Written Submissions by Mark Sandler on Bill C-9

Standing Committee on Justice and Human Rights

My name is Mark Sandler. I have been combatting antisemitism and other forms of hatred for over 40 years. My area of expertise is on the use of criminal law measures to combat hate. I have trained police and prosecutors across the country, chaired or participated in hate crime conferences, and appeared on multiple occasions before Parliamentary committees and in the Supreme Court of Canada respecting hate-motivated crimes and on the constitutionality of hate legislation. I am currently Chair of the Alliance of Canadians Combatting Antisemitism (ALCCA), a non-partisan coalition of over 60 community organizations, Jewish and non-Jewish.

ALCCA previously published my detailed legal analysis of the Combatting Hate Act, Bill C-9. While I commend the government for introducing anti-hate legislation early in its legislative agenda, I take issue with some components of the legislation. I respectfully submit that the legislation needs to be amended if it is to be responsive to spiralling and unprecedented levels of antisemitism and other forms of hatred being experienced across Canada.

However, I start with a cautionary note.

The prime impediment to the prosecution of hate-motivated criminals in Canada has not been the absence of adequate laws. Indeed, police already have available to them a wide range of criminal law tools to combat hate crimes. In some jurisdictions, these tools are being significantly underutilized.[1] So, I look to this Committee to recognize the priority that must be given not only to enhancing existing laws, but to strongly encouraging other levels of government and law enforcement to enforce the laws we already have.

New Intimidation and Obstruction Offences

Description: The proposed legislation creates the crimes of wilfully intimidating and obstructing people respecting their access to places of worship, schools, community centres and other places primarily used by identifiable groups as defined in the Criminal Code. As the government has

[1] These tools are not confined to hate-specific offences, such as hate propaganda offences, but conventional offences such as the existing offence of intimidation (particularly relating to the blockage of roads and intersections), unlawful assembly, wearing a disguise during an unlawful assembly or with the intent to commit an indictable offence, and interference with the lawful use, operation and enjoyment of property (mischief).

acknowledged, this is not "bubble legislation" (that is, legislation at the provincial or municipal level designed to ***prevent*** intimidation or obstruction ***before*** it takes place, rather than criminalize it after the fact.)

Analysis: I acknowledge that the mere creation of these offences sends a significant message to those who wish to intimidate or obstruct people seeking access to vulnerable locations connected to identifiable groups. That is worthy of recognition. As well, these new offences expose perpetrators to more significant terms of imprisonment than otherwise available.

To be clear, the Criminal Code already contains several offences that can address intimidation or obstruction associated with places of worship and other community-based locations.[2] So, it is doubtful that these new proposed offences criminalize any conduct that is not already criminal. As well, the proposed new intimidation offence would be very difficult to prove, based on the defined level of intention required to be proven for a successful prosecution.[3]

Conclusion: On balance, I support these new Criminal Code provisions, although they do not criminalize conduct that is not already criminal. They symbolize a greater focus on activities that target vulnerable community spaces and create enhanced penalties for such activities. They do not relieve provinces and municipalities of their obligation to introduce bubble legislation.

New Hate-Motivated Offences

Description: The proposed legislation creates a separate crime when anyone commits what is already a federal criminal offence that is motivated by hatred against an identifiable group. The potential penalties for committing the new hate crime are enhanced to emphasize the seriousness of the crime.

The Department of Justice backgrounder states that "[s]entencing courts must impose a penalty that reflects the seriousness of the offence and the degree of responsibility of the offender."

"Hatred" is defined under the new legislation. The government has indicated that the "definition is based on Supreme Court of Canada jurisprudence currently followed by courts." The definition

[2] These include mischief (s. 430(1)) which involves any interference with the lawful use, enjoyment and operation of property, disturbing religious worship or certain meetings (s. 176(2)), and the current offence of intimidation (s. 423(1)).

[3] The prosecution must prove not only (1) an intent to provoke a state of fear in a person, but also that the conduct involved was done (2) in order to impede (i.e. for the purpose of impeding) a person's access.

focuses on the concepts of detestation **or** vilification and specifies that mere dislike or disdain is not hatred. The language is similar (though not identical) to the definition adopted by the Supreme Court of Canada. This has prompted some Committee members to question whether the proposed test is materially different by unacceptably lowering the standard for what constitutes hatred.

Analysis: I strongly support this proposed provision. Currently, s. 718(2) of the Criminal Code states that judges must take into consideration, as an aggravating circumstance on sentencing, evidence that an offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor.

The new hate offence goes farther. It does not merely require courts to take into consideration hate motivation on sentencing but makes it more likely that the court will impose a sentence focused on deterrence and denunciation, given the increase in potential penalties and Parliament's expressed intention to treat a hate offence more seriously by labelling it for what it is.

The new offence also ensures that the convicted person's criminal record reflects the hate-motivated crime he/she was found guilty of. Otherwise, it would often not be apparent to someone reviewing a criminal record that a prior conviction was hate-motivated. This is an important point because many hatemongers are repeated offenders.

Conclusion: This is a very useful addition to the Criminal Code, subject to two important qualifications:

(1) The precise language used by the Supreme Court of Canada should be adopted as the definition of "hatred." Utilizing the precise formulation of Chief Justice Dickson in Keegstra would eliminate any concern that the test has been changed. He stated that "hatred" connotes emotion **of an intense and extreme nature** that is **clearly associated** with vilification **and** detestation. He also made it clear that this emotion is stronger than distain or dislike. The proposed Bill C-9 definition states that hatred is the emotion that **involves** detestation **or** vilification and that is stronger than disdain or dislike.

    This amendment should not be problematic for the government given its commitment to follow the pre-existing jurisprudence. I also believe that the amendment would limit any arguments that a new definition of hatred compels the courts to revisit whether the existing hate propaganda offences remain constitutionally valid.

(2) The proposed legislation repeals s. 430(4.1) of the Criminal Code. To date, this aspect of Bill C-9 has not been referred to at the Committee hearings. Subsection 430(4.1) creates a separate, aggravated (that is, a more serious) form of mischief respecting places of worship and other vulnerable locations when the mischief is motivated by bias, prejudice or hate. It is easier to prove that a crime was motivated by bias, prejudice or hate than to prove that it was motivated by hate (the most extreme emotion) alone.

The current bias, prejudice or hate motivated mischief offence uses language similar to the language employed under s. 718.2 of the Criminal Code for sentencing. More specifically, s. 718.2 also adopts the language, "bias, prejudice or hate," not merely hate alone. Mischief motivated by bias, prejudice or hate is frequently committed, and is well known to the Jewish community, which has been the victim of vandalism against its places of worship, and other institutions.

This offence should not be dependent on proof of hate, as opposed to bias, prejudice or hate. This offence should survive the new legislation. Its retention is not incompatible with a higher standard applied to other offences, particularly those that more directly engage freedom of expression issues. It should not be repealed.

New Hate Propaganda Offence (Symbols of Hatred)

Description: The proposed legislation would create a new hate propaganda offence that would make it a crime to wilfully promote hatred against an identifiable group by publicly displaying certain terrorism or hate symbols, including symbols

- principally used by or associated with terrorist entities listed under the Criminal Code,
- the "Nazi Hakenkreuz (also known as the swastika)" and
- the Nazi double-sig rune (also known as the SS bolts).

Analysis: I and others have advocated for the creation of a new free-standing offence that criminalizes the display of symbols associated with terrorist entities listed under the Criminal Code. On careful examination, the government's proposal does not do that. Instead, it merely provides that one way in which an individual can wilfully promote hatred against an identifiable group (already a criminal offence) is by displaying such symbols.

This explicit acknowledgement represents a small step forward, but it is not adequate. This new offence still requires proof not only that the symbol has been displayed in a public place, but also proof of all the elements of wilful promotion of hatred against an identifiable group. Expressed another way, It simply specifies one means by which the prosecution may prove the offence of wilful promotion of hatred against an identifiable group, but does not relieve the prosecution of any elements of proof.

A simple, free-standing offence that criminalizes the display of such items has been utilized in other countries and states. The government may have chosen not to do what some other countries have done out of concern about freedom of speech guarantees.

However, this concern, in my view, is unwarranted if the legislation is carefully drafted to confine itself to the display of items directly associated with terrorist entities prohibited under Canadian law. I do not accept that the intentional/knowing display of items unequivocally associated with prohibited terrorist entities would be constitutionally problematic, especially when coupled with certain limited exemptions already contemplated by the proposed legislation.

The problem with the proposed legislation is compounded by the current language employed.

The Criminal Code already has something analogous, though worded differently, in its anti-terrorism offences. Subsection 83.18(4) provides that "in determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused "**uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group**."

In my view, a new free-standing offence of displaying terror items should more closely track the existing language contained in the above anti-terrorism offence. The currently proposed language can be improved substantially by doing so.

Equally important, I also foresee issues of proof in determining whether it is the terrorist group that "principally" uses or is associated with the symbol. Do we immunize accused from prosecution for display of Hezbollah flags because Hezbollah's supporters are displaying the flags more frequently than Hezbollah itself? I prefer language that describes items that "identify" or are "associated with" or even "closely/directly associated with" a terrorist group.

Finally, the legislation appropriately refers to the Nazi Hakenkreuz but adds that it is "also known as the swastika." "Swastika" is a Sanskrit word that means well-being and good fortune. It is a sacred symbol and a word used by Buddhists, Hindus and Jains worldwide. Unfortunately, due to historical mistranslation or frequent appropriation of the word, it has been conflated with the Nazi hate symbol, the Hakenkreuz.

The legislation fails to differentiate between the Hakenkreuz and the swastika. In my view, it must explicitly make this distinction in the exemption subsection that is being proposed, as has been done in other jurisdictions.

Conclusion: This provision needs to be amended, in accordance with this analysis, before it can become an effective tool for law enforcement.

Repealing the Attorney General's Consent for certain prosecutions

Description: Currently, the consent of provincial Attorneys General is required to lay charges for three of the four existing hate propaganda offences. The government proposes that this requirement be removed to streamline the process for law enforcement to act quickly to counter hate speech and protect communities.

Analysis: I wish to be clear on why, despite the superficial attractiveness of this provision, I oppose it. I have opposed the removal of the Attorney General's consent for many years although I, too, have been frustrated with the bureaucracy associated with the requirement for the Attorney General's consent.

I have also witnessed a lack of will at times shown by several Attorneys General to consent to charges against antisemitic hatemongers where police support such charges and the evidence is compelling. So, I understand why some community organizations have supported this amendment.

But its removal comes at too high a price.

The requirement for the Attorney General's consent was introduced to avoid abuse of the hate propaganda provisions – that is, as a safety measure. I have seen efforts to weaponize the hate propaganda sections of the Criminal Code, usually through attempted private prosecutions, to advance a political agenda. These efforts were thwarted as a result of the Attorney General's intervention.

I acknowledge that not enough such charges are being authorized and that the process leading to the Attorney General's consent can be cumbersome and far too lengthy.

In my view, rather than removing the requirement for the Attorney General's consent in certain hate propaganda cases, the better answer is for the federal and provincial governments, through their Attorneys General and Solicitors General to show their commitment to the laying of charges in appropriate cases, and to create an expeditious, transparent process, with guidelines, for seeking and obtaining the Attorney General's consent.

One alternative approach is to remove the requirement for the Attorney General's consent **only** in relation to cases recommended by the police for prosecution (where the dangers of removing the consent requirement are arguably less pronounced) but retain the consent requirement respecting private prosecutions. There is precedent for this approach: it has been employed under s. 24 of the Youth Criminal Justice Act: "No prosecutions may be conducted by a prosecutor other than the Attorney General without the consent of the Attorney General."

Conclusion: I oppose this provision or alternatively, oppose the removal of the requirement for the Attorney General's consent for private prosecutions.

What is Missing from the Legislation

Description: It was rumoured that the federal government might criminalize the glorification of terrorism, addressing a gap in existing anti-terrorism legislation. Advocates pointed to such legislation in the United Kingdom. It is not included in the federal government's new legislation.

Analysis: I am unconvinced that the "glorification" of terrorism would necessarily survive constitutional scrutiny based on freedom of expression concerns. The United Kingdom operates within a different legal framework. As well, concerns have been raised about the overuse of criminal law in the United Kingdom. However, there is a need to address the existing state of anti-terrorism provisions in Canada.

The Criminal Code contains many terrorism offences. They are extremely complicated and difficult to read or understand. The extent to which they apply to those who express material support for designated terrorist groups is unclear. Freedom of expression does not protect threats of violence;

nor should it protect expression that wilfully promotes terrorist activities or the activities of terrorist groups designated under the Criminal Code.[4]

Parliament should create a new offence (wilful promotion of terrorism) that addresses extremists who publicly promote terrorist activities or the activities of a terrorist group.

More specifically, such an offence would criminalize the conduct of those who, by communicating statements other than in private conversation, wilfully promote terrorist activities or the activities of a terrorist group. Such a provision would be a permissible infringement on speech for the reasons already indicated and because the Supreme Court has already determined that wilful promotion of hatred against an identifiable group (containing precisely the same core language) is a constitutionally valid offence.

This offence would focus on promotion of and support for terrorist activities or terrorist groups (already defined in the Criminal Code), rather than requiring a determination of whether that promotion or support is based upon hatred directed against an identifiable group, such as Jews.

This approach would also solve the deficiencies in the current proposed "display of symbols" offence. For example, whenever terrorist symbols such as Hamas or Hezbollah flags are displayed, the accused under the proposed legislation, if enacted, will argue that they don't hate Jews, only Zionists. This should be irrelevant if they are displaying symbols to support prohibited terror groups.

Summary:

I recommend that this Committee should:

(1) Support the creation of the new intimidation and obstruction offences
(2) Support the creation of the new hate offence
(3) Recommend amendment of the definition of "hatred" to perfectly align with the Supreme Court of Canada's definition
(4) Support the creation of a new offence of displaying terror symbols, subject to the amendments proposed in these submissions

[4] I need not discuss here whether promotion of and support for terror survives constitutional scrutiny because threats of violence are exempt from s. 2(b) freedom of expression Charter protection or because criminalizing the promotion of and support for terror would represent a justified limit on expression under s. 1 of the Charter. See R. v. Khawaja, [2012] 3 SCR 555; Bracken v. Fort Erie (Town) (2017), 137 OR (3d) 161 (CA).

(5) **Oppose the repeal of s. 430(4.1), the bias, prejudice or hate-motivated mischief offence**

(6) **Oppose the removal of the Attorney General's consent requirement or, in the alternative, ensure that the consent requirement is retained only for private prosecutions**

(7) **Support the creation of the offence of wilful promotion of terror groups/activities**

Conclusion: The federal government's proposed legislation represents a first step, but only a first step. It should be amended or added to in accordance with the recommendations contained in these submissions. The legislation must also be accompanied by a demonstrated will at all levels of government to enforce existing laws.

As well, this legislation should be only one piece of a larger strategy to tackle antisemitism and other forms of hatred – through addressing, for example, the presence of political, religious and ideological extremists in Canada, terrorist financing and money laundering, use of social media platforms to promote hate, and immigration and detention issues.

All of which is respectfully submitted.

Mark J. Sandler

Mark Sandler, LL.B., LL.D (honoris causa)

Chair, Alliance of Canadians Combatting Antisemitism