and is capable of denoting a wide range of diverse emotions.[23] McLachlin J added that the subjectivity of the term also carries danger.[24] As she explained, hatred is proved by "the inference of the jury or the judge who sits as the trier of fact – and inferences are more likely to be drawn when the speech is unpopular."[25] Hence, in doubtful cases, the "law-abiding citizen who does not wish to run afoul of the law will decide not to take the chance."[26]

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[22] *R v. Keegstra*, [1990] 3 SRC 697.

[23] *Id.*, at p. 855.

[24] *Id.,* at p. 856.

[25] *Ibid*.

[26] *Ibid*.

Where the possible sanction is life imprisonment, the "law-abiding citizen" will be even more reluctant to exercise their freedom of expression. The proposed change in sentencing would therefore directly chill free speech in Canada.

iii. Plea Bargaining from Innocent Defendants

Plea bargaining can be defined as any agreement by the accused to plead guilty in return for the promise of some benefit. While a defendant has a right to plead guilty, Justice Canada itself recognizes that plea bargaining carries the risk that an innocent defendant will plead guilty.[27] Many reasons explain this, including the defendant's lack of financial resources to conduct a trial, the imbalance between the resources of the Crown and of the defendant, and the prospect and conditions of detention for defendants held prior to their trial.[28]

Naturally, the more severe penalties associated with a conviction after trial provide prosecutors with significant leverage to induce an accused person to plead guilty.[29] Justice Canada acknowledged this as a "real concern" that may lead people to plead guilty to crimes they did not commit, or for which they have a defense, in order to avoid the risk of a significantly harsher punishment after trial.[30]

CCLA's position is that exposing defendants charged with any offence believed to have been motivated by hatred to the risk of life imprisonment will induce these defendants to plead guilty to crimes they did not commit. This goes against key values underpinning our criminal justice system, such as the presumption of innocence and the right to due process.

## II. New recognizance based on a "fear of hate propaganda offence or hate crime"

CCLA also opposes the new "fear of hate propaganda offence or hate crime" provision, pursuant to which a provincial court judge could order a defendant to enter into a recognizance to keep the peace for a term of not more than 12 months, if satisfied that there are reasonable grounds to fear that the defendant will commit any offence motivated by hatred, including hate propaganda (hate speech).[31]

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[27] Department of Justice Canada, Milica Potrebic Piccinato, *Plea Bargaining, "Criticisms of the Practice",* (2022), at pp. 3-5, online: https://justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/pb-rpc/pb-rpc.pdf.

[28] *Ibid*.

[29] *Ibid*.

[30] *Ibid*.

[31] Bill C-63, Part 2, s. 17, introducing s. 810.012 to the *Criminal Code*.

Proposed section 810.012(6) of the *Criminal Code* provides that such a recognizance to keep the peace may include "any reasonable conditions" that the judge "considers desirable to secure the good conduct of the defendant", including wearing a monitoring device, remaining at their place of residence at specified times, abstaining from drugs and alcohol, and providing bodily samples.

Criminal law should be a means of holding individuals accountable for what they have done, not for what others fear they might do. Imposing deeply invasive conditions on an individual who is not even suspected or accused of having committed any crime, let alone convicted, unreasonably and unjustifiably infringes on several *Charter*-protected rights.

*a. The Proposed Provision is Contrary to the Principles of Fundamental Justice and Would Chill Free Speech*

While limiting the *Charter* rights of individuals who have been charged with an offence but are still presumed innocent is in itself problematic, limiting *Charter* rights of individuals about whom there is simply a *fear* that they *might* one day commit an offence motivated by hatred is simply unacceptable.

For one, this threshold is impermissibly vague. It essentially requires a provincial court judge to predict not only an individual's future conduct, but also whether such future conduct will be motivated by hatred. In order to do so, the judge would make an implicit assessment of the defendant's past conduct, character, and propensity, including their record of expression. This exercise would be profoundly subjective, in addition to denying the defendant fundamental protections of the criminal process, to which any person actually charged with an offence is entitled.

In the prosecution of an offence, the Crown is prohibited from leading evidence of a defendant's disposition, propensity or character as a basis for inferring that the accused is a person who is likely to have committed the offence with which they are charged. A defendant is also entitled to be presumed innocent until guilt is proven beyond a reasonable doubt. Since the proposed provision is only preventative in nature (i.e. it is not an offence), these protections would not be available to the defendant.

*b. Overly Restrictive Conditions*

Finally, the concerns arising from this provision are enhanced tenfold by the sweeping range of conditions that the judge would be entitled to impose to "secure the good conduct of the defendant". The judge could impose "any reasonable conditions", including requirements to wear an electronic monitoring device (pursuant to a request from the Attorney General), to remain at their place of residence at specified times, to abstain from

communicating with any person identified in the recognizance, or to refrain from going to any specified place.

This framework exacerbates the existing – though not as well-known as it should be – culture of risk aversion that has been strongly criticized by our Supreme Court.[32] This culture has led to excessive restrictions being imposed on defendants. With respect to bail, the overuse of conditions that often do not address a particular accused's risks is a systemic problem.[33] This unjustifiable encroachment over *Charter* rights is no trivial matter. As the Supreme Court noted, "onerous conditions disproportionately impact vulnerable and marginalized populations", in particular those living in poverty or with addictions or mental illnesses, and Indigenous people.[34]

These concerns are directly relevant to the recognizance conditions provided for under the proposed provision.

**Recommendation 6:** Remove Part 2.

## C. PART 3: AMENDMENTS TO THE CANADIAN HUMAN RIGHTS ACT

Part 3 of Bill C-63 proposes to amend the CHRA to add as a discriminatory practice the communication of hate speech by any means of telecommunication (including the Internet), if the speech in question is likely to foment detestation and vilification of an individual or group of individuals on the basis of a prohibited ground of discrimination.[35] The government is thus suggesting to reinstate a revised form of CHRA's former section 13,[36] which was repealed ten years ago following concerns around its impact on freedom of expression.

The proposed amendments would also give to the CHRC authority to deal with a complaint in relation with a discriminatory practice without disclosing to anybody,

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[32] See *R. v. Zora*, 2020 SCC 14, at para 77. See also Canadian Civil Liberties Association, "Still Failing: The Deepening Crisis of Bail and Pre-Trial Detention in Canada" (2024), online: https://ccla.org/wp-content/uploads/2024/04/CCLA_Bail-Report-V2.pdf.

[33] *Ibid*.

[34] *R. v. Zora*, 2020 SCC 14, at para 79.

[35] Bill C-63, Part 3, s. 34.

[36] Former s. 13 of the CHRA read as follows:

> **13.** (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

including the person against whom the complaint was filed, the identity of the complainant(s).[37]

While CCLA understands that the proposed provisions, just like former section 13, would be enacted in an attempt to combat discrimination and promote equality, we believe that the Canadian human rights framework is an improper and ineffective mechanism to address the problem of hate speech in our modern society. We therefore do not support the amendments proposed under Part 3 of the Bill. Three interconnected reasons justify this position.

First, human rights legislation is not an appropriate framework to deal with the problem of hate speech. The nature of human rights legislation and the work of human rights bodies both call for an expansive consideration of equality rights. This focus on equality rights does not always align with an equally expansive approach to free speech.

Second, allowing anonymous complaints invites individuals or groups to "try their luck" if they disagree with or are bothered by offensive speech that does not qualify as hate speech. This is problematic both from a freedom of expression perspective and from a resource standpoint.

Third, adding complaints about alleged hate speech to the CHRC's and Canadian Human Rights Tribunal ("Tribunal")'s workload would require important resources, to say the least. Unfortunately, human rights bodies are chronically under resourced. The Bill does little to nothing to remedy this situation, let alone anticipate the additional needs that would need to be filled.

## I. Human Rights Legislation Is Not an Appropriate Framework to Address Hate Speech

Canadian human rights investigative and adjudicative bodies (i.e. the CHRC and the Tribunal) must interpret the CHRA broadly in order to address systemic discrimination and help achieve substantive equality. As such, their objective is to capture a wide range of conducts that may interfere with that equality. Their focus and expertise, which do not include freedom of expression, might lead these bodies to adopt a narrower understanding of free speech.

While the CCLA does agree that some extreme forms of speech that incite imminent violence against an identifiable group should be prohibited in our society, existing offences under the *Criminal Code* already cover these situations (including on the Internet). These offences are subject to intent requirements, statutory defences and, in some circumstances, outside control from the Attorney General. These safeguards, which

[37] Bill C-63, Part 3, s. 36(2).

help ensure that dissent and debate in our society can take place without fear of reprisals, are absent from human rights legislation.

### II. The Proposed Complaint Process As Regards Hate Speech Is Problematic

Through the proposed legislation, individuals and groups would now be able to file with the CHRC complaints based on alleged hate speech. These complaints, which would be brought at no cost to the complainant, could, in certain circumstances, be filed anonymously.[38] If the complaint is substantiated, any victim identified in the impugned communication could be awarded a compensation of up to $20,000. The Tribunal could also order the respondent to pay a penalty of up to $50,000 to the Receiver General.

Faced with such parameters, individuals or groups who feel discredited, humiliated, offended or bothered by a communication posted on the Internet might very well choose to file a complaint, in the hope that the respondent will be subject to a financial penalty for having expressed unpleasant opinions. This would undoubtedly invite a great number of complaints based on alleged hate speech. Since the CHRC must consider each claim it receives, the potential flood of hate speech complaints is also likely to worsen existing capacity issues, as further discussed below.

The ease of procedure in bringing hate speech claims, as well as the subjective nature of hate speech, are also likely to lead to self-censorship. Individuals worried that they might be targeted by a complaint will be reluctant to publish material that should not and probably would not have been caught under this new provision.

### III. Human Rights Bodies Lack the Resources to Address Hate Speech Complaints

Although adding hate speech as a discriminatory practice is intended to protect vulnerable minorities, what this would really do is use up the scarce resources of the CHRC and Tribunal.

It is well documented that the CHRC and the Tribunal are chronically under funded. This has already resulted in significant delays in tribunal cases.[39] The Canadian human

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[38] Though fully open proceedings would remain the default approach, per the proposed section 40(8), the Commission may choose to deal with a complaint without disclosing the identity of the complainant(s) if the Commission considers that there is a "real and substantial risk" that any individual involved "will be subjected to threats, intimidation or discrimination".

[39] By the end of 2023, roughly a quarter of the Tribunal's active caseload of complaints was waiting to be assigned to an adjudicator. Parties generally waited an average of 200 days to have their file assigned – a delay Tribunal Chairperson Jennifer Khurana said would worsen as the CHRC increases its case referrals in 2024. Khurana disclosed that this delay impacts the parties at all stages of the Tribunal's process, with

rights system could thus very easily become overwhelmed by the volume of complaints relating to potentially hateful online material.

Finally, we note the Standing Senate Committee on Human Rights' recent findings about the existence of anti-Black racism, sexism, and systemic discrimination experienced by Black employees at the CHRC.[40] Before contemplating expanding its mandate, the CHRC should focus on combatting systemic discrimination within its own organization, and work on restoring trust with equity-deserving groups, particularly members of the Black community.

For these reasons, CCLA submits that Part 3 of the Bill should be set aside.

**Recommendation 7:** Remove Part 3.

## CONCLUSION

We thank you for your consideration. We look forward to the opportunity of discussing these issues further with the Committee.

a significant impact on its productivity and ability to respond effectively to urgent issues. See Jennifer Khurana, *Annual Report 2023* (Ottawa, ON: Canadian Human Rights Tribunal, 2023), online: www.chrt-tcdp.gc.ca/en/about-us/publications/annual-report-2023.

[40] Standing Senate Committee on Human Rights, "Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission" (December 2023), online: https://sencanada.ca/content/sen/committee/441/RIDR/Reports/Report_SS-1_CHRC_e.pdf.