



May 27, 2022

Via email: lcjc@sen.parl.gc.ca

The Honourable Mobina S.B. Jaffer
Chair, Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, ON K1A 0A6

Dear Senator Jaffer:

Re: Bill C-19, *Budget Implementation Act, 2022, No.1, Part 5, Division 21*

I am writing on behalf of the Canadian Bar Association's Criminal Justice Section (CBA Section) about Bill C-19, *Budget Implementation Act, 2022, No.1* which was introduced on April 28, 2022. Division 21 of Part 5 would amend the *Criminal Code* to create an offence of wilfully promoting antisemitism by condoning, denying or downplaying the Holocaust through statements communicated other than in private conversation.

The CBA is a national association of over 36,000 members, including lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of a balance of Crown and defence counsel from every part of the country.

The CBA generally opposes the use of budget implementation bills to enact or amend substantive legislation not directly related to finance, taxation or spending.¹ We believe *Criminal Code* amendments should be properly vetted by relevant stakeholders, in a forum where they are the main consideration of the proposed legislation.

Incidents of antisemitism are on the rise in Canada and throughout the world. The CBA Section supports initiatives to combat racism, antisemitism and other forms of hatred toward identifiable groups. Holocaust denial is just one example of antisemitism. If the government's objective is to punish acts of antisemitism, this legislation does not achieve that objective. If the objective is a narrow one, to address only Holocaust denial, then the legislation meets its objective. Nonetheless, the CBA Section has the following concerns with Bill C-19.

¹ See CBA Resolution 13-04-M, [Omnibus Bills](#)

Attorney General Gatekeeping

Hate propaganda is covered in sections 318 and 319 of the *Criminal Code*. Section 318 makes the promotion of genocide against an “identifiable group” an indictable offence. The first half of s. 319 forbids the communication of statements that incite “hatred against any identifiable group where such incitement is likely to lead to a breach of the peace,” while the second half outlaws public statements that “willfully (promote) hatred against any identifiable group.”

Division 21 of Part 5 of Bill C-19 amends the *Criminal Code* to create an offence of wilfully promoting antisemitism by condoning, denying or downplaying the Holocaust through statements communicated other than in private conversation. Bill C-19, similarly to section 319, requires the Attorney General’s consent to lay the charge in question. The CBA Section accepts that the consent of the Attorney General is appropriate in this area, but consent or denial of consent must be exercised according to principle. We recommend that either Attorneys General or, in jurisdictions where they exist, Directors of Public Prosecution, fill the current vacuum by adopting criteria for denial of consent, so it cannot be denied arbitrarily without explanation. Approval for alternative measures should be given only if:

1. Identifiable individual victims are consulted and their wishes considered;
2. The offender has no history of related offences or violence;
3. The offender accepts responsibility for the act; and
4. The offence was not of such a serious nature as to threaten the safety of the community.

With no judicial review for the exercise of prosecutorial discretion, the prosecution must undertake governance itself to be guided by principle. The Attorney General’s grant or denial of consent for hate speech crimes should be subject to clear public criteria. Reasons should be given for granting or denying consent, explaining why the criteria were or were not met. A brief statement of reasons should be made publicly available when denying consent and should be drafted ensuring that any privileged material contained in the original assessment of the matter is protected².

Proposed defences

The current proposed offence is modelled on section 319 which criminalizes hate speech against any identifiable group. To ensure compliance with section 2(b) of the *Canadian Charter of Rights and Freedoms*, section 319 allows recourse to four key defences: that the statements made were true; that they were expressed in “good faith” to make a religious argument; that the person making the statement believed “on reasonable grounds” that they were true and served “the public benefit”; or that the statement was made “in good faith” to point out a source of racial or religious tension.

If the goal of the proposed offence in Bill C-19 is to criminalize Holocaust condoning, denying or downplaying (Holocaust denial), it is difficult to envision a context where these defences would apply. If the offence is Holocaust denial, how would the defence of truth practically operate? The offence itself presumes Holocaust denial is false so there is no context in which this defence could operate. Similarly, it would be difficult to envision a situation where someone in good faith could make a religiously based argument that Holocaust denial is justified. Finally, if the purpose is to make Holocaust denial an offence, then allowing an exception under the guise of being in the public interest and benefit, based on a reasonably held belief, would create a situation where any trial could devolve into a forum to air conspiracy theories and other questionable historical studies to support the defence.

² See Legal Remedies for Hate Speech, 2020 CBA submission: [online](#)

If the Bill C-19 amendments are intended to create a stand-alone offence, thought should be given to narrowing the above defences to a single one:

(d) if, in good faith, they intended to point out, for the purpose of removal, matters producing or tending to produce feelings of antisemitism toward Jews.

We hope these observations will be helpful.

Yours truly,

(original letter signed by Julie Terrien for Tony Paisana)

Tony Paisana
Chair, Criminal Justice Section