



THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

The Voice of
the Legal Profession

La voix de la
profession juridique

May 13th, 2003

The Honourable Andy Scott, P.C., M.P.
Chair
Justice and Human Rights Committee
House of Commons
Room 622, 180 Wellington Street
Ottawa ON K1A 0A6

Dear Mr. Scott,

Re: Bill C-250, *Criminal Code* amendments (hate propaganda)

We write on behalf of the Canadian Bar Association's National Criminal Justice Section and Sexual Orientation and Gender Identity Conference in regard to private member's Bill C-250, *Criminal Code* amendments (hate propaganda), sponsored by Member of Parliament Svend Robinson. The CBA is a national association representing about 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice, and it is with those objectives in mind that we analyse all legislative proposals.

We appreciate this opportunity to add our views to the Parliamentary Committee's consideration of Bill C-250, and support passage of the Bill.

This position is in keeping with the CBA's support for other measures to recognize and legitimate the right of all people to equal benefit and dignified protection of our laws, regardless of discriminatory considerations. In our view, this amendment is justified. Alongside existing *Criminal Code* sentencing provisions that consider offences motivated by hatred against certain groups as an aggravating factor, the proposed amendment would provide important and complementary components of an effective legislative response to violence based on sexual orientation and to the fomentation of the hatred which breeds that violence.

Bill C-250 would add “sexual orientation” to the characteristics distinguishing those groups enumerated in section 318(4) of the *Criminal Code*, making it a “hate crime” to encourage the hatred of those having a particular sexual orientation.

Identifiable groups are mentioned in the genocide [section 318] and wilful promotion of hatred [section 319] provisions of the *Code*. In section 318(2), genocide is described as the offence of intentionally advocating or promoting the destruction, in whole or in part, of any identifiable group through the killing of members of the group or the deliberate infliction on the group of conditions of life calculated to bring about the group’s physical destruction. Section 319 sets out the offences of public incitement and wilful promotion of hatred against an identifiable group.

Prosecuting hate crimes is a complex task. Charges are generally very difficult to prove, and this would certainly also apply to cases involving hatred on the basis of sexual orientation. There is little case law under either section 319 or 318. Although prosecutions under section 319 are more frequent than those under section 318, and would likely be for hate crimes based on sexual orientation, both still represent a very small number of the prosecutions in this country. While representing challenges for prosecutions, these charges have been made available to protect the groups currently listed. That protection should include groups distinguished by their sexual orientation.

Recent amendments to the sentencing provisions of the *Code* also advance equal treatment and protection on the basis of sexual orientation. Section 718.2(a)(i) makes it an aggravating factor in sentencing if the evidence establishes that the offence was motivated by bias, prejudice or hate based on, among other things, sexual orientation. The section was considered by Judge Stewart of the Provincial Court of British Columbia in *R. v. Miloszewski et al*, [1999] B.C.J. No. 2710 in sentencing five young men for their involvement in the brutal beating death of the elderly caretaker of a local Sikh temple. All five accused were found to have been neo-nazi skinheads at the time of the offence and to have been motivated in their manslaughter by bias, prejudice or hate based on the deceased’s race, national or ethnic origin, colour or religion.

In the decision, Judge Stewart analyses the cases in which “hate” has been considered an aggravating factor in sentencing: see ¶¶135-141. He concludes that section 718.2(1)(a)(i) “is more than simply a reaffirmation of the existing sentencing principles. It is a direction to sentencing judges to give substantial weight to this aggravating factor as the section now reflects the will of Canadians expressed by Parliament.” Even prior to the section’s enactment, sentencing judges viewed racial or other discriminatory motivations as rendering the offences more heinous, and sentences imposed expressed public abhorrence of such conduct. Significantly, the British Columbia Court of Appeal endorsed the comments of Judge Stewart in *R. v. L.E.N. and Synderek*, [2001] B.C.J. No. 2765 (QL) and dismissed the appeals from sentence.

Simply adding “sexual orientation” to section 318(4) will not create immediate additional protection for the gay and lesbian community from despicable acts commonly referred to as “gay bashing.” The real crux of the problem — protection from ignorance, small mindedness, intolerance and bigotry — can only be achieved through education and, of course, the imposition of appropriate sanctions against those who engage in such behaviour. However, Bill C-250 would extend *Criminal Code* protections against hate propaganda to those groups distinguished by their sexual orientation, while section 718.2(1)(a)(i) provides more severe sanctions for other offences motivated by hatred. Together, they would form a comprehensive response to what is unfortunately a widespread social problem.

Thank you for considering the views of the Canadian Bar Association.

A handwritten signature in black ink, appearing to read "Kate Ker". The signature is fluid and cursive, with the first name "Kate" and the last name "Ker" clearly distinguishable.

Kate Ker
Chair
National Criminal Justice Section

A handwritten signature in black ink, appearing to read "Michael Law". The signature is fluid and cursive, with the first name "Michael" and the last name "Law" clearly distinguishable.

Michael Law
Chair
Sexual Orientation and Gender Identity Conference