

## RECOMMENDATIONS TO SENATE ROUNDTABLE ON BILL C-56

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### INTRODUCTION

- As society faces what appears to be a critical inflection point in advancing zero tolerance of sexual misconduct in the workplace, it is disappointing that the federal government's response to this once-in-a-generation opportunity takes the form of Bill C-65. It is hard to argue convincingly that the Bill, which shoehorns the government's response to sexual misconduct in the workplace into the existing occupational health and safety framework of the Canada Labour Code, rises to the challenge of this historic moment. Moreover, some of its provisions, as discussed below, are counterproductive to the announced intentions of the government in bringing forward the Bill and risk setting back the fragile momentum that has been gained in recent months.

- Since I began to write about Bill C-65, I have received several dozen emails from employees in the federal public service wanting to share their stories with me. They tell of troubling experiences about the mishandling of complaints, retaliation, lack of fairness and transparency in the investigation process, and a culture that prevents too many women from coming forward to report abuses in the workplace. A sense of betrayal is a common theme. The voice of survivors must be clearly understood if there is any hope of achieving zero tolerance. I am not confident that the government has heeded that voice sufficiently in drafting this Bill.

### ANALYSIS AND RECOMMENDATIONS

#### A PREAMBLE THAT ELEVATES AND INSPIRES

- As it is currently drafted, the Bill lacks a preamble that could speak to its origins and goals.

**Recommendation: Amend the Bill to include a preamble that captures and reflects society's expectations for zero tolerance of sexual misconduct and bullying in the workplace, and sets out in inspirational language the intended goals of the legislation and the place it takes in the journey for equality and human rights on the part of Canadian women.**

#### **INCLUDE KEY DEFINITIONS IN THE ACT**

- In my previous professional life I had some responsibility for crafting public policy and drafting legislation. In my experience, where definitions are pivotal to the central thrust of an important matter of public policy, they are included in the subject Act.
- Bill C-65 is surprisingly silent on the definitions of “harassment,” “violence,” “sexual harassment” and “sexual violence,” as well as on the term “investigation.” Such definitions are found in comparable legislation in Ontario, for instance.

**Recommendation: Amend the Bill to explicitly define these terms.**

#### **FORCED REPORTING TO SUPERVISOR**

- Clause 5 (1) of the Bill requires a party to report an incident directly to, and only to, the employee’s immediate supervisor. In my view, this is a counterproductive measure that will work against the Bill’s objectives by magnifying already significant barriers to reporting.
- Research shows that seven out of 10 women who experienced sexual misconduct in the workplace never talked to their supervisor about it. If we are to achieve a culture of zero tolerance, it is vital that women are not further discouraged from reporting.
- Fear of humiliation, of being branded a troublemaker, or of showing signs that a male supervisor could regard as indications of weakness and therefore a detracting trait for career advancement are among the chief reasons cited to explain why women do not come forward to report the kind of offensive conduct the Bill seeks to address.

**Recommendation: Amend Clause 5(1) to allow for a range of options for reporting incidents, including a no-wrong-door policy of the kind recently announced by the Government of Manitoba.**

#### **INSUFFICIENT ATTENTION TO INVESTIGATION PROCESS**

- The most critical part of any regime dealing with sexual harassment and violence, aside from the duty to prevent it in the first place, is the investigation process. It is here that so many things can, and do, go awry. For too many women, a cascade of abuses, wrongdoing and improprieties from reprisals to botched

investigative techniques can prevent healing and adversely affect a victim's life for decades.

- However, the Bill fails to address what the key attributes of employer-initiated investigations of sexual harassment and sexual violence should be under the Canada Labour Code, including the requirements of transparency, procedural fairness, impartiality, and good faith as guiding principles in any investigation, gender sensitivity, and the duty to accommodate any physical or psychological limitations the victim may have suffered as a direct result of the incident or its aftermath. There is no requirement that the employee be informed at the outset of any investigation (or commencement of complaint) as to what her or his rights and obligations are, including available remedies in the event of a dispute with the findings. Similarly, victim-led resolution solutions, where the wishes of the victim receive particular care and attention, are not recognized in the Bill.
- Given the importance of the investigation process to the successful resolution of sexual misconduct complaints and victim healing, these elements are too critical to be left unspoken in the Bill.

**Recommendation: Amend the Bill to capture the key attributes deemed essential to employer-initiated investigations of sexual harassment and violence, including requirements of transparency, procedural fairness, impartiality, and good faith, gender sensitivity and the duty to accommodate physical or psychological limitations of the victim, the requirement to inform the employee making the complaint of her or his rights and obligations, including available remedies in the event of a dispute with the findings, and the right to victim-led resolution.**

#### **SHINE THE SUN ON THE FACTS**

- Transparency is a fundamental principle of sound public policy. It advances public confidence and is a vital tool to protect the public. This is true for everything from automobile recalls to the contents of a jar of peanut butter. It also applies to combating sexual misconduct in the workplace. It is impossible to measure progress in something that cannot be seen. Moreover, where sexual misconduct in the workplace is concerned, transparency is an essential indicator of where and to what extent women are being protected — or not. Significantly, the government of Manitoba has adopted ZeroNow's proposal for disclosing of sexual misconduct statistics as part of its five point plan to combat sexual harassment.

**Recommendation: Amend the Bill to require annual public disclosure for every federally-controlled entity (starting initially with the public service) of statistics**

**on the number of sexual harassment, bullying and violence complaints made, the outcome of each complaint, and any financial settlement paid.**

**REMOVE OFFENSIVE VEXATIOUS CLAUSE**

- Clause 9(b) of the Bill would give to the Minister the power to brand any complaint “trivial, frivolous or vexatious” and to refuse to investigate such complaints. In actual fact, as Minister Hajdu has told the Committee, the Minister never gets involved in these matters. This is left to her delegate much further down in the organization.
- This provision is another hideous red flag to women, and one that risks placing yet another barrier between the victim and the decision to report the incident. Many survivors have experienced — and women in the workplace may well fear — the ‘slut or nut’ form of character assassination that is so common in cases of sexual misconduct. We do not expect to see it reappear in a slightly modified version in laws written in the 21<sup>st</sup> century that have the stated intention of preventing such behaviour.
- The damaging effect upon the victim of being told, in effect, that they are not believed cannot be overstated, and is entirely antithetical to Prime Minister Trudeau’s promise that when women come forward to report sexual misconduct in his government they will be believed. Moreover, when the resources of the state are employed against ordinary individuals to deny them their rights under law, there is no effective recourse. I would take the strongest exception to the Deputy Minister’s claim before the Committee that judicial review provides a check on the improper use of such powers. In practical terms, the expense of mounting an application for judicial review is very much beyond the reach of ordinary individuals and places an intolerable and avoidable level of stress on victims.

**Recommendation: Amend the Bill to remove Clause 9 (b).**

**CREATE SECRETARIAT FOR WORKPLACE PROTECTION**

- I cannot emphasize enough the harm that can occur to one’s dignity, emotional well-being and career to be thrown into these uncharted and turbulent waters without significant and vigorous support. Yet Bill C-65 is again silent on the mechanisms that will ensure such support from the outset. It cannot be casual or spotty; it needs to be robust, victim-friendly and experience-based. Moreover, the Bill is silent on key functions such as employee/employer training, vital bystander

training and a mechanism for the confidential/anonymous reporting by victims, witnesses and bystanders of workplace incidents.

- I would also note, as a survivor, and one who hears the pleas of victims for help and support every day, such support cannot be limited to 9-5, five days a week and never on holidays. Victims frequently reach out to me through urgent emails for support and advice during the overnight hours and on holidays.

**Recommendation: Amend the Bill to provide for the creation of what I call a Secretariat for Workplace Protection within the federal public service to provide victim support for those seeking to enforce the remedies provided under the Code, as well as training, including all-important bystander training, related to the government’s anti-harassment workplace policies. The Secretariat would also be responsible for establishing and monitoring a whistleblower system to allow for confidential/anonymous reporting by victims, bystanders, witnesses and third-party contractors in connection with prohibited incidents.**

#### **FOCUS ON PREVENTING RE-VICTIMIZATION**

- Finally, the Bill is unspoken on the issue of retaliation. This is the monster that women fear most. It is one that has devastated countless lives. In my view, the government must squarely address the urgency of preventing and prohibiting retaliation, and ensure that message is carried into the Bill.

**Recommendation: Amend the Bill to specifically prohibit retaliation and provide for appropriate sanctions against employers that engage in it.**

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Respectfully submitted,

Kathleen Finlay, Founder  
The ZeroNow Campaign  
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