

November 18, 2021

Tanzima Khan, Committee Clerk
Standing Committee on Social Policy
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

By email: comm-socialpolicy@ola.org

Re: Bill 27, Working for Workers Act, 2021

Dear Ms. Khan,

This document is AMAPCEO's written submission to the Standing Committee on Social Policy with respect to hearings on *Bill 27, Working for Workers Act, 2021*.

This bill and its proposed changes (Part VII.0.1 in particular) to the *Employment Standards Act (ESA)* will require some employers to establish written policies with respect to disconnecting from work.

AMAPCEO's feedback consists of two parts. First, I offer some thoughts and recommendations on the right to disconnect generally and, second, I renew AMAPCEO's call for the *ESA*, including this proposed new Part, to apply to the Crown.

AMAPCEO is a member-driven union of professional employees, dedicated to providing outstanding representation and membership services. We protect members' rights, defend Ontario's public services, and advocate for better working conditions for all workers.

The majority of AMAPCEO members work for the Ontario Public Service (OPS). You will have met some. They work in every ministry, and in agencies, boards, and commissions in over 130 communities across the province and in eleven cities outside Canada.

We also represent members in seven bargaining units in the Broader Public Sector:

- the Financial Services Regulatory Authority of Ontario;
- the Ontario Arts Council;
- Ontario Health - Quality Unit;
- Public Health Ontario;
- Waypoint Centre for Mental Health Care; and
- the former offices of the Ontario Child Advocate and the French Language Services Commissioner (now part of the Office of the Ontario Ombudsman)

Our membership is educated, professional, and diverse. They are problem solvers who take pride in working hard and offering creative, evidence-based solutions to public policy issues. They are passionate about serving the public interest.

As a non-partisan union, AMAPCEO has a long and proud history of working in a constructive, problem-solving manner with governments of all political stripes. We have worked successfully on legislation and policy initiatives and negotiated free and fair collective agreements with governments led by all three major parties.

The right to disconnect

Bill 27 proposes that employers with more than 25 employees be required to establish a written policy with respect to disconnecting from work. “Disconnecting from work” is defined in the Bill as “not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.”¹

While this bill is currently written to establish regulations concerning the right to disconnect, AMAPCEO believes that it would be better if the proposed legislation—as opposed to regulations—defined minimum standards for the right to disconnect. As the *ESA* is minimum standards legislation, it is the *Act* itself that should set out those standards.

¹ Bill 27, *An Act to amend various statutes with respect to employment and labour and other matters*, 2nd Sess, 42nd Leg, Ontario, 2021, cl. 21.1.1.

The specifics of disconnecting from work should be treated no differently than the minimums for other matters such as vacation, wages, terminations, etc., with the standards prescribed within legislation, not regulation.

Whether ultimately residing within regulation or legislation, AMAPCEO has recommendations concerning the minimum standards for right to disconnect policies.

Numerous jurisdictions and organizations have implemented rules around the right to disconnect. For example, France requires employers with more than 50 employees must negotiate disconnection protocols with their staff.² In Germany, the Ministry of Labour has implemented disconnection rules, as have major German employers such as Volkswagen and Deutsche Telekom.³ In Spain, legislation guarantees employees a right to disconnect outside of normal working hours.⁴

In Ireland, the government has established a Code of Practice which provides guidance as to best practices concerning disconnection from work. The three main elements of this Code are:

1. The right of an employee to not routinely perform work outside normal working hours.
2. The right to not be penalised for refusing to attend to work matters outside of normal working hours.
3. The duty to respect another person's right to disconnect.⁵

Bearing these elements in mind, disconnection policies should be mandated to include, for example:

² Article L2242-17 <<https://www.legifrance.gouv.fr/codes/id/LEGISCTA000035611818/>>.

³ "Minister Halts After-Hours Contact for Staff," *Der Spiegel*, 30 August 2013 <<https://www.spiegel.de/international/germany/no-contact-for-german-labor-ministry-employees-after-work-new-guidelines-a-919463.html>>.

⁴ Ley Orgánica (L.O.) 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales, Article 88. <<https://www.boe.es/eli/es/lo/2018/12/05/3>>.

⁵ Ireland, Workplace Relations Commission, *Code of Practice for Employers and Employees on the Right to Disconnect*, March 2021, 4. <https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf>.

- a clear direction that staff disconnect from work emails, messages, etc., outside of their normal working hours and during vacation periods
- an expectation that managers do not contact employees outside of normal working hours and during vacation periods
- clearly stated normal working hours
- a ban on reprisals for employees adhering to the policy⁶

AMAPCEO is cognizant that certain types of businesses operate 24-hours a day, and that others operate in global environment which necessitates staffing availability for various time zones. Thus, any rules must bear in mind that “normal” working hours may differ across enterprises. As well, we understand that, from time-to-time, employees of any organization may be called upon to monitor emails and other communications after-hours. For these cases, it is vital both that such occurrences are irregular and that on-call pay be provided to impacted employees.

AMAPCEO recommends that the Regulations on the right to disconnect mandate that employer policies include minimum standards such as:

- **clearly stated normal working hours**
- **a clear direction that employees are not required to reply to emails, texts, etc. outside of these hours**
- **an expectation that managers do not contact employees outside of normal working hours**
- **a ban on reprisals for employees adhering to the policy**
- **on-call pay for staff who are asked to monitor emails after normal working hours**

The applicability of the proposed Part VII.0.1 to the Crown

Since the *ESA* became law in 1968, it has applied to the Crown only partially, effectively excluding Ontario’s public servants from the province’s minimum employment standards.

⁶ See, for example, *Ibid.*, 7-8. See also, Prospect, *Right to Disconnect*, May 2021 <<https://prospect.org.uk/news/right-to-disconnect/>>.

Until amendments to the *Act* in 2017, s. 3(4) of the *ESA* listed those parts of it which applied to “the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.”⁷

Following the 2017 amendments, s. 3.1 of the *ESA* simply states that “this Act binds the Crown.”⁸ Despite this clear statement, the entirety of the Act does not in fact apply to the Crown. Rather than being detailed within the *Act* itself, Crown exclusions were shifted into regulation. This regulation exempts “the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown, and any employees of such an employer” from the *ESA*, save and except for those parts detailed in the section.⁹

Despite the Crown having been excluded from portions of the *ESA* since the *Act*’s inception, AMAPCEO has long taken the position that the *ESA* should apply to all workers in Ontario. For instance, in 2015 our first recommendation to the Changing Workplaces Review called for an end to *ESA* exclusions.¹⁰

Exclusion from the minimum standards of the *ESA* has negatively impacted AMAPCEO members in the past. For example, in our 2012 Ontario Public Service bargaining round, the government-as-employer demanded a variety of significant concessions. One of these concessions led to many of our fixed-term (i.e., contract/non-permanent) members being required to surrender sufficient paid days off such that they fell below the two-week minimum vacation threshold set out in section 33(1) of the *ESA*. Falling, as it does, in Part XI of the *Act*, these Crown employees were excluded (at that time) from protection by this section.

As a consequence, many AMAPCEO members found themselves enjoying less than the legislated minimum amount of vacation, while employed for a government that ostensibly championed this standard for the rest of the economy.

⁷ *ESA*, s. 3(4).

⁸ *ESA*, s. 3(1).

⁹ O. Reg. 285/01, s. 2.1.

¹⁰ AMAPCEO, *Submission to the Changing Workplaces Review*, September 2015 <https://amapceo.on.ca/system/files/AMAPCEO_CWR_Submission.pdf>.

Though it came too late to help those members, the Crown and its employees are now covered by Part XI of the *ESA*.

This change to the applicability of the *ESA* highlights an important truth: which parts of the *ESA* that apply to Crown employees are simply a choice of government.

In respect of the right to disconnect, the government must now make the choice to have the proposed Part VII.0.1 of the *ESA* apply to the Crown.

The rationale for this Part applying to the Crown was stated at Bill 27's Second Reading by the Minister of Labour, Training, and Skills Development:

Ontario cannot be a province where people burn out from endless work and family time comes last. We need to give our workers a break. It seems the people of Ontario agree. A recent public opinion poll revealed that 95% of people in Ontario support the right to disconnect from workplace devices. This seems only fair. No one should be on call 24 hours a day. If the pandemic has taught us anything, it has been to put our health and safety first, and that includes our mental health. That's why we're proposing to require larger employers to establish policies to let workers unplug from their devices.¹¹

At that same debate, Minister's Parliamentary Assistant, Deepak Anand, said that the government was

trying to make sure that no one is left behind through putting these things in place, so that the workers can disconnect, so that they can have a family and life balance.¹²

Surely an effort to make sure that "no one is left behind" ought to include the Crown employees. Surely a legislative effort to ensure that "no one should be on call 24 hours a day" should include Crown employees. Surely legislation that seeks "to require larger employers to establish policies to let workers unplug from their devices" must include the Ontario Public Service, an organization with more than 60,000 employees (as well, of course, as the various arms-length agencies).

¹¹ Ontario, Legislative Assembly, *Hansard*, 42nd Leg, 2nd Sess, No. 13 (1 November 2021) at 597.

¹² Ontario, Legislative Assembly, *Hansard*, 42nd Leg, 2nd Sess, No. 13 (1 November 2021) at 604.

AMAPCEO recommends that s. 2.1(2) of Regulation 285/01 be amended to incorporate all Parts of the *ESA* as applying to the Crown, including the proposed Part VII.0.1 – Written Policy on Disconnecting from Work.

Yours sincerely,

David Bulmer

President and CEO