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Via email: EDSC.TRA.PHV-HVP.LAB.ESDC@labour.travail.gc.ca

Brenda Baxter
Director General
Workplace Directorate, Labour Program
Employment and Social Development Canada
140 Promenade du Portage
Phase IV, 12th Floor
Gatineau, QC K1A 0J9

Dear Ms. Baxter:

Re: Consultation on Proposed Regulations to Bill C-65

We are writing on behalf of the Canadian Bar Association Labour and Employment Law Section and Women Lawyers Forum (CBA Sections) to offer input on the proposed regulatory framework for Bill C-65¹ which, if passed, will amend the *Canada Labour Code* and other legislation to address workplace violence and harassment in federally regulated workplaces.²

The CBA is a national association of over 36,000 lawyers, law students, notaries and law teachers. Among our primary objectives are improvements in the law and the administration of justice, and promoting the rule of law. The CBA Labour and Employment Law Section includes both lawyers who act for unions and who act for employers. The Section addresses issues related to law and practice affecting labour-management relations and employment standards. The CBA Women Lawyers Forum promotes women's stature and influence in the legal profession in Canada.

¹ [Bill C-65](#), *An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1*.

² See CBA resolution 15-05-M, [Sexual Harassment in Canadian Workplaces](#) (Feb 2015), urging federal, provincial and territorial governments, Canadian law firms and other Canadian workplaces to take steps to prevent sexual harassment and sexual assault in their workplaces and to create and provide accessible, safe and non-threatening reporting channels for sexual harassment and sexual assault.

The CBA Sections generally support the proposed regulatory approach in the Consultation Paper³ and offer several suggestions for improvement.

Definitions of Workplace Harassment, Sexual Harassment and Violence

Labour and employment lawyers work with standard definitions of workplace harassment, sexual harassment and violence. In our view, Bill C-65 regulations should expand the definition of “harassment and violence” to incorporate the substantive content of such standard definitions, in order to enhance certainty and reduce the risk of confusion.

The Ontario *Occupational Health and Safety Act*⁴ offers an example which we recommend be considered for inclusion in the Bill C-65 regulations:

“workplace harassment” means,

- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
- (b) workplace sexual harassment

“workplace sexual harassment” means,

- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
- (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

“workplace violence” means,

- (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Employee-driven Process

The Consultation Paper does not contemplate a complaint being made by a witness to workplace harassment and violence, or that an employer may have an obligation to investigate in the absence of a formal complaint.

³ Employment and Social Development Canada Consultation Paper, [Proposed regulatory framework: Harassment and violence](#).

⁴ [Occupational Health and Safety Act](#), R.S.O. 1990, Chapter O.1, section 1(1).

Victims of workplace harassment and violence face many barriers to making a complaint. Requiring victims to come forward places the burden of workplace change on the victim, rather than on the workplace as a whole. We suggest that the Bill C-65 regulations explicitly contemplate that witnesses may make a complaint.

Even in the absence of a formal complaint, the employer may become aware of possible workplace harassment or violence and have an obligation to investigate and address the situation due to potential harm and liability. We recommend that a formal complaint not be necessary to trigger the employer's responsibility to investigate and remedy a situation of workplace harassment or violence.

Competent Person

The proposed Bill C-65 regulations build on existing federal occupational health and safety regulations⁵ which provide that employers may appoint a "competent person" to address an unresolved workplace violence complaint. The Consultation Paper proposes that employers be required to make a "genuine attempt" to resolve a complaint of harassment or violence before appointing a competent person.

The proposed requirement for a genuine attempt introduces an unnecessary complexity to the regulatory framework. It is uncertain who must make the genuine attempt and how it will be decided whether that threshold has been met. We recommend that the existing regulations be maintained which require a competent person to be appointed if the issue is unresolved in a specified timeframe.

The Consultation Paper proposes permitting a complainant to demand that a mediator or facilitator be appointed before proceeding to appoint a competent person to investigate. The proposed six-month time limit for employers to resolve a complaint may not be feasible if both mediation or facilitation and investigation by a competent person are undertaken. We recommend that the parties be permitted to agree to extend that timeline and, if agreement is not possible, to allow either party to request an extension from the Labour Program.

Last, the Consultation Paper does not contemplate any steps if a respondent or complainant disagree with a workplace committee's chosen approach on receipt of the competent person's report. We recommend that procedures at this stage of the process be delineated in the Bill C-65 regulations.

Disciplinary Measures

The Consultation Paper suggests that the options for responding to a finding of workplace harassment or violence are limited to discipline, which may not be the most effective way to advance cultural change in the workplace. We suggest that the Bill C-65 regulations include training and education as alternative responses.

Timelines

We support the introduction of predictable timelines for resolution, and emphasize the importance of clearly setting out the steps, deadlines for each step, and recourse where a deadline is missed.

⁵ [Canada Occupational Health and Safety Regulations](#), SOR/86-304, Part XX.

We are concerned that the burden falls on the employee to make a complaint to the Labour Program, where the employer fails to meet the set timelines, with the Labour Program then contacting the employer to seek justification for the delay or need for an extension. We recommend that the Bill C-65 regulations prescribe a more direct and proactive manner of communication on compliance with timelines, relieving the employee of the responsibility to complain to the Labour Program in order to obtain information.

Definition of “Party”

The Consultation Paper uses the term “parties” casually when describing engagement in different stages of the proposed process. It is important that the Bill C-65 regulations be clear as to what is meant by this term in each context. For example, “parties” in the context of mutually agreeing on the competent person is intended to mean the complainant and the employer. Yet in the discussion of the employer’s obligation to provide support, “parties” appears to include the complainant, the respondent and witnesses. It will be significant in the Bill C-65 regulations, as in any legislative framework, to clarify this term and the participants at each stage of the process.

Role of Workplace Committee

A possible error in describing the duties of workplace committees will likely be remedied in the drafting process. Points five and twelve on page 19 of the Consultation Paper specify, respectively, that the workplace committee will refer questions to itself and provide a report to itself. We suspect both of these references are intended to read “the employer”.

We trust that our comments are helpful, and would be pleased to provide any needed clarification.

Yours truly,

(original letter signed by Sarah MacKenzie for Kathryn Sainty and Robyn Trask)

Kathryn Sainty
Chair, CBA Women Lawyers Forum

Robyn Trask
Chair, CBA Labour & Employment Law Section