Submissions to the Standing Committee on Justice Policy
Regarding Bill 138 ("An Act to amend the Change of Name Act and to make consequential amendments to another Act")

January 14, 2023

Canadian Prison Law Association

The Canadian Prison Law Association ("CPLA") is an organization of lawyers, academics, and other professionals who work on behalf of prisoners, and who seek to protect and promote the constitutional rights, interests, and privileges of prisoners by advocating on their behalf within the community and in their dealings with prison and release authorities, by generating and sharing legal information, and by promoting adherence to the rule of law within the prison environment in accordance with the highest standards of justice and fairness as required by and consistent with the Canadian Constitution and in particular the *Canadian Charter of Rights and Freedoms*.

Summary

The CPLA opposes Bill 138 ("An Act to amend the Change of Name Act and to make consequential amendments to another Act"). The Government of Ontario has an interest in protecting public safety, but it also has an obligation to do so in a manner that respects *Charter* rights. As the Supreme Court of Canada reiterated in a case striking down mandatory registration provisions of the *Sex Offender Information Registration Act*: "[e]ven when Parliament acts with a laudable purpose, it must still legislate in a constitutional manner and comply with the *Charter*."[1]

The CPLA is concerned that the framework set out in Bill 138 is inconsistent with section 7 of the *Charter*, since prohibiting someone from changing their name is a violation of the right to liberty. Moreover, this restriction cannot be saved under the proportionality aspect of the Oakes test.

[1] *R v Ndhlovu*, 2022 SCC 38, at para 7.

Prohibiting name changes can infringe the right to liberty (protected by section 7 of the *Charter*)

Restricting persons convicted of sexual offences from changing their names while on the sex offender registry can be an infringement of section 7 of the *Charter*, which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

A law violates section 7 if it interferes with life, liberty, or security of the person in a manner that is inconsistent with the principles of fundamental justice.[2] Section 7 is concerned with "the protection of individual autonomy and dignity."[3] The right to liberty protects "the right to make fundamental personal choices free from state interference."[4] Moreover, the section 7 right to liberty also provides some residual protection of privacy.[5]

The ability to choose one's name is a fundamental personal choice, and prohibiting individuals from a name change is a serious infringement on their autonomy and violation of their dignity. The importance of a name cannot be understated—it can be an expression of one's identity, heritage, and/or community. There are many legitimate reasons why someone might change their name. They may wish to express that they belong to a particular family or community by, for example, taking the name of a spouse or adopted parent. They may wish to break from a painful past by changing their name, such as changing a last name one shared with an abusive partner or parent. They may wish to change a name that does not reflect their identity or that has caused embarrassment. There is a framework for

[2] *R v Ndhlovu*, 2022 SCC 38, at para 49.
[3] *Carter v Canada (Attorney General)*, 2015 SCC 5, at para 64.
[4] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, at para 54; see also *R v Clay*, 2003 SCC 75, at paras 31-32.
[5] *R v Rodgers*, 2006 SCC 15, at para 23; *Cheskes v Ontario (Attorney General)*, 2007 CarswellOnt 5849 (Sup Ct of J).

name changes in Ontario because the government recognizes the importance of giving individuals the freedom to choose their legal name.

Name changes also hold a particular significance for people whose assigned name at birth does not reflect their gender identity. Deadnaming (calling a transgender, genderqueer, or Two-Spirit person by a legal or birth-name that they do not use) can undermine a person's sense of dignity and be emotionally and psychologically harmful. In *XY v Ontario (Government and Consumer Services)*, the Human Rights Tribunal of Ontario found that requiring transgender persons to have "transsexual surgery" prior to changing the sex designation on a birth registration was contrary to Ontario's Human Rights Code.[6] The Tribunal outlined the kind of invasive questioning and consequences that can follow from barriers to changing a sex designation:

> A non-transgendered woman can confidently produce a birth certificate when she is required to do so (or when it would be convenient to do so) without having to contend with a sex designation that is incongruent with her lived experience. Her gender identity accords with the sex assigned at birth and is not open to question or challenge. For a transgendered woman, however, this simple act is fraught with risk. Will she be perceived differently as a result of producing a birth certificate that shows that 'officially' she is a different gender from the one that she presents? Will her gender identity be questioned or challenged by the person viewing her birth certificate? Will she even perhaps be subject to ridicule or humiliation as a result of producing a government issued document that states that she is a different gender than the one in which she presents herself?"[7]

These same problems apply when an individual is unable to change a legal name to one that reflects their gender identity.

[6] *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726.
[7] *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726, at para 148.

The proposed bill is a serious infringement on liberty, as it can prohibit a name change for 10 years to life (depending on the relevant reporting period).[8]

Bill 138 is based upon harmful and incorrect stereotypes about persons convicted of sexual offences. MPP Laurie Scott, co-sponsor of Bill 138, stated that the purpose was "to make it harder for sex abusers to cover up their criminal activity and to hide their true identities", since "[c]riminals will exploit and take advantage of any opportunity that comes their way."[9] People who commit sexual offences, just like any other people, can have legitimate reasons for seeking a name change. Moreover, people convicted of sexual offences who seek a name change to avoid being associated with their crime are not necessarily doing so to reoffend. Someone may wish to avoid being harassed and allowed to return to a normal life after paying their debt to society and being rehabilitated, or to avoid their family and friends facing harassment, stigma, and violence.

A deprivation of liberty violates section 7 if it is not in accordance with the principles of fundamental justice, and the CPLA is concerned that this bill offends the principle of overbreadth. A law is overbroad if it "is so broad in scope that it includes *some* conduct that bears no relation to its purpose" or "is arbitrary *in part*."[10] As clarified by the Supreme Court:

> A law cannot deprive the life, liberty, or security of the person of even one individual in a way that is inconsistent with the principles of fundamental justice. As a consequence, laws that are broadly drawn to make enforcement more practical run afoul of s. 7 should they deprive the liberty of even *one* person in a way that does not serve the law's purpose.[11]

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[8] *Christopher's Law (Sex Offender Registry)*, 2000, S.O. 2000, c. 1, s 7(1).

[9] Ontario, Legislative Assembly, Hansard, 43rd Parliament, 1st Session (of November 14, 2023), online: https://www.ola.org/en/legislative-business/house-documents/parliament-43/session-1/2023-11-14/hansard#para678.

[10] *Canada (Attorney General) v Bedford*, 2013 SCC 72, at para 112.

[11] *R v Ndhlovu*, 2022 SCC 38, at para 78.

In *R v Ndhlovu*, the Supreme Court of Canada stated that "[t]he question is not whether sexual offenders are generally at an increased risk of reoffending, but rather whether there are some offenders who are not."[12] The majority found that mandatory registration provision under *SOIRA* were overbroad because they captured individuals who pose no risk of reoffending.[13]

Bill 138 is overbroad because it attempts to protect public safety by prohibiting people convicted of sexual offences from obtaining a name change without ensuring exceptions for people who do not pose a significant risk of reoffending. A meta-analysis of eighty years of studies found that "sexual recidivism is relatively rare", and it found a weighted pooled sexual recidivism rate of slightly above 10%.[14] As the authors state, "[t]he general public's perception that convicted offenders are all on a trajectory of life-course persistent sexual offending is incorrect."[15]

Bill 138 permits the Lieutenant Governor in Council to make regulations providing for exceptions, but this does not adequately protect the rights of people who present a low risk of reoffending. First, the bill merely permits (not requires) regulations to be created, and low-risk individuals will be prevented from obtaining a name change if appropriate regulations are not promulgated. Second, Bill 138 does not sufficiently narrow the discretion of the Lieutenant Governor in Council to specify the need for a framework of exceptions to protect the rights of low-risk individuals.

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[12] *R v Ndhlovu*, 2022 SCC 38, at para 90
[13] *R v Ndhlovu*, 2022 SCC 38 at paras 91-101.
[14] Patrick Lussier et al, "The sexual recidivism drop in Canada: A meta-analysis of sex offender recidivism rates over an 80-year period" (2023) 22:1 Criminology & Public Policy 125, at 145. See also *R v Ndhlovu*, 2022 SCC 38, at para 9 ("the reality is that 75 to 80 percent never reoffend. Based on the Crown's statistical evidence, there are also a significant number of sex offenders who are at no greater risk of reoffending than members of the general criminal population").
[15] Patrick Lussier et al, "The sexual recidivism drop in Canada: A meta-analysis of sex offender recidivism rates over an 80-year period" (2023) 22:1 Criminology & Public Policy 125, at 145.

The CPLA objects to Bill 138 and any law that would restrict people convicted of sexual offences from obtaining name changes. However, if the Government of Ontario wishes to take this step in the interests of public safety, then it has to ensure that the framework only captures those who would present an undue risk to society if granted a name change.

A framework that does not mandate exceptions for those who pose a limited risk to the public cannot be justified under section 1

The *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." It places a heavy onus on the government to justify restricting rights.

To satisfy section 1 the law must:

1. Have a "pressing and substantial objective"
2. The means must be proportionate
    a. The law is rationally connected to the law's objective
    b. The law is minimally impairing of the right
    c. The law's salutary effects outweigh its deleterious effects.[16]

To the extent that Bill 138 is concerned with public safety, it has a pressing and substantial object. However, the CPLA is concerned that public safety is not the purpose, or at least the whole purpose, of

[16] *R v Oakes*, [1986] 1 S.C.R. 103, at pp 136-40.

Bill 138. For example, comments by MPP Laura Smith, co-sponsor of the bill, suggest that the bill is also about stigmatizing people convicted of sexual offences:

> But sadly, there are many bad actors who use the application to hide their identity for the wrong reasons—creating a new world for themselves, unknown to their victims and their community. These convicted offenders could take advantage of this opportunity of a legal name change to distance themselves from crime so very heinous, providing them with a new life, a fresh start—something their victims will never have.[17]

Bill 138 is not just about protecting public safety—it is about ensuring that people who commit sexual offences will forever be branded as criminals and treated as outcasts. Canada's criminal justice system is committed to denouncing and deterring criminal behaviour, but it also recognizes that individuals have the capacity to be rehabilitated and become law abiding members of society. Rehabilitation is one of the principles of sentencing, and it is also one of the goals of the correctional and parole systems.[18] To the extent that Bill 138 is about stigmatizing people convicted of sexual offences, this is an improper purpose and would make Bill 138 subject to legitimate constitutional criticism.

In any event, a framework that does not mandate exceptions for people who pose a low risk to public safety or who have a valid reason for seeking a name change is disproportionate. An appropriate legal framework has to ensure that there are exceptions in the framework that protect the rights of people who do not (or who no longer) pose a significant risk to public safety. It must also consider whether there are any other legitimate purposes for a name chance (such as changing one's name to reflect their sexual identity) that should justify an exception, even in the absence of a lowered risk.

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[17] Ontario, Legislative Assembly, Hansard, 43rd Parliament, 1st Session (of November 14, 2023), online: https://www.ola.org/en/legislative-business/house-documents/parliament-43/session-1/2023-11-14/hansard#para678.

[18] *Criminal Code*, RSC 1985, c C-46, s 718(d); *Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss 3, 100; *Ministry of Correctional Services Act*, R.S.O 1990, c. M.22, s 5.

First, the connection between banning people who commit sexual offences from obtaining a name change and public safety is suspect. To be clear, Ontario does not have American-style registries where any member of the public can look up if someone is on a registry, as the registry is a law enforcement tool. Even if information about someone convicted of a crime is available online, then changing a name does not allow someone to hide their past because name changes are generally posted in The Ontario Gazette—which is available to members of the public.

Second, a framework that does not make exceptions for low-risk individuals is not minimally impairing. While the CPLA objects to any prohibition on name changes, it is possible to develop a framework to ensure that dangerous people do not misuse the name change system. Restrictions could be placed against high-risk individuals changing their names (although Ontario would have to develop a framework for assessing who is high risk) and/or name changes could be prohibited for a shorter period of time to reflect how recidivism rates decrease over time.

Third, the deleterious effects of a framework lacking exceptions for low-risk individuals outweigh any benefits. Again, the vast majority of people who commit sexual offences will not reoffend, and Bill 138 causes significant hardship on the majority to prevent harm by the minority. People convicted of sexual offences have a right to privacy, and preventing this group of people from changing their names can infringe upon their privacy and expose them to ongoing stigma from the public. This can have profound consequences on an individual's mental and psychological wellbeing, and it can impede their rehabilitation and reintegration as law-abiding members of society. Being prevented from taking a name that reflects one's belonging in a family or community or that reflects one's gender identity, potentially for life, is an extremely serious consequence.

It is not just the privacy and interests of the person convicted of a crime that need to be considered—their children, partners, friends, and neighbours can all be impacted negatively. They can also suffer stigma, shame, harassment, and even violence from their proximity to someone convicted of a sexual offence.

A framework that restricts people convicted of sexual offences from obtaining a name change without ensuring exceptions for those who do not pose a significant risk to the public offends the *Charter.* For this reason, the CPLA opposes Bill 138.