

**Written Submissions by Mark Sandler on Bill C-9
Standing Senate Committee on Human Rights**

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Introduction

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 the criminal law 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 the Chair of the Alliance of Canadians Combatting Antisemitism (ALCCA), a non-partisan coalition of 70 community organizations, Jewish and non-Jewish and am the non-policing member of the Canadian Association of Chiefs of Police (CACP) Special Purpose Committee on Hate Crimes.

Bill C-9 has evolved substantially as a result of the hearings conducted by the Standing Committee on Justice and Human Rights (the House committee). I and others collaboratively proposed amendments to the legislation, most of which were adopted. Although the legislation may not be perfect, I support its passage in its current form. I also observe that 34 of ALCCA's member organizations advised the House committee that they endorse the amendments I proposed to the House committee. As you have already heard, the legislation is also supported by the Canadian Association of Chiefs of Police. In these submissions, I address each component of Bill C-9.

However, I begin 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. So, while I urge this Committee to support Bill C-9's enhancements to the criminal law, I ask you individually and collectively to strongly encourage 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 offences of (a) intimidating a person in order to impede them from accessing places of worship, and other places primarily used by identifiable groups for certain purposes and (b) intentionally obstructing or interfering with a person's lawful access to such places.

Analysis: These offences do not criminalize any behaviour that was not previously criminal.¹ However, the creation of these offences sends an important message to those who wish to intimidate or obstruct people seeking access to vulnerable locations associated with identifiable groups. That message is worthy of recognition at a time of soaring levels of intimidation and harassment, disproportionately impacting certain communities, including the Jewish community. These new offences expose perpetrators to more significant terms of imprisonment than otherwise available. They are consistent with recommendation 19 of this Committee's recent report on antisemitism. They are also compliant with the Charter. The intimidation offence requires not only proof of conduct engaged in **with the specific intent to provoke a state of fear** but that the conduct be done **in order to impede access** (*i.e.* for the added purpose of impeding access) to

¹ The applicable existing offences 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)).

identified types of locations. The obstruction or interference offence requires proof that the perpetrator acted **without lawful authority** and **with the intention of obstructing or interfering** with lawful access.

New Hate 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, if prosecuted by indictment, are enhanced to emphasize its seriousness.

“Hatred” is also defined under the new legislation. The original version of the legislation deviated from the definition set out by the Supreme Court in *R. v. Keegstra*. I submitted to the House committee that the definition should be amended to adhere precisely to the Supreme Court’s definition, as Bill C-9 now does. Utilizing the precise formulation of Chief Justice Dickson in *Keegstra* eliminates any concern that the test has been changed. This adherence is of importance because the definition of hatred also applies to several hate propaganda sections of the Criminal Code, including wilful promotion of hatred. That offence survived Charter scrutiny, in part, because it only criminalizes the most extreme forms of hate speech. The definition is also consistent with recommendation 20 of this Committee’s recent report on antisemitism.

Analysis: I strongly support this proposed hate offence, as well as the statutory definition of hatred. 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-motivation behind the crime he/she was found guilty of. Otherwise, it often would 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 driven by distorted ideological, religious or political fervor, and as such, are remorseless repeat offenders. The new offence also promotes better data collection on hate crimes by law enforcement, informing the allocation of resources to combat crime.

Retention of bias, prejudice or hate motivated mischief

Description: The original version of Bill C-9 repealed s. 430(4.1) of the Criminal Code. The current version no longer repeals s. 430(4.1)

Analysis: I proposed to the House committee that s. 430(4.1) be retained, as reflected in the current version of Bill C-9. Subsection 430(4.1) creates a separate, aggravated form of mischief respecting places of worship and other vulnerable locations when the mischief is motivated by bias, prejudice or hatred. It is easier to prove that a crime was motivated by bias, prejudice or hatred than to prove that it was motivated by hatred (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 hatred,” not merely hatred alone. Mischief motivated by bias, prejudice or hatred is frequently committed, and is well known to the Jewish community, which has been the victim of vandalism against its places of worship, schools, businesses and other institutions.

This offence (unlike hate speech offences) should not be dependent on proof of hatred, as opposed to bias, prejudice or hate. Its retention is not incompatible with a higher standard applied to other offences, particularly those that 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 a symbol:

- principally used by or associated with terrorist entities listed under the Criminal Code,
- the “Nazi Hakenkreuz” or the Nazi double Sig-Rune (also known as the SS bolts), or
- that so nearly resembles one of the above symbols that it is likely to be such a symbol.

Analysis: I and others have advocated for the creation of a new freestanding offence that criminalizes the wilful display of symbols associated with terrorist entities listed under the Criminal Code. This legislation does not do that. Instead, it 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.

A simple, freestanding offence that criminalizes the display of such items has been utilized in other countries and states. The government appears to have chosen not to create a freestanding offence out of concern about freedom of speech guarantees. I respectfully 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 incorporated by the proposed legislation. The Criminal Code already has something analogous, though worded differently, in its antiterrorism offences: see subsection 83.18(4).

However, I accept that Bill C-9’s explicit acknowledgement of the role that symbols play in promoting hatred represents a step forward, and that practically speaking, it is likely to enhance enforcement in cases involving symbols. Accordingly, I support this measure, although it is imperfect and may have to be revisited in the future if it fails to adequately address the dangerous use of terror symbols. Legislating in this area, regardless of the precise approach taken, is also consistent with recommendation 18 contained in this Committee’s recent report on antisemitism.

The original version of Bill C-9 appropriately referred to the Nazi Hakenkreuz but added 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.

I submitted to the House committee that the legislation failed to differentiate between the Hakenkreuz and the swastika. The current version has removed the reference to the swastika, which I support.

Removing 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 originally proposed that this requirement be removed to streamline the process for law enforcement to act quickly to counter hate speech and protect communities. The removal of the consent requirement no longer forms part of the legislation.

Analysis: I opposed the removal of this requirement, despite its superficial attractiveness. 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 there was early support for the removal of this requirement.

However, its removal would come 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 meritorious 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."

In my view, that option should be explored if, at a later date, no improvements have taken place in the processes associated with the Attorney General's consent.

Removal of the Good Faith Religious Exemption

Description: The proposed legislation repeals the defence based on the expression of opinions on religious subjects or texts in relation to the offences of wilful promotion of hatred or antisemitism.

Analysis: On one end of the spectrum, it has been contended that the religious exemption defence should be repealed because the defence immunizes from criminal liability anyone who frames hate

speech in religious terms. I disagree. At the other end of the spectrum, it has been contended that removal of the religious exemption represents an attack on freedom of religion and those who express religious views. I also disagree with this broad contention.

It is a crime to wilfully promote hatred against an identifiable group. The offence, through use of the words “wilful” “promote” and “hatred” sets a very high threshold of proof that must be overcome, and appropriately so, before speech is criminalized. Only the most extreme forms of speech are subject to prosecution. This is true for the other offences to which the defence would apply: wilful promotion of hatred by display of terror symbols and wilful promotion of antisemitism. I will focus on the current wilful promotion of hatred offence but the same analysis applies to the other two offences.

The offence sets out four available affirmative defences. One of those defences is the so-called religious exemption. It provides that “no one shall be convicted of this offence if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject.”

All four defences, including this one, were inserted to reinforce Parliament’s commitment not to restrict freedom of speech except to the extent necessary to protect identifiable groups from the real dangers associated with hate speech, including marginalization of targeted communities, and the mobilization of adherents to hate ideologies that may expose communities to the risk of violence.

The Supreme Court of Canada made it clear that once the prosecution proves that someone has wilfully promoted hatred against an identifiable group, it would be rare that any of the available defences could be successfully utilized. Any defence that involves elements of good faith or honest belief would almost invariably be inconsistent with wilful promotion of hatred. The defences were designed to make more explicit the scope of wilful promotion of hatred and provide a strong signal that good faith activities will not be swept into the ambit of the offence.

In the context of the religious exemption, it is virtually inconceivable that anyone can successfully claim that they expressed, in good faith, an opinion on a religious topic once it is determined that they wilfully promoted hatred. For example, the imam who publicly prayed for all Zionists to be killed in Montreal was, in my view, guilty of advocating genocide, incitement of hatred, and wilful promotion of hatred. This could not be characterized as a good faith attempt to establish by argument an opinion on a religious subject. There has never been a case – not one – in which the religious exemption has successfully resulted in the acquittal of someone found to have wilfully promoted hatred.

The defences exist out of an abundance of caution, and not because there is a likelihood they can be successfully invoked. Another one of the defences reinforces the point. It applies if someone, “in good faith, intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.” To state the obvious, once it is decided that someone has wilfully promoted hatred, how could they ever be found to have intended, in good faith, to seek to remove feelings of hatred?

It follows that the religious exemption defence does not immunize hatred spewed by a religious figure or someone preaching hate from a pulpit. Or someone who frames their hate in religious language.

So, its presence or removal is unlikely to make the slightest bit of difference in any prosecution. However, there are problems of perception both with its retention and with its removal.

Its presence is used, at times, as an excuse for non-prosecution. For example, people claimed that the imam described earlier was protected by the religious exemption. This is inaccurate.

Its removal was also likely to raise concerns, even if it did not make any practical change in the law, about imperilling freedom of religion.

The government has chosen to remove the exemption, which I did not propose when the subject was raised during the hearings by the House committee. However, the government, in my view, addressed the concerns raised by the addition of clarifying language in subsections 319(2), (2.1) and (2.2). In my view, this approach reinforces the point that the removal of the defence does not undermine guaranteed freedoms. In the circumstances, I believe that the offence will survive any further Charter scrutiny.

I also note that this defence is not available for two of the hate propaganda offences: public incitement and advocating genocide. This reinforces how limited the applicability of the defence was.

What is Missing from the Legislation

Description: Some have advocated for inclusion of an offence of glorifying terrorism, such as exists in the United Kingdom. It is not included in Bill C-9. In my view, Parliament should, separate and apart from Bill C-9, create an offence of wilfully promoting terror.

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.²

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.

² 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).

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.

Summary:

I recommend that this Committee endorse the current version of Bill C-9 for the reasons given above.

Conclusion: The federal government's proposed legislation represents a first step, but only a first step. 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, and use of social media platforms to promote hate.

All of which is respectfully submitted.

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