CHRISTIAN LEGAL FELLOWSHIP | ALLIANCE DES CHRÉTIENS EN DROIT

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Attn: The Honourable David Lametti
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8
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October 19, 2020

Dear Minister Lametti:

Re: Combatting Online Hate

Christian Legal Fellowship ("CLF") appreciates this opportunity to provide input as the federal government explores additional legal remedies for victims of online hate.

About Christian Legal Fellowship

CLF is a national association of over 700 law students, lawyers, retired judges and law professors, with members in eleven provinces/territories from more than 30 Christian denominations. CLF is also a Non-Governmental Organization in Special Consultative Status with the Economic and Social Council of the United Nations. Our members have appeared before Parliamentary committees, provincial governments and regulators, and at all levels of court, on issues related to the freedoms of religion, conscience, and expression, as well as equality, human rights, and other matters affecting religious minorities and their accommodation in Canada's pluralistic society.

CLF's historical engagement with the issue of hate speech in particular includes submissions to Parliament in 2003 concerning *Bill C-250, An Act to Amend the Criminal Code (Hate Propaganda)* and submissions before the Supreme Court of Canada in *Saskatchewan (H.R.C.) v Whatcott*[1] in 2013.

The dual threats of online hatred and government restrictions on free expression

CLF recognizes the harm that online hatred can inflict on targeted individuals or communities and society as a whole. In particular, we share the government's concern that online platforms may be used to propagate and normalize hatred against vulnerable minorities, as well as to recruit persons for violence, terrorism, or other nefarious purposes.[2] We further recognize that, in some instances,

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[1] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11.
[2] Standing Committee on Justice and Human Rights, *Taking Action to End Online Hate: Report of the Standing Committee on Justice and Human Rights* (June 2019: 42nd Parliament, 1st Session) at 7-8 (Chair: Anthony Housefather), online: House of Commons Canada <https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10581008/justrp29/justrp29-e.pdf> at 7-8.

the anonymity of online fora may insulate purveyors of hate speech from accountability under existing enforcement measures, such as sections 318 and 319 of the *Criminal Code*. We support the Government's desire to respond to these concerns.

CLF is also mindful, however, that any law empowering state actors to decide which ideas are legitimate to express, and which are not, risks stifling minority viewpoints and suppressing important expression. Parliament's response to online hatred must strike a cautious balance, lest well-meaning government restrictions undermine Canada's constitutional commitments to freedom, equality, and the maintenance and enhancement of multiculturalism.

The concept of what constitutes "hate" or "hatred" is inherently subjective and value-laden, and it can be mis-used as a label to silence ideas with which the majority disagrees. This point is of particular concern to religious minorities. Canada is home to a deeply pluralistic society comprised of diverse ethnic, cultural and religious communities whose lawful beliefs and practices are commonly miscommunicated, misunderstood, or otherwise perceived as offensive by others.

The Supreme Court of Canada rightly recognizes that the freedom to express even unpopular, reprehensible, or offensive opinions and beliefs is essential to "individual self-fulfillment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy."[3] While the importance of these functions does not preclude the imposition of certain limits on expression, it is of utmost importance to all Canadians that any such limitations be rare, minimal, and "demonstrably justified".

In our deeply pluralistic society, the temptation to politicize disputes over controversial and offensive expression will often be great. Nevertheless, the legitimacy of our liberal democratic political and legal orders requires that allegations of hate speech be examined impartially and in accordance with our *constitutional* commitments, rather than according to the sensibilities or commitments of, for example, the complainant, the adjudicator, or the majority culture. Accordingly, we urge that, to the greatest extent possible, courts alone be entrusted with the determination of whether a particular expression departs from the broad zone of protection guaranteed by the Constitution. Formal rights of appeal, the right to counsel and a court hearing, and judicial expertise in and respect for the Constitution are essential safeguards against conscious or unconscious attempts to silence unpopular minorities in the public square.

CLF believes that measures along the lines of those proposed by the Standing Committee on Justice and Human Rights in Recommendations #1, #2, #3, #4, #5, #6, and #9 of its 2019 Report can be used to ensure that *existing* legislative measures are more effectively utilized in holding purveyors of online hatred to account, where appropriate.[4] Moreover, such measures are better suited to avoiding the risk of silencing minorities that would likely accompany a novel civil remedy.

The Supreme Court of Canada identified similar concerns in *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 74.

[3] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 65 (citing *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927).

[4] Standing Committee on Justice and Human Rights, *Taking Action to End Online Hate: Report of the Standing Committee on Justice and Human Rights* (June 2019: 42nd Parliament, 1st Session) at 7-8 (Chair: Anthony Housefather), online: House of Commons Canada <https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10581008/justrp29/justrp29-e.pdf>.

Reintroducing section 13 of the *CHRA* raises rights concerns

If Parliament were to reintroduce a civil remedy such as the repealed s. 13 of the *Canadian Human Rights Act* (*CHRA*), wherein private complainants may freely initiate proceedings wherever they perceive hate speech to occur, there is a real risk that such proceedings will become a sword to be turned upon minorities whose beliefs diverge from the public orthodoxies of our day, rather than a shield to restrain the social ills of hate speech.

This concern is all the more pressing in our current cultural environment. The sincerely held and constitutionally protected beliefs of many Christians, Muslims, Orthodox Jews, and other religious minorities in Canada, particularly their beliefs concerning human life, sexuality, and gender, are increasingly cast as intrinsically hateful by those who oppose them. There are already those who publicly advocate for the state to silence the public expression of such beliefs.

In this context, the addition of a civil remedy for perceived incidents of actionable speech will once again force religious minorities to litigate in defence of their sincere beliefs. This may have a chilling effect on important public debate and the exercise of constitutionally protected minority rights. The mere threat of litigation, with its attendant emotional, reputational, and financial costs, can be enough to silence the expression of minority views.

CLF is concerned that, without an ostensibly objective and publicly accountable gatekeeper such as the Attorney General's office, private litigation can be used by special interest groups to exclude religious or other minority viewpoints from public discourse, or to enforce majority beliefs and opinions as public orthodoxies on important social issues. Such consequences would injure not only the individuals or communities whose views are silenced, but also society as a whole.[5]

While it may be possible to mitigate such ill effects to some extent by requiring careful preliminary reviews of claims by legally qualified personnel and by penalizing frivolous claims, the resources required to implement such measures could be more effectively directed to the Standing Committee's other proposed measures, as listed above: addressing the root causes of hatred and ensuring that existing statutory mechanisms are being utilized to their full potential.

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[5] Peter Edge, "Oppositional Religious Speech: Understanding Hate Preaching" (2018) 20:3 ECC LJ 278 at 279. Looking at hate speech laws and their effects on unpopular or "oppositional" religious speech in the United Kingdom, Professor Edge observes: "Religious critique is one way in which the values of a particular society may be challenged, and perhaps come to be changed, through 'influential, voluntary contributions to debate on matters of profound public controversy'". We are concerned that discouraging religiously informed critiques of contemporary social issues and majoritarian culture will seriously undermine society's capacity for meaningful public moral debate. The very possibility of social conscience demands that citizens be free to voice their convictions, religious or otherwise, publicly and without fear of reprisal.

Upholding the purpose and constitutionality of s. 319(2) by maintaining the s. 319(3)(b) defence

The courts have articulated the purpose of s. 319(2) (then s. 281.2(2)) as working "to shield intended targets of wilfully promoted hatred from injury."[6] More recently, the Supreme Court articulated "that the prohibition in s. 319(2) aims directly at words […] that have as their content and objective the promotion of racial or religious hatred."[7] In light of this context, the religious expression defence in s. 319(3)(b) is given clear meaning: namely, in the same spirit of protecting minorities from hatred and persecution, the defence ensures that the very protections contained in the *Criminal Code*'s anti-hatred regime are not wielded as a tool of religious hatred by those who find certain religions or religious beliefs distasteful.

Some have suggested that the s. 319(3)(b) defence offers inappropriate protection and could be abused by individuals to superficially shield otherwise hateful speech. However, contrary to these misconceptions, s. 319(3)(b) has a high threshold. The case law has been clear, for example, that the provision cannot be used to cloak religious opinion with "impunity as a Trojan Horse to carry the intended message of hate forbidden by s. 319".[8] The defence's "good faith" requirement has been a critical component in ensuring its proper application, and it has been strictly enforced by the courts, who have consistently rejected any notion of construing the defence "in a manner that would permit the mere imbedding of a wilful message of hate within protected religious comment to immunize the maker of the message from successful prosecution."[9] In short, the religious expression defence does not artificially shield hateful expression, but rather ensures that sincerely held, diverse religious opinions expressed in good faith are not censored and excluded in the name of combatting hate speech.

The intimate connection between the principles underlying s. 319(2) and the purpose of the s. 319(3)(b) defence has also been recognized by the Supreme Court as a matter of constitutional importance. The Supreme Court has emphasized that, insofar as s. 319(3) offers a short list of defences—including the religious expression defence—"it reflects a commitment to the idea that an individual's freedom of expression will not be curtailed in borderline cases."[10] While some have theorized that religious freedom could be taken into consideration by a judge without need for an explicit defence such as this one, having the clearly defined s. 319(3) defences means that "individuals engaging in the type of expression described [therein are] given a strong signal that their activity will not be swept into the ambit of the offence", which helps mitigate any chilling effect that the s. 319(2) prohibition would otherwise have on good faith expressions of religious opinions by religious minorities.[11]

In short, the courts have recognized that the s. 319(3) defences create a positive balancing effect and that, because of these "built in defences and restrictions", s. 319(2) has only "a very minimal effect on the overall right of freedom of expression."[12] This has ultimately contributed to the courts

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[6] *R v Keegstra*, [1984] AJ No 643 at para 14 (ABQB).
[7] *R v Keegstra*, [1990] 3 SCR 697 at para 33.
[8] *R v Harding*, [1998] 45 OR (3d) 207; see also *R v Harding*, [2001] OJ No 4953 at para 42.
[9] *R v Harding*, [2001] OJ No 4953 at para 42.
[10] *R v Keegstra*, [1990] 3 SCR 697 at para 120.
[11] *Ibid*.
[12] *Supra* note 6 at para 87.

upholding the constitutionality of s. 319(2), clearly demonstrating the integral role that the s. 319(3) defences play in the overall anti-hate speech framework and indicating that the defences strengthen, rather than weaken, the regime as a whole.[13]

Notwithstanding any well-intentioned concerns surrounding the s. 319(3) defences, there is nothing to suggest that the s. 319(3)(b) religious expression defence has been abused since it was first introduced in 1970. It has neither shielded extremists from prosecution, nor has it been wielded by individuals who would use religion as a thin veil to shroud their deplorable expressions of hate.

In light of this recognition, it is necessary to remember *why* the s. 319(3) defences exist: to protect Canadians against imprisonment for honest, good faith speech. The s. 319(3)(b) defence assists in this goal and is directly in line with the principles of justice, compassion, equality, diversity, and inclusivity that inform efforts to combat discrimination and hatred. To remove this defence would risk undermining the constitutional integrity of the entire s. 319 regime and would run counter to the very principles of multiculturalism and pluralism that anti-hate speech efforts were designed to promote. Rather than walking back from these principles, it is vitally important that the Canadian government continue to uphold them and reaffirm its support of religious minorities in Canada's diverse and pluralistic society.

Making the best use of existing tools

Cumbersome as they may appear in some instances, CLF believes the current *Criminal Code* provisions prohibiting advocacy of genocide and the public incitement of hatred[14] strike the most appropriate balance between society's interests in preventing the dissemination of hate speech, on the one hand, and preserving Canadians' fundamental freedoms of expression, thought, belief, opinion, conscience, and religion, on the other. If properly applied, these provisions constitute a forceful response to online speech promoting hatred or violence toward identifiable groups, along with the deterrents of potential imprisonment and the stigma of criminal conviction.

The included statutory defences of truth or reasonable belief, religious opinion, and public interest ensure that the manifold public interest in free expression (i.e. democratic health, self-fulfillment, and truth seeking) is not hindered or subordinated to lesser interests such as personal offence or

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[13] *R v Keegstra*, [1990] 3 SCR 697 at para 120: "The result is that what danger exists that s. 319(2) is overbroad or unduly vague, or will be perceived as such, is significantly reduced. To the extent that s. 319(3) provides justification for the accused who would otherwise fall within the parameters of the offence of wilfully promoting hatred, it reflects a commitment to the idea that an individual's freedom of expression will not be curtailed in borderline cases. The line between the rough and tumble of public debate and brutal, negative and damaging attacks upon identifiable groups is hence adjusted in order to give some leeway to freedom of expression." See also *R v Andrews*, [1988] OJ No 1222 (Ont. C.A.), reasons of Justice Cory, concurring: "As well, a number of specific defences are provided by the section. For example, the accused cannot be convicted if he establishes that the statements which he communicated were true. Nor can he be convicted if what he expressed was intended to establish an opinion upon a religious subject; or if the statements he made were relevant to any subject of public interest, the discussion of which was for the public benefit and if on reasonable grounds he believed them to be true; or, if in good faith he intended to point out for the purpose of removal matters producing or tending to produce feelings of hatred towards an identifiable group in Canada. I am satisfied that s. 281.2 meets all the requirements set forth in *R. v. Oakes*, supra. I am strengthened in this position by recent decisions of the Supreme Court of Canada."

[14] Sections 318, 319(1) and (2), 430(4.1), and 718.2(a)(i).

social conformity. These defences ensure that sincerely held dissenting ideas expressed in good faith are not mis-cast as hate crimes and prosecuted by a "tyranny of the majority" who find them offensive. By preventing the majority from silencing the voices of minorities they disagree with, these defences guard against the use of hate speech laws as a type of anti-blasphemy law.[15] Moreover, courts have prevented the misuse of these defences by reading them narrowly and in accordance with their intended purposes of defending the legitimate expression of minorities.[16]

Given the high value of freedom of expression to a free and democratic society, it is appropriate that only speech that falls outside these parameters should be subject to prosecution, and, even then, only where proven beyond a reasonable doubt. Similarly, the requirement that the Attorney General consent to proceedings under s. 319(2) maintains a degree of democratic accountability where a decision to prosecute expression must be made. The legitimacy of the system is bolstered by the fact that the gatekeeper determining whether a given expression warrants prosecution in the first place is visible and accountable to the public.

Of course, CLF recognizes that ss. 318 and 319 of the *Criminal Code* will only achieve their intended purpose of preventing the incitement of hatred if they are effectively enforced. For this reason, we encourage Parliament to focus its response to online hate on measures that will maximize the effect of these provisions. Increasing informational and training resources to police, prosecutors, and the Attorney General's staff; sharing best investigation and enforcement practices; and insisting on an objective definition of "hatred" that honours the profound public interest in free expression are all plausible means to this end. Additional public awareness of precisely what constitutes hate speech and the profound interest our society has in free expression may also improve enforcement through better informed complaints.

With proper training and awareness on the part of police and Crown prosecutors as to the scope of protection offered by s. 2(b) of the *Charter* and the legal definition of "hatred", ss. 318 and 319 should not, in themselves, pose any obstacle to policing clear-cut cases of hate speech, online or otherwise. As for the less clear-cut and more controversial cases of alleged hatred, these are precisely the instances in which a minority's freedom to freely publish its beliefs is most threatened and wherein the scrutiny of state censors is most justified.

Addressing the root causes of hatred

CLF urges Parliament to take proactive and necessary steps to reduce and eliminate hatred in Canada. In doing so, it is important for Parliament to bear in mind that sanctioning the online expression of hate will not address the underlying causes of hatred itself. That is a role for civil society. Community engagement, public awareness, and robust dialogue – independent of the state – are far more likely to expose the folly of bigotry in the public square, and these can be pursued without eroding the public's interest in free expression.

Where an individual or group believes that online speech is so extreme as to exceed Constitutional guarantees of free expression, the appropriate remedy is to notify law enforcement. To the extent

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[15] In the way, for example, that Jehovah's Witnesses were targeted and prosecuted for "sedition" among other things in the 1950s: see *Roncarelli v Duplessis*, [1959] SCR 121.
[16] *R v Harding*, [2001] OJ No 325 at para 40.

that state intervention is in fact warranted to remove, prevent, or punish hate speech, the prudent course is to make full use of the existing *Criminal Code* provisions, which are intended for that very purpose. These provisions include the appropriate judicial safeguards to ensure that unpopular minorities enjoy the full freedom of expression guaranteed by the *Charter* and are not forced to defend against frivolous or misguided claims. Such protections ensure that, no matter whose beliefs, thoughts, and opinions happen to benefit from the privilege of mainstream support at any given time, all Canadians, especially minority communities, are protected from a "tyranny of the majority".[17]

Yours very truly,

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[17] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 96.