
# Tackling Hate, Protecting Dissent: Independent Jewish Voices Submission on the Federal Online Hate Initiative

***Introduction***

Independent Jewish Voices Canada (IJV) has been asked, along with several other organizations and individuals, to comment on the federal government's initiative on online hate.

We speak as Jewish proponents of protection against antisemitic and other types of hate expressions.

We also speak as victims of verbal and physical attacks and threats by other Jews and non-Jews who claim we are not the proper kind of Jews, that we are "self-hating" because of our critical opinions on policies and actions of the State of Israel. That accusation is, in itself, antisemitism. Therefore, we want to ensure that any interpretation of hate expression in the *Canadian Human Rights Act* (CHRA) does not curtail our freedom and that of others to speak on these important *political* issues.

In summary:

- IJV represents a significant and growing opinion within the Canadian Jewish community
- We agree with reinstating the former Section 13 of the Canadian Human Rights Act, with special attention to online hate
- We oppose categorically the so-called International Holocaust Remembrance Alliance Working Definition of Antisemitism (IHRA-WDA) and oppose inclusion of that definition in any human rights legislation or interpretation
- The current provisions in the Canadian Criminal Code relating to hate expression are, on their own, not sufficient to combat online hate
- The powers of a renewed Section 13 must be strong enough to remove online platforms dedicated to hate expression
- The Canadian Human Rights Commission should track incidents of hate expression, but it must do so systematically and independently of civil society groups

***IJV and the Canadian Jewish community***

IJV reflects a sizable and significant group within the Canadian Jewish community whose opinions are based on support for human rights and international law.

A 2018 EKOS poll of Canadian Jews co-sponsored by IJV indicates that:

- Over a third of Canadian Jews have a negative opinion of the Israeli government (only 50% have a positive opinion)

- Over half agree that criticism of Israeli government policy is like criticism of any other government and is not necessarily antisemitic
- Half agree that accusations of antisemitism are often used to silence legitimate criticism of Israeli government policies

These views  are associated not with the institutional Jewish organizations in Canada, but with IJV and give some idea of the breadth and depth to which they are shared within the Jewish community.

Even polls commissioned by the institutional Jewish community disclose that members of IJV would fit well within Canadian Jewish communal characteristics as reported in the 2019 Environics Institute poll of Canadian Jews

- Jewish identity is very important to IJV members. Indeed it is one of our main raisons d'être.
- We care deeply about Israel and what goes on there; many of us have visited Israel, some many times; some of us have relatives in Israel; some of us maintain Israeli citizenship; some of us have served in the Israeli military
- We too have experienced antisemitism
- We run the same gamut in piety from observant Jewish religious practice to secularism as is current in the Jewish population as a whole

So we are unequivocally an integral part of the Canadian Jewish collectivity. While the Canadian Jewish community tends to be somewhat more traditional and conservative than its US counterpart, it is no different than its US cousins in these matters.

In light of Israel's current policies directed toward Palestinians in Occupied Palestinian Territory, as well as the Trump-Netanyahu agenda, the American Jewish community is experiencing deep rifts in its commitment to Israeli policy. A recent report by the conservative Jerusalem Center for Public Affairs concludes, among other things, that:

> "Pro-Israel" liberal Jewish-Americans feel at least some sympathy for Palestinians, with overall mild-to-moderate levels of sympathy. What can be considered a distinct but possibly significant minority (which may be up to 25%) appears to hold beliefs that are intensely critical of Israel and Zionism itself, including attitudes that Zionism may be a colonial and/or racist, apartheid movement as practiced in Israel today."

***Antisemitism and the International Holocaust Remembrance Alliance Working Definition of Antisemitism (IHRA-WDA)***

Part of IJV's mission is to combat antisemitism because we know that antisemitism is heinous and must be taken seriously. We have published on the topic and for some time we have been offering both in-person and online workshops on antisemitism.

We note with deep concern that several institutional Jewish organizations have rallied behind a single, very flawed campaign, backing the so-called IHRA-WDA.

IJV resolutely opposes the IHRA-WDA and resists its inclusion in any human rights legislation or interpretation. IJV has an extensively researched campaign against the IHRA-WDA, including a 3 ½ minute video.

There are several things wrong, and indeed dangerous, about the IHRA-WDA:

- The general statement in the IHRA-WDA is vague and confusing, adds no substance to the understanding of genuine antisemitism and thereby commits a dangerous injustice to the necessary fight against antisemitism
- The devil is in the details and in the case of the IHRA-WDA, the devil is in the eleven examples meant to be read and adopted with the vague, unsubstantive general definition. Seven examples specifically include criticism of the State of Israel. At its worst, the purpose of the IHRA-WDA is to shut down expression criticizing Israeli treatment of Palestinians. Civil society groups, including several Israeli groups, have long identified Israeli government actions and policies targeting Palestinians as illegal, violent and discriminatory.
- IJV believes that antisemitism is malice towards Jews *as Jews* and that criticism of the State of Israel, its policies and practices, including criticism of Zionism, is legitimate speech. IJV strongly condemns the intentional conflation of reasonable and proportional political speech with antisemitism, as is done in the IHRA-WDA. The State of Israel is a political entity like any other state. Its policies, actions and history can be judged and criticized, even harshly. Such criticism is not, by itself, antisemitic.
- The IHRA-WDA implicitly treats antisemitism as exceptional and sets it apart from other forms of racism and bigotry, like anti-Black racism and Islamophobia. IJV objects to this attempt to exceptionalize antisemitism through the IHRA-WDA. IJV suggests antisemitism is closely related to, and often driven by, similar motivations and forces as other forms of racism and bigotry. IJV strongly believes all forms of racism and bigotry must be treated similarly and is committed to working in solidarity with targeted groups. Privileging the efforts to combat discrimination against one group only risks further marginalizing the other targeted groups and undermines solidarity and cooperation among groups fighting common enemies. Fighting and educating against antisemitism must therefore be part of a larger struggle against all group hatred and discrimination.

Criticism of the policies and practices of Israel and Zionism itself, even rigorous or foundational criticism, are political positions and are NOT and should never be included in the prohibited grounds under any Human Rights legislation. Political beliefs must not be given the same level of protection as personal characteristics, such as, but not limited to, ancestry, disabilities, sexual orientation, gender identity, race or skin colour.

The question as to whether or not 'political opinion' is to be read into the prohibited ground of creed was comprehensively considered in 1995, 1997 and 1999 by the Ontario Human Rights Commission and various levels of courts in the case of Nuri Jazairi vs Ontario Human Rights Commission, York University, et al. The complainant in this case asserted that he was denied promotion at York University on the basis of his political opinions of the Israeli-Palestinian conflict. The Human Rights Commission's (Commission) original decision to dismiss Mr. Jazairi's complaint was later upheld by the Ontario Supreme Court and the Court of Appeal for Ontario. The Commission found that his application for promotion was differentially treated but there was no evidence that his differential treatment was based on Mr. Jazairi's creed. Further, it was held that the ground of creed was not contemplated to extend to, or be inclusive of, political opinion. The Court of Appeal held that individuals who possess or express a political opinion are [not] a discrete and insular minority" or a "historically disadvantaged group in need of protection." Thus, one's political views on the issue of Israel and Palestine is not the proper subject for a human rights complaint. Significantly, subsequent to the Jazairi decision, Ontario amended its *Human Rights Code* by adding new grounds, but continued to intentionally omit political opinion.

IJV has developed its own definition of antisemitism, which includes in part:

> Antisemitism is racism, hostility, prejudice, vilification, discrimination or violence, including hate crimes, directed against Jews, as individuals, groups or as a collective – because they are Jews.

We also point out that, while each form of racism and bigotry has its own characteristics,

> It is essential to recognize that antisemitism is not an exceptional form of racism and bigotry. People who hate, discriminate and/or attack Jews, will also hate, discriminate and/or attack other protected groups – including, but not limited to, racialized people, Muslims, LGBTQ2+, women, Indigenous peoples.

Notably and relevant to this discussion is the fact that some strong proponents of Israel are also clearly antisemitic, e.g., some American Evangelical Christian fundamentalists and the regime of Hungarian Prime Minister Viktor Orban. Indeed, the American Richard Spencer, a well-known white supremacist and antisemite who lauded US President Trump's omission of Jews and antisemitism from a speech on Holocaust Remembrance Day 2017, has praised Israel and called himself a "white Zionist." Yet Spencer might not necessarily be considered an antisemite according to the IHRA definition and its examples.

Some supporters of the IHRA-WDA downplay their calls for approval of the definition as merely aspirational, benign and not intended to shut down critics of Israel and point to one of the examples of the IHRA-WDA which they claim reinforces this position  However, the facts have repeatedly disproven this misleading assertion. A recent article in Canadian Dimension presents over thirty Canadian cases in the past decade where Israel lobby organizations, singly or in collaboration, attempted or succeeded in shutting down events and speakers critical of Israel. Just recently we have heard of the decision by the University of Toronto Law School to rescind the hiring of a distinguished academic allegedly because David E. Spiro,  a sitting Tax Court judge, and donor to the law school, objected to the new hire's criticism of Israel. IJV is also maintaining a running list of incidents in which  the IHRA-WDA is being used internationally as a cudgel against opponents. The mounting evidence of this fanatical "cancel culture" gives the lie to the claim of the IHRA proponents of the benignity of the definition and of its intended use.

While, in general, IJV strongly supports bringing hate expression back within the ambit of the *CHRA*, we strongly warn against using this as an opportunity to bring the IHRA-WDA in through the back door. This we will oppose absolutely.

In what follows, we provide specific responses to several questions asked in the roundtable on online hate conducted under the auspices of the Federal Department of Justice. Our grave concerns about the misleading intentions of those supporting the IHRA-WDA informs our entire approach.

***Should online hate be included in the Human Rights Act?***

An article in the September/October 2020 edition of *Walrus* is particularly instructive. "The Making of an Incel: How misogyny in online forums turns into real-life violence" illustrates how serious these online forums can be in fuelling aggression against vulnerable groups, in this case women.

> "…when someone has all three [foundational components]—a desire for personal significance, a narrative that guides them in that quest for renown, and a network that offers veneration to the members who validate and implement the collective narrative—they're much more likely to

progress into violent extremism. And research is proving that these online communities act as pressure cookers, speeding up the radicalization process."

We also note the recent hate-motivated slaying of the caretaker of a Toronto mosque by a man who followed hate groups online, including one group described as a "a satanic neo-Nazi death cult."

Alarmingly, according to the report *An Online Environmental Scan of Right-wing Extremism in Canada*, by Institute for Strategic Dialogue, far-right hate groups have proportionally more online participation from Canada than from almost anywhere else in the English-speaking countries. The report found that haters gather online, recruit, encourage, and promote acts of violence against women, religious and ethnic groups, and other groups needing protection.

Section 13 of the *CHRA*, which prohibited hate messages "likely to expose a person or persons to hatred or contempt" was repealed by parliamentary vote in 2013.

We support amending the *CHRA* by reinstating Section 13 or something similar and by expanding the section to include online expressions of hate. However, this is with the strong caveat previously expressed regarding inserting, whether directly or indirectly, the inappropriate and misleading IHRA-WDA.

There are Equity-Seeking Groups (ESGs) who desperately need protection and the *Criminal Code* remedy, as the sole method of addressing the dissemination of hate expression, is limiting.

***Limitations of the Criminal Code in Dealing with Hate Expression***

There are two ways in which Canada's *Criminal Code* can be used in cases of hate expression. First, Sections 318 and 319 make it an offence to publicly advocate genocide and incite or promote hatred. Second, Section 718.2 allows a court, in sentencing, to take into consideration as an "aggravating circumstance" evidence that the offence was motivated by bias, prejudice or hate based on several grounds.

While the criminal charges are applicable to some incidences, the following are some problems with relying on sections 318 and 319 as the sole deterrence/sanctions for hate expression:

- Criminal cases require a more prohibitive standard of proof (i.e. beyond a reasonable doubt) than civil cases (balance of probabilities.)
- The Attorney General's consent is required to initiate a prosecution for the *Criminal Code*'s Hate Propaganda offences. This has led to too few charges actually being laid despite the significant public interest in doing so. While the involvement of the Attorney-General may be useful in avoiding frivolous charges, laying hate charges has become a primarily political decision
- Attorneys-General, offices of public prosecution, crown attorneys and the police are remarkably ill-informed and ill-prepared to prosecute those responsible for the hate propaganda offences targeting identifiable groups under the *Criminal Code*

These concerns are evinced by the very few cases in Canadian legal history where the *Criminal Code* provisions have been used and fewer where they have been used successfully.

In the famed Keegstra case the Supreme Court of Canada determined the reasonable and justifiable limitation on freedom of expression and upheld Canadian legislation under which the teacher was charged finding that the legislation ought to eliminate racism and hatred, and in this case, specifically antisemitism.

Another, lesser-known case, was an incident near Windsor, Nova Scotia in 2010, where two youths burnt a cross on the lawn of a mixed-race couple. A young man was charged under the hate provisions of the *Criminal Code*, convicted, and sentenced to jail. The crown attorney in the case claims it was the first time a cross-burning has been recognized as a hate crime in Canada.

We posit that a major reason both of the above cases went forward and were successfully prosecuted was because of their profound reputational damage to the provinces involved. The Keegstra case brought Alberta into disrepute and the cross-burning made Nova Scotia look like it was living up to the reputation of "Mississippi North."

We argue that in other, less notorious, but still egregious cases of bigotry and racism, the powers-that-be are much less prepared and much less willing to apply the *Criminal Code* provisions. That leaves many grievous cases of bigotry and racism outside the bounds of legal sanction.

For these reasons, we advocate for the reinstatement of S. 13 of the *CHRA* but caution that it must be informed by Charter protections and court decisions on freedom of expression and political opinion . The intentionally misleading IHRA-WDA should not inform the reinstated S. 13.

***Civil remedies***

We recommend remedies similar to those that Human Rights tribunals have now. Damages and public interest remedies are critical. That said, unlike previous remedies which went after individuals, judgments in online hate complaints should also target the online platforms themselves. Human rights tribunals have traditionally awarded low damages in the belief that the purpose of the process is educative rather than punitive. However, many operators of hate platforms and those who use them are hardly educable.

***Should the process be solely complaints-driven? Should the Commission have the power to initiate complaints and investigations? Should there be a screening mechanism?***

The process should not be solely complaints-driven. Even if there may be individual complainants for some instances of online hate expression, complainants may be missing for others. Thus, the Commission ends up playing "whack-a-mole" against a serious societal problem that requires more comprehensive solutions. The Commission should therefore have the power to do its own research and initiate complaints and investigations.

We agree with a screening mechanism such as that employed right now by the Commission. There can be genuinely frivolous and vexatious claims. The Commission needs to be very careful that it does not use new powers to limit legitimate freedom of expression. A good examplestressed earlier is criticism, even harsh criticism, of the policies and practices of the State of Israel, which the IHRA-WDA claims is antisemitic. As mentioned earlier, we strongly oppose the IHRA-WDA and especially its inclusion of criticism of Israel.

***Should complainants be able to remain anonymous?***

We understand anonymity and publication bans to be very distinct features available to protect the identity of a complainant. Anonymity should not be allowed automatically. Human rights boards of inquiry have the power to make identity publication bans for compelling reasons upon special pleading as in the recent YZ v Halifax Regional Municipality case.

***Should a tribunal have power to award costs where a party has abused the process?***

We suggest that to keep tribunals accessible and to be seen to be so, costs should not be awarded. To do so may have a chilling effect.

***Tracking incidents and collecting data***

Incident-tracking is imperative but the Commission must be exceedingly careful if relying on civil society organizations.

Tracking and collection must be done by a government agency, using reliable and professional techniques that are comparable across the board.

Recommendation 4 of the 2019 Report of the Standing Committee on Justice and Human Rights suggests the establishment of "uniform pan-Canadian guidelines and standards for the collection and handling of hate crime data and hate incident data; this would include efforts to standardize the definition and the interpretation, by law enforcement, of hate crimes"

The data collected must compare apples with apples, otherwise it is likely to misconstrue the frequency of incidences. Well established, confident and assertive equity-seeking groups, with strong organizations devoted to combating hate and bigotry can be expected to report more. Newer, less established and less-confident ESGs can be expected to report less.

Some civil society organizations may under-report; some may over-report. For example, B'nai Brith Canada's (BBC) so-called "audit of antisemitic incidents" raises serious problems, including:

- The incidents are non-transparent; very little information is provided on individual incidents (as compared with a similar audit by the Anti Defamation League in the US, whose audit is in itself questionable.) If we are to believe the Canadian organization's audit, antisemitic incidents in Canada are MORE numerous than in the entire United States. For example, BBC reported 2,207 antisemitic incidents in Canada in 2019. Compare this to the US Anti-Defamation League (ADL), an analogous organization in that country, which reported 2,100 incidents in the US in the same year. If one accepts both ADL's and BBC's figures, then one would have to believe that antisemitism in Canada is more than 18 times more prevalent proportionally than it is in the US. That beggars the imagination.
- BBC relies on the discredited IHRA-WDA when determining if an incident is antisemitic This means that their numbers of incidents include political criticism of the State of Israel's policies and actions. To illustrate how powerfully the inclusion of Israel-critical incidents skew the data, take the following two observations:
    - The 2018 Global Anti-Semitism Report published by Israel's Ministry of Diaspora Affairs noted that 70% of anti-Semitic incidents in 2018 were tied to anti-Israel sentiment

- The US Amcha Initiative report on campus anti-Semitism found that "classical antisemitic incidents have decreased by 42%, but Israel-related incidents significantly increased by 70% in both number and intensity."

***Conclusion***

Independent Jewish Voices Canada is appalled by the great harm done and that continues to be done by online hate expression. At the same time, we are deeply concerned that defenders of Israeli illegal, violent and discriminatory policies and actions are using the real danger of online hate expression to press their own muzzling, chilling, and misleading agenda. Two stories illustrate these points.

An October 12, 2020 *The New Yorker* magazine ran an investigative article entitled "Why Facebook Can't Fix Itself" subtitled "The platform is overrun with hate speech and disinformation. Does it actually want to solve the problem?" The article concludes that self-regulation, even by a self-proclaimed politically-neutral site like Facebook, is simply not working.

One tragic example of Facebook's wilful failure to eradicate the misuse of its platform by white supremacist groups occurred in August 2020. Protests erupted in response to a Kenosha, Wisconsin police officer's shooting of a Black man,Jacob Blake, seven times in front of his children. That's when a white supremacist group, the Kenosha Guard, posted a "call to arms" on its Facebook page. A follower of the site wrote, "I fully plan to kill looters and rioters tonight." Despite more than 400 people reporting this to Facebook, the platform's content moderators decided it did not violate any of Facebook's standards. Two days later, a 17-year-old came to Kenosha with a semi-automatic rifle and shot three protesters, killing two.

Consider how much more perilous and how much more in need of strong oversight are platforms wholly dedicated to spewing bigoted venom.

Greater enforcement of Canada's effective *Criminal Code* Hate Propaganda provisions is essential to protecting identified groups, as is the reinstatement of the online hate section in the *CHRA* coupled with the commitment to enforce the section. .

We understand and strongly support the Justice Minister's current decision to explore ways to inform the development of legal remedies for victims of online hate.

But another story illustrates the other side of the coin. The US State Department is reported to be ready to declare Amnesty International, Oxfam and Human Rights Watch as "antisemitic" organizations because those NGOs, in the words of Elan Carr, special envoy to monitor and combat anti-Semitism, "promote the Global BDS Campaign or engage in other activities that meet the International Holocaust Remembrance Alliance (IHRA) Working Definition of anti-Semitism." The irony is stupefying: three highly respected international human rights organizations scooped up in a bogus drag-net, their good names hauled in the mire, precisely for taking a stand on human rights. A recent Toronto Star article gives several Canadian examples of the same syndrome.

Thus we must repeat our caveat: Do not let this important initiative afford an opportunity to come up with one party's definition of antisemitism (IHRA-WDA), a definition which would close down political debate and do very little to identify and address genuine antisemitism and very real racism.

***Authors***

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