Submission to:

House of Commons Standing Committee on Justice and Human Rights

In Respect of the Study on Online Hate

Submission from:

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May 9, 2019

The study on which the Committee has embarked is a critical one for Canadians and for Canada. The danger is not that you will give it too much study. The danger is that, given the time left available to this study in this Parliament, you will study or recommend too narrowly. I urge you to "[T]ake responsibility for the face of the world."[i]

Hate and hate speech, and harm from both, are present in many forms in the world, and in our country, and that has been the case for a very long time. They are deeply embedded and feed aspects of our society, culture, economy and politics in ways that equally deeply challenge us to address.

The Parliament of Canada has an uneven record on addressing hate. It should be understood. It should never be repeated.

For example, the opposition to adding the ground of sex, in particular, to the definition of "identifiable groups" in the Criminal Code provisions on hate propaganda came from arguments that hate speech related to the ground of sex was so prevalent it would burden the justice system to address it.

Successive governments and sponsors of private member's bills adding additional grounds opted not to do so because it would detract from the focus on the particular "identifiable group" that was the subject of a bill.

I advocated strongly, and recognise the government of the day, for adding the additional grounds of age, sex and mental or physical disability to s. 318(4) of the Criminal Code. That this was done by Bill C-13 (41/2) relates to a confluence of initiatives (Bill C-304 and Bill C-279 in 41/1, the latter eventually being put into law by Bill C-16 in 42/1) that rendered the exclusions so obvious and inexplicable that they had to be added.

In my time as a Parliamentarian, the dominant question about "online hate" was whether a legislative provision on it was politically acceptable, even if it was within federal power and otherwise constitutional. The constitutionality of Section 13 of the Canadian Human Rights Act was never in doubt. It was deleted by Parliament when Bill C-304 received Royal Assent on June 26, 2013 because it was deemed by the majority in both chambers to be politically unacceptable.

I believe that any actions by Parliamentarians with respect to hate and hate speech will be intensely political, even the act

of studying them. I also believe that Parliamentarians must exercise particular care when considering matters which touch deeply on the lives of those in "identifiable groups", who continue to be underrepresented in Parliament.

In addition, we cannot allow the invocation of "the marketplace of ideas" to displace addressing the lived experience of Canadians.

As pointed out by Professor Kathleen Mahoney in testimony on Bill C-304, media play a brokerage role in framing the debates on hate, hate speech and harm. Media have an implicit (and sometimes explicit) conflict of interest on what is at the heart of the issues within this study:

> **… what is the right balance that should be achieved as between competing rights? This is all about balance … the media does not get the balance right. Speech is its business; speech is what the media is all about. From a self-interested point of view, they do not want to have any limits on speech … they do not look at Canada in the world in terms of the issue; they give very short shrift to the harms of hate speech … The media makes huge investments in the marketplace of ideas – billions of dollars of investments – so that it gets to control the message … People such as homosexuals or women, especially disadvantaged women – perhaps Aboriginal women, disabled women, women of a different sexual orientation – cannot afford to make those kinds of investments, so they do not get to hold the microphone … they approach this problem of hate speech with a notion of formal equality; in other words, everyone is equal. That is a blind and decontextualized way to look at the world.**[ii]

Even though the pervasiveness and power of online hate is better understood today than five years ago, this Committee will have to face into the same politics in order to move forward. Please be the microphone for <u>all</u> groups that are overrepresented in the harms of hate speech, and underrepresented where the power to ameliorate them resides. As Catharine MacKinnon challenged University of Ottawa law school graduates, "meet the challenge of saying yes" to reality:

> **Paying attention to the unnoticed, asking the unasked question, snapping law and academia out of its trance and taking the risk of applying equality principle to reality has brought me here. Sexual harassment was just life. Rape**

> **is inevitable, especially in genocide and war as well as everyday life. Pornography is culture and prostitution is a cultural universal. These are problems that power does not want seen as problems, far less solved. So we are told, with hypnotic regularity, that they are insoluble.[iii]**

I urge the Committee to pursue an inclusive process that does not repeat the same old debate. I urge the Committee to privilege Canada's constitutional equality and human rights principles in its information-gathering, analyses and recommendations, as opposed to privileging the historical roots of power in our society.

I recommend that:

1. **<u>The Committee focus on online harm, which includes but is not limited to online hate.</u>**

Critically, this broadens the focus – and hence the public policy responses – from cause to effect, from a frame in which freedom of expression is the starting point (modified by equality to the extent necessary) to one where human rights are the starting point (modified by freedom of expression to the extent necessary).

This shifts power from the voices of hate and harm – who are imposing costs - to those silenced by hate and harm – who are absorbing the costs. It recognizes the exponential effect of hate and harm for individuals, groups, communities and societies.

When the effects of hate are better understood, the solutions can be better crafted. See, for instance, what the Supreme Court of Canada said in R. *v.* Butler, a case relating to the obscenity provisions of the Criminal Code:

> **Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance.[iv]**

A focus on harm means that the Committee must look at the full nature and scope of online harm. The data on police-reported hate crime produced by Statistics Canada are an important

indicator of the nature and extent of hate crime in Canada and are no doubt of deep concern and interest to the Committee. The data, however, has limitations, particularly in understanding online hate/online harm, as it is not clear how much of that activity is reported to police or, if it is, is judged to be motivated by hate (for example, as the Committee recently heard in its study of Bill C-78 amending the Divorce Act, gendered cyberbullying is becoming more common in domestic violence cases but it is not clear whether violence in a domestic context would be classified as incident motivated by hate.) It is not clear how the data captures intersectionality, and the grouping of "other motivation" is concerning. The offline and online worlds are different. We need to understand the facts of both.

Professor Mahoney pointed out in 2013 that the context in which hate and harm are considered alters the result of the inquiry. She illustrated the progression in the law, from Keegstra and Taylor, to Whatcott – noting that the context compelled "more protections for those targeted by hate speech."[v] The facts drive shifts in how we balance competing rights.

The growing international focus on harm is also driven by a very practical reality: addressing what is occurring online cannot be done in a piecemeal or siloed basis or the effort will fail. Internet service providers and proprietary platforms around the world are currently making daily decisions on a range of issues touching about hate and harm. This is private and largely non-transparent regulation. Moving to a more public system of regulation offers opportunities but how we proceed is very important to efficacy.

2. **<u>Parliament ensure that the hate propaganda provisions of the Criminal Code are as strong as possible.</u>**

These provisions are essential as an expression of public values and as one of the tools to tackle extreme hate speech, even if they are narrowly defined. Consideration should be given as to whether the limitations of "communicating statements" "public space," and "other than in private conversation" and "public space" in s. 319 (1) and (2) are too narrow in the contemporary online context. Consideration should be given to whether the defences in s.319(3) are too broad. Consideration should also be given to the value of s. 319(6): the Crown reviews every criminal charge with care against proper criteria in any event. What is the value of requiring the permission of the Attorney

General of a province to proceed with a charge, what practical effect (s) arise from the requirement?

3. **<u>Parliament ensure that the Canadian Human Rights Act provisions on hate and harm are as strong as possible.</u>**

This is essential for the reasons outlined in the written brief to the Committee from the Women's Legal Education and Action Fund (LEAF). As a timing matter, given the challenges inherent in external regulation (including the passage of time) of the online pathways and platforms, the Criminal Code provisions are necessary but not sufficient. Private regulation needs guidance now, and for the foreseeable future, on values, boundaries and standards.

As argued above, this is a matter of political will, not constitutionality. The provinces and territories are able to maintain constitutionally-sound provisions on hate speech. Yet the federal government, with its exclusive jurisdiction over interprovincial and international telecommunications, in a digital-dominant world, has vacated the very space where so much is happening.

4. **<u>Parliament find a way to ensure that Canada find immediate ways to participate in, and contribute to, initiatives on external regulation, with a view to determining the next best steps for Canadians.</u>**

I fully support both the overall analysis in the LEAF brief to the Committee, and in its comments on external regulation.

I wish the Committee well in its work and I look forward to the Committee's Report.

[i] Timothy Snyder, *On Tyranny: Twenty Lessons from the Twentieth Century*, #4 (Tim Duggan Books, 2017)
[ii] Kathleen E. Mahoney (Professor, Faculty of Law, University of Calgary), Canada, Parliament, *Proceedings of the Standing Senate Committee on Human Rights*, 41/1, Issue No. 29 (June 26, 2013), p. 29:64
[iii] https://www.uottawa.ca/president/bio/mackinnon-catharine-0
[iv] [1992] 1 SCR 452, at p. 485, per Sopinka, J.

[v] Mahoney, ibid, p. 29:65