INDEPENDENT PRESS GALLERY

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Digital Citizen Initiative
Department of Canadian Heritage
25 Eddy Street
Gatineau, QC K1A 0S5

Dear Digital Citizen Initiative:

Re: Harmful Online Content Feedback

I am the President of the Independent Press Gallery of Canada ("**IPG**"). This letter is provided as feedback on the Government of Canada's proposed approach to regulating social media and harmful online content. We hope you take our perspectives seriously in crafting any bill the Government may intend to introduce on this topic.

Generally, we assert that the proposed approach desperately needs to be reconsidered, with greater consultation and further analysis taking place before proceeding. The proposal has significant legal issues throughout and harmful legal consequences to *Charter*-protected freedoms and the rule of law.

The IPG is a not-for-profit dedicated to the promotion of a free and independent media in Canada. We have a large membership, which includes independent journalists and media outlets. We support and advocate for a media that remains separate from the government, and have a strong commitment to *Charter* values, particularly freedom of expression, association, and free press. The IPG is vital to the fabric of Canada and essential to an independent media. The Government regulation, as proposed, is detrimental to these democratic values.

In preparing these comments we have reviewed several sources. The following is an outline of our response.

1. Bill C-36

The Discussion Guide starts out by referring the reader to Bill C-36, which was introduced on June 23, 2021. The Discussion Guide advises that Bill C-36 will "complement the regulatory approach for online social media platforms." The Technical Paper mentions hate speech in one paragraph[1] out of 126, so by inference, Bill C-36 is instrumental in understanding the regulation of social media and harmful online content.

The Definition of Hatred

Bill C-36 introduces a new defined term, "hatred", into the *Criminal Code,* which is particularly concerning for being vague, ambiguous, and difficult (if not impossible) to distinguish where dislike or disdain end and hatred begin:

> ***hatred*** means the emotion that involves detestation or vilification and that is stronger than dislike or disdain; (haine)

[1] Technical Paper, paragraph 8.

The Supreme Court of Canada, and Courts across the country have struggled with the interpretation and application of section 319 of the *Criminal Code* for the public incitement of hatred. It is not an easy concept to define, and it is not something tangible that we can all agree has occurred or has not. It is nuanced, and is usually informed by a person's own experiences and philosophies. Hatred, according to the Courts, is separate from violence and threats of violence. Hatred is, as it is put in the definition in Bill C-36, an emotion, a personal and subjective experience. The problem with criminalizing such an emotion was put succinctly by Justice McLachlin (as she was then):

> It is not only the breadth of the term "hatred" which presents dangers; it is its subjectivity. "Hatred" is proved by inference -- the inference of the jury or the judge who sits as trier of fact -- and inferences are more likely to be drawn when the speech is unpopular. The subjective and emotional nature of the concept of promoting hatred compounds the difficulty of ensuring that only cases meriting prosecution are pursued and that only those whose conduct is calculated to dissolve the social bonds of society are convicted.[2]

The definition proposed in Bill C-36 does nothing to clarify when an emotion becomes criminal.

Currently, Canada is amid a pandemic. Vaccination mandates are being rolled out by provincial, municipal, and federal governments, as well as businesses and all sorts of employers. Those who support these efforts detest and vilify those who object to vaccination or oppose the mandates. Emotions are high on both sides, are politicized and are polarizing. Certainly, the vaccinated and unvaccinated are identifiable groups for the purposes of section 319(2) of the *Criminal Code* - we have government issued identification papers to distinguish one group from the other, as well as different applicable criteria and accessibility between the groups. This current climate is a perfect example as to the problem with this definition and the criminalization of hatred - none of the defences listed in section 319(3) of the *Criminal Code* would immunize comments of detestation or vilification directed towards either group. Such politicized positions as between interests respecting bodily autonomy and public health, should <u>not</u> attract criminal liability. To legislate such a definition of hatred, in the way proposed, is

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[2] *R v Keegstra*, [1990] 3 SCR 697 at 856 (McLachlin J, dissent).

to encourage the difficulties identified by our former Chief Justice rather than mitigate those difficulties.

Discrimination by Hate Speech

Bill C-36 also proposes to create a new category of discrimination in the *Canadian Human Rights Act*, RSC 1985, c H-6 ("***CHRA***"), the expression of hate speech on the internet or by other means of telecommunication. This is nonsensical, in that it proposes to regulate online communications for hate speech but provides no recourse to verbalized hate speech. This two-tiered system of communication is problematic. In addition, the definition of hate speech faces the same problems that the definition of hatred faces. It is a nearly impossible to get a uniformed appreciation as to what is, or is not, hate speech.

The exemption to hate speech, as set out in proposed section 13(5), fails to understand the nuance of online communication:

> **Exception — private communication**
> (5) This section does not apply in respect of a private communication.

There is no guidance in this Bill or in the proposed revisions to the *CHRA* to determine when a communication is private. There are several online communications that one may consider private or public, such as communications posted to a private group, direct messages, group messages, posts by a private account, posts where only a handful of people have seen the communication or could see the communication. Then the question arises of who is responsible for the private communication when it is made public by screen shot or shared to a wider, more public audience. Section 13(3)(a) seems to protect someone who amplifies the communication, leaving an unintelligible structure to monitor online communication. Bill C-36 is woefully disconnected to the manner of communications online.

Accepting section 13 as it is, it is also difficult to establish how "online hate speech" can be discriminatory. There is a standard test for discrimination:

1. Does the complainant have a protected characteristic?
    a. In the *CHRA*, protected characteristics are race, national or ethnic origin, colour, religion, age, sex (including pregnancy or child-

birth[3]), sexual orientation, gender identity or expression, marital status, family status, genetic characteristics (including a refusal to undergo genetic testing or disclose results of such testing[4]), disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.[5]

2. Did the complainant suffer an adverse consequence?

    a. In the *CHRA* the adverse consequence must be related to the access of goods, services, facilities, or accommodations;[6] residential accommodation;[7] employment, employment organizations, employment policies, wages, or employment applications and advertisements;[8] or the publication of notices, signs, symbols, emblems.[9]

3. The adverse consequence must be related to the protected characteristic.[10]

This three-part test is commonly referred to as the *Moore* test. In the *CHRA* it is also discriminatory when a person is harassed on the basis of a protected characteristic in the provision of goods and services, commercial or residential accommodation, or in matters related to employment.[11] It would have made far more sense to craft a hate speech section that mirrored section 14 of the *CHRA* on harassment, to confine alleged discrimination to the usual boundaries of protected grounds and specific adverse effects. As it is currently drafted in Bill

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[3] *CHRA*, s 3(2).

[4] *CHRA*, s 3(3).

[5] *CHRA*, s 3(1).

[6] *CHRA*, s 5

[7] *CHRA*, s 6

[8] *CHRA*, s 7-11

[9] *CHRA*, s 12

[10] *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33.

[11] *CHRA*, s 14

C-36, the Canadian Human Rights Commission will be inundated with allegations of hate speech where the speech is of a quasi-private nature, or the complainant has not suffered an adverse consequence in the protected areas as required by part two of the *Moore* test. Finally, it is arbitrary, unreasonable, overly broad, and unnecessary for the Commission to have jurisdiction over communication on the internet or by telecommunication, where the same communication made verbally or in print would fall outside the Commission's jurisdiction.

Concerningly, Bill C-36 leaves anyone open to accusation of hate speech, with little recourse in which to make a reasonable response or defence. This is made clear by the proposed section 40(8):

> The Commission may deal with a complaint in relation to a discriminatory practice described in section 13 without disclosing, to the person against whom the complaint was filed or to any other person, the identity of the alleged victim, the individual or group of individuals who has filed the complaint or any individual who has given evidence or assisted the Commission in any way in dealing with the complaint, if the Commission considers that there is a real and substantial risk that any of those individuals will be subjected to threats, intimidation or discrimination.

The proposed section 40(8) is contrary to the rule of law and runs afoul the principles prescribed in section 11(a) of the *Charter*.

In sum, Bill C-36 is a poor foundation upon which to build a regulatory structure for social media and harmful online content.

2. Discussion Guide and Technical Paper

Collectively, we have referred to the Discussion Guide and Technical Paper as the "**Proposal**" throughout the remainder of these feedback submissions.

Module 1: Regulating Social Media

There are five categories of harmful content enumerated in the Proposal. Our comments will focus on three categories:

- terrorist content;

- content that incites violence; and
- hate speech.

These categories are tied to freedoms of expression and the IPG has serious concerns about the proposed regulation of these categories, as will be described in further detail below.

Hate Speech

The hate speech category is presumably informed by Bill C-36. The Proposal suggests that hate speech "should only be considered as harmful content for the purpose of the Act when communicated in a context in which it is likely to cause harms identified by the Supreme Court of Canada and in a manner identified by the Court in its hate speech jurisprudence."[12] This is wholly unclear and ambiguous. What harms identified by the Supreme Court? What case? Are these harms identified in the criminal law, Canadian human rights law, regulatory law, or civil law context? On what balance of proof should the likelihood of these harms be considered? This paragraph refers to the amended *CHRA*, which (i) has not yet been amended, (ii) has no case law associated to hate speech provisions, and (iii) does not otherwise have hate speech provisions in the unamended version. As a result, it is difficult to understand what "harms identified by the Supreme Court of Canada" could be contemplated in the application of the Proposal. This ambiguity causes the IPG serious concerns.

Freedom of Expression

Although the Proposal alleges that it regulates Online Communications Services Providers ("**OCSP**"), the result is the indirect regulation and suppression of *users* who post content to those sites. The Proposal infringes on those users' freedom of expression and creates an unreasonable censorship mechanism.

OCSP who cooperate with the regulatory structure will be motivated to respond overzealously to avoid unnecessary business risks. This risk aversion has been identified extensively in public commentary on the Proposal. OCSP will engage in censorship to avoid investigation, shutdowns, and disproportionate fines. Again, this censorship will have extensive impacts on freedom of expression. These

[12] Technical Paper at para 8.

impacts do not meet the requirements for *Charter*-infringing legislation to ensure minimal impairment and proportionality to objectives.

Finally, the "exceptional recourse"[13] power to block sites from use in Canada for persistent non-compliance is an egregious and disproportionate exercise of government authority, particularly if such commonplace and integral sites such as YouTube or Twitter were suddenly blocked from use or access by Canadians. To block a whole site, which contains extensive relevant and necessary content that is not harmful, in response to non-compliance regarding a small portion of the content available, is undemocratic.

Other Harms and Delegation of Authority

In addition to the categories identified, the Discussion Guide also notes that, "the Government recognizes that there are other online harms that could also be examined and possibly addressed through future programming activities or legislative action." The Technical Paper alludes to types and subtypes of harmful content as well.[14] Such statements are concerning. It is unclear from the Proposal upon which basis "other harms" will be identified or brought into this regulatory framework. The main concern being that the legislation will be drafted to subdelegate such authority to a Minister or the Governor in Council to prescribe "other harms".

We expect that Parliament may subdelegate the authority to prescribe "other harms" by regulation. Although the British Columbia Court of Appeal observed that "the case law on delegation of legislative powers admits of few, if any restrictions, on the scope or content of what powers may constitutionally be delegated,"[15] this does not mean that this is the type of regulatory authority that should be delegated to the Governor in Council. It is more appropriate to delegate authority for public convenience and general policies,[16] rather than delegating authority which will almost certainly have a direct effect on *Charter* rights. The Governor in Council is the executive branch of the government, has

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[13] Technical Paper at paras 120-123.

[14] Technical Paper at para 11(c).

[15] *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 at para 89.

[16] *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 21, citing *Thorne's Hardware Ltd v The Queen*, [1981] 1 SCR 106 at 111.

no opposition, and has no specialized knowledge regarding when or whether certain content is harmful. Generally, we submit that the sub-delegation of legislative powers is undemocratic in that executive action is ordinarily exercised without due process, procedural fairness, or consultation, is often politicized, does not reflect the will of the populace, fails to achieve the transparency, and is usually not subject to the review that parliamentary legislation is subjected to. The Governor in Council should only be granted authority that is broad, generalized, and "commonplace"[17] for the purpose of generalized management of government or policy determinations. The Governor in Council should not receive broad authority which relies on a subjective opinion which will invariably infringe on the freedom of expression.

Undefined "other harms", such as harassment, privacy violations, or defamation, would be even more difficult for OCSP to monitor, than the harms explicitly identified in the Proposal. As has been noted by many commentators, the Proposal is likely to result in responses by OCSP that favour risk aversion over freedom of expression. These risks to *Charter*-protected rights will be amplified if the Governor in Council is granted regulation making authority to broaden the scope "harmful content". The risk aversion outcome is amplified by the obligation imposed on an OCSP to remove harmful content within 24 hours of being flagged[18] and the excessive administrative monetary penalties which are not proportional to the supposed harms.[19]

The Technical Paper contemplates a very vague and possibly very broad delegation of authority to the Governor in Council,[20] many areas of contemplated delegations of authority,[21] and further subdelegation by the Governor in Council to the Digital Safety Commissioner.[22] This delegation of authority is problematic for all the reasons listed above: transparency, justification, judicial review, and procedural fairness. As a constitution academic, Lorne Neudorf said:

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[17] Patrick Monahan, Byron Shaw & Padraic Ryan, Constitutional Law, 5th ed (Toronto: Irwin Law Inc, 2017) at 57-58.

[18] Technical Paper at para 11(a), 12(b).

[19] Technical Paper at paras 108, 119.

[20] Technical Paper at para 5.

[21] Technical Paper at paras 3, 9, 11

[22] Technical Paper at paras 10, 12.

> Under the Constitution of Canada, Parliament is placed firmly at the centre of public policymaking by being vested with exclusive legislative authority in certain subject matters. Parliament must therefore play the principal federal lawmaking role. The Supreme Court's 1918 judgment[23] should no longer be followed to the extent that it allows courts to accept near unlimited delegation of Parliament's lawmaking powers to the executive. […] Courts and Parliament must take delegation more seriously, and constitutional safeguards should be established to better protect the role of Parliament as lawmaker in chief and restore the proper constitutional balance.[24]

The IPG agrees with Mr. Neudorf's comments. The delegation to the executive in the Proposal is so extensive that it is unconstitutional and contrary to the balance of powers.

Suspicions and Bias

We also raise issues with the obligation on OCSPs to make reports to the RCMP when they have "reasonable grounds to suspect" harm. First, this Proposal is supposed to be a regulatory process, and not an expansion of policing obligations to private organizations. Second, unbridled and discretionary authority based on suspicions will almost certainly result in disproportionate policing (by OCSP and law enforcement) of racialized and low-income communities,[25] as well as those who express unpopular speech.

No Justification

The Proposal is overly broad and unworkable. It encroaches on free expression and fails to provide adequate protection to ensure that the Executive or regulator exercise their authority reasonably. The mechanisms and results proposed will stifle communication, infringe on basic freedoms, and suppress diversity of perspectives. The Proposal will also unjustifiably violate privacy interests, and likely result in discriminatory policing. The fact that the Proposal is silent on

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[23] A reference to *Re: Gray,* (1918) SCR 150, 42 DLR 1.

[24] Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dal LJ 519 at 519.

[25] *R v Le*, 2019 SCC 34 at para 97.

safeguards for freedom of expression or consideration of *Charter* rights is alarming and leaves the impression that the Government has either failed to consider *Charter*-protected freedoms or has no interest in ensuring that the violations are justifiable.

We remind the Government that it **must** show that legislation which violates *Charter*-protected rights and freedoms is justified:

> Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law.[26]

There is nothing in the Proposal which shows Canada has met its burden. As a result, the Proposal unconstitutionally trespasses on civil liberties in its current form.

Module 2: Modifying the Legal Framework

Module 2 proposes revisions to the *Canadian Security Intelligence Act* ("***CSIA***") which are contrary to Supreme Court of Canada jurisprudence on this subject. This is the only place in the Technical Paper where the Government has acknowledged that it is seeking feedback, despite the invitation on the Have Your Say page to "submit comments" on the Proposal more generally.

We are opposed to the "simplified process" vaguely proposed in this section of the Technical Paper for CSIS to obtain basic subscriber information ("**BSI**"). We are aware of no reason why CSIS should be authorized to bypass well established laws on search warrants, which protect individual rights and freedoms against unreasonable search and seizures. With respect to hate speech, the expediency sought by this section would in almost all circumstances be unnecessary. It is not clear, seeing as this is a regulatory proposal, whether these amendments to the CSIA would be reserved for criminal behaviour or more generalized investigatory procedures.

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[26] *R v Carter,* at para 94, citing *R v Oakes*, [1986] 1 SCR 103.

Further, it is unclear what the Discussion Guide considers to be an "online threat actor". To anchor such an impressive power of rushed warrants with a government intelligence service, based on an ambiguous and fear-mongering term, is problematic and irreconcilable to our democratic institutions, *Charter* values, and common law.

Privacy Issues

The Proposal seems designed to bypass the Supreme Court of Canada's decision in *R v Spencer*, 2014 SCC 43. In *Spencer*, the Court considered when BSI could be obtained. As noted in the first line of that decision, "the internet raises a host of new and challenging issues about privacy." It appears that the Proposal has not given sufficient consideration to issues about privacy. Obtaining BSI is a search, and such searches should be conducted with judicial authorization and otherwise meet the requirements in the case law and should respect *Charter* protected rights under section 8. There is insufficient detail in the Proposal to believe that those rights will be protected and respected in the expedited CSIS procedure contemplated. IPG expresses its disagreement with the proposed changes to the *CSIA*.

This same encroachment on section 8 rights is captured in the "Inspection Powers" section of the Technical Paper.[27] The pattern of *Charter*-infringing legislation shows that the Government has not paid due care to democratic values. As one commentator identified, these powers seem to create a "new internet speech czar" and "speech police",[28] powers that are usually associated to autocratic governments, not ones who should be guided by constitutional values and human rights.

3. Conclusion

In summary, the Proposal:

i. has a problematic foundation in Bill C-36;

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[27] Technical Paper, paras 88-93.

[28] Corynne McSherry and Katitza Rodriguez, "O (No!) Canada: Fast Moving Proposal Creates Filtering, Blocking and Reporting Rules - and Speech Police to Enforce Them" (2021 August 10) Electronic Frontier Foundation, available online at: https://www.eff.org/deeplinks/2021/08/o-no-canada-fast-moving-proposal-creates-filtering-blocking-and-reporting-rules-1

ii. unreasonably and undemocratically infringes on rights guaranteed by section 2(b) of the *Charter* by constraining what can be said or seen on OCSPs (and other internet sites later prescribed by the Governor in Council);

iii. puts unreasonable obligations on OCSPs which will invariably result in risk averse responses that unreasonably stifle free expression;

iv. fails to reflect recent jurisprudence from the Supreme Court of Canada on privacy and subscriber information;

v. creates unreasonable obligations and gives improper authority to OCSPs to determine whether they have "reasonable grounds to suspect" that the harmful content may reflect imminent risks to people or property and then report that suspicion to law enforcement, presumably for criminal investigation (despite the assertion that this is supposedly a regulatory proposal);

vi. fails to respect current jurisprudence on section 8 *Charter* rights; and

vii. creates ample opportunity for bias, discrimination, and inequal application of the law by creating an arbitrary and unworkable system.

We note that there is extensive commentary online by experts in this space that also raise serious issues with the Proposal. We have done our best not to duplicate their comments, but adopt and agree with the critiques put forward by Michael Geist in "Picking Up Where Bill C-10 Left Off: The Canadian Government's Non-Consultation on Online Harms Legislation" and Daphne Keller in "Five Big Problems with Canada's Proposed Regulatory Framework for "Harmful Online Content"". We also suggest that you review the "26 Recommendations on Content Governance: A guide for lawmakers, regulators and company policy makers" issued by AccessNow, which provides extensive guidance on the regulation of internet content which reflects democratic principles and respects human rights, something which the current Proposal fails to do.

The IPG opposes the Proposal and expresses a serious concern to the harmful effects on freedom of expression and principles of law that will ensue if the Government moves forward with the Proposal. We expect that the Government

will take our criticisms into account and will cease its pursuit of the Proposal in its current form.

Yours truly,

Candice Malcolm
Independent Press Gallery