Justice Centre
for Constitutional Freedoms

253-7620 Elbow Drive SW
Calgary AB T2C 1K2

Criminalizing emotions does not reduce crime

Submission of the Justice Centre for Constitutional Freedoms,
in respect of Bill C-9, the *Combatting Hate Act*,
to the Standing Committee on Justice and Human Rights

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The Justice Centre for Constitutional Freedoms (jccf.ca) is gravely concerned about Bill C-9, the *Combatting Hate Act*, as it undermines freedom of expression protected by the *Canadian Charter of Rights and Freedoms*, and for other reasons set out in this Submission.

Table of Contents

Opening the door to more prosecutions based on what Canadians say

Bill C-9 repeals the current requirement that the Attorney General consent to prosecutions for hate propaganda offences. This crucial safeguard promotes a proper public-interest assessment that considers, among other things, the *Charter*'s protection of free expression. The removal of this review process will result in more Canadians being prosecuted over what they say on social media and elsewhere. In the United Kingdom, thousands of people are charged criminally each year based on what they say on social media. Bill C-9 is a step that takes Canada in that direction.

By repealing the current review process that provides for sober, second thought on the part of the Attorney General, local police and prosecutors acquire a wide latitude to authorize prosecutions against Canadians over what they say and write. The argument that local police will not abuse their newly expanded authority holds little water, because it is not uncommon for police to charge people in response to complaints from citizens, even when the complaints are baseless.

Bill C-9 opens the door to having far more people file complaints about offensive speech that they feel is "hateful," resulting in more instances of police laying criminal charges. If local police know that prosecutions are not subject to the approval of the Attorney General, it is likely that more charges will be laid against Canadians over what they say, which harms free expression for all Canadians.

The argument that only the truly guilty will be convicted and punished in the face of unjustified prosecutions also holds little water, because the process of being criminally prosecuted is itself a grave and severe punishment, even if the prosecution eventually (after months, and often years) results in the acquittal of the accused.

Politically motivated prohibitions on some symbols, but not others

Bill C-9 prohibits displaying certain political symbols in public places, including the Nazi swastika and symbols used by various terrorist groups. By banning the Nazi swastika but not the Communist hammer-and-sickle, Bill C-9 is based on an arbitrary and subjective political assessment rather than on any sound principle. Further, this new provision assumes, incorrectly, that displaying certain political symbols in public *necessarily* constitutes the willful promotion of hatred, which may not be the case in reality.

The current *Criminal Code* section 319 prohibition on the wilful promotion of hatred is already political because it applies selectively to only some groups, and not others. Canadians are free to promote hatred against individuals and groups identifiable on the basis of their wealth, social status, level of income, means of earning a livelihood, profession, appearance, behaviour, political opinions, and an endless list of other personal characteristics. Promoting hatred against a religious or ethnic group is illegal, while promoting hatred against Canadians who choose not to get injected with a new vaccine is legal.

If promoting hatred is truly worthy of criminalization, and if this criminalization is a justified violation of free expression as protected by the *Charter*, why is the law so selective in including only some groups while excluding so many others?

The existing criminal prohibitions on hate speech become even more political when some hateful symbols are criminalized while others are not. Up to two years of jail time await those who publicly display the Nazi swastika or the flag of a terrorist entity. Yet the communist hammer-and-sickle, the symbol under which tens of millions of people were murdered in the Soviet Union, China, Cambodia and elsewhere, is fully permissible under Bill C-9. Good laws are based on sound principles, not on politics, as is the case with Bill C-9.

We note that Bill C-9 does exempt the display of symbols for a "legitimate purpose related to journalism, religion, education or art, that is not contrary to the public interest." In theory, this would protect Hindus, Buddhists and others who display a swastika (an ancient symbol of prosperity and good fortune) on their homes and in other contexts, for a religious purpose. However, police may not be aware of this important distinction. Bill C-9 therefore creates a risk that law enforcement will lay charges (or issue warnings) to Canadians who display the swastika or other prohibited symbols for legitimate reasons.

Punishing emotions that cannot be clearly defined or measured

Bill C-9 attempts to define "hatred" by excluding expression that solely "discredits, humiliates, hurts or offends," and by asserting that "hatred" means "the emotion that involves detestation or vilification and that is stronger than disdain or dislike." As is the case with "hate," there is no clear, objective or identifiable standard of what does – and does not – constitute "detestation" or "vilification."

Hate is an emotion. Regardless of how courts or legislatures may seek to define it, the determination of what is "hateful" will always depend ultimately on the personal feelings and subjective prejudices of the police, prosecutors and judges who see or hear the expression in question.

Unnecessary increases in maximum penalties

Bill C-9 creates a new hate crime offence that escalates – and often doubles – maximum penalties for any offence motivated by hatred. Bill C-9 risks duplicative punishment, as well as excessive and disproportionate sentencing.

Whether an offence "was motivated by bias, prejudice or hate" is *already* a required consideration at the sentencing stage, as per section 718 of the *Criminal Code*. If a person

commits a serious crime, the available sentences are lengthy. There is no evidence that current sentences are insufficient, even in cases "motivated by hate."

The increased maximum penalties created by Bill C-9, which can be imposed when a judge feels that a crime was motivated by "hate," are disconcerting. Maximum prison sentences rise from two years to five years; from five years to ten years; from ten years to 14 years, and from 14 years to life imprisonment. This goes far beyond the considerable power that judges already have to impose longer jail sentences on those whose crimes may have been motivated by hate.

Bill C-9 departs from the longstanding principle in criminal law that criminal liability generally does not consider a person's motivation in committing a crime.[1] It does not matter why a person assaulted their spouse, drove drunk, or committed murder. Criminal liability is established when the Crown proves beyond a reasonable doubt that the accused person committed the physical act (*actus reus*) with the required intention (*mens rea*) to commit that act, without regard to underlying motives.

Further, these increased maximum penalties under Bill C-9 would, in some cases, give the accused an additional procedural right to a preliminary inquiry, which would further contribute to unnecessary delay in the system.

Impeding access to a house of worship is already a crime

Bill C-9 would create a new crime of deliberately impeding access to houses of worship as well as a "building or structure" used primarily by a group that is identifiable by its colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability. The "building or structure" could be used for administrative, social, cultural or sports activities or events; it could be a seniors' residence, daycare centre or other "educational institution." Bill C-9 also criminalizes impeding access to a cemetery.

Of interest, the federal government's own website references "rising antisemitism, Islamophobia, homophobia and transphobia" as a justification for Bill C-9, while saying nothing about the burning of dozens of Christian churches, deliberately destroyed by arson, and the dozens more that have been vandalized and desecrated. Sadly, it therefore appears that the motivation behind Bill C-9 is political, by way of this glaring exclusion.

The locations to which Bill C-9 applies are vaguely defined, and could easily include tens of thousands of buildings and structures in Canada. Peaceful protesters who exercise their *Charter* freedom of peaceful assembly may find it hard to know which buildings and structures are included, or not, under Bill C-9. Similarly, in cases where law enforcement personnel disagree with a certain protest, they could take a broad interpretation of which buildings are included,

[1] See: *Lewis v. The Queen*, [1979] 2 SCR 821. "Motive is … legally irrelevant to criminal responsibility. It is not an essential element of the prosecution's case as a matter of law." See also: *R. v. Barton*, [2019] S.C.J. No. 3.

thereby prohibiting protests in legitimate places. Bill C-9 therefore risks criminalizing legal and peaceful protests.

Criminal Code section 264.1 prohibits knowingly uttering, conveying or causing any person to receive a threat to cause death or bodily harm to any person; to burn, destroy or damage real or personal property; or to kill, poison or injure an animal or bird that is the property of any person. Section 430 criminalizes obstructing, interrupting or interfering with the lawful use, enjoyment or operation of property, as well as obstructing, interrupting or interfering with any person in the lawful use, enjoyment or operation of property.

Impeding access by engaging in "any conduct with the intent to provoke a state of fear" is already criminalized by *Criminal Code* section 430. Section 430 prohibits obstructing, interrupting or interfering with "the lawful use, enjoyment or operation of property" and also prohibits obstructing, interrupting or interfering with "any person in the lawful use, enjoyment or operation of property." Further, *Criminal Code* section 423 prohibits "intimidation" that consists of "compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing" by using violence or threats, or by persistently following a person.

Bill C-9 creates a new criminal offence of intimidating a person and impeding access to houses of worship and other places. However, as per the above, this conduct is already prohibited by the *Criminal Code*, making Bill C-9 duplicative and therefore unnecessary. The *Criminal Code* already prohibits Canadians from interfering with lawful access to all public and private property.

As one very prominent example of existing law being used to punish interference with the use of city streets, Tamara Lich and Chris Barber were convicted under *Criminal Code* section 430.

Together, these existing sections of the *Criminal Code* already protect access to cemeteries, to daycare centres, to seniors' residences, to houses of worship, and to buildings and structures used for administrative, social, cultural or sports activities or events. If those who attend churches, mosques, synagogues and temples are facing threats or intimidation when accessing their house of worship, existing *Criminal Code* provisions are adequate to deal with this problem, provided that existing laws are enforced. To suggest that the new *Combatting Hate Act* of Bill-9 is necessary is disingenuous.

Preserving a valid defence for citizens who are prosecuted

Some have advocated for the removal of section 319(3)(b) from the *Criminal Code*, which is one of the defences available to an accused person who is prosecuted for wilfully promoting hatred against an identifiable group.

In *R. v. Keegstra*, Chief Justice Dickson, along with Justices Wilson, L'Heureux-Dubé and Gonthier, upheld section 319 as a valid and reasonable restriction on *Charter*-protected freedom of

expression. In a narrow 4:3 ruling, dissenting Justices La Forest, Sopinka and McLachlin would have struck down section 319 as a violation of free expression that was not "demonstrably justified" in a free and democratic society.

The Court's majority upheld this *Criminal Code* provision in part *because of the four defences that are available to an accused person*. Under section 319(3), the accused can be acquitted if he establishes (a) that the statements communicated were true; or (b) if, in good faith, the accused person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; or (c) if the statements 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 (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Parliament later added section 319(2.1) to the *Criminal Code*, which prohibits communicating statements in public that wilfully promote antisemitism by condoning, denying, or downplaying the Holocaust. The same four defences are available under section 319(3.1), for those prosecuted under section 319(2.1).

To date, when a person charged with wilfully promoting hatred has tried to rely on the section 319(3) "religious defence" (expressing or attempting to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text), courts have rejected that defence when the accused person mixed hatred with religious statements.

In other words, this section 319(3)(b) defence is not a "blank cheque" or "free pass" to invoke religion when spewing hate. Rather, this defence appropriately affords Canada's rabbis, imams, priests, pastors, granthis and other religious leaders to read publicly and to teach what their sacred scriptures say. Section 319(3)(b) ensures that neither religious leaders nor the majority of Canadians who adhere to a religion should ever need to fear adverse consequences simply for teaching and proclaiming what their faith holds to be true.

Removing sections 319(3)(b) and 319(3.1)(b) from the *Criminal Code* would make it possible to characterize certain sections of religious texts as illegal hate speech, which would profoundly undermine the freedoms of conscience, religion and expression of all Canadians.
Therefore, sections 319(3)(b) and 319(3.1)(b) should not be repealed.