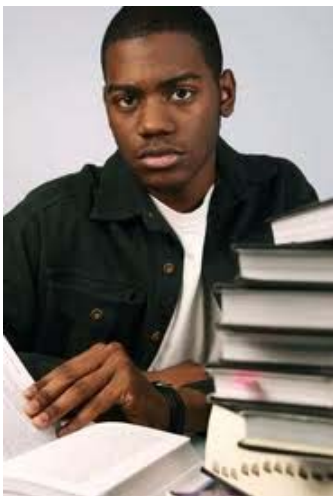




ERRORS AND OMMISSIONS: ANTI-BLACK RACISM IN CANADA

A Report on the
Canadian Government's
Compliance with the
International
Convention on the
Elimination of All Forms
of Racial Discrimination



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EXECUTIVE SUMMARY

Established in 1994, the African Canadian Legal Clinic (“ACLC”) is a community-based not-for-profit organization with status at the United Nations Economic and Social Council that is committed to combating anti-Black racism and other forms of systemic and institutional discrimination in Canadian society. The ACLC represents and advocates on behalf of the African Canadian community by: (i) addressing racial discrimination through a test-case litigation and intervention strategy; (ii) monitoring significant legislative, regulatory, administrative and judicial developments; and (iii) engaging in advocacy, law reform and legal education. In addition, the ACLC operates three programs – the Youth Justice Education Program, the African Canadian Youth Justice Program, and the Adult Justice Program – aimed at assisting and improving the lives of African Canadian youth and adults. The ACLC’s experience with these agencies has given it a unique insight into the problems affecting the African Canadian community in the Greater Toronto Area, the province of Ontario, and throughout Canada. Through its community involvement, the ACLC has been and continues to be at the forefront of ground-breaking legal and social justice developments.

According to the 2011 Human Development Index, Canada is ranked as one of the best countries in the world in which to live.¹ Canada’s ranking, however, conceals the fact that different groups within the country have very different levels of human development. The African Canadian experience, for example, is one of extreme marginalization and disadvantage; restricted access to housing and health care; racial profiling in policing, security and education; criminalization; overrepresentation in the criminal justice system; high levels of unemployment; under representation in institutions and organizations of influence and power; and disproportionate and extreme poverty.² This alarming state of affairs contravenes a number of Canada’s obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (the “Convention”).

The consideration of Canada’s nineteenth and twentieth periodic reports under the Convention during the Committee on the Elimination of Racial Discrimination’s (the “Committee” or “CERD”) 80th session presents an important opportunity to shine a light on the prevalence of anti-Black racism in Canada and some of the shortcomings of Canada’s compliance with its anti-racism obligations. These shortcomings are examined in four parts, including the Executive Summary. Part I provides an overview of the historical context and current reality of anti-Black racism in Canada. Part II examines the failure of Canada’s current policy of multiculturalism as an anti-racism strategy. Part III highlights the Canadian government’s continuing practices of

¹ United Nations Development Program, *Sustainability and Equity: A Better Future for All* (Human Development Report, 2011), online: <http://hdr.undp.org/en/reports/global/hdr2011/>. The Report measures such things as life expectancy, educational attainment and income.

² Doudou Diène, *Report by Mr. Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance – Mission to Canada*, UNHRC, E/CN.4/2004/18/Add.2 (2004) at para. 72 [Doudou Diène].

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discrimination with specific regard to the Articles of the Convention. Each section of Part III is followed by specific recommendations including the following:

- Increase the resources and targets dedicated to processing immigration applications from Africa in order to address the imbalance in resource allocation that is currently biased in favour of European immigrants and refugees;
- Cease using the term “visible minority” to describe racial minorities as this term obscures differences between racialized groups that are important to the creation of effective and responsive policies;
- Develop an effective action plan towards eliminating the disparity in rates of sentencing and incarceration of African Canadians, including such things as sentencing reforms and training on anti-Black racism for members of the police, Crown prosecutors, and members of the judiciary;
- Ensure that section 13 of the *Canadian Human Rights Act* is not repealed as this is an important protection against different forms of anti-Black hate; and
- Adopt measures, including culturally reflective education (e.g. Afrocentric schools and/or programs), increased diversity among teaching staff, and diversity training, to increase the academic engagement, reduce the drop-out rate and decrease the disproportionate discipline of African Canadian students.

The complete list of recommendations can be found in Part IV.

I. ANTI-BLACK RACISM IN CANADA: HISTORICAL CONTEXT AND CURRENT REALITY

In order to understand contemporary anti-Black racism in Canada, it is necessary to first understand its history. Canadians tend to downplay the role of slavery in our history. “Unlike the United States, where there is at least an admission of the fact that racism exists and has a history, in this country one is faced with a stupefying innocence.”³ Slavery, however, did exist in Canada from the 16th century until its abolition in 1834. During this time, persons fleeing from slavery in the United States found themselves either re-enslaved or living a discounted version of freedom. After slavery was abolished, African Canadians had to contend with *de facto* segregation in housing, schooling, and employment, and exclusion from public places such as theatres and restaurants.⁴ These racist practices were reinforced by a justice system that often served to keep African Canadians “in their place.”⁵

Despite their oppressed and enslaved status, African Canadians made significant contributions to early Canadian society. In the war of 1812, for example, African

³ Dionne Brand, *Bread Out of Stone* (Toronto: Coach House Press, 1994).

⁴ Robin Winks, *The Blacks In Canada: A History*, 2d ed., (Montreal: McGill-Queen’s Press, 1997).

⁵ *Christie v. York Corporation*, [1940] S.C.R. 139; *R. v. Desmond*, (1947) 20 M.P.R. 297 (N.S.S.C.); *Hill v. Camden and Zone*, 11 U.C.B.Q. 573 (Ont. Q.B.).

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Canadians fought in the British army in defence of Canadian borders against the United States.⁶ Similarly, in 1837, African Canadians assisted in quashing a rebellion in Upper Canada against the proposed unification of both Upper and Lower Canada by the British.⁷ The contribution of African Canadians extended beyond military support; Canadians of African descent were involved in politics, for example, where they helped join the province of British Columbia to the Federation of Canada,⁸ and in education, where they established successful settlements and founded schools that provided education to children of all races.⁹ These contributions, however, are all but absent from educational curricula and public discourse on the nation's history.¹⁰

Canada's refusal to accept its racist past and simultaneous failure to recognize the historical contributions of people of African descent is partly responsible for the perpetuation of contemporary anti-Black racism. Specifically, denying Canada's history of slavery, segregation and racial oppression means that the modern day socio-economic circumstances of Canada's Afro-descendant population cannot be placed in their proper historical context; at the same time, neglecting the numerous contributions of members of the African Canadian community leads to the portrayal of this community as "good-for-nothing." The "blame" for the disadvantaged position occupied by African Canadians is thus placed only on the shoulders of the African Canadian community itself.

Left without a reasonable historic explanation for the disadvantaged position occupied by the African Canadian community and any acknowledged record of African Canadian accomplishments, it is easy to explain the marginalized position of the African Canadian community by reverting to racist stereotypes (e.g. Afro-descendants as unintelligent, lazy, savage, overly aggressive and prone to anti-social or criminal behaviour).¹¹ This continuing legacy of Canada's racist past was acknowledged by Dr. Doudou Diéne, the UN Special Rapporteur on Racism, upon his visit to Canada in 2004:

⁶ Lawrence Hill, *Trials and Triumphs: The Story of African Canadians*, (Toronto: Umbrella Press, 1993) at 19, 20 and 53.

⁷ *Ibid.* at 54.

⁸ *Ibid.* at 41-42. Milfflin Wistar Gibbs was part of the Victoria City Council and played a role in encouraging British Columbia to become a part of Canada, which eventually happened in 1871.

⁹ *Ibid.* at 22, 23 and 35. The Dawn settlement, Chatham, Ontario was established by Josiah Henson in the 1840s. Another prominent Black school, the Buxton Mission School in Ontario, was established in 1850.

¹⁰ Four-Level Government/African Canadian Community Working Group, *Towards a New Beginning: The Report and Action Plan of the Four-Level Government/African Canadian Community Working Group* (Toronto: African Canadian Community Working Group, 1992) at 15: "The story of people of African origin in Canada is a long one, predating Confederation itself by more than two centuries. Yet few Canadians know of this story and fewer still are aware of the contributions which this ethnic minority group has made over these centuries to the development of Canadian society as we know it today. One tragic consequence of this ignorance is that it has denied Black Canadians the full measure of their own self-worth in the way that other communities ... have been able to enjoy." See also TDSB, "Improving Success for Black Students: Questions and Answers," accessed January 13, 2012, online: http://www.tdsb.on.ca/_site/viewItem.asp?siteid=9998&menuid=10863&pageid=9585.

¹¹ Earl Hutchison, *The Assassination of the Black Male Image*, (New York: Touchstone, 1997); Esmeralda Thornhill, *Focus on Racism: Legal Perspectives From a Black Experience*, (Ottawa: National Judicial Institute, 1995) at 81, 83, 86, and 87; Frances Henry and Carol Tator, *Racist Discourse in Canada's English Print Media* (Toronto: The Canadian Race Relations Foundation, 2000).

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Canadian society is still affected by racism and racial discrimination. Because of its history, Canadian society, as in all the countries of North and South America, carries a heavy legacy of racial discrimination, which was the ideological prop of trans-Atlantic slavery and of the colonial system. The ideological aspect of this legacy has given rise to an intellectual mindset which, through education, literature, art and the different channels of thought and creativity, has profoundly and lastingly permeated the system of values, feelings, mentalities, perceptions and behaviours, and hence the country's culture.¹²

Racist stereotypes are the result but also the cause of racist practices. In the past, stereotypes of Black people were used to justify slavery and segregation.¹³ Today, they provide the basis for discriminatory policies and practices such as over-policing of African Canadian communities, police brutality, disparities in sentencing, disproportionate discipline of African Canadian students, and failure to implement equitable policies to address disparities in employment, economics, and education.¹⁴ These phenomena reveal a legislative, administrative and judicial focus on the perceived deviance of members of the African Canadian community and ignorance of their underlying socioeconomic and historic causes.

This year, Canada will celebrate the bicentennial of the War of 1812. As a result, the federal government is launching a major drive to commemorate the conflict by sponsoring hundreds of events and re-enactments across the country, honouring military regiments that “perpetuate the identities of War of 1812 militia units,” and designating October 2012 as a “month of commemoration” of the heroes and key battles of the war. The ACLC is encouraged by upcoming events like the Freedom Landing Festival's Black History Forum, a festival that will feature the contribution of people of African descent in the War of 1812. However, the ACLC urges the government of Canada to ensure that these types of events go beyond “tokenism” and that the contributions of African Canadians are fully reflected in every aspect of the bicentennial celebrations. To this end, the ACLC recommends that the government work closely with organizations like the Ontario Black History Society to plan inclusive events and allocate to these types of organizations a fair portion of the funding that has been set aside for the commemoration.

RECOMMENDATION

That the Committee recommends that Canada:

- **Work closely with organizations like the Ontario Black History Society that are dedicated to the study, preservation and commemoration of**

¹² Doudou Diène, *supra* note 2 at para. 68.

¹³ Richard Delgado, ed., *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995) at 547-548; Frances Henry and Carol Tator, *Discourses of Domination: Racial Bias in the Canadian English-Language Press* (Toronto: University of Toronto Press, 2002) at 163-202.

¹⁴ Ellis Cashmore, ed., *Out of Order? Policing Black Populations* (London: Routledge, 1991); Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2005) at 18 [*Paying the Price*].

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African Canadian history to ensure that the bicentennial celebration of the War of 1812 adequately reflects the contributions and role of African Canadians.

- **Allocate a fair portion of the funding that has been set aside for commemorative events to organizations like the Ontario Black History Society.**

II. MULTICULTURALISM VERSUS ANTI-RACISM

Racism is entrenched at all levels of Canadian society.¹⁵ It strives to preserve systems of power and dominance based on a false perception of white superiority. An anti-racist approach employs methods and strategies to actively break down and devalue these systems. A policy of multiculturalism, on the other hand, is premised simply on the equal recognition and acceptance of the cultural identities of citizens without any real change to the racially stratified structures in which these cultures coexist. Seen in this way, multiculturalism and anti-racism are related, but fundamentally different concepts.

Although [multiculturalism] can and should include anti-racism, there has been an increasing recognition of the limitations of this concept because [multiculturalism] does not explicitly acknowledge the critical role that racism plays in preventing the achievement of the vision.¹⁶

Canada's current version of multiculturalism is limited to the superficial celebration of cultures rather than the adoption and implementation of programs and policies that promote equal opportunities and access for all Canadians. Merely celebrating the fact that many cultures co-exist within Canada does not however address or eliminate the structural power imbalances and inequities that lead to the socio-economic stratification of these cultural groups.

In the early- to mid-2000s, the issues of racism and discrimination were clear priorities for the Government of Canada. In the October 2004 Speech from the Throne, for example, the government pledged to "take measures to strengthen Canada's ability to combat racism, hate speech and hate crimes."¹⁷ Further, the 2005 federal budget included a five-year investment of \$56 million for *Canada's*

¹⁵ Frances Henry et al., *The Colour of Democracy: Racism in Canadian Society* (Toronto: Harcourt Brace) at 14, 15, 44, and 45 [*Colour of Democracy*].

¹⁶ Canadian Race Relations Foundation, "Glossary", (accessed January 13, 2012) online: http://www.crr.ca/component/option.com_glossary/task.list/glossid.70/letter.M/lang.english/.

¹⁷ Government of Canada, *Speech from the Throne*, 38th Parl 1st Sess, (5 October 2004), online: <http://publications.gc.ca/collections/Collection/SO1-1-2004-1E.pdf> (Hon. Paul Martin).

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Action Plan against Racism (“CAPAR”).¹⁸ CAPAR sought to guarantee both equality of opportunity and of outcome and to close the socio-economic gap for all Canadians by, *inter alia*, eliminating racist behaviours and attitudes.¹⁹

Unfortunately, the current government has since shifted its priorities away from anti-racism and anti-discrimination and back to an outdated version of multiculturalism. The November 2008 Speech from the Throne, for example, committed the Government of Canada only to ensuring that “all Canadians share in the promise of this land, regardless of cultural background, gender, age, disability or official language,”²⁰ while the March 2010 Speech from the Throne stated that Canada demonstrated that “people drawn from every nation can live in harmony.”²¹

The flowery and utopian discourse of multiculturalism perpetuates the denial of racism as a problem in Canada. In sharp contrast to academic research, disaggregated race-based data and the experiences of racialized Canadians, many Canadians wrongly believe that racial discrimination does not seriously affect minorities or that, when racism does occur, it is on the fringes of mainstream society.²² This denial of racism in turn helps to foster the belief that current policies are sufficient to maintain an environment that is favourable to minorities and immigrants.²³ Thus, a policy of multiculturalism that is aimed at furthering social cohesion as opposed to challenging the institutional power structures of systemic racism not only obscures the problem, it further entrenches racism at all levels of Canadian society.

III. NON-DISCRIMINATION OBLIGATIONS – CANADA’S FAILURE TO COMPLY

A. ARTICLE 1 – DEFINITION, INTERPRETATION AND GENERAL

Article 1(3) – Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

¹⁸ This amount includes funding to implement the Anti-Racism Test Case Initiative (“ARTCI”). However, only one-year funding was requested for 2005-06 in order to support the development of ARTCI. Thus, the total five-year allocation for CAPAR was \$53.6 million.

¹⁹ Government of Canada, *Canada’s Action Plan Against Racism: A Canada For All*, (Ottawa: Government of Canada, 2005), online: <http://publications.gc.ca/collections/Collection/CH34-7-2005E.pdf> at 10 [CAPAR].

²⁰ Government of Canada, *Speech from the Throne*, 40th Parl, 1st Sess, (20 November 2008), online: http://www.sft-ddt.gc.ca/local_grfx/docs/sft-ddt-2011_e.pdf (Hon Michaëlle Jean).

²¹ Government of Canada, *Speech from the Throne*, 40th Parl, 3rd Sess, (3 March 2010), online at: www.discours.gc.ca/eng/media.asp?id=1389 (Hon Michaëlle Jean).

²² Jeffrey G. Reitz and Rupa Banerjee, “Racial Inequality, Social Cohesion and Policy Issues in Canada,” in *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal: Institute for Research on Public Policy, 2007) at 11.

²³ *Ibid.*

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In its concluding observations regarding States' reports as well as its opinions on individual communications, this Committee has underscored the need for States parties to: focus on the problems faced by non-citizens with regard to economic, social and cultural rights, in areas such as housing, education and employment; to apply international and regional standards pertaining to refugees equally, regardless of the nationality of the asylum-seeker;²⁴ and to use all available means, including international cooperation, to address the situation of refugees and displaced persons, especially regarding their access to education, housing and employment.²⁵

In 2004, the Committee adopted *General Recommendation No. 30 – Discrimination Against Non-Citizens* in which it recommended the adoption of a number of measures to ensure that legislation does not have a discriminatory effect on non-citizens.²⁶ Among the recommendations were the following:

- States must abstain from applying different standards of treatment to different categories of non-citizens, such as female non-citizen spouses of citizens and male non-citizen spouses of citizens;
- Deportation or other removal proceedings must not discriminate among non-citizens on the basis of race or national origin and should not result in disproportionate interference with the right to family life; and
- Non-citizens must not be returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses.

Finally, in 2011, the Committee adopted *General Recommendation No. 34 – Racial Discrimination against People of African Descent*. The General Recommendation provides, that states

Ensure that legislation regarding citizenship and naturalization does not discriminate against people of African descent and pay sufficient attention to possible barriers to naturalization that may exist for long-term or permanent residents of African descent.²⁷

²⁴ See Committee on the Elimination of Racial Discrimination, concluding observations on the 9th, 10th and 11th periodic reports of the Sudan (A/56/18, para. 215). An example of such discrimination based on nationality occurred when the United States systematically refused to consider asylum claims from Guatemalans and Salvadorans on the same footing as other claimants. See also *American Baptist Church v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

²⁵ See Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Azerbaijan (A/54/18) at para. 497.

²⁶ CERD/C/64/Misc.11/rev/3, 64th session, 23 February – 12 March 2004.

²⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 34: Racial discrimination against people of African descent*, 3 October 2011, CERD/C/GC/34 at para. 47 [*General Recommendation No. 34*].

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As will be explained below, in light of recent legislative enactments and policy changes adopted by the Canadian government, Canada's compliance with Article 1(3) is a serious area of concern. Specifically, the introduction of *Bill C-11 - The Balanced Refugee Reform Act*, government cuts to immigrant settlement services and changes to Canada's family reunification policy have the effect of, *inter alia*, distinguishing between classes of non-citizens on the basis of nationality, placing certain non-citizens at greater risk of being returned to countries where they are subject to human rights abuses, increasing the difficulty of integration of African immigrants into Canadian society, and making immigration and naturalization significantly more difficult for persons of African descent.

1. Bill C-11 – The Balanced Refugee Reform Act

In June 2010, Bill C-11, the *Balanced Refugee Reform Act*, received Royal Assent.²⁸ The Bill proposes to reform the refugee protection system in Canada into one that is “fast and fair.”²⁹ A number of the reforms of Bill C-11, however, have been criticized by members of the legal community and service providers as they are likely to negatively impact access to justice for refugees in Canada.³⁰ Four of the proposals that are of particular concern are: (i) the creation of a list of “safe” countries or nationals and the consequences of such a designation; (ii) the creation of new timelines for interviews and hearings; (iii) the reforms to access to humanitarian relief; and (iv) the eligibility requirements for a final assessment of risk prior to deportation.

i. Designated “Safe” Lists

Bill C-11 proposes to divide prospective refugees into two classes – those from countries deemed to be “safe” and those that are not. The Bill allows the Minister of Citizenship and Immigration to designate as “safe” a country, part of a country, or class of nationals of a country, on the basis of: (1) the country's human rights record, (2) the availability of mechanisms for redress, (3) the rate of claims accepted by the Refugee Protection Division (“RPD”) and appeals allowed by the Refugee Appeal Division (“RAD”) and (4) any other criteria set out in the regulations.³¹

²⁸ Citizenship and Immigration Canada, “Balanced Refugee Reform, Moving Ahead with Refugee Reform” (accessed 15 December 2011), online: <http://www.cic.gc.ca/english/refugees/reform.asp>.

²⁹ Jason Kenney, Minister of Citizenship and Immigration Canada, *Parliamentary Speech* (26 April 2010), online: <http://openparliament.ca/hansard/2252/16/>

³⁰ Canadian Bar Association, “Letter to Jennifer Irish, Asylum Policy and Programs, Director” (2 May 2011), online: <http://www.cba.org/cba/submissions/pdf/11-25-eng.pdf>; Canadian Council for Refugees, “Comments on C-11 Regulatory Amendments” (11 April 2011), online: <http://ccrweb.ca/en/comments-c-11-regulatory-amendments>.

³¹ Library of Parliament, *Legislative Summary of Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)*, (12 January 2011), online: <http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/40/3/c11-e.pdf> at 8.

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The “safe” designation raises a number of concerns. First, prospective refugees will be pre-screened by public servants and subject to different procedural protections based solely on the designation of their country of origin; this clearly amounts to discriminatory treatment based on country of origin and is thus contrary to the fundamental principles of equality and non-discrimination required by international human rights obligations.

Second, even countries with generally good human rights records are capable of mistreating vulnerable groups. This is one of the reasons that refugee determination is an individualized assessment. The effect of the “safe country” and “safe national” designations, however, is to prejudge the validity of refugee claims solely on the basis of nationality. Under the new regime, it is possible that people from “safe” countries that face individualized risk (e.g. domestic violence) and have a legitimate fear of persecution by states or by a third party (e.g. drug lords) will not get a fair hearing.³² This will result in a greater likelihood of claimants from “safe” countries being sent back to risk, persecution, torture or death.

ii. Expedited Processes

The likelihood of returning non-citizens to serious human rights abuses is also increased by the government’s proposals to expedite the refugee claim process. Bill C-11 provides that, after an applicant initiates a refugee claim, he or she must, no earlier than 15 days later, attend a preliminary interview with an official from the Immigration and Refugee Board. The information gathered during this interview will form the basis of the refugee claim. If the claimant omits information, this could result in an adverse inference later on. The matter is then set down for a hearing within 60 days following the interview for nationals of designated “safe” countries and within 90 days for all other claimants.³³

These timelines will significantly disadvantage the most vulnerable refugee claimants.

Claimants with severe trauma are often hesitant to discuss their past experiences for a variety of reasons, including fear of retribution, shame, post-traumatic stress symptoms, memory repression, and intimidation and mistrust of authority figures. Forcing victimized claimants to set out all their relevant history within 15 days of initiating

³² Nicholas Keung, “Will a new bill save the refugee mess?” *The Toronto Star*, (4 April 2010), online: <http://www.thestar.com/news/insight/article/789855-will-a-new-bill-save-the-refugee-mess>. Figures from Britain, which employs the safe/unsafe country system, reveal that there is often poor decision-making at the initial stage. Specifically, while only 19 per cent of 19,400 claims were accepted at the initial stage, 34 per cent of appeals of rejected refugee claims were granted.

³³ Government of Canada, “Regulations Amending the Immigration and Refugee Protection Regulations” *Canada Gazette*, Vol. 145, No. 12 (March 19, 2011), online: <http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-19/html/reg1-eng.html>.

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a refugee claim, to an authority figure who does not represent their best interests is arguably unfair and potentially re-traumatizing.³⁴

Further, claimants will no doubt experience great difficulty securing a lawyer, gathering evidence and undergoing the necessary psychological and medical assessments in such a short time. According to the Canadian Council for Refugees, the inevitable result of this will be that, contrary to *General Recommendation No. 30*, more wrong decisions will be handed down and more refugee claimants will be sent back to risk, persecution, torture or death.³⁵

iii. Humanitarian and Compassionate Relief

Currently, the *Immigration and Refugee Protection Act* (“IRPA”) gives the Minister discretion to grant foreign nationals who do not meet the requirements of the IRPA or qualify for an exemption from the applicable criteria, permanent resident status based on humanitarian and compassionate (“H&C”) considerations or public policy reasons.³⁶ The H&C provisions allow the government to consider a wide variety of factors (e.g. natural disasters, civil unrest, persons victimized by human traffickers).³⁷

Contrary to the representations made by the Government of Canada that it “does not have plans to amend the IRPA” with respect to H&C considerations,³⁸ Bill C-11 would amend the IRPA to eliminate the Ministerial obligation to consider additional public policy considerations raised by the applicant. Instead, these considerations will be examined only if the Minister decides to undertake a review of the applicant’s circumstances on his or her own initiative. Bill C-11 also provides that when examining an application for H&C grounds, the Minister may not consider a well-founded fear of persecution, risk to life, risk of cruel and unusual treatment, or any other factors taken into account during the refugee protection determination process.

It is estimated that 200,000 to 300,000 people live without legal immigration status in Canada.³⁹ Many “non-status” people come from countries of extreme poverty and violence, but do not qualify as Convention Refugees. Among other things, being “non-

³⁴ Equality Rights Central, “Bill C-11 Update: The Reformed Refugee Determination System Raises Equality Concerns,” (30 August 2010), online:

http://www.equalityrightscanada.com/canada_equality_rights_law.php?page=legislative_reform&subtopic=Updates&id=20100531143927&doc=Immig-c11+update%28final%29.html.

³⁵ Canadian Council for Refugees, “Comments on C-11 Regulatory Amendments” (11 April 2011), online: <http://ccrweb.ca/en/comments-c-11-regulatory-amendments>.

³⁶ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s.25(1) and (2).

³⁷ Government of Canada, *Reports submitted by States parties under article 9 of the Convention, Nineteenth and twentieth periodic reports of States parties due in 2009, Canada* (CERD/C/CAN/19-20) at para. 118 [Canada’s Report to CERD].

³⁸ *Ibid.*

³⁹ Colour of Poverty Campaign, “Fact Sheet #8: Understanding the Racialization of Poverty in Ontario in Immigration and Newcomer Settlement in 2007”, online: www.colourofpoverty.ca.

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status” often means that these individuals do not qualify for housing support and cannot work legally thereby increasing the risk of abuse, unfair wages, and poverty. Often, the only way for non-status persons to apply for status is on H&C grounds. Contrary to the Committee’s recommendation that states focus on problems faced by non-citizens with regards to economic, social and cultural rights, limiting the basis on which H&C grounds can be considered will thus have a detrimental impact on the quality of life of these already vulnerable persons.

iv. Pre-Removal Risk Assessment

When an individual makes a claim for refugee protection from inside Canada, a removal order conditional on the outcome of the claim is issued against the person. If the refugee claim is unsuccessful, the removal order will usually come into force 15 days following the refusal. At this time, the person may, subject to certain eligibility criteria, apply for a pre-removal risk assessment (PRRA).

The PRRA takes place just prior to deportation and examines whether the individual may be safely removed from Canada. This determination is based on evidence that was not available at the time of the refugee hearing or that arose since the hearing (e.g. a change in the political climate of the destination country).

Under Bill C-11, failed refugee claimants will not be permitted to apply for a PRRA until 12 months after their claim is rejected, abandoned or withdrawn.⁴⁰ According to the Canada Border Services Agency in most cases,

Failed refugee claimants who do not leave Canada voluntarily and whose removal order is enforceable will be deported from the country by the CBSA ... within 12 months following a final negative decision by the [Immigration and Refugee Board].⁴¹

As such, by the time that a failed refugee claimant is permitted to apply for a PRRA, he or she will have already been deported. Contrary to Canada’s international human rights obligations, this proposal thus increases the likelihood of non-citizens being returned to countries where they are at risk of serious human rights abuses.

RECOMMENDATION

That the Committee recommends that Canada:

- **Not subject refugee claimants from designated “safe” countries to lesser procedural protections based on nationality or other prohibited ground;**

⁴⁰ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s.112(2)(b.1).

⁴¹ Canada Border Services Agency, “Balanced Refugee Reform: Improving Canada’s asylum system” (25 August 2011), online: <http://www.cbsa-asfc.gc.ca/agency-agence/refugee-refugie/menu-eng.html>.

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- **Take steps to ensure that the expedited process and the changes with respect to pre-removal risk assessments proposed under Bill C-11 do not lead to the return of non-citizens to countries or territories where they are at risk of being subject to serious human rights abuses; and**
- **Ensure that the Canadian government does not amend the *Immigration and Refugee Protection Act* with respect to humanitarian and compassionate considerations.**

2. Budget Cuts to Settlement Services

Ninety percent of settlement funding provided by Citizenship and Immigration Canada goes to language training and settlement/integration programs while the remaining funds go to programs that match newcomers with Canadian volunteers for community orientation.⁴² These agencies provide services and programs to immigrants and refugees that lead to their full participation in the social, economic and political life of the country.

In 2010, Citizenship and Immigration Canada announced a 5% reduction in funding to Settlement and Integration services for new immigrants across Canada. This amounted to \$53 million in 2011-2012 and an additional \$6 million to be cut in 2012-2013. Despite the fact that nearly 21 percent of the total immigrants coming to Canada choose to settle in the City of Toronto, more than 80% of the cuts for 2011-2012, representing more than \$43 million, came out of Ontario.⁴³

As a result of these cuts, many organizations saw their funding slashed by up to 40 per cent while 34 were notified that their contracts with Citizenship and Immigration Canada would not be renewed, effectively defunding them.⁴⁴ In the Greater Toronto Area, where the unemployment rate for new immigrants rose from 13 to 20 percent in one year, the cuts are predicted to negatively impact the economic and social success of 70,000 newcomers.⁴⁵

⁴² Nicholas Keung, "Dots on a map: Why newcomer funding is taking a hit" *The Toronto Star*, (24 February 2011) online": <http://www.thestar.com/news/investigations/immigration/article/944449-dots-on-a-map-why-newcomer-funding-is-taking-a-hit> [Dots on a map].

⁴³ Ontario Council of Agencies Serving Immigrants, "Background Information on CIC Cuts" (9 March 2011), online: http://www.ocasi.org/downloads/OCASI_CIC_Cuts_Backgrounder.pdf. According to the Minister of Citizenship and Immigration, the \$43 million reduction reflected a drop in the number of newcomers choosing to settle in Ontario, from 140,525 in 2005 to 106,867 in 2010. Louisa Taylor, "Funding cuts to hurt classes for young immigrants: Tailor-made lessons now at risk", *Ottawa Citizen*, (4 March 2011), online: <http://www.ottawacitizen.com/Fuding+cuts+hurt+classes+young+immigrants/4381485/story.html>.

⁴⁴ Dots on a map, *supra* note 42.

⁴⁵ CBC News, "Immigrant centre cuts spark City Hall protest" *CBC News*, (27 January 2011), online: <http://www.cbc.ca/news/canada/toronto/story/2011/01/27/toronto-settlement-funding.html>.

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These funding cuts will have a disproportionate impact on racialized immigrants in general and immigrants of African descent in particular. First, approximately 75% of all recent immigrants are identified as “visible minority;” of these, approximately 14% are from Africa and the Caribbean.⁴⁶ Second, African-born immigrants have a much greater need for the settlement integration services provided by affected agencies, particularly in the realm of employment. African-born immigrants, regardless of when they landed in Canada, experience difficulties in the labour market. In 2006, for example, the 70,000 African-born immigrants who landed from 2001 to 2006 had a jobless rate of nearly 21%, more than four times that of the Canadian born population. In contrast, Asia and Latin America had the second and third highest rates of unemployment at only 10%.⁴⁷ Third, according to the Ontario Council of Agencies Serving Immigrants (“OCASI”), an organization that represents 200 settlement organizations across the province,

Intentional or not, this divestment in integration programming differentially impacted communities that have been hit the hardest by the recent recession and who have historically been over-represented in groups experiencing underemployment, regardless of comparable education and employment histories, and who because of the issue of discrimination are critically marginalized socially or politically.⁴⁸

Specifically, a number of the agencies whose funding was cut (e.g. Eritrean Canadian Community Centre, Tropicana Community Services, and the Ethiopian Association in the Greater Toronto Area and Surrounding Region) worked directly with African communities.⁴⁹ Francophone immigrant communities in Southern Ontario – primarily those from French speaking Africa, Haiti and the Middle East – were also significantly impacted.⁵⁰ The cuts to settlement services are thus contrary to the Committee’s recommendation that states focus on problems faced by non-citizens with regard to economic, social and cultural rights.

RECOMMENDATION

That the Committee recommends that Canada:

- **Ensure the adequate funding of services that address the problems affecting immigrants of African descent, with regard to economic, social and cultural rights, in areas such as housing, education and employment.**

⁴⁶ Statistics Canada, *2006 Census*, Catalogue No. 97-562-XCB2006013.

⁴⁷ Jason Gilmore, *The Immigrant Labour Force Analysis Series: The Canadian Immigrant Labour Market in 2006: Analysis by Region or Country of Birth*, (Ottawa: Statistics Canada, 2008), Catalogue No. 71-606-X, online: <http://www.statcan.gc.ca/pub/71-606-x/71-606-x2008002-eng.pdf>.

⁴⁸ Ontario Council of Agencies Serving Immigrants, “OCASI position on the CIC cuts to Ontario settlement funding” (10 March 2011) <http://www.ocasi.org/index.php?qid=1072> [OCASI position on the CIC cuts].

⁴⁹ Nicholas Keung, “Funding axed for Toronto immigrant agencies” (23 December 2010) Toronto Star < <http://www.thestar.com/news/article/911205-funding-axed-for-toronto-immigrant-agencies>>.

⁵⁰ OCASI position on the CIC cuts, *supra* note 48.

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3. Family Reunification

There is an internationally recognized right to family unity as expressed in, *inter alia*, Article 16(3)2 of the *Universal Declaration on Human Rights*, Articles 17 and 23 of the *Covenant on Civil and Political Rights*, and Article 9(1) of the *Convention on the Rights of the Child*. Accordingly, once asylum seekers or immigrants are recognized as refugees or granted permanent residence in Canada, they can apply to bring their family members to Canada. Nonetheless, refugee and immigrant families of African descent are frequently separated for prolonged or indefinite periods due to: (1) general delays in the processing of applications; (2) an unequal distribution of immigration resources that is biased against the Global South; and (3) a Eurocentric prioritization of certain members of the family class.

Currently, there exists a backlog of over one million immigration applications,⁵¹ 165,000 of which are applications under the family class.⁵² In November 2011, in an effort to help eliminate this backlog, Citizenship and Immigration Minister, Jason Kenney placed a two-year moratorium on applications from parents and grandparents seeking to reunite with family members in Canada.⁵³

While efforts to clear the backlog that has resulted in wait times of up to 10 years are welcome, the measures adopted are unlikely to address the root causes of the build-up. A key reason for the backlog in the family reunification class is that despite consistently high demand, Canada has steadily cut back on the number of immigrants accepted for residency in this category. As an example, while Canada received 37,500 family class applications in 2010,⁵⁴ the target number of parents and grandparents dropped from 20,000 in 2006 to 15,000 in 2010.⁵⁵

While delays in processing times of sponsorship applications affect all immigrants and refugees, they have a disproportionate impact on immigrants and asylum seekers of African descent because processing delays are particularly long in certain areas of Africa. Specifically, Canada's visa office in Nairobi, Kenya, which covers 18 countries, including the Democratic Republic of Congo, Eritrea, Somalia, Ethiopia, Burundi and Rwanda,⁵⁶ is by far the slowest in the world for the sponsorship of

⁵¹ Thandi Fletcher, "Conservatives to ease immigration backlog by capping relatives", *Postmedia News*, (21 October 2011), online: <http://www.canada.com/news>.

⁵² John Ibbitson, "Immigration Minister hits pause on family reunification applications", *Globe and Mail Update*, (4 November 2011), online: www.licence.icopyright.net.

⁵³ Citizenship and Immigration Canada, "Government of Canada to cut backlog and wait times for family reunification – Phase I of Action Plan for Faster Family Reunification" (4 November 2011), online: <http://www.cic.gc.ca/english/department/media/releases/2011/2011-11-04.asp>. This measure was combined with the introduction of a new visa that would permit parents and grandparents to temporarily visit their family in Canada upon completing a medical exam, purchasing medical insurance, and demonstrating that their children or grandchildren could support them.

⁵⁴ Laura Payton, "Cut immigration applications to fix backlog, Kenney says", *CBC News* (20 October 2011), online: <http://www.cbc.ca/news/politics/story/2011/10/20/pol-kenney-immigration-cut-applications.html>.

⁵⁵ Laura Payton, "Kenney tackles parents immigration backlog" *CBC News* (4 November 2011), online: <http://www.cbc.ca/news/politics/story/2011/11/04/pol-immigration-kenney-parents-grandparents.html>.

⁵⁶ Citizenship and Immigration Canada, "Website for the visa office in Nairobi" (28 June 2002), online: <http://www.cic.gc.ca/english/information/offices/missions/nairobi.asp>.

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refugees (58 months);⁵⁷ of parents and grandparents (51 months);⁵⁸ and of spouses, common-law or conjugal partners and dependent children (30 months).⁵⁹

The backlog in Africa is the result of a number of factors. Sub-Saharan Africa is home to about 40 per cent of the world's refugees in need of protection, yet Canada maintains only four visa posts in the region with authorization to deal with refugees. In comparison, there are 10 European visa posts to handle refugee applications.⁶⁰ Further, despite the high number of refugees coming from this region, the Canadian government has consistently refused to set a target that is commensurate with the region.⁶¹ As an example, every year, Canada receives over 2,000 applications under the Private Sponsorship of Refugees ("PSR") program from Nairobi. Nonetheless, in 2011, the Canadian government had a PSR application target of only 1,000.⁶² Remarkably, the government moved last year to further limit the number of PSR applications it will accept from its Nairobi visa post.⁶³ Finally, the Canadian government has recently acknowledged that the Nairobi visa office needs more staff to handle the many cases for which it is responsible.⁶⁴ This biased distribution of resources means that the spouses, dependent children, parents and grandparents of refugees from this region are left in dangerous situations for a significantly longer period than anywhere else in the world.

The Canadian government's continued devaluing of the category of parents and grandparents is representative of a Eurocentric approach to family. By creating unreasonable caps on applications from parents and grandparents, Canada's family reunification policies prioritize the unity of nuclear families with minor children. Many refugees and immigrants, however, come from societies where the nuclear family is not the norm and where more importance is placed on the clan or the extended family.⁶⁵

⁵⁷ Citizenship and Immigration Canada, "Processing times for privately sponsored refugee applications processed by visa offices outside Canada" (11 November 2011), online:

<http://www.cic.gc.ca/english/information/times/perm/ref-private.asp>.

⁵⁸ Citizenship and Immigration Canada, "Processing times for sponsorship of parents and grandparents applications processed by visa offices outside Canada" (3 November 2011), online:

<http://www.cic.gc.ca/english/information/times/perm/fc-parents.asp#africa>.

⁵⁹ Citizenship and Immigration Canada, "Processing times for sponsorship of spouses, common-law or conjugal partners and dependent children applications processed by visa offices outside Canada", (1 November 2011) online: <http://www.cic.gc.ca/english/information/times/perm/fc-spouses.asp>. The average processing time for applications of this nature is 19 months.

⁶⁰ Citizenship and Immigration Canada, "Visa Offices Outside of Canada", (2 September 2011), online:

<http://www.cic.gc.ca/english/information/offices/missions.asp>.

⁶¹ Michael Swan "New refugee policy condemned for lacking compassion" (6 April 2011) *The B.C. Catholic Paper*, online: <http://bcc.rcav.org/canadian/624-michael-swain>.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Canadian Council for Refugees, "Nairobi: Are We Being Fair?" (October 2011), online:

<http://ccrweb.ca/en/nairobi>.

⁶⁵ Anne Staver, "Family reunification policies and diverse family life: a fraught relationship", unpublished, online: <http://www.cpsa-acsp.ca/papers-2010/Staver.pdf> at 7 [A Fought Relationship]; and Anne Staver, "Family Reunification: A Right for Forced Immigrants: Working Paper Series No. 51" *Refugee Studies Centre* (November 2008), online: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5063 at 5 and 29 [A Right for Forced Immigrants]. As an example, due to both conflict and AIDS, child-headed households and informal

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Because the nuclear family is historically specific to the West, “non-Western persons are immediately less likely to have their relationships of caring recognized” within the Canadian immigration framework.”⁶⁶ One may suspect that these measures result in a targeting of specific populations.

Is it a coincidence that the forms of family which are the most restricted in immigration coincide with norms in Third World countries from which immigration is politically controversial?⁶⁷

Through facially neutral immigration policies coupled with policy decisions relating to the distribution of resources, Canada is thus able to control the character of its society.⁶⁸ This is a clear contravention of Article 1 of the Convention which has been interpreted as urging states to ensure that legislation regarding citizenship and naturalization does not discriminate against people of African descent.

RECOMMENDATION

That the Committee recommends that Canada:

- **Increase the resources and targets dedicated to processing immigration applications from Africa in order to address the imbalance in resource allocation that is biased in favour of European immigrants and refugees; and**
- **Take steps to move away from the Eurocentric approach to family currently reflected in Canada’s policies with respect to family class applicants.**

B. ARTICLE 2 – LEGISLATIVE, ADMINISTRATIVE, JUDICIAL OR OTHER MEASURES

Article 2(1)(c) – Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

adoptions by extended family members are increasingly common in many African countries (e.g. Rwanda). Similarly, studies suggest that due to the complicated circumstances of the refugee experience (e.g. high mortality), family groupings are very often not nuclear but families of choice or circumstance. Finally, a study conducted on Somali immigrants in Denmark determined that 58% of Somalis given DNA testing by Danish authorities between January, 1997, and September, 1998, received a negative result. According to Somali community leaders, this was due to the differing conceptions of the family and misunderstandings among Somalis of the “Danish concept of who is a family member.”

⁶⁶ A Fraught Relationship, *supra* note 65 at 11.

⁶⁷ A Right for Forced Immigrants, *supra* note 65 at 20.

⁶⁸ *Ibid.* at 23.

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Disaggregated race-based data is necessary for “effectively monitoring discrimination, identifying and removing systemic barriers, ameliorating historical disadvantage and promoting substantive equality.”⁶⁹ The data facilitates the implementation of policies and programs that accommodate the needs of diverse groups; this is in fact recognized in Canada’s Action Plan Against Racism. Specifically, in reviewing the Ethnic Diversity Survey (“EDS”), a “ground-breaking” post-census report released by Statistics Canada in 2003, the report notes:

The EDS provides new and important information on the racial and ethnic background of Canadians and their lives in Canada today. Ongoing analysis will give the Government of Canada valuable information for developing future efforts to address racism and discrimination.⁷⁰

Further, in 2005, the Ontario Human Rights Commission identified disaggregated data collection as a prerequisite for organizations seeking to combat racism and racial-discrimination, or defend themselves against such claims. The Commission held that a failure to collect disaggregated data, where there was some evidence of racial discrimination, could be indicative of an organization’s failure to meet its duty to prevent a violation of the provincial human rights law.⁷¹

Most recently, the importance of disaggregated race-based data in the fight against racism was recognized in “Human Rights Accountability in National Security Practices,” a special report to Parliament by the Canadian Human Rights Commission (“CHRC”).⁷² The CHRC determined that, in the fight against racism, good policy is not enough. Many organizations have policies designed to prevent discrimination, but few can demonstrate whether or not these policies are actually effective in practice. Data collection is needed to accurately report on the impact of security measures on human rights. For example, a 2011 interim report of the Special Senate Committee on Anti-Terrorism found that members of ethnic or religious communities believed that they were singled out or profiled.⁷³ Without data collection and public reporting, the assertions of national security organizations that they did not use racial or ethnic

⁶⁹ Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination*, (9 June 2005), online: <http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy/pdf> [OHRC *Policy and Guidelines on Racism and Racial Discrimination*].

⁷⁰ CAPAR, *supra* note 19 at 30.

⁷¹ OHRC *Policy and Guidelines on Racism and Racial Discrimination*, *supra* note 69 at 44-47. The Commission noted that in situations where the collection of data was clearly warranted: (1) a failure to do so may prevent an organization from putting forward a credible defence; (2) result in the commission relying on qualitative evidence to prove disproportionate representation; and (3) result in the commission seeking public interest remedies compelling data collection and analysis during litigation and during settlements.

⁷² Canadian Human Rights Commission, *Human Rights Accountability in National Security Practices: A Special Report to Parliament*, (Ottawa: Canadian Human Rights Commission, 2011) [*Human Rights Accountability in National Security Practices*].

⁷³ *Ibid.* at 5.

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profiling in their work were easily challenged.⁷⁴ The CHRC recommended the enactment of legislation requiring national security organizations to track their human rights related performance and to account publicly for that performance.⁷⁵

Proactive and corrective measures are needed to address the problem of anti-Black racism in Canada. The collection of disaggregated data is the first step in taking effective measures in the development of legislation and policies that target systemic racial disparities. When used properly, this type of data collection can be vital in the fight against anti-Black racism.⁷⁶ As will be further explained below, for the most part, the federal government has failed to collect disaggregated race-based data.⁷⁷

1. Abolition of the Long Form Census

Canada's long-form census has long required that individual households answer a number of questions relating to, *inter alia*, racial and ethnic origin. In July 2010, however, the Conservative cabinet decided to abolish the mandatory long-form census and replace it with a voluntary survey.⁷⁸ The census in its revised form requires households to answer only questions on gender, age, marital status, and relationships of people in a household. Questions pertaining to race and ethnicity are provided on a supplementary survey which individuals can choose not to complete.

According to Industry Minister Tony Clement, the government's decision was based on the fact that some Canadians found the mandatory process coercive and the detailed questions intrusive.⁷⁹ In coming to this decision, however, the government disregarded or ignored the evidence of numerous economists, former government officials (including the Director of Statistics Canada who resigned as a direct result of

⁷⁴ *Ibid.* at 8.

⁷⁵ *Ibid.* at 10.

⁷⁶ See Ontario Human Rights Commission, "Commission Settles Employment Case With Toronto District School Board" (10 November 2005), online: http://www.ohrc.on.ca/english/news/e_bg_omoruyi-odin-settlement.shtml. In 2005, the Ontario Human Rights Commission settled a case with the Toronto District School Board ("TDSB") The case concerned allegations of systemic racial discrimination against African Canadian teachers in the employment context. As part of the settlement the TDSB agreed to develop a survey and collect data on the number of racialized persons (disaggregated by race) who are in permanent and acting positions of responsibility for the school year of 2005-2006.

⁷⁷ See *Employment Equity Act* S.C. 1995, c. 44. Neither the statutory sections nor regulations require the collection of disaggregated data by race and ethnicity. The Act only requires the collection of data on four designated groups: 1. Women 2. Aboriginal Peoples; 3. Persons with Disabilities; 4. Members of Visible Minorities. There is no separation between minority groups.

⁷⁸ Janet Davidson, "Will new census capture clear picture of Canada?" *CBC News*, (5 May 2011), online: <http://www.cbc.ca/news/canada/story/2011/05/05/f-census-forms-information-gathered.html>.

⁷⁹ Steven Chase, "Privacy commissioner not consulted on plan to scrap compulsory census", *The Globe and Mail* (14 July 2010), online: <http://www.theglobeandmail.com/news/politics/privacy-commissioner-not-consulted-on-plan-to-scrap-compulsory-census/article1640288/>. "The Harper government is blaming privacy fears for a controversial decision to scrap a mandatory long-form census questionnaire – but the country's privacy watchdog has heard almost nothing from Canadians on the topic. In fact, according to the Office of the Privacy Commissioner, only three complaints were laid about any aspect of the census in the last decade: two in 2006 and one in 2001."

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the government's decision),⁸⁰ charities, doctors and educators who argued that the demographic details collected by the mandatory long form census were vital to the private and public sectors.⁸¹ Further, in abolishing the long-form census, the government directly contravened the recommendations of this Committee in 2007,⁸² and the Special Rapporteur on Minorities in 2010.⁸³

Understanding what services are needed, where problems or opportunities arise, or how a region is changing depends on having accurate data. For the African Canadian community, disaggregated data helps to identify patterns of denial and resistance by Canadian institutions and provides a basis on which to pursue structural changes in order to rectify policies, programs and legislation that are having a disparate impact.

If governments and community groups are unaware of the racial and ethnic make-up of its citizens, there is no way that appropriate policies and programmes to accommodate the needs of particular groups can be sought or implemented. Contrary to Article 2(1)(c) of the Convention, the government's decision will thus erode its ability to deliver social programs that are responsive to the specific needs of racially marginalized communities and will lead instead to further marginalization.

2. The "Visible Minority" Category

Canada's categorization of racialized persons as "visible minorities" – "persons other than Aboriginal People, who are non-Caucasian in race or non-white in colour"⁸⁴ – was recognized by the Committee as possibly being contrary to Article 1 in the Convention. Article 1 provides that racial discrimination occurs when equitable treatment is upset by "any distinction, exclusion, restriction or preference based on race, colour, descent, or national ethnic origin."

The Canadian government has responded to this concern by stating that it has no plans of changing its standard usage on the ground that the term is specific to the

⁸⁰ Steven Chase and Tavia Grant, "Statistics Canada chief falls on sword over census" *The Globe and Mail*, (21 July 2010), online: <http://www.theglobeandmail.com/news/politics/statistics-canada-chief-falls-on-sword-over-census/article1647348/>.

⁸¹ The Globe and Mail, "Canada's long-form census debate," *The Globe and Mail* (21 July 2010), online: <http://www.theglobeandmail.com/news/politics/canadas-long-form-census-debate/article1647591/>

⁸² Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*. CERD/C/CAN/CO/18 at para. 11. The Committee requested the nationwide collection of disaggregated data for a better evaluation of the overall situation of different racial and ethnic groups. See also *General Recommendation No. 34*, *supra* note 27 at para. 9.

⁸³ Gay McDougall, *Report of the independent expert on minority issues*, (15 and 16 December 2008), A/HRC/10/11/Add.1 at para. 91. The Special Rapporteur, like the Committee, recommended that disaggregated data along ethnic, racial and gender lines be collected in order to reveal hidden inequalities and to provide a key resource for informed policy decisions.

⁸⁴ See for example *Employment Equity Act* S.C. 1995, C. 44.

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administration of the *Employment Equity Act* which, like a “special measure” referred to in the Convention, is ameliorative in its aim.⁸⁵

The government’s response does not, however, address the concern that, despite its origins, the term is in fact used at all levels of Canadian society and serves to homogenize and obscure the experiences of those who are non-white and non-Aboriginal thereby contravening Article 2 of the Convention. The “visible minority” population consists mainly of the following groups: Chinese, South Asian, Black (Afro-descendant), Arab, West Asian, Filipino, Southeast Asian, Latin American, Japanese and Korean. Because racism is linked to socially constructed beliefs and perceptions of superiority or inferiority, however, different groups experience racism in different forms, dimensions and intensities. Grouping these persons together carries with it various incorrect assumptions about similarity of experiences making it “very difficult to gain an accurate reflection of the varying degrees of treatment, outcomes and access to equality experienced by these groups.”⁸⁶

As an example, the Ethnic Diversity Survey referred to earlier found that, in the past five years, nearly 50 percent of African Canadians reported discrimination or unfair treatment. By contrast, only 33 percent of South Asians and 33 percent of Chinese respondents reported experiencing discrimination or unfair treatment.⁸⁷ The same research notes that earnings differentials for some “visible minority” groups, such as Chinese and Japanese men, improved between 1986 and 1996. However, outcomes worsened for other groups. For example, compared to men of British origin, the relative earnings of African Canadian and Aboriginal men declined significantly over the same period – by 20 percent and 18 percent respectively.⁸⁸

While the term “visible minority” comes from the *Employment Equity Act*, its use is not limited to the administration of the *Act*. As an example, “[t]he kind of information reported by the media concerning earnings of visible minorities is typically very aggregated.”⁸⁹ Similarly, while figures calculated from Statistics Canada’s Survey of Labour and Income Dynamics provides finer distinctions among groups, the public-release data only reports whether a respondent is, or is not, a “visible minority” member.⁹⁰ The term “visible minority” is thus used by both the media and the greater public.

The failure to distinguish among different “visible minorities” means that “ameliorative” policies that are developed on the basis of this data are often misguided and ineffective. As an example, the most popular way of determining whether Canada’s “visible minorities” face discrimination in the labour market is

⁸⁵ Canada’s Report to CERD, *supra* note 37 at paras. 41-43.

⁸⁶ African Canadian Legal Clinic, “Policy Paper: Disaggregated Data Collection (Race-Based Statistics)” online: <http://www.aclc.net/wp-content/uploads/Policy-Papers-1-11-English-FINAL.pdf>.

⁸⁷ CAPAR, *supra* note 19 at 8.

⁸⁸ *Ibid.* at 15.

⁸⁹ Derek Hum and Wayne Simpson, “Not all Visible Minorities Face Labour Market Discrimination” *Options Politiques* (December 2000), online: <http://www.irpp.org/po/archive/dec00/hum.pdf> at 2.

⁹⁰ *Ibid.*

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simply to compare their average wages and annual earnings with those of white Canadians.⁹¹ However, a statistical explanation of the wage gap finds that among native-born Canadians only African Canadians face a statistically significant wage gap once other variables are controlled for. Among immigrants, however, an unexplained wage gap is common. This suggests that, with the notable exception of African Canadian males, “visible minorities” who are native-born are for the most part not disadvantaged; it is mainly among *immigrant* males who are “visible minorities” that a statistically significant unexplained wage gap exists. This data suggests that policies that focus on employment or wage equity for all “visible minorities”, as opposed to African Canadians in particular, or that do not focus on helping immigrants integrate into Canadian society miss the mark.⁹²

The continued use of the term “visible minority” by government and public institutions thus continues to maintain a significant barrier to effectively addressing the gaps in wages, education, and employment for African Canadians and immigrant populations.

RECOMMENDATION

That the Committee recommends that Canada:

- **Cease using the term “visible minority” to describe racialized persons as this term obscures differences between racialized groups that are important to the creation and implementation of effective and responsive policies;**
- **Reintroduce the mandatory long-form census in order to provide governments and community groups with an accurate statistical basis from which to pursue structural changes and rectify policies, programs and legislation that have a disparate impact on African Canadians;**
- **Implement nationwide mandatory disaggregated data collection, based on race, colour, and ethnic and national origin in order to determine if and where racial disparities exist and address them accordingly;**
- **Provide in its next periodic report information on any data collection measures implemented and their results.**

3. Racial Profiling

Article 2(1)(d) – Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.

⁹¹ *Ibid.* at 1.

⁹² *Ibid.*

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In February 2010, the *Toronto Star* newspaper published a series of reports on racial profiling by the Toronto Police Service in which it examined data captured on police contact cards in mostly non-criminal encounters with the public.⁹³ The articles were a follow-up to the *Toronto Star's* 2002 series on race, policing and crime in Toronto in which the newspaper discovered that African Canadians in Toronto were subject to racial profiling and harsher treatment with respect to arrests, stops, searches, and release.⁹⁴

The *Toronto Star* articles revealed that despite a change in police chiefs, a tripling in the number of minority officers in the service over the last 17 years, significant improvements in the number of “visible minorities” in higher ranks, an acknowledgement by the Toronto Police Services that racial bias *is* a factor in police decisions, and an attempt to deal with racial profiling through training,⁹⁵

- If you are African Canadian and you do something wrong – use illegal drugs, drive without car insurance – your chances of getting caught are much greater than your white counterpart;
- Although African Canadians make up 8.4 per cent of Toronto’s population, they account for three times as many contacts with police;
- African Canadian males aged 15-24 are stopped and documented 2.5 times more than white males the same age; and
- Differences between African Canadian and white carding rates are highest in more affluent, mostly white areas of the city, indicating the presence of the “out-of-place” phenomenon.⁹⁶

The consequences of this misconduct are manifold. African Canadians live in constant fear of enduring the humiliation of being targeted by police for no apparent reason other than the colour of their skin. They feel the need to warn family members

⁹³ Jim Rankin, “Race Matters: Blacks documented by police at high rate,” *The Toronto Star* (6 February 2010), online: <http://www.thestar.com/specialsections/raceandcrime/article/761343--race-matters-blacks-documented-by-police-at-high-rate>; Royson James, “Change trickles slowly to the streets,” *The Toronto Star* (6 February 2010), online: <http://www.thestar.com/news/article/761503--james-change-trickles-slowly-to-the-streets>; Jim Rankin, “Police ponder how to best to collect race data,” *The Toronto Star* (15 February 2010), online: <http://www.thestar.com/specialsections/raceandcrime/article/765605--police-ponder-how-best-to-collect-race-data>; Jim Rankin, “Story behind the numbers” *The Toronto Star* (6 February 2010), online: <http://www.thestar.com/specialsections/raceandcrime/article/761069--story-behind-the-numbers>; and Toronto Star, “The Chief on race, crime, and policing” (6 February 2010), online: <http://www.thestar.com/specialsections/raceandcrime/article/761112--the-chief-on-race-crime-and-policing> [Race Matters 2010].

⁹⁴ Jim Rankin, “Singled Out,” *The Toronto Star* (19 October 2002); Jim Rankin, “The Story Behind The Numbers,” *The Toronto Star* (19 October 2002); and Jim Rankin, “Police Target Black Drivers, Star Analysis of Traffic Data Suggests Racial Profiling” *The Toronto Star* (20 October 2002). These results were independently reviewed and validated. Factors such as age, criminal history and employment were taken into account. See *Toronto Star*, “Star’s Race Profiling Series Valid, Board Told York U. Professor Explains Analysis”, December 11, 2002; Michael Friendly, *Analysis of Toronto Police Data Base*, (York University, 2003).

⁹⁵ *Race Matters 2010*, *supra* note 93.

⁹⁶ *Ibid.*

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(particularly young males) “to be careful around the police” and feel the need “to be protected from” the individuals that are supposed to be the protectors of society.⁹⁷ Racial profiling thus divests African Canadians of a sense of citizenship and belonging within their country and respective communities. This violation of the right to live free from discrimination diminishes the human dignity of African Canadians.

Further, as the first point of contact, the racial inequities in police enforcement contribute to the disproportionate numbers of African Canadians being investigated and prosecuted.⁹⁸ According to the Commission on Systemic Racism in the Ontario Justice System, “[e]nforcement practices, rather than offending behaviours are key” to explaining the over-representation of African Canadians among prison admissions.⁹⁹ Canada continues to bury its head in the sand, hoping that racial profiling will correct itself. It will not. Rather, what is needed is a serious government strategy at the provincial and federal levels aimed at eradicating this racist practice and its impact.

4. Overrepresentation in the Criminal Justice System

In 2005, the Committee released its *General Recommendation No. 31 - Prevention of Discrimination in the Administration and Functioning of the Criminal Justice System*.¹⁰⁰ In that document, the Committee recognized that the number and percentage of persons belonging to particular groups who are held in prison or preventive detention is a possible indicator of racial discrimination.¹⁰¹

The overrepresentation of African Canadians in provincial and federal prison populations is startling. African Canadians make up only 2.5 per cent of Canada’s population. However, in 2010-2011, the proportion of African Canadian offenders in federal prison was 9 per cent. This represented a 52 percent leap from just a decade

⁹⁷ *Paying the Price*, *supra* note 14 at 24 and 25.

⁹⁸ Scot Wortley and Julian Tanner, “Data, Denials and Confusion: The Racial Profiling Debate in Toronto” (2003) 45(3) *Canadian Journal of Criminology and Criminal Justice* 367 at 372-373.

⁹⁹ Faisal Mirza, “Mandatory Minimum Prison Sentencing and Systemic Racism” (2001) 30 *Osgoode Law Journal* 491 at para. 20; Scot Wortley, *Bias Free Policing: The Kingston Police Data Collection – Final Report* (Toronto: Centre of Criminology, University of Toronto, 2005), at 73 and 75; and Margaret Gittens et al., *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, (Toronto: Queen’s Printer for Ontario, 1995) at 99 [Gittens]. In 1992, in the wake of the “Yonge Street Riots”, the Ontario government established the Commission on Systemic Racism in the Ontario Criminal Justice System. The Commission studied all facets of criminal justice and, in December 1995, issued a 450 page report with recommendations. To date, this is the most comprehensive report on the issue of systemic racism in Ontario’s criminal justice system.

¹⁰⁰ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 31: The prevention of racial discrimination in the administration and functioning of the criminal justice system*, A/60/18 [General Recommendation No. 31].

¹⁰¹ *Ibid.* at 1(e).

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earlier.¹⁰² This alarming increase occurred during a period when the national crime rate was at its lowest level since 1973, continuing a 20-year decline.¹⁰³

Similarly, between 1986 and 1993, the number of African Canadian prisoners admitted to Ontario prisons increased by 204%, while the number of white prisoners admitted increased by only 23%. African Canadian admissions to prison tripled from 4,205 in 1986/1987 to 12,765 in 1992/1993. In 1992/1993, Black persons accounted for 15% of Ontario's prison admissions while representing only 3% of the province's population.¹⁰⁴

This overrepresentation of African Canadians can be largely attributed to a criminal justice system that is racially biased at almost every step. Racial discrimination by Canadian police, legal professionals, courts, jurors, and prisons is well documented.¹⁰⁵ Anti-Black racial bias operates at all levels of the criminal justice system from racial profiling, to the exercise of prosecutorial discretion, to the imposition of pre-trial incarceration, and to disparities in sentencing.¹⁰⁶ For example, there are small but statistically significant differences in favour of white accused in the decision of Crown prosecutors to proceed summarily or by indictment. Summary conviction offences are considered less serious than indictable offences because they are punishable by shorter prison sentences and smaller fines. In a hybrid drug charge sample, for example, 65% of charges laid against white accused compared to 46% of those laid against African Canadian accused were dealt with summarily.¹⁰⁷ These results are not surprising considering that Crown prosecutors rely on documentation prepared for them by the often racially biased police.¹⁰⁸

Similarly, in 1997, Julian Roberts and Anthony Doob completed the first major study that examined the processing of African Canadian and white persons by Canadian courts.¹⁰⁹ The study revealed that African Canadian accused are significantly more likely to be denied pre-trial release on bail, and, for certain offences, are more likely to be given custodial sentences.¹¹⁰

The denial of bail strongly influences whether an individual will “cut a deal” and plead guilty or assert their right to a trial. In a study released in 2010, it was determined that, controlling for other factors, the odds of pleading guilty were found to be 2.5 times greater for those who were detained than those who were released.

¹⁰² Alison Crawford, “Prison watchdog probes spike in number of black inmates” *CBC News* (15 December 2011), online: <http://www.cbc.ca/news/politics/story/2011/12/14/crawford-black-prison.html>.

¹⁰³ Canadian Press, “Canada Crime Rate Continues Fall: StatsCan” *Huffington Post* (21 July 2011), online: http://www.huffingtonpost.ca/2011/07/21/crime-rate-continues-to-fall-statscan_n_905649.html.

¹⁰⁴ Gittens, *supra* note 99 at 70-71.

¹⁰⁵ *Colour of Democracy*, *supra* note 15; and Nelson, C.A. *Out of Sync-Reflections on the culture of diversity in private practice* (Toronto: York University, 1995) at 199-205.

¹⁰⁶ Julian Roberts & Anthony N. Doob, “Race, Ethnicity and Criminal Justice in Canada” (1997) 21 *Crime and Justice* 469 at i to xi [Race, Ethnicity and Criminal Justice in Canada].

¹⁰⁷ Gittens, *supra* note 99 at 192.

¹⁰⁸ *Ibid.* at 191.

¹⁰⁹ Race, Ethnicity and Criminal Justice in Canada, *supra* note 106 at 498.

¹¹⁰ *Ibid.* at 469.

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Alternatively, the odds of having all charges withdrawn were 2.3 times greater for those who were released than those who were held in pre-trial detention. Interviewees frequently cited how the kinds of conditions experienced in prisons meant that pleading was an action that one could take to better one's situation.¹¹¹ As the statistics suggest, the over-incarceration of African Canadians has been a persistent and long standing problem. The Canadian government has continually failed to address this disparity.

RECOMMENDATION

That the Committee recommends that Canada:

- **Implement a nationwide mandatory disaggregated race-based data collection policy, and collect disaggregated data on police stops, searches, arrests, and releases;**
- **Adopt national and provincial measures, including legislation and external complaint mechanisms, to end racial profiling by law enforcement and national security agencies;**
- **Provide in its next periodic report, information on any data collection measures implemented and their results;**
- **Conduct an extensive study of systemic anti-Black racism and the overrepresentation of African Canadians at all levels in the criminal justice system; and**
- **Develop an effective action plan towards eliminating the disparity in rates of sentencing and incarceration of African Canadians, including such things as sentencing reforms and training on anti-Black racism for members of the police, Crown prosecutors, and members of the judiciary.**

C. ARTICLE 4 – PROHIBITION AGAINST PROMOTION OF RACIAL HATRED

1. Hate Speech

Article 4 – States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention ...

¹¹¹ Gail Kellough and Scot Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42 *British Journal of Criminology* 186 at 197.

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In 1993, the Committee adopted *General Recommendation No. 15 – Organized violence based on ethnic origin (Art. 4)*. In it, the Committee affirmed the importance of Article 4 as “central to the struggle against racial discrimination,”¹¹² recalled that the provisions of Article 4 are of a mandatory character,¹¹³ opined that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression,¹¹⁴ and affirmed that Article 4 requires states to penalize, *inter alia*, the dissemination of ideas based upon racial superiority or hatred.¹¹⁵

In 2011, in *General Recommendation No. 34*, the Committee affirmed the importance of Article 4 to the security and integrity of people of African descent. The Committee recommended that states take measures to prevent any dissemination of ideas of racial superiority and inferiority or ideas which attempt to justify violence, hatred or discrimination against people of African descent.¹¹⁶ The Committee also recommended that states take strict measures against any incitement to discrimination or violence against people of African descent including through the internet and related facilities of a similar nature.¹¹⁷ Canada has provincial, federal, civil and criminal legislation that addresses the dissemination of hate propaganda. However, as will be explained below, these laws are either inadequate or under attack.

i. Federal and Provincial Human Rights Legislation

While it is true that the *Canadian Human Rights Act* (“CHRA”) and provincial and territorial legislation contain provisions that relate to the prohibition of hate speech,¹¹⁸ a number of these provisions are currently in danger of being struck down or repealed.

Section 13(1) of the CHRA provides:

13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or

¹¹² Office of the High Commissioner for Human Rights, *General Recommendation No. 15: Organized violence based on ethnic origin (Art. 4)*, Forty-Second Session, 1993, 03/23/1993 at para. 1 [*General Recommendation No. 15*].

¹¹³ *Ibid.* at para. 2.

¹¹⁴ *Ibid.* at para. 4.

¹¹⁵ *Ibid.* at para. 3.

¹¹⁶ *General Recommendation No. 34*, *supra* note 27 at para. 27.

¹¹⁷ *Ibid.* at paras. 27-29.

¹¹⁸ Canada’s Report to CERD, *supra* note 37 at para. 78.

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persons to hatred or contempt by reason of the fact that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Despite the fact that section 13 of the *CHRA* was held by the Supreme Court of Canada to be a justifiable limit on the constitutional right to freedom of expression,¹¹⁹ a recent decision of the Canadian Human Rights Tribunal has held that the provision is unconstitutional.¹²⁰ While the Tribunal was concerned primarily with the introduction of section 54, a separate and severable penalty provision,¹²¹ it opted to strike down both section 13 and section 54. This approach is not only contrary to extensive jurisprudence from the Supreme Court of Canada on constitutional remedies,¹²² it is in violation of Article 4 of the Convention.¹²³

Second, on September 30, 2011, Conservative Member of Parliament (“MP”) Brian Storseth introduced Private Member’s Bill C-304 to repeal Section 13 of the *CHRA*. As is often the case with attacks on anti-hate speech legislation, the introduction of this Bill was premised largely on the argument that it violated the apparently absolute right to freedom of speech.¹²⁴ The Bill had its first reading at the House of Commons on September 30, 2011.¹²⁵ While Private Member Bills usually have little chance of passing, the likelihood of Bill C-304’s success has been bolstered by an endorsement from Mr. Rob Nicholson, Canada’s Minister of Justice, who recently urged that MPs from all parties vote to repeal section 13 of the *CHRA* because it is an affront to free speech.¹²⁶

Third, Saskatchewan is one of the few Canadian provinces/territories to prohibit hate speech in its human rights legislation.¹²⁷ Section 14(1) of the *Saskatchewan Human Rights Code* provides:

No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other

¹¹⁹ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.

¹²⁰ *Warman v. Lemire*, 2009 CHRT 26, [2009] C.H.R.D. No. 26.

¹²¹ *Warman v. Warman*, 2005 CHRT 26, 55 C.H.R.R. D/148, 2005 CarswellNat 6696, at para. 50

¹²² *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, paras. 111-127, referring to *Schachter v. Canada*, [1992] 2 S.C.R. 679.

¹²³ The decision is currently being judicially reviewed by the Federal Court.

¹²⁴ *Parliament of Canada, 41st Parliament, 1st Session, Edited Hansard, Number 051, contents, Tuesday, November 22, 2011.*

¹²⁵ Parliament of Canada, *Bill 304 – An Act to Amend the Canadian Human Rights Act*, 41st Parliament, 1st Session, online: <http://www.parl.gc.ca/legisinfo/BillDetails.aspx?Language=E&Mode=1&billId=5124394>

¹²⁶ Joseph Brean, “Repeal controversial hate speech law, minister urges” *The National Post* (18 November 2011), online: <http://news.nationalpost.com/2011/11/18/repeal-controversial-hate-speech-law-minister-urges/>.

¹²⁷ Saskatchewan under s. 14 of the *Saskatchewan Human Rights Code*, R.S.S. 1979, c. S-24.1 (since 1979, as amended in 1989); Alberta under s. 2 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (since 1996); British Columbia under s. 7 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (since 1993); and Northwest Territories under s. 13 of the *Consolidation Of Human Rights Act*, R.S.N.W.T. 2002, c. 18 (since 2004).

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medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

(a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

Like section 13 of the *CHRA*, the constitutional validity of section 14 of the *Saskatchewan Human Rights Code* is currently being decided by the Supreme Court of Canada.¹²⁸ In that case, the hate propagandist argued that legislation that prohibited the promotion of hatred against individuals because of their sexual orientation violated his right to freedom of speech and religion.

Given the widespread presence of anti-Black racism and hate in Canadian society,¹²⁹ this move away from the prohibition of hate propaganda is particularly concerning for members of the African Canadian community. The public discourse seems to suggest that there is a real possibility that guarantees of freedom of expression and religion will become a “constitutional right to be racist” or weapons with which to defend the *status quo*,¹³⁰ and that arguments of hate propagandists, cloaked in terms of freedom of expression or religion, will be permitted to obscure the fact that what is truly at issue is the right of vulnerable and marginalized groups to be treated as equals and to be free from hate.¹³¹

ii. Criminal Law Provisions Relating to Hate Speech

One of the arguments most commonly raised by those that oppose human rights legislation as a means of regulating hate speech is that the matter can be adequately addressed through the criminal law. This argument, however, falls short for a number of reasons.

¹²⁸ *Saskatchewan Human Rights Tribunal v. William Whatcott*, [2010] S.C.C.A. No. 155.

¹²⁹ *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 46; and Stephen Lewis, *Report to the Premier on Racism in Ontario* (Ontario: Government of Ontario, 1992) at 2.

¹³⁰ Mari Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993) at 15.

¹³¹ *Ibid.* at 14.

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First, whereas criminal liability requires a ‘guilty mind’ (*mens rea*), Canada’s human rights provisions apply to both intentional and unintentional discrimination.¹³² The motives or intentions of those who discriminate are not a central concern; rather, the focus of the law is on the *effect* of the discriminatory act on the vulnerable groups.¹³³ This means, for example, that an individual may have a sincerely held belief that Blacks are savages but this will not make his or her communications any less discriminatory.

The absence of an intent requirement “communicates the priority of addressing the effects of discrimination on socially vulnerable groups, rather than on the interests of the respondent or of dominant groups.”¹³⁴ To be guided instead by concerns that the unintentional perpetrators of hate speech will be more likely to self-censor is thus to wrongly prioritize the interests of the hater over those of the victim; i.e. African Canadians and similarly marginalized groups.¹³⁵

Second, provincial human rights legislation provides the only control for non-violent hate expression and expression which incites discrimination. The *Criminal Code* provisions, on the other hand, regulate only the most extreme forms of hate-filled expression— those acts which advocate genocide, incite a “breach of the peace,” or *willfully* promote hatred.¹³⁶

Third, criminal law and civil law serve different purposes. While the principal object of criminal law is “the recognition of society’s abhorrence of a criminal act,”¹³⁷ human rights legislation has as its main goal compensation for harm caused by discrimination or hate propaganda. In other words, in criminal law, the interests of the state are paramount while the interests of victims are peripheral. This is evinced by the fact that charges of illegal behaviour must be laid by an intermediary agent of the state (e.g. police officer, crown prosecutor). The human rights process, on the other hand, can be initiated by the victims themselves.¹³⁸

Because the tort of discrimination is not yet recognized as a cause of action in Canadian law, one of the only remedies a citizen has to redress the harm caused by discrimination or the effects of hate propaganda is through human rights legislation.¹³⁹ Human rights legislation provides a range of individual (e.g. monetary

¹³² See also *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 14.

¹³³ *Ibid.* at para. 12.

¹³⁴ Jane Bailey, “Twenty Years Later Taylor Still Has It Right: How the Canadian Human Rights Act’s Hate Speech Provision Continues to Contribute to Equality” in Sanda Rogers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada Inc., 2010) 349 at 385; and *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 10.

¹³⁵ Jane Bailey, *ibid.* at 380.

¹³⁶ *Criminal Code*, s. 318, 319(1), and 319(2).

¹³⁷ *R. v. Lucas*, [1998] 1 S.C.R. 439 at para. 70.

¹³⁸ *Ibid.*

¹³⁹ The ACLC recognizes that in provinces where compensation/financial assistance programs exist (all provinces except Newfoundland and the territories), victims and survivors of certain crimes may be eligible for financial compensation/benefits for crimes perpetrated against them. However, the ACLC notes that compensation under these programs is limited to violent or personal crimes such as homicide, sexual assault, domestic violence, assault and child sexual abuse and neglect and so is unlikely to apply to cases involving hate speech.

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compensation) and broad public interest remedies (e.g. public education, systemic advocacy and complaints). Without this legislative tool, the ability of governments to promote equality and reduce discrimination is severely compromised.

The importance of compensating victims of discrimination is embodied in Article 6 of the Convention and was recognized by the Committee in *General Recommendation No. 26 - Article 6 of the Convention*.¹⁴⁰ In that document, the Committee recognized the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation.¹⁴¹ The Committee further noted that the right to seek just and adequate reparation for any damage suffered as a result of such discrimination "is not necessarily secured solely by the punishment of the perpetrator of the discrimination;" rather, "the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim."¹⁴²

RECOMMENDATION

That the Committee recommends that Canada:

- **Ensure that section 13 of the *Canadian Human Rights Act* is not repealed as this is an important protection against different forms of anti-Black hate propaganda.**

2. Racist Violence and Hate Motivated Crime

Article 4(a) – [State Parties] Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

With respect to hate motivated crimes, the Committee has elaborated on the states' obligation contained in Article 4 by stating that state parties must take necessary steps to ensure that

police services have an adequate and accessible presence in the neighbourhoods, regions, collective facilities, camps or centres where

¹⁴⁰ Office of the High Commissioner for Human Rights, *General Recommendation No. 26: Article 6 of the Convention*, 03/24/2000 (56th Session, 2000) [*General Recommendation No. 26*]. See also *General Recommendation No. 31*, *supra* note 100 at para. 6: In accordance with article 6 of the Convention, States parties are obliged to guarantee the right of every person within their jurisdiction to an effective remedy against the perpetrators of acts of racial discrimination, without discrimination of any kind, whether such acts are committed by private individuals or State officials, as well as the right to seek just and adequate reparation for the damage suffered.

¹⁴¹ *General Recommendation No. 26, ibid.* at para. 1.

¹⁴² *Ibid.* at para. 2.

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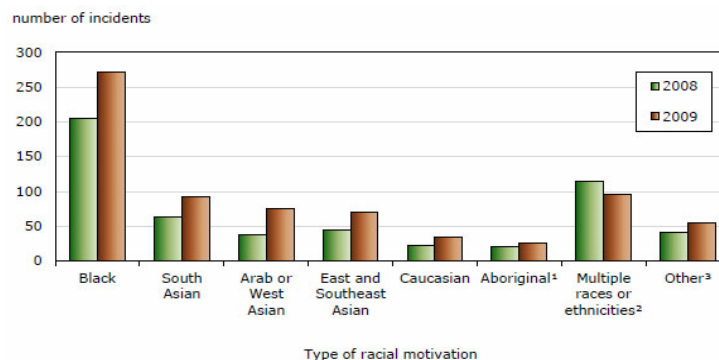
the persons belonging to the groups referred to in the last paragraph of the preamble reside, so that complaints from such persons can be expeditiously received.¹⁴³

The Committee has also noted that protection of the security and integrity of people of African descent is dependent on the adoption of measures that prevent racially motivated acts of violence, ensure the prompt investigation and punishment of such acts, and make certain that perpetrators do not enjoy impunity.¹⁴⁴

Unfortunately, as will be explained below, with respect to African Canadians, Canada has failed to honour these international commitments.

i. Frequency of Hate Crimes against African Canadians

Police-reported hate crimes refer to criminal incidents that, upon investigation by police, are determined to have been motivated by hate towards an identifiable group. The most recent statistics reveal an alarming trend of victimization based on race, especially for African Canadians.¹⁴⁵ In 2011, for example, it was reported by Statistics Canada that the number of police-reported hate crimes rose 42 per cent in 2009 on top of a 35 per cent increase the previous year. Alarming, violent offences, such as assault, accounted for four in ten of these hate crimes. The statistics also reveal that, while representing only 2.5 per cent of the Canadian population,¹⁴⁶ African Canadians continue to be the most commonly targeted racial group, accounting for 38 per cent of all racially motivated incidents.¹⁴⁷



¹⁴³ *General Recommendation No. 31*, *supra* note 100 at para. 10.

¹⁴⁴ *General Recommendation No. 34*, *supra* note 27 at para. 28.

¹⁴⁵ Citizenship and Immigration Canada, "Minister Kenney issues statement expressing concern about the increase in number of hate crimes reported in Canada in 2009" (8 June 2011), online: <http://www.cic.gc.ca/english/department/media/statements/2011/2011-06-08.asp>.

¹⁴⁶ Statistics Canada, *Population Groups (28) and Sex (3) for the Population of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2006 Census – 20% Sample Data* (Ottawa: Census of Population Catalogue no. 97-562-XCB2006007, 2006).

¹⁴⁷ 54 per cent of hate crimes were motivated by race or ethnicity, 29 per cent by religion, and 13 per cent by sexual orientation.

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ii. The Current State of the Law Relating to Hate Motivated Crime

Canada's *Criminal Code* criminalizes advocating or promoting genocide;¹⁴⁸ and publicly inciting hatred against an identifiable group in such a way that there will likely be a breach of the peace.¹⁴⁹ In addition, the *Code* provides for the seizure and forfeiture of hate propaganda material kept on any premises for distribution or sale,¹⁵⁰ and the deletion of hate propaganda from computer systems.¹⁵¹ Also, the mischief section of the *Code* covers hate-motivated mischief and mischief relating to religious property.¹⁵²

The *Code*, however, does not contain a specific offence for acts of violence against racialized or ethnic individuals. A hate crime motivated by race is not an offence in and of itself; rather, it is dealt with by the sentencing provisions of the *Criminal Code*. Specifically, under s. 718.2(a)(i), the courts may define the motivations of hate, bias or prejudice as aggravating factors when sentencing an offender for other offences, such as assault, damage to property, threatening, or harassment.¹⁵³

iii. Shortcomings of the Current System

There are several reasons why hate crimes should be singled out for special attention by the criminal justice system beyond the current provisions of Canada's *Criminal Code*.

First, while the presence of aggravating factors *presumably* leads to harsher sentences, there is no way to ascertain whether this in fact occurs. Because the *Code* makes no distinction between an assault and an assault motivated by racism (the sentence may differ, but the conviction is the same), it is practically impossible to track and measure the efficacy of hate crime prosecutions and convictions. The absence of a federal offence for race based assaults thus creates a problem with transparency and accountability. Similar concerns have been voiced by police forces.¹⁵⁴

¹⁴⁸ *Criminal Code*, R.S.C., 1985, c. C-46, s. 318. The criminal act of "advocating genocide" is defined as supporting or arguing for the destroying of an "identifiable group" – persons distinguished by their colour, race, religion, ethnic origin or sexual orientation.

¹⁴⁹ *Criminal Code*, R.S.C., 1985, c. C-46, s. 319. It should be noted that subsection 319(3) identifies acceptable defences. Specifically, the statute provides no person shall be convicted of an offence if the statements in question: are established to be true; were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds it was believed to be true; or were expressed in good faith.

¹⁵⁰ *Criminal Code*, R.S.C., 1985, c. C-46, s. 320.

¹⁵¹ *Criminal Code*, R.S.C., 1985, c. C-46, s. 320.1.

¹⁵² *Criminal Code*, R.S.C., 1985, c. C-46, s. 430.4.1.

¹⁵³ *Criminal Code*, R.S.C., 1985, c. C-46, s. 718.2(a)(i). The section also considers whether the hate was motivated by national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor.

¹⁵⁴ Kelly Pedro, "Chief seeks stronger laws on hate crimes" *The London Free Press* (7 February 2007).

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Second, Canadians who are not members of one of the usually targeted communities have difficulty comprehending the seriousness of hate crimes. Since racial minorities are underrepresented among criminal justice professionals, the seriousness of hate crimes is also not fully appreciated in the criminal justice system.¹⁵⁵ As such, in practice, victims and community groups have to exert pressure on prosecutors to have offences recognised as a hate crime motivated by anti-Black racism.¹⁵⁶ Leaving hate-motivated crimes to be dealt with by the sentencing provisions of the *Code* thus presumes a racial equality before the law that does not exist for African Canadians. Rather, because the prosecutor must request that the judge consider the racist nature of the crime, a lack of understanding of anti-Black racism by prosecutors and/or the members of the judiciary often prevents hate and bias towards African Canadians from being considered.¹⁵⁷

Third, relatively few hate crime cases are completed in Canadian courts.¹⁵⁸ As an example, in 2009, Canadian police services reported 1,473 hate crimes. Nonetheless, adult courts completed only 14 cases involving at least one hate crime charge, while youth courts completed only five. Of the 14 cases in adult court, hate crime charges accounted for the most serious charge in just two cases, both of which resulted in the accused person being found guilty and subsequently sentenced to probation. Similarly, in all five cases in youth court, the hate crime charges were not determined to be the most serious offence.¹⁵⁹ As noted earlier, there is currently no data available on the use of sentencing provisions related to hate crime.

The low number of completed hate crimes cases points to a lack of strong public condemnation of hate crimes and sends a message to victims that they do not merit proper protection. As a result, victims of hate appear to be reluctant to report incidents to police. Self-reported victimization data from Canadians suggests that only about one-third (34 per cent) of incidents perceived by respondents to have been motivated by hate are subsequently reported to police.¹⁶⁰ According to police sources, the reporting rate is even lower for African Canadians due to the African Canadian community's mistrust of the police and the criminal justice system.

Finally, hate crimes have effects upon the victim beyond those commonly associated with non-bias crimes. Information on self-reported victimization, collected by the General Social Survey ("GSS"), for example, suggests that the emotional consequences for victims of crimes motivated by hate are greater than for victims of

¹⁵⁵ Julian Roberts, *Disproportionate Harm: Hate Crime in Canada*, (Ottawa: University of Ottawa, 1995), online: http://www.justice.gc.ca/eng/pi/rs/rep-rap/1995/wd95_11-dt95_11/wd95_11.pdf [*Disproportionate Harm*].

¹⁵⁶ See for example CBC News, "Beating a hate crime, Quebec City victim says", *CBC News*, (6 July 2006), online: <http://www.cbc.ca/canada/montreal/story/2006/07/06/hate-crime.html>. A Black victim was beaten by four white men with a wrench, shouting "white power" during the attack. The police would not call it a hate crime.

¹⁵⁷ *Disproportionate Harm*, *supra* note 155; and Julian Roberts and Andrew Hastings, "Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a) (i) of the Criminal Code" (2001) 27 *Queen's Law Journal* 93.

¹⁵⁸ Information on court cases is collected by Statistics Canada's Integrated Criminal Court Survey.

¹⁵⁹ Mia Dauvergne and Shannon Brennan *Police-reported hate crime in Canada, 2009* (Ottawa: Statistics Canada, 2011), online: <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11469-eng.htm>.

¹⁶⁰ *Ibid.*

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crimes not motivated by hate. For example, for four in 10 crimes perceived to have been motivated by hate, victims stated that they found it difficult or impossible to carry out their everyday activities; this was double the proportion of crimes that had not been motivated by hate.¹⁶¹ Also, unlike other crimes, the effects of hate crimes reach far beyond the immediate victim, impacting whole communities. “Hate crimes convey a message of fear to all members of the community to which the specific individual belongs.”¹⁶²

If a crime is motivated by racism, and this is not taken into account by the criminal justice system, the system will have failed to reflect the true extent of the harm caused by the crime. “To the extent that victims are aware of this, they may well become disenchanted with the criminal justice response, and this may reduce still further the probability that such incidents will be reported to the police.”¹⁶³

The only way to protect African Canadians, to publicly denounce anti-Black hate crimes, and to ensure consistent sentences for race-based hate crimes across the country is to enact a criminal offence of race-based assault as is required by Article 4(a) of the Convention. Such a provision has been enacted in other jurisdictions and is a clear affirmation by states that race-based violence requires specific recognition and attention.¹⁶⁴

RECOMMENDATION

That the Committee recommends that Canada:

- **Design and implement training for police, judges and prosecutors on the nature of anti-Black hate;**
- **Enact criminal legislation creating an offence for racial violence;**
- **Implement a nationwide mandatory disaggregated data collection policy that requires the collection of disaggregated data on the reporting, prosecution, conviction and sentencing of hate crimes; and**
- **Provide in its next periodic report information on any data collection measures implemented and their results.**

D. ARTICLE 5 – EQUALITY BEFORE THE LAW

Article 5 – In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or

¹⁶¹ In 2001, 53 of the 90 race based victims were African Canadian. In 2004, 31 of the 41 race based victims were African Canadian.

¹⁶² *Disproportionate Harm*, *supra* note 155.

¹⁶³ *Ibid.*

¹⁶⁴ In the United States, 40 states and the District of Columbia have enacted hate crime laws. See also *Hate Crime Statistics Act of 1990*; *Hate Crimes Working Group*, *supra* at 51.

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national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...
(d) Other civil rights, in particular:

- (i) The right to freedom of movement and residence within the border of the State;
- (ii) The right to leave any country, including one's own, and to return to one's country;

...
(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

- (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

...
(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

1. Bill C-10 – The Safe Streets and Communities Act

In *General Recommendation No. 34 - Racial discrimination against people of African descent*, the Committee urged states to ensure that measures taken in the fight against crimes do not discriminate in purpose or effect on the grounds of race and colour.¹⁶⁵ Similarly, in *General Recommendation No. 31 - The prevention of racial discrimination in the administration and functioning of the criminal justice system*, the Committee recognized the handing down by courts of harsher or inappropriate sentences against persons belonging to racialized groups as a possible indicator of racial discrimination.¹⁶⁶

On September 20, 2011 Justice Minister Rob Nicholson tabled Bill C-10, an omnibus bill titled the *Safe Streets and Communities Act*. Combining amendments from nine separate bills that had failed to pass in previous sessions of parliament, Bill C-10 proposes to make fundamental changes to almost every component of Canada's criminal justice system. Bill C-10 has been put forward as legislation to make "streets, families and communities safer".¹⁶⁷ It proposes to do this by, *inter alia*, imposing tougher sentences (e.g. mandatory minimums) for the production, possession and trafficking of illicit drugs; eliminating the use of conditional sentences for certain crimes; extending ineligibility periods for applications for a pardon; and increasing the likelihood of custodial and adult sentences for young offenders under the *Youth Criminal Justice Act* ("YCJA").

¹⁶⁵ *General Recommendation No. 34*, *supra* note 27 at para. 38.

¹⁶⁶ *General Recommendation No. 31*, *supra* note 100 at para. 1(f).

¹⁶⁷ Department of Justice Canada, "Government of Canada Introduces the *Safe Streets and Communities Act*" (20 September 2011), online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc_32631.html.

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While the purported goal of “safety” and “security” is laudable, the means chosen to achieve it are unnecessary, contrary to reason, and counterproductive, and will only serve to worsen existing racial and socioeconomic disparities in the criminal justice system.

First, by most accounts, the current criminal law is working. With the introduction of progressive measures such as conditional sentencing and the YCJA, Canada appeared to be moving in the right direction. As an example, in 2004, police reported 2.6 million offences, a crime rate that was 12% lower than a decade before. Today, not only is crime in Canada down to its lowest level since 1973,¹⁶⁸ the volume of crimes, as reported by police forces nation-wide, has declined 5% in the last year alone.¹⁶⁹ Since the YCJA was proclaimed in 2003 both the rates of youth crime and the rates of after-sentence incarceration of young persons have consistently gone down. As another example, almost all pardon recipients – 96% over the last 40 years – remain crime-free in the community.

Second, the “tough on crime” approach proposed in these amendments does not work. Many studies demonstrate that increases in penalties do not positively affect crime rates. This finding was recognized by government officials as early as 1993 when the Progressive Conservative Party of Canada’s election platform noted that the answer to offending “does not lie in simply adding more prisons and getting more police. If that were true, then the United States would be the safest place on Earth.”¹⁷⁰

While the legislation will negatively affect all Canadians, – from offenders, to the family members and communities of the incarcerated, to tax payers – the effects of Bill C-10 will be even more pronounced in marginalized communities. As noted earlier, nowhere are the effects of anti-Black racism more pronounced or more palpable than within the criminal justice system. Bill C-10 will serve only to exacerbate the negative impact of criminal law on the African Canadian community. Specifically, Bill C-10 will lead to the mass criminalization and incarceration of the African Canadian community, thereby depriving African Canadians of the right to freedom of movement, peaceful assembly and association, work, education and equal participation in cultural activities. Due to its inevitable disproportionate impact on the rights and freedoms of members of the African Canadian community, the federal government’s introduction of *The Safe Streets and Communities Act* contravenes the Committee’s recommendations and Article 5 of the Convention.

¹⁶⁸ Terry Milewski, “Texas Conservatives Reject Harper’s Crime Plan,” *CBC News*, (17 October 2011), online: <http://www.cbc.ca/news/politics/story/2011/10/17/pol-vp-milewski-texas-crime.html?cmp=googleeditorspick>.

¹⁶⁹ Bea Vongdouangchanh, “Critics continue to slam fed’s omnibus crime bill,” *The Hill Times Online*, (3 October 2011), online: http://hilltimes.com/news/legislation/2011/10/03/critics-continue-to-slam-feds%E2%80%99-omnibus-crime-bill/28335?page_requested=2

¹⁷⁰ Edward Greenspan and Anthony Doob, “Ottawa’s Drug Problem: The Penalty Doesn’t Fit the Crime”, *The Globe and Mail*, (22 August 2011), online: <http://www.theglobeandmail.com/news/opinions/opinion/ottawas-drug-problem-the-penalty-doesnt-fit-the-crime/article2136102/>.

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i. Mandatory Minimum Sentences

Bill C-10 proposes to establish mandatory minimum penalties for “serious drug offences” such as production, trafficking, possession for the purpose of trafficking, importing and exporting, and possession for the purpose of exporting when they are carried out for organized crime purposes, or if they involve targeting youth. The Bill also proposes to increase the maximum sentences for production of certain drugs, including marijuana from 7 to 14 years.

The proposed amendments raise a number of concerns. First, they will move discretion with respect to sentencing from judges to Crown prosecutors. Specifically, prosecutors will now have the power to proceed, dismiss, or stay a charge to which a mandatory minimum sentence attaches. Research suggests that this discretion will be exercised to the disadvantage of African Canadians.¹⁷¹ By removing discretion from the sentencing process, mandatory minimum sentences will have “succeeded only in shifting it ... from the judge, in public proceedings conducted on the record in the courtroom, to the prosecutor’s office, off the record behind closed doors.”¹⁷² Because prosecutorial discretion is largely unreviewable, any bias that occurs cannot be appealed or challenged.

Also, in practice, mandating minimum sentences for dealing in any quantity of an illegal drug leads to the incarceration of some of the most marginalized people who use drugs, while doing little to penalize large-scale traffickers.¹⁷³ To begin, the real profiteers in the drug market, those who traffic in large quantities of illegal drugs, distance themselves from more visible drug-trafficking activities.¹⁷⁴ Drug markets operated by Blacks, on the other hand, tend to be more open and vulnerable to police action.¹⁷⁵ Further, the shift from judicial to prosecutorial discretion noted above means that prosecutors, who can offer deals to offenders that provide evidence to support cases against other drug dealers or offenders,¹⁷⁶ will be unlikely to exercise their discretion in favour of small-scale users that often do not have the kind of evidence that prosecutors in these circumstances seek. Instead, the beneficiaries of this discount are likely to be major high-level dealers that have more information to trade.

In evaluating the above arguments, it is useful to consider the racially disparate impact that mandatory minimum drug sentences have had on the African American community in the United States. To begin, it is important to note that, according to

¹⁷¹ Gittens, *supra* note 99 at 192.

¹⁷² Henry Wallace, “Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jeckyll and Mr. Hyde”, (1993) 57 *Federal Probation* (3) at 13.

¹⁷³ Thomas Kerr, “The public health and social impacts of drug market enforcement: A review of the evidence,” (2005) 16 *Int J Drug Pol* 4 at 210.

¹⁷⁴ Canadian HIV/AIDS Legal Network, “Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses” (April 2006), online: <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1455>.

¹⁷⁵ Thomas Gabor and Nicole Cruther, *Mandatory Minimum Penalties: Their effects on crime, sentencing disparities, and justice system expenditures*, (Ottawa: Justice Canada, Research and Statistics Division, 2002) at 23.

¹⁷⁶ *Ibid.* at 26.

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national survey data, 76% of illicit drug users in the US are white.¹⁷⁷ The disproportionate incarceration of African Americans is therefore not due to higher consumption levels. The US introduced mandatory minimum sentences for selected drug offences in the 1980s. Between 1976 and 1989, white drug arrests grew by 70%, while black drug arrests grew by 450%.¹⁷⁸ African Americans, who in 1990 constituted 28.2% of all federal (US) defendants in the US, accounted for 38.5% of all federal defendants convicted under mandatory minimum provisions.¹⁷⁹ Similarly, in the era of mandatory sentences, incarceration of women for drug-related offences in state prisons increased by 888%; the majority of this increase was accounted for by women of colour and women living in poverty.¹⁸⁰ As such, under Bill C-10, sentences will become excessive, harsh and unfair for all offenders but, given the racial biases that currently exist in the criminal justice system, even more so for African Canadians.

ii. Criminal Pardons

Once a pardon is granted by the federal government, pardon recipients are not required to reveal, to anyone, that they ever had a criminal record. All charges and convictions are removed and kept separate from active criminal files stored in the police database. Access to these records cannot be obtained without prior written permission from the Minister of Public Safety Canada. The benefits of obtaining a pardon include, *inter alia*, the removal of restrictions on employment and the ability to freely travel outside of Canada.

Bill C-10 includes proposed amendments to the *Criminal Records Act* which, *inter alia*, would extend the ineligibility periods for applications for a record suspension to five years for summary conviction offences, and to 10 years for indictable offences. The proposed amendments would also make certain people ineligible to apply for a pardon including those convicted of more than three indictable offences. These proposals are ostensibly designed to prevent serious criminals from seeking a pardon but are much wider in their reach, capturing summary conviction offences which are, by definition, minor.

Given the extremely low percentage of pardon recipients that re-offend – 4 per cent over the last 40 years – the proposed amendments are entirely overbroad in their reach and will inevitably have an effect entirely contrary to their purported aim. Indeed, because these measures all but guarantee that criminal offenders will have more difficulty reintegrating into society due to the stigma of conviction, the proposed amendments will likely make recidivism all but inevitable. Given the high rates of

¹⁷⁷ *Ibid.* at 23.

¹⁷⁸ Michael Tonry, *Sentencing Matters*, (New York: Oxford, 1996).

¹⁷⁹ Marvin Free, "The Impact of Federal Sentencing Reforms on African American", (1997) 28 *Journal of Black Studies* 2 at 268.

¹⁸⁰ The Brennan Centre, *Caught in the Net: The Impact of Drug Policies on Women and Families*, (New York: The Brennan Institute, 2006).

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arrest and incarceration of the African Canadian community, this is an area of particular concern for the ACLC.

iii. Conditional Sentences

It has been recognized by many, including the federal government, that while long prison sentences serve to punish offenders, they do not deter, rehabilitate, or contribute to the long term safety of the community. In fact, long prison sentences have been shown to increase the chances that the offender will offend again.¹⁸¹ The impression that harsher sentencing leads to safer communities is therefore false. Safer communities require concerted efforts at rehabilitating and reintegrating offenders into society through supervision and support in the community.

When a court finds a person guilty of a crime, the person may be sentenced to time in prison or, in certain circumstances, may be allowed to serve the sentence in the community. This is called a conditional sentence.

The current law surrounding conditional sentences effectively prohibits conditional sentences in cases involving serious violent offences and serious property offences. Bill C-10, however, seeks to expand the list of offences for which conditional sentences cannot be made available. The proposed amendments would severely restrict the availability of conditional sentences in precisely the situations where they are the most appropriate response; i.e., less serious violent and property offences.

The unnecessary incarceration of individuals – a sure result of Bill C-10 – will not advance the aims of rehabilitation or reintegration, will have a negative effect on public safety, and will cause irreparable damage to the families and communities of the incarcerated. The advantages of house arrest include that offenders can remain at their jobs and support their families thereby avoiding the crime-creating effects of incarceration. Mandatory incarceration, on the other hand, will further exacerbate problems with the breakdown of family units, depriving children of financial and parental support and perpetuating a cycle of poverty and criminality.

iv. Youth Criminal Justice Act

The *Youth Criminal Justice Act* (“YCJA”) takes a rehabilitative approach to dealing with young offenders, to ensure that young people get out and stay out of the criminal justice system. The proposed amendments under Bill C-10 represent a significant departure from this mandate and back into the punitive and out-dated *Young Offenders Act*.

¹⁸¹ Department of Justice, *A Framework for Sentencing, Corrections and Conditional Release, Directions for Reform*, (Ottawa: Department of Justice, 1990) at 9.

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The proposed amendments indicate an intention, on the part of the federal government, to elevate crimes committed by youth to the same level as those committed by their adult counterparts. The Bill ignores the root causes of youth crime and, instead, opts to react to the problem with more custodial sentences—a punishment which previously was rightly reserved as a “last resort” in dealing with young offenders. As African Canadian youth are already disproportionately represented within the Canadian criminal justice system and the youth prison system, they are likely to bear the brunt of these amendments.

Given that these proposed changes will likely increase the over-incarceration of African Canadian youth, Canada must remain committed to the objectives of the YCJA which are rehabilitation and reintegration and address youth crime with age appropriate remedies and community-based rehabilitative programs.

RECOMMENDATION

That the Committee recommends that Canada:

- **Ensure that mandatory minimum sentences are not imposed for drug offences;**
- **Ensure that the timelines for criminal pardons are not extended;**
- **Ensure that conditional sentences continue to be available for those convicted of less serious violent or property offences; and**
- **With respect to young offenders, ensure that custodial sentences continue to be reserved as a “last resort,” and expand rehabilitative and community-based programs.**

2. The Right to Education

In *General Recommendation No. 34 - Racial discrimination against people of African descent*, the Committee recognized that the particularly vulnerability of children of African descent can perpetuate the poverty and inequality affecting Afro-descendant persons. The Committee urged states to adopt special measures to ensure the equality of people of African descent in the areas that most affect the lives of children.¹⁸² Specifically, it recommended that states take steps to remove all obstacles that prevent the enjoyment of economic, social and cultural rights by people of African descent in the area of education;¹⁸³ ensure that public and private education systems do not discriminate against or exclude children based on race or descent;¹⁸⁴ take measures to reduce the school dropout rate for children of African

¹⁸² *General Recommendation No. 34*, *supra* note 27 at para. 25.

¹⁸³ *Ibid.* at para. 50.

¹⁸⁴ *Ibid.* at para. 62.

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descent;¹⁸⁵ and act with determination to eliminate any discrimination against students of African descent.¹⁸⁶

Canada continues to fail in its duty to protect the rights of African Canadian students. As an example, serving more than 250,000 students each year, the Toronto District School Board (“TDSB”) is the largest school Board in Canada and the fourth largest in North America. Recent research done by the TDSB found a 40 per cent drop-out rate among African Canadian students.¹⁸⁷ This is significantly higher than the average drop-out rate which is approximately 25 per cent.¹⁸⁸ The high drop-out rate, and related high failure and expulsion rates of African Canadian students, is not new. In fact, the *Every Student Survey Reports (1970-1993)* of the former Toronto School Board have consistently shown that African Canadian students do not do as well academically as their non- African Canadian counterparts.

The alarmingly high drop-out rates and low rates of success of African Canadian students can be partly attributed to the disproportionate application of disciplinary policies. The *Safe Schools Act*, in force from 2001 to 2008, forced masses of students out of school. In 2002-2003, for example, the number of students suspended in Ontario spiked to 157,436 – an increase of almost 50,000 from two years earlier.¹⁸⁹ These students were disproportionately racialized and from at-risk neighbourhoods with significant African Canadian populations.

In 2007, as a result of a human rights complaint that argued that zero-tolerance policies had a disproportionate impact on racial-minority students and students with disabilities, the Ontario Ministry of Education agreed to end its zero-tolerance approach.¹⁹⁰

The provincial government introduced *Bill 212–The Education Amendment Act* which, *inter alia*, pressured school boards to reduce suspensions and expulsions by requiring principals to first consider mitigating circumstances before imposing disciplinary measures, and provided \$44 million to hire psychologists and social workers and to set up alternative programs for suspended and expelled students.

The measures from Bill 212 have not trickled down to African Canadians. While the end of the zero-tolerance approach to delinquent students is a welcome change, many of the same problems of denial of equal access to education services continue to plague African Canadian students and, in some instances, have even gotten worse.

¹⁸⁵ *Ibid.* at para. 63.

¹⁸⁶ *Ibid.* at para. 65.

¹⁸⁷ Toronto District School Board, *Improving Success for Black Students: Questions and Answers*, online: <http://www.tdsb.on.ca/site/viewItem.asp?siteid=9998&menuid=10863&pageid=9585>.

¹⁸⁸ Madhavi Acharya-Tom Yew, “Waiting for Superman: A Warning for Canada” *The Toronto Star* (12 September 2010), online: www.thestar.com/print/article/859942.

¹⁸⁹ Jim Rankin, “Suspended Sentences: Forging a School-to-Prison Pipeline?” *The Toronto Star* (6 June 2009), online: <http://www.thestar.com/news/gta/article/646629> [Suspended Sentences].

¹⁹⁰ Ontario Human Rights Commission, “Backgrounder - Human Rights Settlement Reached with Toronto District School Board”, online: <http://www.ohrc.on.ca/en/resources/news/Nov142005Backgrounder>.

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First, under the new legislation, school boards must ensure that students have the opportunity to continue their education by offering alternative programs for all students that are removed from school for a period of more than five school days. However, many students are denied the opportunity to participate. Reports suggest that only half of suspended students actually participate in alternative programming.¹⁹¹ In the experience of the ACLC, this is due in large part to the fact that parents and students are not fully advised of the programs, resources and services available to them. Also, many students do not meet the threshold qualification of having been suspended for more than five days; rather, they receive multiple suspensions throughout the year, for less than five days at a time, the cumulative effect of which is equally damaging.¹⁹²

Second, recent reports indicate that Toronto principals are finding loopholes to get rid of problem students and circumventing legislation designed to have the opposite effect. Some suspensions, meant to be brief, are lasting months. In the experience of the ACLC, this is largely because school administrators are quick to contact the police for minor infractions which results in the imposition of police and court conditions that not only lead to criminalization but prevent students from coming within a certain distance of their school often for a period of months. Also, while students that are formally expelled are permitted to return to regular school upon the achievement of behavioural and academic criteria set by their principals, academic conditions are often set so high that students are effectively barred for the rest of their high school years.¹⁹³ Between February 2008 and April 2009, for example, only 29 per cent of students who participated in a TDSB expulsion program returned to regular schools.¹⁹⁴

Finally, there are 33 “safe school” programs for expelled and suspended students run by the TDSB. Because African Canadian students continue to be disproportionately suspended and expelled,¹⁹⁵ the students at these alternative schools are also disproportionately African Canadian.¹⁹⁶ These alternative schools, however, provide a sub-par education at best. As an example, in some cases, the school day is only three and a half hours long, compared to a regular six-hour school day.¹⁹⁷ Further, students from schools where they study eight courses for the whole year can be sent to expulsion programs where they can study only four courses per semester, virtually assuring failure in at least four courses.¹⁹⁸ **The result is that a**

¹⁹¹ Suspended Sentences, *supra* note 189.

¹⁹² Sandro Contenta and Jim Rankin, “Are Schools Too Quick to Suspend?,” *The Toronto Star* (8 June 2009), online: <http://www.thestar.com/printarticle/647102>.

¹⁹³ Suspended Sentences, *supra* note 189.

¹⁹⁴ *Ibid.*

¹⁹⁵ TDSB, “Improving Success for Black Students: Questions and Answers,” accessed January 13, 2012, online: <http://www.tdsb.on.ca/site/viewItem.asp?siteid=9998&menuid=10863&pageid=9585>.

¹⁹⁶ See also Sandro Contenta and Jim Rankin, “Expulsion Class Gives Students Another Chance,” *The Toronto Star* (7 June 2009), online: <http://www.thestar.com/printarticle/646865>.

¹⁹⁷ *Ibid.*

¹⁹⁸ Suspended Sentences, *supra* note 189.

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large number of African Canadian students are receiving an education that is separate and unequal.

For a high percentage of African Canadian students, the short and long-term problems associated with prolonged absences from school thus continue to be a concern. The short-term effects of exclusionary discipline practices include reduced opportunities to learn, grade repetition, and disengagement from learning and school. In the long-term, students who are expelled or suspended are more likely to drop out, commit crimes, and be incarcerated.¹⁹⁹ More than 70 per cent of Canadian inmates did not complete high school – this is a prime example of the “school to prison pipeline.”²⁰⁰ Additionally, students who are suspended or expelled suffer academically, develop maladaptive behaviours, have difficulty forming relationships with teachers and peers, and have trouble re-entering school.²⁰¹

RECOMMENDATION

That the Committee recommends that Canada:

- **Take steps to ensure that parents of suspended and expelled African Canadian students are made fully aware of their rights and the resources, services and programs available to them;**
- **Take steps to ensure that the alternative programs created under the Ontario *Education Act* provide full and equal access to education for African Canadian students; and**
- **Adopt measures, including culturally reflective education (e.g. Afrocentric schools and/or programs), increased diversity among teaching staff, and diversity training, to increase the academic engagement, reduce the drop-out rate and decrease the disproportionate discipline of African Canadian students.**

¹⁹⁹ American Psychological Association Zero Tolerance Task Force, *Are zero tolerance policies effective in the school?* (2006), online: <http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf>; Fabelo, T., Thompson, Martha Plotkin et al., *Breaking schools' rules: A statewide study of how school discipline relates to students' success and juvenile justice involvement*, (New York: Council of State Governments Justice Center, 2011); R. Skiba et al., *Suspended education: Urban middle schools in crisis*, (Montgomery: Southern Poverty Law Center, 2010); The Civil Rights Project, *Opportunities suspended: The devastating consequences of zero tolerance and school discipline*, (Washington: 2000); David Osher et al., “Issues of cultural and linguistic competency and disproportionate representation” in R. Ruthford et al., *Handbook of Research in Behavioral Disorders*, (New York: Guilford Publications).

²⁰⁰ Suspended Sentences, *supra* note 189.

²⁰¹ American Psychological Association Zero Tolerance Task Force, *Are zero tolerance policies effective in the school?* (2006), online: <http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf>; David Osher, et al., “Schools make a difference: The overrepresentation of African American youth in special education and the juvenile justice system” in D. Losen et al., *Racial Inequality in Special Education* (Cambridge: Harvard University Press, 2002).

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E. ARTICLE 7 – EDUCATION, CULTURE AND INFORMATION

Article 7 – States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

1. Durban Review Conference

2011 marked the 10th anniversary of the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (“WCAR”) which took place in Durban, South Africa in 2001. The Durban Conference (“Durban”) resulted in the creation and adoption by consensus of the *Durban Declaration and Program of Action* (“DDPA”), the international community’s innovative and action oriented blueprint to fight all forms of racism and racial discrimination. Among other things, the DDPA recognized that slavery is and always has been a crime against humanity and encouraged states to consider reparations for the slave trade.

In 2004, Canada’s Minister of Foreign Affairs in addressing the United Nations Commission on Human Rights stated as follows:

Both domestically and internationally, the fight against racism is a top priority for Canada. It should also be a top priority of states to draw on many of the strategies and approaches outlined in the Program of Action of the World Conference Against Racism.²⁰²

Canada’s actions since the WCAR, however, belie this stated commitment. Canada has consistently voted against or abstained from General Assembly and Human Rights Commission resolutions regarding racism and the implementation of the DDPA.²⁰³

²⁰² Foreign Affairs and International Trade Canada. *Notes For An Address By The Honourable Bill Graham, Minister of Foreign Affairs, To The 60th Session of The Commission on Human Rights*. Geneva, Switzerland. March 16, 2004.

²⁰³ Canada abstained from voting on the following resolutions before the General Assembly; *Comprehensive implementation of and follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/RES/56/266. *The fight against racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, A/RES/57/195. *Global efforts for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, A/RES/59/177, A/RES/60/144, and A/RES/61/149; [Canada voted against this resolution at the 58th session (A/RES/58/160) and the 65th session Res/65/240]. *Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, [Canada abstained from voting for A/RES/60/143, A/RES/61/147 and A/RES/65/199. Canada voted against the following resolutions before the Commission on Human Rights; *Racism, racial discrimination,*

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Most recently, the Canadian government refused to participate in events commemorating the 10th anniversary of the adoption of the *DDPA* in September 2011. Specifically, on September 22, 2011, the United Nations General Assembly held a one-day high-level meeting in New York City to commemorate the 10th anniversary of the adoption of the *DDPA*. The high-level meeting resulted in, *inter alia*, the adoption by consensus of a political declaration proclaiming the "strong determination [of world leaders] to make the fight against racism, racial discrimination, xenophobia and related intolerance, and the protection of the victims thereof, a high priority for [their] countries." Like it had done in 2001 and 2009, Canada again led the withdrawal of nation states from the Durban event.²⁰⁴

Canada's rejection of the Durban process was ostensibly based on the fact that the Durban process "promote[d] racism" and was an "organized exercise in scapegoating."²⁰⁵ Specifically, the Canadian government has long held the position that the *DDPA*, which recalls "that the Holocaust must never be forgotten",²⁰⁶ recognizes "the right to security for all States in the [Middle East], including Israel",²⁰⁷ and calls for "a just, comprehensive, and lasting peace in the region in which all peoples shall co-exist and enjoy equality, justice and internationally recognized human rights and security"²⁰⁸ was anti-Semitic because it recognized the right to self-determination of the Palestinian people.²⁰⁹ A simple reading of the *DDPA* reveals, however, that this interpretation of the *DDPA* cannot be supported.

Whatever the reasons for Canada's disengagement from the Durban processes, the end result has been the Canadian government's avoidance of its obligations under the *DDPA* with respect to the full and accurate inclusion of the history and contribution of Africans and people of African descent in the education curriculum; the adoption of programs and measures to ensure the effective access of Afro-descendants to the justice system; and the assigning of particular priority and sufficient funding to improving the situation of people of African descent in the areas of health systems, education, and housing. The government's inaction thus demonstrates a lack of commitment to the elimination of racism and racial discrimination faced by African Canadians.

xenophobia and related intolerance, E/CN.4/2002/L.12. *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, E/CN.4/2003/L.4.

²⁰⁴ Citizenship and Immigration Canada, "Government of Canada will not attend Durban commemorative event," (25 November 2010), online: <http://www.cic.gc.ca/english/department/media/releases/2010/2010-11-25.asp>.

²⁰⁵ *Ibid.*

²⁰⁶ *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance – Durban Declaration*, 8 September 2001, A/CONF.189/12 at para. 58.

²⁰⁷ *Ibid.* at para. 63.

²⁰⁸ *Ibid.* at para. 64.

²⁰⁹ *Ibid.* at para. 63.

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RECOMMENDATION

That the Committee recommends that Canada:

- **Publicize the true contents of the *Durban Declaration and Programme of Action* (“DDPA”);**
- **Re-commit to a national anti-racism strategy such as Canada’s 2005 *Action Plan Against Racism* that will result in the adoption and implementation of the *DDPA*; and**
- **Participate in any and all upcoming events addressing the implementation of the *DDPA*.**

IV. SUMMARY OF RECOMMENDATIONS

1. Work closely with organizations like the Ontario Black History Society that are dedicated to the study, preservation and commemoration of African Canadian history to ensure that the bicentennial celebration of the War of 1812 adequately reflects the contributions and role of African Canadians.
2. Allocate a fair portion of the funding that has been set aside for events commemorating the War of 1812 to organizations like the Ontario Black History Society.
3. Do not subject refugee claimants from designated “safe” countries to lesser procedural protections based on nationality or other prohibited grounds.
4. Take steps to ensure that the expedited process and the legislative changes with respect to pre-removal risk assessments proposed under Bill C-11 do not lead to the return of non-citizens to countries or territories where they are at risk of being subject to serious human rights abuses.
5. Ensure that the Canadian government does not amend the *Immigration and Refugee Protection Act* with respect to humanitarian and compassionate considerations.
6. Ensure the adequate funding of services that address the problems affecting immigrants of African descent, with regard to economic, social and cultural rights, in areas such as housing, education and employment.
7. Increase the resources and targets dedicated to processing immigration applications from Africa in order to address the imbalance in resource allocation that is biased in favour of European immigrants and refugees.
8. Take steps to move away from the Eurocentric approach to family currently reflected in Canada’s policies with respect to family class applicants.
9. Cease using the term “visible minority” to describe racialized persons as this term obscures differences between racialized groups that are

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- important to the creation and implementation of effective and responsive policies.
10. Reintroduce the mandatory long-form census in order to provide governments and community groups with an accurate statistical basis from which to pursue structural changes and rectify policies, programs and legislation that are having a disparate impact on African Canadians.
 11. Implement nationwide mandatory disaggregated data collection, based on race, colour, and ethnic and national origin in order to determine if and where racial disparities exist and address them accordingly.
 12. Implement a nationwide mandatory disaggregated race-based data collection policy, and collect disaggregated data on police stops, searches, arrests, and releases.
 13. Adopt national and provincial measures, including legislation and external complaint mechanisms, to end racial profiling by law enforcement and national security agencies.
 14. Conduct an extensive study of systemic anti-Black racism and the overrepresentation of African Canadians at all levels in the criminal justice system.
 15. Develop an effective action plan towards eliminating the disparity in rates of sentencing and incarceration of African Canadians, including such things as sentencing reforms and training on anti-Black racism for members of the police, Crown prosecutors, and members of the judiciary.
 16. Ensure that section 13 of the *Canadian Human Rights Act* is not repealed as this is an important protection against different forms of anti-Black hate propaganda.
 17. Design and implement training for police, judges and prosecutors on the nature of anti-Black hate.
 18. Enact criminal legislation creating an offence for racial violence.
 19. Implement a nationwide mandatory disaggregated data collection policy that requires the collection of disaggregated data on the reporting, prosecutions, convictions and sentencing of hate crimes.
 20. Ensure that mandatory minimum sentences are not imposed for drug offences.
 21. Ensure that the timelines for criminal pardons are not extended.
 22. Ensure that conditional sentences continue to be available within a reasonable timeframe for those convicted of less serious violent or property offences.
 23. With respect to young offenders, ensure that custodial sentences continue to be reserved as a “last resort,” and expand rehabilitative and community-based programs.

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24. Take steps to ensure that parents of suspended and expelled African Canadian students are made fully aware of their rights and the resources, services and programs available to them.
25. Take steps to ensure that the alternative programs created under the Ontario *Education Act* provide full and equal access to education for African Canadian students.
26. Adopt measures, including culturally reflective education (e.g. Afrocentric schools and/or programs), increased diversity among teaching staff, and diversity training, to increase the academic engagement, reduce the drop-out rate and decrease the disproportionate discipline of African Canadian students.
27. Provide in its next periodic report, detailed information on any and all data collection measures implemented and their results.
28. Publicize the true contents of the *Durban Declaration and Programme of Action* (“DDPA”).
29. Re-commit to a national anti-racism strategy such as *Canada’s 2005 Action Plan Against Racism* that will result in the adoption and implementation the *DDPA*.
30. Participate in any and all upcoming events addressing the implementation of the *DDPA*.