CHRISTIAN LEGAL FELLOWSHIP | ALLIANCE DES CHRÉTIENS EN DROIT

Written Submission to the

Senate Standing Committee on Human Rights

Re: Bill C-9, *An Act to amend the Criminal Code (hate propaganda, hate crime and access to religious or cultural places)*

By: Christian Legal Fellowship | Alliance des chrétiens en droit

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About Christian Legal Fellowship

CLF is a national association of over 800 lawyers, retired judges, law students, and law professors, with members in twelve provinces & territories and from more than 40 Christian denominations and traditions. CLF is also a Non-Governmental Organization in Special Consultative Status with the Economic and Social Council of the United Nations. CLF has appeared before Parliamentary committees, provincial governments and regulators, and at all levels of court.

CLF has experience and scholarly expertise on the *Canadian Charter of Rights and Freedoms* and, in particular, the protection of the fundamental freedoms of religion, conscience, expression, peaceful assembly, and association (guaranteed by section 2) and the right to the equal benefit and protection of the law (guaranteed by section 15), as well as on human rights and the law of discrimination. CLF has intervened as a friend of the court in over 40 cases involving the *Canadian Charter of Rights and Freedoms*, including before the Supreme Court of Canada, in support of freedom of religion and the accommodation of religious minorities in Canada's pluralistic society.

CLF previously made submissions to Parliament on hate speech, and in 2021 to the Department of Justice concerning proposals to combat online hate.

CLF appeared before the House of Commons Standing Committee on Justice and Human Rights in its study of the present legislation in October 2025. CLF was also an intervener before the Supreme Court of Canada in *Saskatchewan (H.R.C.) v Whatcott*[1] in 2013, and CLF's submissions were cited in the Court's unanimous decision.

CLF is grateful for the opportunity to provide input on this matter.

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[1] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11.

Executive Summary

Hatred inflicts profound harm on targeted individuals and communities, and on society as a whole.[2] The propagation of hatred is calculated "to compromise the dignity of those at whom it is targeted, both in their own eyes and in the eyes of other members of society. And it sets out to make the establishment and upholding of their dignity … much more difficult."[3]

As a national association of legal professionals working with faith communities and other minority groups, Christian Legal Fellowship shares the government's desire to combat all acts that propagate and normalize hatred. We therefore wish to ensure that initiatives like Bill C-9 are both effective and constitutionally sound. To this end, it is important that Bill C-9 avoid two potential pitfalls.

The first pitfall is a regime so nebulous and unclear that it makes prosecutions difficult and enforcement ineffective, leaving harmful and tangible manifestations of hatred unaddressed.

The second pitfall is that the term "hatred" may be applied subjectively to silence speech that is not *hateful* but rather *hated* by those who deem it offensive and wish to suppress it. Determining what constitutes "hate" or "hatred" can be inherently subjective and laden with value judgments, and susceptible to misinterpretation or misuse. The law must not conflate subjectively offensive speech with objectively hateful criminal conduct. As Supreme Court Chief Justice Dickson cautioned, "the danger that a trier will improperly infer hatred from statements he or she personally finds offensive cannot be dismissed lightly".[4]

Parliament's response to hatred must therefore strike a careful balance, lest well-meaning government restrictions undermine Canada's constitutional commitments to freedom, equality, and pluralism. To that end, CLF makes three recommendations to ensure that Bill C-9 achieves the dual objectives of targeting manifestations of hatred with precision and preserving appropriate protection for freedom of expression. These two objectives are not mutually exclusive, but can be simultaneously advanced and upheld through carefully tailored legislation. Specifically, CLF recommends:

1) clarifying the statutory definition of "hatred" to ensure consistency, objectivity, and effectiveness in Bill C-9's application;
2) protecting the overall purpose and constitutionality of the regime by retaining the statutory defences set out in s. 319(3) of the *Criminal Code*, and clarifying the language in Bill C-9's "for greater certainty" clause; and,
3) refining the proposed offence in s. 320.1001 from one "motivated" by hatred to one "committed with the intent to incite hatred".

These recommendations and their rationales are discussed in turn below.

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[2] *Taking Action to End Online Hate*: *Report of the Standing Committee on Justice and Human Rights*, Anthony Housefather, Chair (June 2019: 42nd Parliament, 1st Session) at 7-10. The Supreme Court of Canada identified similar concerns in *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 74.
[3] Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012) at 5.
[4] *R v Keegstra*, [1990] 3 SCR 697 at 778.

Recommendation 1: Clarify the definition of "hatred"

CLF recommends amending clause 4(3) of Bill C-9 and adding proposed s. 319(7.1) as follows:

> **Subsection 319(7) of the Act is amended by adding the following in alphabetical order:**
>
> ***hatred*** means the manifestation of an emotion of an intense and extreme nature that is clearly associated with vilification and detestation; *(haine)*
>
> **(7.1)** For the purposes of determining "hatred", the court must consider whether, in the view of a reasonable person aware of the context and circumstances, the activity in question exposes or tends to expose members of an identifiable group to enmity and extreme ill-will, or seeks to abuse, denigrate or delegitimize them to render them dangerous or unworthy, in the eyes of the audience.[5]

Rationale & Analysis

CLF wants to ensure that any statutory definition of "hatred" not be misused to suppress the good faith expression of minority points of view, even if others find such expression distasteful or offensive. While it is difficult to remove this risk entirely, our proposed amendment to the language of Bill C-9 would substantially alleviate that concern. As discussed below, this language is drawn from the Supreme Court of Canada's jurisprudence and from other provincial statutes.

Any law that empowers state actors to decide which ideas are permissible to express raises serious concerns, particularly for those who hold minority views. Canada is home to a deeply pluralistic society comprised of diverse ethnic, cultural, and religious communities whose lawful beliefs and practices are, at times, miscommunicated, misunderstood, or otherwise perceived as offensive by others. Unfortunately, some within Canada can also be uncharitable towards religious beliefs and practices. It is vitally important that Bill C-9 be considered against this backdrop to avoid stifling viewpoints and suppressing important expression.

Section 2(b) of the Charter protects the freedom to express even unpopular or offensive opinions and beliefs – this freedom is essential to "individual self-fulfillment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy."[6] This broad conception of expressive freedom does not preclude the imposition of limits, though it is vital that any limitations be minimally impairing and "demonstrably justified", as section 1 of the Charter requires.

The *Charter Statement* accompanying Bill C-9 emphasizes that the definition of "hatred" is designed to "codify a definition settled in the leading jurisprudence of the Supreme Court of Canada", particularly

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[5] This language is drawn from paras. 41, 59, and 95 of *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11. For a similar provision establishing guidance for decision makers on the meaning and analysis of an offence, see s. 33.1 (2) of the *Criminal Code*.

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

R. v. Keegstra and *Saskatchewan (H.R.C.) v Whatcott*.[7] CLF expressed concerns to the Justice Committee that Bill C-9's original definition of "hatred" was incomplete in this regard, and was grateful to see the Committee amend the definition of hatred in response to these and other concerns. While the amended language is a significant improvement, it still omits some important parameters contained in the Supreme Court's jurisprudence. Those include the need to: (1) assess hatred *objectively*, and not based on the subjective feelings of a speaker or those opposing their expression;[8] (2) regulate "*extreme manifestations*" of detestation and vilification, and not the *emotions* themselves;[9] and (3) target not the *content* of one's ideas but the harmful *modes* and *effects* of their expression.[10] These parameters should be explicit in any definition of "hatred" to ensure the regime's clarity and constitutionality. CLF's amendments address these concerns.

In CLF's submission, and in line with Supreme Court jurisprudence, the definition should be amended to explicitly refer to the "manifestation" (and not just the "emotion") of "hatred".[11] This retains the focus on modes of expression and the effect those modes of expression have on its audience, and not on a speaker's (subjective) emotions.[12] Supreme Court jurisprudence is not concerned with *emotion* on its own but on the "*extreme manifestation* of the emotion described by the words 'detestation' and 'vilification'".[13]

In combination, adding "manifestation" to the statutory definition of hatred and adding CLF's proposed subsection (7.1) to clarify its objective meaning will help decisionmakers screen vexatious or inappropriate claims, and mitigate the risk of a "chilling effect" on public dialogue.[14] This also helps authorities and courts focus their limited resources on true crimes.

The proposed amendments serve the government's stated objectives by maintaining a clear and objectively determined legal demarcation between hate propaganda, on the one hand, and what the Supreme Court refers to as "healthy and heated debate on controversial topics of political and social reform", on the other.[15] These amendments would confirm that Parliament's intent is not to "censor

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[7] Department of Justice, "Charter Statement - *Bill C-9: An Act to amend the Criminal Code (hate propaganda, hate crime and access to religious or cultural places)*" (tabled in the House of Commons, October 7, 2025), online: <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c9_2.html>.
[8] See *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 56.
[9] See *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 57.
[10] See *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 58. See also para. 51.
[11] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 57.
[12] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at paras 49 – 54. See also para 58: "The key is to determine the likely effect of the expression" (emphasis added) and para 35: "the outcome does not depend on the subjective views of the publisher or of the victim of the alleged hate publication, but rather on an objective application of the test".
[13] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 57 (emphasis added).
[14] The chilling effect occurs not only from a criminal conviction, but also from criminal charges and prosecution – whether a conviction follows or not – and the stigma, emotional distress, and financial cost that can accompany this. As Justice Lamer noted in *Mills v The Queen*, 1986 CanLII 17 (SCC) at para 145: "the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against 'overlong subjection to the vexations and vicissitudes of a pending criminal accusation' ... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. These forms of prejudice cannot be disregarded nor minimized…" (references omitted).
[15] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 111.

ideas or to compel anyone to think 'correctly"', but to target those public modes of expression meeting the high threshold established in Charter jurisprudence.[16]

The Supreme Court has recognized that "[a] prohibition of hate speech will not eliminate the emotion of hatred from the human experience".[17] Dealing with the root causes of hatred requires the involvement of civil society, including faith communities, and not just the state. Community engagement, public awareness, and robust dialogue must be enhanced to expose the folly of bigotry in the public square, and these can and must be pursued (with the government's support) without eroding the public's interest in free expression.

Recommendation 2: Maintain and clarify protections for good faith religious expression

CLF remains concerned that Bill C-9 was amended to remove the good faith religious expression defence in s. 319(3)(b) of the *Criminal Code*. We urge the Senate to restore this defence.

The courts have stated that the overall purpose of the anti-hatred regime in s. 319(2) is "to shield intended targets of wilfully promoted hatred from injury."[18] 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."[19] In this context, the good faith religious expression defence in s. 319(3)(b) is given clear meaning: namely, in the same spirit of protecting groups *from* hatred, the defence ensures that these very protections are not wielded as a tool *of* religious hatred by those who find certain religions or religious beliefs distasteful, and wish to suppress them.[20]

The s. 319(3) defences exist to protect Canadians against imprisonment for the good faith expression of sincerely held beliefs. They have provided "considerable assistance" to the Supreme Court[21] and other courts[22] in analyzing the *Criminal Code*'s regime, reducing the danger that restrictions on speech are unconstitutionally "overbroad or unduly vague".[23] The s. 319(3)(b) defence is directly in line with the principles of justice, equality, diversity, and inclusivity that inform efforts to combat discrimination and hatred. Removing this defence without adding additional protections for expression risks undermining the constitutional integrity of the s. 319 regime.

The good faith defence does not shield threats of violence

Some have suggested that the s. 319(3)(b) defence (for good faith religious expression) can be abused by individuals to shield hateful speech. Contrary to these misconceptions, s. 319(3)(b) has a very high

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[16] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at paras 58, 41.
[17] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 48.
[18] *R v Keegstra*, [1984] AJ No 643 at para 14. The section was then s. 281.2(2).
[19] *R v Keegstra*, [1990] 3 SCR 697 at 730.
[20] Section 319(3)(b) states that no person shall be convicted of an offence under s. 319(2) (wilful promotion of hatred) "if, in good faith, the 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".
[21] *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031, at para 3.
[22] See, e.g., *R. v. Andrews*, 1988 CanLII 200 (ON CA).
[23] See *R. v. Keegstra,* [1990] 3 S.C.R. 697 at p. 779 (per Dickson CJC).

threshold. There is nothing to suggest that this defence has been abused since it was first introduced in 1970. The case law has been clear, for example, that the defence cannot be used to cloak a religious opinion with "impunity as a Trojan Horse to carry the intended message of hate forbidden by s. 319".[24]

The defence's "good faith" requirement 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."[25] To be clear, the s. 319(3)(b) defence does not apply where an accused "calls people to action through violence".[26] Threats of violence are, by definition, excluded from the scope of the Charter's protection for freedom of expression, and could never be expressed "in good faith".[27] This has been the consistent position of the Supreme Court of Canada,[28] appellate courts,[29] and trial level courts.[30]

Thus, the scenarios posed by some opposed to the 319(3)(b) defence – such as embedding threats in a so-called prayer – simply would not fall within the scope of the defence. Such examples must not be relied on to suggest that the s. 319(3)(b) defence is inappropriate or would protect threats of violence. This is simply unfounded. To the contrary, by protecting only "good faith" (but potentially controversial) speech, the defence actually protects the *opposite* of violence – expression that "fosters dialogue rather than preventing it."[31]

Similarly, the defence does not excuse the public incitement of hatred simply because someone cites a religious text. It simply ensures that a good faith, truth-seeking exegesis of a religious text is not *itself* a hate crime – even where opposing voices might allege that the content of the text is, in their view, 'hateful'.

The Supreme Court has emphasized that s. 319(3) "reflects a commitment to the idea that an individual's freedom of expression will not be curtailed in borderline cases."[32] While some have theorized that religious freedom could be considered by a court without need for an explicit defence, 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

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[24] See *R v Harding*, [1998] 45 OR (3d) 207 at 219-220; see also *R v Harding*, [2001] OJ No 4953 at para 42.
[25] *R v Harding*, [2001] OJ No 4953 at para 42.
[26] *R. v. Popescu*, 2020 ONCJ 427, at para 64.
[27] As the Supreme Court explained in *R. v. Khawaja*, 2012 SCC 69, at para 70 : "Threats of violence fall outside the s. 2(b) guarantee of free expression."
[28] *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, at para 60: "Violence is not excluded because of the *message* it conveys (no matter how hateful) but rather because the *method* by which the message is conveyed is not consonant with Charter protection" (emphasis added). See also *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 969-70 S.C.R.; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, at paras 60, 72.
[29] *Bracken v. Fort Erie (Town)*, 2017 ONCA 668 at para 28: "[A]cts of physical violence or threats of violence do not come within the scope of s. 2(b)."
[30] For two recent examples where the court found that the s. 319(3)(c) defence did not apply, see *R. v. Sears,* 2019 ONCJ 104, paras 33-34, conviction and sentence upheld on appeal (*R. v. Sears*, 2021 ONSC 4272, leave to appeal dismissed (*R. v. Sears*, 2021 ONCA 522)) and *R. v. Popescu*, 2020 ONCJ 427, paras 62-67.
[31] See *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, at para 72.
[32] *R v Keegstra*, [1990] 3 SCR 697 at 779.

offence", which helps mitigate any chilling effect that the s. 319(2) prohibition would otherwise have on good faith expressions of religious opinions, particularly by those with minority viewpoints.[33]

In short, the courts have recognized that the s. 319(3) defences, including the defence for good faith religious expression, 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."[34] This has ultimately contributed to the courts upholding the constitutionality of s. 319(2), demonstrating that s. 319(3) defences play an integral role in the overall anti-hate framework and indicating that the defences strengthen, rather than weaken, the regime as a whole.[35]

The legislative history of the s. 319(3)(b) defence

A review of the legislative history of the defence – both before and after the Charter – confirms that it has long been understood as a means of ensuring that the goals of combatting hatred and protecting good faith expression can co-exist. For example, when the *Criminal Code* was amended to strengthen protections for sexual minorities in 2004, s. 319(3)(b) was updated to make clear that good faith expression of opinions based on religious texts on matters of human sexuality would not be criminalized. Bill C-250 simultaneously added protections for individuals from hatred based on sexual orientation and for the good faith expression of "an opinion based on a belief in a religious text".[36] The sponsor of the Bill, NDP MP Svend Robinson, supported the addition of this religious text defence, which was introduced by Liberal MP Derek Lee. MP Robinson explained that the updated defence "would explicitly make it clear that religious texts are not being targeted by this amendment. I can certainly say that I have no objection whatsoever to the member's amendment. If it clarifies the intent of the bill, certainly that is a positive thing".[37] Mr. Lee further explained the purpose of the religious defence:

> … these religious texts … are in fact today for many Canadians, living manifestations of their faith … My amendment ensures in fairly clear words that a good faith expression of an opinion based on a religious text is not, and cannot be, seen as any type of a hate crime or an expression of hate. In my view the amendment will protect all religious texts which are subscribed to and adhered to by many Canadians.[38]

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[33] *R v Keegstra*, [1990] 3 SCR 697 at 779.
[34] *R v Keegstra*, [1984] AJ No 643 at para 86.
[35] *R v Andrews*, [1988] OJ No 1222 (ONCA), 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…. I am satisfied that s. 281.2 meets all the requirements set forth in *R. v. Oakes*… I am strengthened in this position by recent decisions of the Supreme Court of Canada" (Justice Cory's decision was upheld on appeal by the majority of the Supreme Court of Canada in *R v Andrews*, [1990] 3 S.C.R. 870). See also *R. v. Keegstra,* [1990] 3 S.C.R. 697.
[36] Bill C-250, *An Act to Amend the Criminal Code (hate propaganda),* 37th Parl, 3rd Sess (assented to 29 April 2004).
[37] Bill C-250, *An Act to amend the Criminal Code (hate propaganda)*, Report stage, *House of Commons Debates*, 37-2, No 113 (6 June 2003) at 6990 (Svend Robinson) (emphasis added).
[38] Bill C-250, *An Act to amend the Criminal Code (hate propaganda)*, Report stage, *House of Commons Debates*, 37-2, No 113 (6 June 2003) at 6990-1 (MP Derek Lee).

Parliamentary Secretary Paul Harold Macklin further explained why the government determined it was important to protect good faith expression based on a belief in a religious text:

> Throughout the committee hearings it became apparent that Canadians want it to be crystal clear that it will be possible to continue quoting and teaching the Bible or other religious texts without being concerned about being accused of propagating hatred. Motion No. 1 [the religious text defence] as drafted provides this kind of reassurance. This amendment would clarify the application of the defence to an expression of opinion based on a religious text when the opinion is expressed by a person who believes in the text. …
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> …with the amendment … the necessary balance is struck between adding protections for this identifiable group and on the other hand ensuring that those who quote or teach in good faith the Bible or other religious texts are not accused of inciting hatred…[39]

The amendment received multi-party support. The Senate now has the opportunity to restore this vital language as a reflection of the principle that combatting hatred and protecting good faith expression are not opposing goals, but mutually reinforcing ones.

Clarify the "For Greater Certainty" Clause

CLF appreciates the government's efforts at the Committee stage to clarify the scope of conduct captured by the *Criminal Code* by introducing a new "for greater certainty" clause. CLF especially appreciates Parliamentary Secretary Patricia Lattanzio's affirmation, in introducing this clause, that "the bill will state in plain terms that nothing in this legislation affects worship, sermons, prayer, religious education, peaceful debate, or even the good faith reading and discussion of religious texts".[40]

However, it is important that this be expressed more clearly in the text of the bill itself. The "for greater certainty" clause is an important measure but, as currently worded, does not fully address the very serious concerns about the potential (mis)interpretation of the s. 319(2) offence. CLF therefore recommends the following revisions to the "for greater certainty" clause:

> For greater certainty, nothing in subsection 319(2) or (2.2) of the *Criminal Code* shall be construed as prohibiting a person from communicating a statement**, in good faith,** on a matter of public interest, including an educational, religious, political, or scientific statement made in the course of a discussion, publication, or debate~~**, if they do not willfully promote hatred against an identifiable group by communicating the statement**~~.

Bill C-9 needs to clarify what is – and what is not – included in the meaning of "wilful promotion of hatred". Stating that communications on a matter of public interest do not wilfully promote hatred "if they do not wilfully promote hatred" is circular and fails to address the central issue: what constitutes the wilful promotion of hatred to begin with?

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[39] Bill C-250, *An Act to amend the Criminal Code (hate propaganda)*, Report stage, *House of Commons Debates*, 37-2, No 116 (11 June 2003) at 7172-7173 (MP Paul Harold Macklin) [emphasis added].
[40] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 45-1, No 18 (23 Feb 2026) at 1220.

CLF appreciates the need to place parameters around the scope of a clarifying clause, lest it undermine the regime itself. CLF's proposed amendments address this concern by making clear what is excluded from the scope of the offence: good faith communications about ideas and opinions (rather than bad faith statements vilifying individuals). The term "good faith" already exists in s. 319(3)(d) as well as in many other places in the *Criminal Code* and is a well-established concept in criminal law. It can help ensure that the amendment provides clarity, without undermining the laudable goals of the legislation.

This language would be consistent with the government's desire to codify the standards established by the Supreme Court in *Whatcott* (particularly paragraphs 197–199 of the decision), which emphasized that decision makers "should exercise care in dealing with arguments to the effect that foundational religious writings" constitute hate speech:

> sacred texts such as the Bible … will typically have characteristics which cannot be ignored if they are to be properly assessed in relation to [the hate speech law] … objective observers would interpret excerpts of the Bible with an awareness that it contains more than one sort of message, some of which involve themes of love, tolerance and forgiveness … the biblical passage, in and of itself, cannot be taken as inspiring detestation and vilification…[41]

It is important that these principles are not forgotten or overlooked, which is a serious danger should the *Criminal Code* lose specific textual reminders that good faith religious expression is, definitionally, *not* hateful. For this reason, we also recommend inserting this clause directly in the text of the *Criminal Code* itself. This amendment will clarify the fundamental difference between *disagreement over ideas* – which is an essential ingredient of genuine pluralism – and promoting *detestation of individuals* – which is not. This is what the pursuit of truth requires in a free and democratic society: protecting the practice of debating *ideas* without attacking the *individuals* who hold them. As the Supreme Court of Canada recently affirmed:

> a right not to be offended [has] no place in a democratic society …. The applicable test must not be focused either on the repugnant or offensive nature of the expression or on the emotional harm caused to the person. Otherwise, it would amount to censoring expression because of its content or its impact on a person, regardless of its discriminatory effects. An approach of this kind has been rejected by this Court.[42]

It is through the open expression of our disagreement that we can show our concern and care for each other, by highlighting possible paths to a better life in our collective search for truth.[43]

Recommendation 3: Clarify s.320.1001's "Offence motivated by hatred"

Finally, for many of the reasons already discussed in this brief, the "motive" offence in s. 320.1001 requires clarification. CLF recommends amending clause 5 of Bill C-9 as follows:

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[41] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at paras 197-199 (emphasis added).
[42] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at at para 82.
[43] See further discussion in Derek B.M. Ross "Truth-Seeking and the Unity of the Charter's Fundamental Freedoms" (2020), 98 *Supreme Court Law Review* (2d) 63.

320.1001 (1) Everyone who commits an offence — referred to in this section as the "included offence" — under this Act ~~or any other Act of Parliament~~, if the ~~commission of the~~ included offence is ~~motivated by~~ committed with the intent to incite hatred based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or gender identity or expression, is

(a) guilty of an indictable offence and liable to the punishment provided for in subsection (5); or

(b) guilty of an offence punishable on summary conviction.

Clarification

(3) For greater certainty, the commission of an offence under this Act ~~or any other Act of Parliament~~ is not, for the purposes of this section, ~~motivated by~~ intended to incite hatred based on any of the factors mentioned in subsection (1) solely because it discredits, humiliates, hurts or offends.

(3.1) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.

(3.2) For greater certainty, it is not an offence under this section to discuss, criticize, or argue in good faith for or against any opinion, belief, behaviour, or practice, whether based on scientific, moral, religious, philosophical, or other grounds.

Rationale & Analysis

Section 320.1001(1) of Bill C-9 prescribes an additional criminal charge where the commission of an included offence is motivated by hatred. However, section 718.2(a)(i) already requires courts to consider "evidence that the offence was motivated by bias, prejudice or hate" as an aggravating factor in imposing a sentence. A new offence with separate and additional penalties should be carefully tailored to target a distinct and specific harm. CLF therefore recommends an amendment that refines the offence in s. 320.1001 from one "motivated" by hatred to one "committed with the intent to incite hatred".

To that end, the Supreme Court in *Whatcott* focused on the law's concern with the "societal harm flowing from hate" and stated that this harm must be "assessed as objectively as possible".[44] A separate offence that is based solely on an individual's emotional state of mind, rather than the *effect* or at least the *intended effect* of their acts, risks being difficult to prosecute and is constitutionally vulnerable. As the Supreme Court has emphasized, "the feelings of the publisher or victim are not the test"[45] and "a test predicated on a vague emotion makes subjective application inevitable."[46] Instead, "the focus must be on the likely effect of the hate speech, particularly on how individuals external to the group might reconsider the social standing of the group."[47] CLF's amendment also clarifies that this provision would apply only to *Criminal Code* provisions, not other statutes which are not criminal in nature.

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[44] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 82 (emphasis added).
[45] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 82 (emphasis added).
[46] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 37.
[47] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 82 (emphasis added). See also *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at para 103: "In determining whether the communication expressed hatred, the court looks at the understanding of a reasonable person in the context".

CLF's proposed subsections (3.1 and 3.2) would codify the principle that the Charter protects the freedom to discuss and criticize particular beliefs, opinions, or practices – even those which may be shared, for example, by a particular religious community or group.[48] It would clearly communicate that *questioning* the teachings or practices of a particular religion or group is not tantamount to *vilifying* those who hold them. This is also consistent with the defences contained in ss. 319(3)–(3.1), as discussed above. CLF's proposed subsection 320.1001(3.1) is drawn from similar language in s. 14(2) of Saskatchewan's *Human Rights Code*[49] and similar provisions in the statutes of Nova Scotia,[50] New Brunswick,[51] Alberta,[52] and the Northwest Territories.[53] Given its approval by the Supreme Court of Canada (in *Whatcott*) within the human rights law context, we believe this language is all the more necessary to secure the constitutional validity of any hate speech provisions within the criminal law context (where the penalties are even greater).[54]

Of course, in extreme cases, expression attacking a particular belief or practice may be used as a 'smoke-screen' to vilify a particular group, and if such expression is framed in such a way as to publicly vilify members of that group (assessed objectively) such speech may be limited.[55] But this is an "extreme and marginal" exception, and the general rule remains that the law should "protect almost the entirety of political discourse as a vital part of freedom of expression."[56] This includes so-called "awful but lawful" speech – even expression deemed "offensive", "hurtful", "humiliating", "repugnant", "derogatory", "insensitive", and "belittling".[57]

Finally, CLF notes existing *Criminal Code* provisions could be better employed to deter manifestations of hatred. In particular, the following sections already apply to a number of the matters that Bill C-9 aims to address, and further consideration to employing these existing tools is merited: s. 63 (unlawful assembly), s. 175 (causing a disturbance), s. 176 (obstructing/disturbing religious worship or meetings), s. 264 (criminal harassment), s. 264.1 (uttering threats), ss. 298–317 (defamatory libel), s. 423 (intimidation) and s. 430 (mischief).

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[48] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 163. See also para 97.
[49] The exact wording in Saskatchewan's *Code* is as follows: "Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject." The language we have proposed is slightly different, drawn from s. 3(2) of Alberta's *Human Rights Act*, which the Alberta Court of Appeal upheld and interpreted as "drawing a line between pure opinion in the context of public discourse, and statement and publications of a different nature and character." See *Lund v. Boissoin*, 2012 ABCA 300, paras 79 and 89.
[50] Nova Scotia *Human Rights Act*, s. 7(2).
[51] *Human Rights Act*, RSNB 2011, c 171, s 7(2).
[52] *Alberta Human Rights Act*, s. 3(2).
[53] Northwest Territories *Human Rights Act*, s. 13(2).
[54] This language addresses the "minimal impairment" branch of the *Oakes* test and confirms that the law's object "is not to censor ideas or to legislate morality" but rather "to address harm from hate speech while limiting freedom of expression as little as possible." See *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 110. See also para 180.
[55] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 124.
[56] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at para 120.
[57] *Saskatchewan (H.R.C.) v Whatcott*, 2013 SCC 11 at paras 46, 47, 57, 89-92, 109. See also *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at paras 59-64.

Conclusion

In our pluralistic society, there is a temptation to politicize disputes over controversial and offensive expression, and to label speech we find offensive as "hateful". Indeed, the Supreme Court recently recognized that "allegations [of hate speech] have permeated public discourse in a way that well exceeds their narrow meaning within the legal system".[58] Nevertheless, the legitimacy of our political and legal orders requires that allegations of hate speech be examined impartially, objectively, and in accordance with Canada's *constitutional* commitments. We urge that safeguards be integrated (including review and approval of prosecutions by an objective and publicly accountable gatekeeper like the Attorney General[59]) to protect against conscious or unconscious attempts to silence unpopular minorities in the public square.

The protection of free expression and the fight against hatred are not conflicting goals but share a common objective: that of upholding human dignity.[60] Canada's efforts to uphold human dignity in one context must not undermine those efforts in another.

Ultimately, our commitments to human dignity require us to jealously guard the pursuit of truth, even (and *especially*) when that pursuit is messy and difficult. Challenges to our truth claims can sometimes be (mis)interpreted as an attack on *us*. It can be tempting to label such speech as "hate". But if we are serious about the search for truth – and upholding our core commitments to human dignity – we must preserve freedom to dialogue, examine, and even challenge and criticize one another's claims without fear of sanction or censure.

A clear line must be drawn between expression seeking to mobilize others to vilify *groups*, and expression which simply challenges *ideas*. Such protections ensure that all Canadians, especially minority communities, are protected from the "tyranny of the majority".[61]

CLF respectfully submits that the language recommended in this brief can help achieve this demarcation and strengthen the government's efforts to combat hatred.

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[58] *Hansman v. Neufeld*, 2023 SCC 14, para 113.

[59] Bill C-9 originally proposed removing this requirement (currently s. 319(6)) from the *Criminal Code* – CLF is grateful that the Bill was amended to retain this important safeguard.

[60] See Jeremy Waldron, *The Harm in Hate Speech*, *supra* note 2, at 105: "Dignity… is precisely what hate speech laws are designed to protect…dignity in the sense of a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction." The propagation of hatred is an affront to human dignity because it rejects the notion that every person is, in the words of the *Universal Declaration of Human Rights*, "born free and equal in dignity and rights" and endowed with equal and inalienable worth. Attacks on free speech are also an affront to human dignity: "Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment" (*R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at para 32).

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