

SUBMISSIONS TO: The Honourable Dave Cooke
Minister of Education and Training for
Ontario

RE: Framework Regarding Prevention of
Harassment and Discrimination in Ontario
Universities

FROM: Canadian Civil Liberties Association

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| DELEGATION: | Shira Herzog (Vice President) | A. Alan Borovoy (General Counsel) |
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Toronto

March 15, 1994

Introduction

The Canadian Civil Liberties Association is a national organization with more than 5000 individual paid supporters, 8 affiliated chapters across the country, and some 20 associated group members which themselves represent several thousands of people. A wide variety of persons and occupations is represented in the ranks of our membership - lawyers, academics, homemakers, trade unionists, journalists, artists, clergy, minority group leaders, etc.

One of our organization's key objectives is to protect the freedom and dignity of the individual against unreasonable encroachments by public authority. It is not hard to appreciate the relationship between this objective and the government document entitled Framework Regarding Prevention of Harassment and Discrimination in Ontario Universities. On the one hand, certain forms of harassment may be seen as an affront to the dignity of women, minorities, and gay people. On the other hand, the attempt to legally curtail harassment could encroach on the fundamental freedom of expression that is so necessary to the role universities are mandated to play in our community.

Not unexpectedly, the sympathies of civil libertarians lie on both sides of this thorny issue. In a world without absolutes, the idea is to strike the most reasonable balance possible between and among the goals we seek. It is to this end that the ensuing submissions are directed.

The Defects in the Government's Approach

This is to express the disquiet of the Canadian Civil Liberties Association over a document distributed by your Ministry entitled Framework Regarding Prevention of Harassment and Discrimination in Ontario Universities. In the course of declaring "a policy of zero tolerance of harassment and discrimination at Ontario's universities", this document indicates a "minimum expectation" regarding the kind of policies that the universities should adopt. For the moment, we will focus primarily on those elements that the document says should be included in the definition of disciplinable harassment.

Among other things, the minimum proposed definition would curb "one or a series of vexatious comments ... related to one or more of the prohibited grounds [race, ancestry, place of origin, colour, ethnic origin ... citizenship, creed, sex, sexual orientation ...] that is known or might reasonably be known to be unwelcome/unwanted, offensive, intimidating, hostile, or inappropriate". The minimum proposed definition for sexual harassment is "one or a series of comments ... of a gender-related or sexual nature that is known or might reasonably be known to be unwelcome/unwanted, offensive, intimidating, hostile or inappropriate".

Unfortunately, this definition suffers from both vagueness and overbreadth. Subjective concepts such as "unwelcome", "unwanted", and "offensive" could operate so as to make one person's thin skin the condition of another person's free speech. Thus, this definition is capable of catching within its net varieties of expression that it would simply be unconscionable for an academic community to suppress or even imperil.

With rules like this in force, it's hard to imagine forthright discussions on many controversial issues such as ethnicity and crime, the allegations of anti-semitism in Quebec, or the

possibility of a genetic component in sexual preferences. At the same time, it is not hard to imagine how any of these topics could trigger formal complaints.

Moreover, such rules could even wind up hurting their most enthusiastic advocates. Consider, for example, the following possibilities:

- A native leader was recently quoted as expressing the view that it would have been better for the aboriginal people to have killed the white explorers instead of welcoming them when they first came to this continent. Suppose this native leader has supporters at an Ontario university who wish to make similar statements on campus?
- In an apparent attack on heterosexual men and women, a well-known radical feminist was quoted as saying that, during intercourse, women are occupied territory, but, in their case, "occupied women [are] more base in their collaboration than other collaborators have ever been: experiencing pleasure in their own inferiority". Suppose a supporter of this radical feminist made similar remarks in a forum at an Ontario university?
- For years, anti-apartheid activists have denounced South Africa in the most bitter terms. Suppose a group of such activists, in the course of supporting the African National Congress in the forthcoming elections, picketed the campus lecture of an ultra right wing South African, with signs referring to "South African monsters"?

In the foregoing cases, there would be an argument that the expressions at issue could fairly be described as "vexatious comments related to one or more of the prohibited grounds." And, in view of the hard-hitting unpleasantness contained in many of these expressions, it would not be difficult to conclude that the speakers would or should know that such comments were at least "unwelcome", "unwanted", or "offensive".

Of course, the Canadian Civil Liberties Association is in no position to make a confident prediction that the above examples would produce culpability under the proposed definition. We can

confidently predict, however, that at least some such examples would lead to formal complaints. And that prospect itself can be relied upon to generate the kind of chilling effect that academic communities should go out of their way to avoid.

For such purposes, it is no longer necessary to rely entirely on the imagination for examples of potential abuse. We need only look at the actual experience under some of the anti-harassment policies that have already been adopted at Ontario universities. The following represent a few such examples:

- In the late 1980s at York University's Osgoode Hall Law School, a young male law teacher was reportedly admonished by two of the University's sexual harassment counsellors after some women in his class sought counselling because of their discomfort over having to prepare a legal factum challenging the constitutionality of a hypothetical anti-pornography law. The issue was that, since the students had to argue against their own point of view, they were suffering identity crises. The counsellors reportedly warned the teacher that "if a similar situation were to occur again, there would be a possibility of an investigation to determine whether sexual harassment was actually taking place".
- Toward the end of 1990, complaints were filed at Toronto's Ryerson Polytechnic Institute against two engineering students for the way they had reportedly criticized the awareness day planned by the campus gay and lesbian group. One of the students allegedly called the event "totally unacceptable and immoral"; in his view, "society has allowed that nonsense to build up in time". The other student is quoted as saying, "I think homosexuality is a social or genetic problem and society is way too tolerant". Although the complaints were ultimately dismissed, the grounds for the dismissal were technical: the impugned statements were not "unsolicited" within the meaning of the anti-harassment policy: the engineering students had made the statements in response to questions from the campus newspaper. There was no indication what fate they might have met in the event that they themselves had initiated the discussion. Moreover, they had to wait a full two months for the decision with the prospect of discipline hanging over their heads.

- At the University of Western Ontario, a Spanish professor was subjected to a racial harassment complaint because, in the course of explaining the correct use of the word "condemn", she reportedly referred to the experiences of condemnation suffered by the people of Iran. This apparently offended a student who comes from Iran. In this case, it took five months before the complaint was dismissed. And it took another nine months before the University would agree to compensate the professor for legal expenses of more than \$6000.
- In 1992 at Toronto's Seneca College, students were required to take down a poster that advertised a seminar on business protocol to be held the following week. The poster contained a portrait of the Queen (copied from a \$2 bill and enlarged) with a talk bubble coming out of her mouth. The bubble contained a series of questions and answers relating to the subject of the conference and the eyes on the Queen's portrait were turned so as to make it appear that she was looking at the bubble. The poster became the basis of a complaint under Seneca's anti-harassment policy. The argument was that the picture of the Queen represented a mockery of Canada's sovereign and an insult to the complainants' British heritage.

The fact that the ultimate result may have been acceptable in some of the above cases should not unduly console us. The result was not universally acceptable. Moreover, we should be profoundly disquieted that such actions were even attempted against legitimate university activity. Thus, the adoption of the proposed harassment code would likely multiply such coercive pressures against campus political and intellectual activities. To avoid becoming targets, many campus members could be expected to censor themselves.

It is conceivable, of course, that some supporters of the document might take the position that it is proper to chill the kind of speech involved in these examples. In our view, that would constitute a most regrettable response for an institution of higher learning. Members of the academic community should be encouraged to question and challenge all the conventional wisdoms of the day. No opinion or point of view should be immune.

For such purposes, there should be no institutional truths to which members of the campus community must submit. They should not be required to subscribe to capitalism, socialism, Catholicism, Protestantism, Judaism, Islam, liberalism, conservatism, or even egalitarianism. As an institution, the university's commitment should be, not to any particular ideology, but to the methods of intelligent inquiry by which its faculty members and students will be encouraged to reach their own conclusions about the truths to which they will subscribe.

Moreover, vitriolic speech about serious subjects must be permissible in a university setting. Intellectual and political freedom at institutions of higher learning were not intended only for those whose expressions can pass muster with Emily Post. Since the policy as drafted creates the kind of doubts it does, it should be rejected.

In making these observations, the Canadian Civil Liberties Association does not pretend that freedom of speech, even in a campus setting, is an absolute that can never be fettered. We acknowledge that certain forms of speech could undermine the functions that a university is supposed to perform. Speech which amounts to plagiarism or cheating, for example, could not be tolerated. Moreover, speech from persons who exercise power over others should not be allowed if it attempts to extract sexual favours in exchange for employment or academic advantage. For such purposes, explicit prohibitions would be unassailable.

Admittedly, there are also certain forms of verbal insult that could undermine the operations of the academic community. For these purposes, however, harassment must be seen as a synonym for taunting, hectoring, or pestering. We can all imagine situations in which verbal expressions of this kind could reach the point of unacceptability. But there is no reason to condition prohibitions in this area on the basis of the prohibited grounds in the

definition. Pestering can become unacceptable even if it has nothing to do with categories such as race, creed, gender, or orientation. By formulating a harassment policy in these terms, the government would convey the message that there are taboo areas for discussion on campus. Such a consequence would surely subvert what a university is supposed to be about.

On the issue of unacceptable hectoring or pestering, the government must ask itself to what extent an anti-harassment policy is necessary. As far as the professor-student relationship is concerned, there is good reason to believe that ordinary ethical codes for faculty or discipline for cause would suffice to curb delinquent professors. And the normal control that professors exercise over their classes would likely suffice to curb delinquent students. As far as the student-student relationship is concerned, the question is whether the informal pressures of the student community might not suffice to address any excesses. At this point, we do not purport to answer these questions; but we do ask them. How serious and prevalent a problem would there be without such an anti-harassment policy? Can excessive pestering and hectoring by students against students be stopped only by the kind of prohibitions and machinery that are contemplated by these anti-harassment policies? To what extent, in short, is the game worth the candle?

Without a thorough inquiry into such matters, it is unacceptable for a government to promote such a regime for the universities of this province. To imperil the kind of speech that could be caught by the minimum proposed definition is to betray the role that must be played by institutions of higher learning in our community. Indeed, it is fair, at this point, to describe this entire exercise as an improper use of government power.

Recommendation

The Ministry should withdraw the document entitled Framework Regarding Prevention of Harassment and Discrimination in Ontario Universities.

CANADIAN CIVIL LIBERTIES ASSOCIATION

SUMMARY OF RECOMMENDATIONS TO
METRO TORONTO POLICE SERVICES BOARD

The Canadian Civil Liberties Association requests the Metro Toronto Police Services Board to enact resolutions calling upon the Ontario government to take the necessary steps in order to achieve the following:

1. Ensure that the next director of the Special Investigations Unit (SIU) enjoys more job security than those who have held the position until now.
2. Require that, as a condition of employment, police officers answer fully all questions put to them by SIU investigators.
 - (a) Provide that such answers be generally unuseable against such officers in the event that they are charged with criminal offences.
 - (b) Provide that such answers be fully useable in disciplinary proceedings against such officers.

CANADIAN CIVIL LIBERTIES ASSOCIATION

SUMMARY OF RECOMMENDATIONS TO METRO TORONTO POLICE
SERVICES BOARD RE POLICE INTELLIGENCE GATHERING

The Canadian Civil Liberties Association requests the Metro Toronto Police Services Board to take action along the following lines:

1. Provide for appropriate consultations, involving the community and the police, to address issues not adequately explored thus far, including accountability and permissible methods of intelligence gathering.
2. Enact a resolution calling upon the province of Ontario to empower an independent agency - through ongoing access to police facilities, records, and personnel - to conduct and report publicly on self-generated audits of police intelligence gathering practices and policies.

Toronto, Ontario

April 27, 1995