

**SUBMISSION TO THE
STANDING SENATE COMMITTEE ON HUMAN RIGHTS
REGARDING BILL C-304**

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A society is to be measured and judged by the protections it offers to the vulnerable in its midst.¹

EXECUTIVE SUMMARY

1. Bill C-304, which would repeal s. 13 of the *Canadian Human Rights Act*,² should be rejected because:
 - a. section 13 uniquely contributes to a balanced and multi-faceted public policy response to hate propagation in a democratic society constitutionally committed to co-equal protection of freedom of expression, equality, Aboriginal rights, and multiculturalism;³
 - b. repeal of s. 13 disproportionately burdens members of equality-seeking groups in the Canadian community who are already rendered vulnerable to hateful attacks in light of the social and technological context – a vulnerability recognized in recent legal affirmation of human rights based protections against hate propagation; and
 - c. repeal of s. 13 would leave women and disabled persons especially vulnerable because the *Criminal Code*⁴ provisions prohibiting various forms of hate propagation currently offer no protection on the basis of sex or disability.

I. SECTION 13's UNIQUE POLICY CONTRIBUTION

2. Hate propagation poses two issues of pressing concern in a constitutional democracy committed to equally valuing and protecting freedom of expression, equality, Aboriginal rights and multiculturalism:
 - a. it gives rise to “grave psychological and social consequences to individual members of the targeted group from the humiliation and degradation caused by hate propaganda”; and
 - b. it creates “harmful effects on society at large by increased discord and by affecting a subtle and unconscious alteration of views concerning the inferiority of targeted groups”.⁵

3. Hate propagation effects these results through “[r]epresentations vilifying a person or group ... [that] seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous or unworthy or unacceptable in the eyes of audience.”⁶ In addition to the immediate effects of this form of discrimination, the vilification and dehumanization of target groups and their members that are often hallmarks of hate propagation can work to pave the way for future discrimination, intolerance and violence.⁷

4. Moreover, hate propagation undermines the ability of targeted groups and their members 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.⁸

5. Consistent with its international obligations, Canada has taken a multi-faceted approach to this pressing social equality issue, including a variety of criminal, human rights and administrative law restrictions that seek to provide co-equal respect for equality and freedom of expression.⁹ Section 13 is a unique and integral component of that multi-faceted approach because:

- a. access to the hate propaganda-related provisions of the Criminal Code is circumscribed by requiring the consent of the Attorney General to initiate prosecution. In contrast, under s. 13, group members are entitled to file a complaint without any prior state authorization;
- b. full carriage of criminal prosecutions lies with the crown, in a contest between the individual and the state characterized by “a deeply entrenched prioritizing of liberal values” often at the expense of substantive equality concerns.¹⁰ In contrast, human rights mechanisms offer complainants a greater degree of control in a forum expert not only on issues of individual rights, but also the equality rights of socially vulnerable groups;
- c. in criminal prosecutions, punitive rather than restorative remedies tend to predominate. Human rights mechanisms offer the unique opportunity for forward-looking, conciliatory remedies and educative reform, insofar as that is possible given the vitriol that often characterizes these kinds of attacks. Forward-looking mediated resolutions of s. 13 cases have resulted in letters of apology and renunciation of the impugned materials, as well as agreements to remove content and to close impugned accounts;¹¹ and

- d. criminal proceedings related to hate propaganda require proof of intent, which equality-seeking communities have identified as a deterrent to seeking legal redress for hate crimes.¹² In contrast, section 13, as a human rights provision, is not aimed at proof of blameworthy intent, but at identifying and providing redress for the *effects* of this discriminatory practice on its targets and on society as a whole.

II. SOCIAL, TECHNOLOGICAL AND LEGAL CONTEXT

6. Over the last decade Canada, like many other nations around the world, has experienced significant economic and political upheaval likely to leave many who are suffering as a result of these dislocations grasping for explanations. These are the kinds of conditions in which empathy and respect can too easily be eclipsed by scapegoating “other” identifiable groups as the source of the problem.¹³ Manifestations of hatred against identifiable groups are evident both offline and online.
7. Police-reported hate crime increased by 35% from 2007 to 2008 and by 42% from 2008 to 2009.¹⁴ Over half of all of the incidents in 2009 related to race or ethnicity, while 29% were based on religion and 13% on sexual orientation.¹⁵ The number of hate crimes rose for all racial groups between 2008 and 2009, with Blacks being the most commonly targeted group and the number of hate crimes against Arabs and West Asians doubling in the same period.¹⁶ Seventy percent of religiously motivated hate crimes in 2009 targeted those of the Jewish faith, with the total number of crimes against that group increasing by 71% from 2008 to 2009.¹⁷ Hate crimes against the Muslim faith increased 38% in the same period, while those against the Catholic faith increased 10%.¹⁸ Seventy-four percent of hate crimes motivated by sexual orientation involved a violent offence, compared with 39% of racially motivated incidents and 21% of incidents motivated by religion.¹⁹ Self-reported victimization by hate-motivated crimes also increased from 3% of all incidents to 5% of all incidents reported in the General Social Survey between 2004 and 2009.²⁰
8. Growth in hate-motivated crime is not isolated to Canada, but is also a concern in many other countries around our increasingly interconnected globe.²¹
9. Hate motivated behaviours, however, are not isolated to “real space” as any distinction between our offline and online worlds increasingly begins to blur, if not disappear. In many ways the internet and other digital communications technologies offer us an unprecedented and often public window into the heights and depths of our own humanity.²²
10. Online hate propagation includes both generalized attacks on identifiable groups²³ and attacks targeted at individuals on the basis of their actual or perceived membership in an identifiable group or groups.²⁴ Lesbians, Black women, Aboriginal women, and Muslim women are among the targeted groups at issue in human rights

cases in Canada.²⁵

11. With respect to online attacks on individuals, cyberbullying has become a central area of public and policymaker concern, particularly in recent months. In many cases, these attacks are founded on the very kinds of group-based hatred and discrimination at issue in s. 13, including in relation to women, racialized persons, religious minorities and members of the GLBTQ community:

On social networking sites, blogs and other Web 2.0 platforms, destructive groups publish lies and doctored photographs of vulnerable individuals. They threaten rape and other forms of physical violence. ... They flood websites with violent sexual pictures and shut down blogs with denial-of-service attacks. These assaults terrorize victims, destroy reputations, corrode privacy, and impair victims' ability to participate in online and offline society as equals.²⁶

12. For example, the online discussion board AutoAdmit (self described as the "most prestigious law school discussion board in the world")²⁷ has included discussion threads entitled "if God didn't intent men to rape women then", and "reminder: [individual woman's name] deserves to be raped". Individual women have been targeted through fake postings suggesting they provided sexual services in exchange for grades, labeled "Jew bitch" clearly deserving of being raped and have been listed in threads labeled "which female [Yale Law School] students would you sodomize?"²⁸
13. Similarly, those involved in cyberbullying research have emphasized the degree to which membership in a minority ethnic group, the LGBTQ community or being disabled exposes youth to a greater risk of being targeted.²⁹ For example, an EGALE study released in 2011 showed that 23% of gay boys and 47% of transgendered students who responded to their survey said that they had been victims of online harassment, as compared to only 5.6% of the heterosexual students who responded to the survey.³⁰
14. Cyberharassment and cyberbullying research suggests that the ability to operate anonymously or pseudonymously while interacting with others through certain forms of digital communication assists in explaining the growth and vitriol of these forms of online targeting:

Online, bigots can aggregate their efforts even when they have insufficient numbers in any one location to form a conventional hate group. They can disaggregate their offline identities from their online presence escaping social opprobrium and legal liability for destructive acts.³¹
15. Research in these areas also emphasizes the heightened impact that online attacks can have on targets related both to the breadth of dissemination and to the pervasive presence of online media in everyday life.³² As Keats Citron describes it with respect to targeted women:

Such harassment has a profound effect on targeted women. It discourages them from writing and earning a living online. It interferes with their professional lives. It raises their vulnerability to offline sexual violence. It brands them as incompetent workers and inferior sexual objects. The harassment causes considerable emotional distress. Some women have committed suicide.³³

16. Our evolving socio-technological context strongly suggests that rather than retreating from a human rights based approach to online hate propagation, we ought to be embracing it. Indeed, the Nova Scotia Task Force on Bullying and Cyberbullying recommended involvement of human rights commissions to assist in resolving these harassment-based issues.³⁴ Similarly, Keats Citron, writing from a US perspective, has called for civil rights recourse for online hate and harassment:

[T]he Internet's impact on civil rights has gone largely neglected to date. As a result, something with the potential to be a great engine of equality has all too often reflected and reinforced the offline world's power imbalances. The brutality of online mobs is an important part of that story, but it is only a part. Scholars and activists need to devote the same attention to online threats to civil rights that they have to civil liberties.³⁵

17. Canada already has such legal recourse in the form of s. 13 of the CHRA. From a legal perspective, the constitutionality of s. 13 (subject to severance of the penalty provision) has recently been affirmed.³⁶ Moreover, the pressing and substantial purposes of human rights restrictions on dissemination of group based hate were very recently endorsed by the Supreme Court of Canada in *Whatcott*.

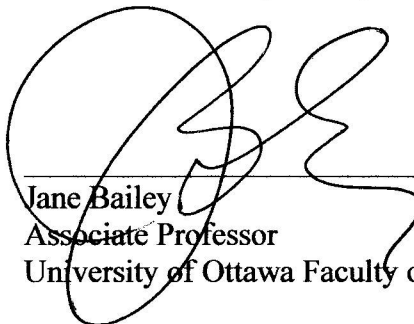
III. UNPROTECTED VULNERABLE GROUPS

18. Viewed in context, restrictions on hate propaganda can be understood as equality measures, designed to mitigate against hate's incursion on target group members' right and ability to fully participate in our democracy. Without s. 13, however, certain equality seeking groups will be deprived of federal legal protections.
19. The hate-related provisions of the Criminal Code apply only in relation to colour, race, religion, ethnic origin and sexual orientation, thereby leaving out sex and disability (among others).³⁷
20. Without s. 13, equality seeking groups such as women, persons with disabilities and those targeted on the basis of intersections between these and other axes of discrimination would be left unprotected.
21. Conscious removal of these equality-seeking groups from the ambit of federal legislative protection would be difficult to justify in any context, but is particularly troubling in a social and technological context in which their vulnerability is rendered so clearly evident.

IV. CONCLUSION

22. Section 13 is a constitutionally sound contribution to an equality-based Canadian public policy strategy to combat group-based hatred and discrimination. Despite the fact that its scope is limited to extreme content, s. 13 offers a unique, forward-looking remedial mechanism for addressing the disproportionate risk of harm borne by socially vulnerable groups and their members, particularly in light of current social, technology and legal realities.
23. Digital communications technologies present unprecedented opportunities for growth and diversity, but at the same time can create conditions ripe for widespread dissemination of hatred, as well as fomentation of hatred and a mob mentality within insular groups. Hate sites and other technological platforms continue to proliferate, along with identity-based cyberharassment and cyberbullying against members and perceived members of identifiable groups with documented psychological and exclusionary impacts on their targets. Disturbing levels of hate crime and the lack of effective legal mechanisms for addressing racism and discrimination leave threatened groups feeling excluded in a time of economic and social dislocation that exposes them to scapegoating as members of traditionally empowered groups confront their own vulnerabilities.
24. As we move toward proactive responses to bullying and cyberbullying designed to encourage our children and youth to act with empathy, respect for diversity and equality and to behave responsibly online, Canadian policymakers have the opportunity to lead by example by refusing to repeal existing human rights protections for the vulnerable in our midst.
25. For the foregoing reasons, Bill C-304 should be rejected.

All of which is respectfully submitted,



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¹ *R v Zundel* [1992] SCJ No 70, [1992] 2 SCR 731 at para 212, per Gonthier, Cory and Iacobucci JJ (as they then were) (dissenting).

² *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [CHRA].

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- ³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c. 11, ss 2(b), 15, 28, 35.
- ⁴ *Criminal Code*, RSC 1985, c. C-46 [Criminal Code], ss 318(4) and 319(7).
- ⁵ *Saskatchewan Human Rights Commission v William Whatcott* 2013 SCC 11 at para 73 [Whatcott]
- ⁶ *Ibid* at para 41.
- ⁷ Alexander Tsesis, *Destructive Messages: How Hate Speech Pave the Way for Harmful Social Movements* (New York: New York University Press, 2002).
- ⁸ Whatcott, *supra* note 5 at para 75.
- ⁹ Jane Bailey, “Twenty Years Later *Taylor* Still Has it Right” (2010) 50 SCLR (2d) 1 at 18 [Bailey].
- ¹⁰ Rosemary Cairns Way, “Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?” (2005) 4 JL & Equality 203 at para 38.
- ¹¹ Bailey, *supra* note 9 at 16.
- ¹² Andrea Slane, “Combating Hate on the Internet: Current Canadian Efforts and the Recommendations of Non-Governmental Organizations to Improve Upon Them” (Paper for the Department of Justice, December 2007) at 23.
- ¹³ Bailey, *supra* note 9 at 3-4.
- ¹⁴ Statistics Canada, *Police-reported Hate Crime in Canada, 2008* (Juristat article) by Mia Dauvergne (Ottawa: Minister of Industry, 2010); Statistics Canada, *Police-reported Hate Crime in Canada, 2009* (Juristat article) by Mia Dauvergne (Ottawa: Minister of Industry, 2011) [Statistics Canada 2011], chart 1.
- ¹⁵ Statistics Canada 2011, chart 4.
- ¹⁶ *Ibid* table 3 and chart 5.
- ¹⁷ *Ibid* table 3 and chart 6.
- ¹⁸ *Ibid* table 3 and chart 6.
- ¹⁹ *Ibid* 2011, p 8.
- ²⁰ *Ibid* 2011, p. 8.
- ²¹ Leadership on Civil Rights Education Fund, *Confronting the New Faces of Hate: Hate Crimes in America 2009* (Leadership in Civil Rights Education Fund, 2009), online: <http://www.civilrights.org/publications/hatecrimes/>.
- ²² Bailey *supra* note 9 at 3.
- ²³ League for Human Rights of B’nai Brith Canada, “2012 Audit of Antisemitic Incidents” (B’nai Brith Canada National Office, 2012), online: <http://www.bnaibrith.ca/audit2012/> at 16; Douglas MacMillan, “Twitter Aids Rise of Web-Based Hate Forums, Report Finds” *Bloomberg News* (7 May 2013), online: <http://www.bloomberg.com/news/2013-05-07/twitter-aids-rise-of-web-based-hate-forums-report-finds.html>.
- ²⁴ Danielle Keats Citron, “Cyber Civil Rights” (2009) 89 Boston University L Rev 61-125 [Keats Citron].
- ²⁵ See, for example: *Schnell v Machiavelli and Associates Emprize Inc.* 2002 CanLII 1887 (CHRT) at para 94-98; *Warman v Guille* 2008 CHRT 40 (CanLII); *Association of Black Social Workers v Arts Plus* (1994), 24 CHRR D/513 (NS Bd Inq); *Warman v Western Canada for Us*, 2006 CHRT 52 (CanLII); *Warman v Kouba*, 2006 CHRT 50

(CanLII); *Warman v Beaumont*, 2007 CHRT 49 (CanLII); *Warman v Northern Alliance*, 2009 CHRT 10 (Can LII).

²⁶ Keats Citron, *supra* note 24 at 64.

²⁷ www.xoxoth.com

²⁸ Danielle Keats Citron, “Law’s Expressive Value in Combating Cyber Gender Harassment” (2009) 108 Mich LR 373 [Keats Citron 2009].

²⁹ See, for example: UNICEF Innocenti Research Centre, “Child Safety Online: Global challenges and strategies” (Florence: UNICEF, 2011) at 3, online: Unicef Canada <http://www.unicef.ca/sites/default/files/imce_uploads//TAKE%20ACTION/ADVOCATE/DOCS/Child_Safety_online_Globa_challenges_and_strategies.pdf>.

³⁰ Senate, Standing Committee on Human Rights, *Cyberbullying Hurts: Respect for Rights in the Digital Age* (Canada: December 2012) at 30 [Senate Report].

³¹ Keats Citron, *supra* note 24 at 63. With respect to the impact of online anonymity on bullying behaviours, see also: Senate Report, *supra* note 30 at 21.

³² Senate Report, *supra* note 30 at 17.

³³ Keats Citron 2009, *supra* note 28 at 375.

³⁴ A. Wayne MacKay, “Respectful and Responsible Relationships: There’s No App for That” (Nova Scotia Task Force on Bullying and Cyberbullying: 2012) at 44.

³⁵ Keats Citron 2009, *supra* note 28 at 125.

³⁶ *Canadian Human Rights Commission v Richard Warman, The Attorney General of Canada and Marc Lemire* 2012 FC 1162 (currently under appeal).

³⁷ Criminal Code, *supra* note 4, ss 318 and 319.