

## Hate Propaganda Talking Points on Bill C-250

We do not condone or support the promotion of hatred, speech that incites violence or acts of violence towards any person. Nevertheless, we have serious concerns about the consequences of the inclusion of sexual orientation in the hate propaganda sections of the *Criminal Code* (ss. 318-319).

As it stands, Bill C-250 has the potential to silence reasonable debate on issues like marriage and school curricula and restrict the legitimate expression of moral and religious views on sexual practices. We share the concerns expressed by Justice McLaughlin and her fellow justices on the Supreme Court who wrote in their dissenting opinion in *R. v. Keegstra* that ss. 318 and 319 of the *Criminal Code* are only tenuously linked to the actual suppression of hate propaganda and risk having a chilling effect on legitimate free speech and expression.<sup>1</sup>

### Two freedoms are at stake in this debate:

- **The freedom to read, preach and distribute sacred texts.** When officials from the Department of Justice were asked by the Justice Committee whether Bill C-250 could be used to criminalize parts of the Bible, they could not give a definitive answer. The freedom to read, preach and distribute sacred texts such as the Bible and the Qur'an must be clearly protected.
- **The freedom to publicly discuss and comment on sexual morality.** Discussing and developing norms for sexual behaviour is one of the central social roles of religion. All religions do this, whatever their particular views on homosexual behaviour. If C-250 is passed as it stands, there is a real risk that these important conversations will be shut down and religious instruction in Canada will be profoundly limited.

**Sexual Orientation** Some contend that sexual identity and practice cannot be distinguished. This is unlike the other protected grounds in s. 318 (colour, race, religion or ethnic origin). For example, religious people understand that when someone from another religious group condemns their religious beliefs or practices they are not necessarily attacking their personhood. We understand this because in our society we often distinguish between people and the activities they undertake (our entire *Criminal Code* is based on this distinction). When practice and identity are fused and are argued to be inseparable in the case of sexual orientation, moral objections to practices are suddenly interpreted as moral objections to persons. If sexual orientation is interpreted in this way under s. 318, could someone be accused of promoting hatred for publicly expressing their moral views on homosexual activity?

**Hatred is not defined** "Promotion of Hatred" is a serious offence, yet "hatred" is not clearly defined in Canadian law and jurisprudence. Justice McLaughlin pointed this out in her dissent in *Keegstra*, saying "The term 'hatred' in s. 319(2) is capable of denoting a wide range of diverse emotions and is highly subjective, making it difficult to ensure that only cases meriting prosecution are pursued and that only those whose conduct is calculated to dissolve the social bonds of society are convicted."<sup>2</sup>

- In November 2001, Senator Mobina Jaffer accused her fellow Senators of "...giving comfort to those who hate" and attempting "to use faith to mask hatred" when they rose in the Senate to speak in favour of an act reaffirming the definition of marriage.
- In September 2002, MP John Bryden was publicly accused of issuing "a venomous and hateful tirade" when he released a statement outlining his reasons for not supporting same-sex marriage.
- Elizabeth Birch, director of the Human Rights Campaign, has said that endorsing reparative therapy for gays and lesbians or even saying that gays and lesbians have a choice about their sexual orientation is "hateful." Yet many former gays and lesbians in Canada say they did have a choice about their sexuality.

<sup>1</sup> [1990] 3 S.C.R. 697, at 858. McLachlin J. referred to the track record of section 319(2). While she noted that many cases are dropped, the fact that they are even initially considered shows that this section catches quite a bit of speech. She noted that Leon Uris's novel *The Haj* and Salman Rushdie's novel *Satanic Verses* both faced calls for banning under this section. The film *Nelson Mandela* was temporarily stopped at the border for offending this section.

<sup>2</sup> [1990] 3 S.C.R. 697, at 703.

Adding sexual orientation to the list of identifiable groups will put a chill on the religious expression of disapproval for moral practices. Again, since hatred is undefined and "sexual orientation" does not include a distinction between sexual behaviour and sexual identity, it is not clear whether this legislation will effectively ban comment on the morality of various sexual practices, such as homosexual behaviour.

**The defences are ineffective** The defences listed in s. 319 only apply to the last section on "wilfully promoting hatred." Even these defences are ineffective in protecting legitimate but controversial speech. The Supreme Court in *R. v. Keegstra* and the Ontario Court of Appeal in *R. v. Harding*<sup>3</sup> have indicated that, in their opinion or as a consequence of their interpretation, the defences will not significantly narrow the application of section 319(2).<sup>4</sup>

EGALE and others have emphasized the *Criminal Code's* requirement of a clear element of intentionality (*mens rea*) as another reason that Bill C-250 will not have a serious chilling effect on legitimate public discourse in Canada. However, the decision of the Ontario Court of Appeal in *R. v. Harding* significantly lowered the *mens rea* requirement for s. 319 by changing the standard from "wilful promotion of hatred" to "wilful blindness." So if someone failed to think about the possibility that their statements could promote hatred and a court decides that his or her words or writings did in fact promote hatred, that person faces conviction under s. 319.

Rather than relying on the current defenses (which have been significantly narrowed by judicial interpretation), religious freedom could be better protected by a clear exemption for religious texts and religious instruction. Similar legislation in New South Wales, Australia, includes such an exemption for religious instruction, among other things. The section in the Australian legislation reads "nothing in this section renders unlawful...religious instruction...." This type of provision (as opposed to defenses) makes it clear that religious instruction and sacred texts will not be targeted by this legislation.

**Religious texts are not protected** Under the *Criminal Code*, literature becomes hate propaganda if it is used by someone to promote hatred against a protected group. If texts such as Leviticus 20:13 are used by someone to promote hatred or advocate genocide, will the Bible itself be considered hate literature? How would s. 320, providing for the seizure of offensive material, be applied? Will Bibles and other sacred texts still be distributed and freely available in Canada? Will religious instruction on sexual morality based on sacred texts also be limited?

Svend Robinson, MP has said that the defenses in ss. 318 and 319 are, in his opinion, sufficient to protect sacred texts such as the Bible from being outlawed as hate literature. If sacred texts are not the target of Bill C-250, then it is the responsibility of Parliament to make this clear in the legislation.

**Bill C-250 will put a severe chill on legitimate expression.** It is a very serious matter to face criminal charges or investigation. Proponents of Bill C-250 point out the small number of cases successfully prosecuted under this section of the *Criminal Code* and the requirement that the Attorney General agree before charges are laid. However, many more cases have been investigated under this section than have been carried to trial (including the film *Nelson Mandela* and *The Satanic Verses*). Furthermore, the threat of facing a criminal investigation is in itself a serious deterrent to free speech. It is the responsibility of Parliament to make sure that fundamental Canadian freedoms are not eroded by the potential effects of Bill C-250.

*"Freedom of expression was entrenched in our Constitution...so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is... "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."*

**Irwin Toy v. Quebec**<sup>5</sup>

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<sup>3</sup> (2001), 57 O.R. 333.

<sup>4</sup> *Keegstra*, at 858.

<sup>5</sup> *Irwin Toy v. Quebec* [1989] 1S.C.R. 968