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Via email: maria-fernanda.maxil-platas@pch.gc.ca

Maria-Fernanda Maxil-Platas
Senior Policy and Reports Officer, Human Rights Policy
Department of Canadian Heritage
15 Eddy Street, 12th Floor, Room 0
Gatineau, QC K1A 0M5

Dear Ms. Maxil-Platas:

Re: Canada's reports on the International Convention on the Elimination of all Forms of Racial Discrimination

We are writing on behalf of the Canadian Bar Association's Equality Subcommittee, International Law Section and Immigration Law Section (CBA Sections) in support of Canada's reporting obligations on the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).

The CBA is a national association of 37,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The Equality Subcommittee is dedicated to achieving equality in the legal profession, in particular on the basis of sex, gender, sexual orientation, gender identity, race, national or ethnic origin, colour, religion, language, age or disability. The International Law Section addresses both private and public international law including treaties and conventions, international economic law and international trade, as well as conflict of laws and how they interact with domestic law. The Immigration Law Section deals with law, policy, administration and enforcement related to immigration, citizenship and protected persons.

The CBA Sections commend the federal government for its commitment to implementing ICERD and for the issues already noted in the report outline. As requested, this letter identifies key issues not included in the outline, issues of priority for inclusion in the report, and Canada's main successes and challenges related to the issues. We appreciate the opportunity to make these preliminary comments on the outline and look forward to consulting further on the report.

Overarching Implementation Considerations

We applaud the current list of subject areas to be included in this section. Two items – consultations with civil society and Indigenous organizations and federal, provincial and territorial mechanisms to combat racial discrimination – are especially important as they inform the concrete steps taken to consult to get a view of the problem and what tools are in place to combat the problem, while also

noting gaps in both. In consultation with civil society, the federal government should keep in mind previous advice of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance¹ on cultural rights and draw on the longstanding work of anti-racist, migrant rights, intercultural and interfaith groups and human rights defenders. The federal government should also, in developing laws and programs, consult with groups most affected by hatred on the basis of religion, race and migrant status. This should include consultations with women and other marginalized members of affected communities.

A key issue not presently included in the outline is the overlap between racial and religious discrimination, what Canada has already done and what is further needed to combat religious discrimination. Racial and religious discrimination should not be viewed as distinct issues, and the issues stemming from their intersectionality must be highlighted.

All other overarching implementation considerations should account for intersectionality,² how individuals with intersecting identities face racial discrimination and how this can be combatted.

Ethnocultural groups

We applaud the issues in this section, including education, employment equity, hate crimes and hate speech, victim reporting and compensation, investigation, detention of migrants, the STCA and the status of temporary migrant workers.

We believe it is important not to aggregate the discussion in a catchall category of “ethnic minorities.” Racial discrimination plays out differently on the ground for different groups. The discussions need to recognize the varying experiences of different racialized groups, nationality groups, migrant status groups and religious groups.

For racist hate crimes, additional discussion is needed around:

- What proactive steps have been and need to be taken to ensure all groups have equal access to the services of law enforcement and the justice system;
- Assessment of the level of trust, safety and access that members of different groups have with law enforcement and the justice system, and necessary steps needed to improve this relationship;
- What training judges receive and how the Canadian Judicial Council may ensure training modules address anti-discrimination obligations and hate speech laws;
- What training law enforcement officers receive and how it should be updated to address anti-discrimination obligations and hate speech laws;
- Discussion of how to institute systems to monitor discriminatory processes such as profiling by decision-makers and law enforcement.

¹ *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (Addendum: Mission to Canada)*, Commission on Human Rights, 60th Sess, E/CN.4/2004/18/Add.2 (204).

² Intersectionality is an analytical framework for understanding how aspects of a person’s social and political identities combine to create different modes of discrimination and privilege. Intersectionality identifies multiple factors of advantage and disadvantage based on intersecting impacts of sexual orientation, gender identity and expression, sexual characteristics, race, nationality, immigration status, class, physical ability, mental health etc.

The education section would benefit from additional details from provincial and territorial governments to ensure that educational policies and curriculum adequately promote religious and racial tolerance. There should be discussion about anti-racist, intercultural and human rights-focused education, as well as balanced historical education that recognizes the contributions of all groups to national identity.

All discussions under this section should report on provincial and territorial efforts to implement ICERD to combat racism, and how the federal government is facilitating or supporting these efforts.

The report also needs to discuss the Safe Third Country Agreement and the situation of migrants, refugees and asylum-seekers in Canada.

Most refugee claimants crossing from the US Border into Canada are racialized, and many are gender-diverse. The fact that someone could have a successful refugee claim in Canada and is excluded from doing so because of what border they crossed is the root of an inequality for these individuals. There is no safe, viable alternative, if not allowed to claim refugee protection in Canada. Claimants awaiting a decision are not granted temporary status, and face removal at any time. These complexities should be included in the report.

The question of why the US is not a viable alternative for certain racialized groups should also be addressed. Racialized, gender diverse and religious minority persons transit through the US to claim refugee status in Canada because of the discriminatory treatment of these groups in the US immigration system.

For instance, women facing gender-based violence do not qualify for refugee protection in US but they can be eligible for refugee status in Canada. Women, often racialized, suffer disproportionately from the US refugee regime, while they do not to the same extent in Canada. The US immigration jurisprudence interprets the term refugee from the *Convention relating to the Status of Refugees* as not including gender-based persecution, while the Canadian courts have interpreted the definition broadly to specifically include gender-based persecution. There can be further consultation with civil society groups to include more detail on this in the report.

As Amanda Ghahremani and Jamie Liew have written (hyperlinks from original article):

America's policies and practices include [arbitrary detentions](#), the [forcible transfer](#) of infants and children from their parents – of which many were [sexually abused](#) and [hundreds are still missing](#) – [forced and unnecessary medical procedures](#), and [inhumane detention conditions](#) such as holding women and children in cages or frigid holding cells, and denying them soap or toothbrushes.

These practices did not start or end with former U.S. president Donald Trump. Rather, they are part of a [continuous policy](#) to discourage migration, including by those fleeing violence and persecution, often as a by-product of [U.S. foreign policy](#) — including, for example, its past support of right-wing military regimes in Central America, resulting in refugee-producing oppression and conflict.

Joe Biden's nascent presidency has not yet ushered in any meaningful changes to America's immigration policies. Children are [still detained](#) in inhumane conditions and hundreds of thousands of migrants have been [turned back](#) since January 2021.

Moreover, the U.S. has [narrower criteria](#) than Canada for determining refugee status. This means U.S. authorities routinely [deport](#) women escaping gender-based persecution and individuals fleeing gang violence. In Canada, these persons might otherwise qualify for refugee protection. In one [recent investigation](#) by Human Rights Watch, researchers found hundreds of

deportees from the U.S. to El Salvador were killed, disappeared, or subjected to sexual violence, torture, and other harm.³

It would be helpful to engage in more research and report on the racialized and gendered differences between the US refugee regime/detention versus the Canadian system.

Indigenous Peoples

We applaud the issues in this section, including federal strategies, violence against Indigenous women and girls, socioeconomic issues, and consultations with Indigenous peoples. We believe consultation with Indigenous groups is required to determine the priority issues in this section and what key issues are missing.

We recommend expanding the scope of the second issue in keeping with the Missing and Murdered Indigenous Women and Girls report: “violence against Indigenous women and girls” should read “violence against Indigenous women and girls, including LGBTQ2S people.”

Justice

We applaud the issues in this section, including the prevention of racial discrimination in the criminal justice system, access to justice, and Indigenous peoples, minorities, especially Black Canadians, in the criminal justice system.

However, we believe the section needs to be expanded beyond the consideration of criminal justice to all interactions with the justice system, especially interactions of minority groups with the administrative justice system in immigration, employment and human rights. For example, the section should address reports of differential treatment in Immigration, Refugees and Citizenship Canada decisions based on applicants’ country of provenance. There needs to be a discussion about judges and administrative decision-makers training that is mindful of judicial independence, and how training can be tailored with an anti-racist approach and meet Canada’s anti-discrimination obligations. Colourblind approaches allow racial discrimination and inequalities to persist because they ignore the underpinnings of race in the evidence and facts. The report should also address how to institute systems to monitor discriminatory processes by judges and administrative decision-makers.

Government-funded research and the need for further research in this area should also be noted.

The CBA Sections appreciate the opportunity to offer feedback. We trust our comments are helpful and would be pleased to offer further clarification.

Yours truly,

(original letter signed by Véronique Morissette for Audrey Boctor, Ewa Gosal and Lisa Middlemiss)

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³ Amanda Ghahremani and Jamie Liew, [Why the Safe Third Country Agreement must go](#).