CHRISTIAN LEGAL FELLOWSHIP
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SUBMISSION OF CHRISTIAN LEGAL FELLOWSHIP ("CLF")

TO THE

STANDING COMMITTEE ON HEALTH

RE:

Public Health Effects of Online Violent and Degrading Sexually Explicit Material on Children, Women and Men (M-47)

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Introduction

Christian Legal Fellowship ("CLF") is grateful for the opportunity to provide this written brief outlining some of the legal issues that the Standing Committee on Health may encounter as it studies the public health effects of online violent and degrading sexually explicit material as per Motion M-47 (the "Motion").

CLF supports the Motion and agrees there is a need to better understand and respond to sexualized violence in a digital age. Government efforts to understand the harmful impact of material depicting sexual violence against women, girls, and children - with a view to eliminating those harms - are laudable. CLF encourages this Committee in this endeavour and seeks to assist it, and Parliament, in developing an appropriate and meaningful response.

In this brief, CLF will address the following:

- Freedom of expression is a broadly defined *Charter* right but limitations on expression can be justified where there is evidence of harm, defined as conduct incompatible with societal functioning
- Federal lawmakers can legislate in the sphere of health care on a number of grounds, including where the intent is to address a public health evil
- Lawmakers can also legislate on the basis of morality when it is grounded in core social values

1. Expression is a broadly defined fundamental freedom yet limitations can be justified

Government authority must always be exercised in a way that respects fundamental rights and freedoms. How does that obligation fit within the context of this study and the right to expression? We provide a brief answer to that question by examining the nature of the freedom, the importance of a principled framework, and scenarios in which limitations are justified.

In summary, although "violent and degrading sexually explicit material" may engage freedom of thought and expression, restrictions on its use are justifiable and constitutional, particularly to the extent that such materials can be linked to harm.

Nature of Freedom of Expression

Expression has been described as "among the most fundamental rights possessed by Canadians", making possible liberty, creativity, and democracy.[1] It protects both "'good' and popular expression" and "unpopular or even offensive expression" because such broad protection facilitates the "best route to truth, individual flourishing and peaceful coexistence."[2] Thus, our courts have held, "absent some constitutionally adequate justification, we cannot forbid a person from expressing [an idea or an image]".[3]

Free expression ensures that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream" and is essential "in a free, pluralistic and democratic society" that prizes "a diversity of ideas and opinions for their inherent value, both to the community and to the individual".[4]

Free expression underpins vigorous debate on policies and values; without free expression "rights may be trammelled with no recourse in the court of public opinion."[5] In sum, it is a foundational right that provides a vehicle for the exercise of many other rights, and is one that must not be trivialized or unnecessarily restricted.

Applying a Principled Framework

How can legislators pass a law that might engage a freedom so fundamental as that of expression? The simple answer involves using a principled framework, informed by *Charter* rights jurisprudence, and an awareness of the need to protect to the fullest extent possible *Charter* rights and freedoms, even while contemplating legislative measures that would limit their scope.

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[1] *R v Sharpe*, 2001 SCC 2 at para 21 ["*Sharpe*"]
[2] *Ibid*
[3] *Ibid*
[4] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at p 968
[5] *R v Keegstra*, [1990] 3 SCR 697 at 849 ["*Keegstra*"]

In coming to any conclusions about the standards to be legislated and enforced by the state, such a principled framework must be applied to ensure protection of fundamental rights and freedoms, and bring consistency to legislation with a 'moral' component.

In the past, criminal (and other) prohibitions on indecent and/or obscene conduct and material were largely grounded in the moral views of the community. A prohibition was justified where the exploitation of sex was a dominant characteristic of the conduct or material and that exploitation was "undue", where "undue" was defined by community standards; that is, what the community would not tolerate other Canadians being exposed to.[6]

Over time, this came to be seen as unworkable: "…courts came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function with only a generous measure of tolerance for minority mores and practices. This led to a legal norm of objectively ascertainable harm instead of subjective disapproval."[7]

Criminal indecency is now defined using an objective, harm-based approach. Harm is defined as "conduct which society formally recognizes as incompatible with its proper functioning"[8] and which undermines, or threatens to undermine, a value reflected in the Constitution or similar fundamental law.[9] Examples of the latter include:

1. confronting members of the public with conduct that significantly interferes with their autonomy and liberty;
2. predisposing others to anti-social behaviour; or,
3. physically or psychologically harming persons involved in the conduct.[10]

As explained by the Supreme Court, this is "…not to say that social values no longer have a role to play," but unlike the community standards test, a requirement of "formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society."[11]

Yet, even an "objective" understanding of harm, as it is intended to reflect "core social values", is not immune to change and shift over time. The Court's caution about minority views and diversity, as it applies to community standards, applies equally to the concept of "core social values."

"Core social values" is a standard that must not be simply equated with majoritarian views to ensure the definition maintains strong protection for fundamental rights and freedoms. Harm must be defined as more than merely objectionable or offensive words, conduct, or material.

Justifying limitations: Harm, protecting the vulnerable

To the extent that "violent and degrading sexually explicit material" can be linked to harm, restrictions are justifiable. What type of harm(s) might be engaged here? Some guidance can be drawn from the Supreme Court of Canada's decision in *R v Sharpe*, which considered criminal prohibitions on child pornography. The court affirmed that all but two prohibitions were justified and constitutional. In the course of its analysis, the majority made a number of findings that are relevant to this study. One such finding was that where there is evidence of harm, particularly harm that threatens vulnerable members of our society, prohibitions on certain types of expression can be justified.[12] The majority of the Supreme Court found that although the private nature of pornography (child, in

[6] *R v Butler*, [1992] 1 SCR 452 at pg 478 ["*Butler*"]
[7] *R v Labaye*, 2005 SCC 80 at para 14 ["*Labaye*"]
[8] *Butler* at pg 485
[9] *Labaye* at para 29
[10] *Labaye,* at paras 57-59
[11] *Labaye,* at para 33
[12] *Sharpe* at para 22

that case) engaged freedom of thought and expression, evidence raised a reasonable apprehension that such materials aggravated the potential harm to children through incitement, attitudinal change, grooming, and seduction.[13]

Evidence specifically demonstrated that "exposure to [child] pornography may reduce [paedophiles'] defences and inhibitions against sexual abuse [of children]. Banalizing the awful and numbing the conscience, exposure to [child] pornography may make the abnormal seem normal and the immoral seem acceptable."[14] The *Criminal Code*'s prohibitions were designed to prevent attitudinal changes that would erode societal attitudes toward children, instead seeking to assert their fundamental worth and value.[15] The majority went on to say:

> Children are used and abused in the making of much of the child pornography caught by the law. Production of child pornography is fueled by the market for it, and the market in turn is fueled by those who seek to possess it. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves. The link between the production of child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact […] the child must live in the years that follow with the knowledge that the degrading photo or film may still exist and may at any moment be being watched and enjoyed by someone.[16]

Assuming social science evidence to the same effect will be gathered[17], the same principles would apply to the "violent and degrading, sexually explicit material" that is the subject of this Parliamentary study.

Furthermore, although freedom of expression is broadly defined and includes all manner of offensive expression, it is easier to justify infringements of expression that lie at the "periphery" rather than the "core" of expression.[18] In terms of obscene material, its value as expression has been described as engaging "mainly the justification of self-fulfillment".[19] Furthermore, "[Child] pornography does not generally contribute to the search for truth or to Canadian social and political discourse. Some question whether it engages even the value of self-fulfillment, beyond the base aspect of sexual exploitation."[20]

In the United States, obscene speech is not protected by the First Amendment; however, sexually graphic but non-obscene material is not necessarily excluded from protection.[21] American courts apply an approach similar to that of Canadian courts in determining whether material crosses the line between sexually graphic and obscene.[22] The United States Supreme Court, which has held that "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"[23] nonetheless permits a content-based restriction for obscenity,[24] including legislation aimed at curbing harm against children as a result of the proliferation of online pornography.[25] Canada is not alone in its efforts to curb the harmful effects of degrading and violent sexual materials; efforts in other jurisdictions, such as the United States, demonstrate that limitations on this type of expression can be justified while maintaining respect and robust protection for fundamental freedoms.

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[13] *Sharpe* at para 27, 87-89
[14] *Sharpe* at para 88
[15] *Sharpe* at para 82
[16] *Sharpe* at para 92
[17] In addition to the evidence to be gathered within the current Parliamentary study, a number of studies have already examined the links between violent/sexually degrading explicit material and acts of violence, for example. See A. Bridges, et al., "Aggression and Sexual Behavior in Best Selling Pornography Videos: A Content Analysis Update." *Violence Against Women* 16, 10 (October 2010): 1065–1085. See also M. Allen, et al.,, "Exposure To Pornography And Acceptance Of The Rape Myth". *Journal Of Communication* 45, 1 (1995): 5–26. See also G.M. , N.M. Malamuth, and C. Yuen, "Pornography And Attitudes Supporting Violence Against Women: Revisiting The Relationship In Nonexperimental Studies." *Aggression And Behavior* 36, 1 (2010): 14–20.
[18] *Keegstra* at 762
[19] *Sharpe* at para 24
[20] *Ibid*
[21] *United States v Williams*, 533 US 285 (2008) ["*US v Williams*]
[22] Three factors are applied: (1) whether the average person applying contemporary community standards would find the work appeals to the prurient interest; (2) whether the work depicts in a patently offensive way, sexual conduct; (3) whether the work lack serious literary, artistic, political or scientific value. See *Miller v California*, 413 US 15 (1973) ["*Miller*"]
[23] *Ashcroft v American Civil Liberties Union*, 535 US 562, 573 (2002)
[24] *Miller*
[25] *US v Williams*, *supra* note 20

2. Addressing "public health evils"

Restrictions placed on the use of and access to "violent and degrading sexually explicit material" for the purpose of reducing and eliminating harm are within Parliament's constitutional purview- not only per the *Charter*, but also under the *Constitution Act*'s division of powers between Federal Parliament and provincial legislatures.

The *Constitution Act* grants provincial legislatures power over the establishment, maintenance, and management of hospitals,[26] but "health" is not a matter that has been exclusively assigned to one level of government.[27] Rather, it is an "amorphous topic" that can be dealt with by either the federal or provincial government depending on the "nature or scope of the health problem in question."[28]

Generally, the federal government derives authority over health care from one of three spheres: its criminal law power, spending power, and legislating for the peace, order, and good government of Canada. Given that the matter of "violent and degrading, sexually explicit material" is most akin to obscene or indecent material, this brief only discusses the use of criminal law power as a source of authority to legislate on health.

Use of the federal criminal law power is a legitimate means to protect health when it addresses a "legitimate public health evil".[29] The Supreme Court has identified three consistent features where criminal laws have been upheld on the basis of public health evils, namely where there is (1) human conduct (2) that has an injurious or undesirable effect (3) on the health of members of the public.[30]

For example, prohibitions aimed at curbing tobacco consumption, prohibitions to protect the public from environmental hazards, and prohibitions to protect the public from dangerous food and drugs, illicit drugs, and firearms have all been found to be legitimate uses of the criminal law power to combat public health evils.[31]

In each of these examples, a reasonable apprehension of harm was established. This means that the conduct or matter at issue presented more than "little or no threat of harm".[32] If the matter at issue presents only "little" or "no threat" of harm, it is unlikely to qualify as a public health evil.

Without pre-empting any findings this Committee may make, but understanding the content of briefs already filed with the Committee and the very nature of the material being studied ("violent and degrading, sexually explicit material"), we suggest that such material would fall within the category of "public health evils" justifying Parliamentary response pursuant to its criminal law power.

3. Morality is a legitimate legislative objective

Lawmakers also have authority to legislate on the basis of morality and safeguarding moral commitments that are integral to a free and democratic society.[33] Morality has long been recognized as a proper basis for the exercise of the criminal law power.[34] The mere fact that a law is grounded in morality does not automatically render it illegitimate.[35] Although Parliament is limited in that it cannot impose a "standard of public and sexual morality" merely to reflect certain social conventions,[36] if the legislation is grounded in core social values, morality is a legitimate legislative purpose. As the Supreme Court of Canada recently explained:

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[26] Section 92(7)
[27] *Schneider v The Queen*, [1982] 2 SCR 112
[28] *Ibid* at 142
[29] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 52 ["*Assisted Reproduction*"]
[30] *Ibid* at para 54
[31] *Ibid* at paras 41, 53
[32] *R v Malmo-Levine*, 2003 SCC 74, at para 212 *per* Arbour J., dissenting but not on this point
[33] *Butler* at para 80
[34] *Assisted Reproduction* at para 49
[35] *Butler* at para 81
[36] *Butler* at pg 492

> Moral disapprobation is itself sufficient to ground criminal law when it addresses issues that are integral to society … under [a] federalism analysis, the focus is on the importance of the moral issue, not whether there is societal consensus on how it should be resolved … Parliament need only have a reasonable basis to expect that its legislation will address a moral concern of fundamental importance.[37]

Matters relating to sexuality, sexual material, and legislation governing any aspect of sexuality necessarily engage moral considerations. For example, in a Supreme Court case that raised the issue of criminal indecency, the dissenting decision held that commercial exploitation of sexual activities is "contrary to a number of values of the Canadian community." The decision specifically highlighted the values of equality, liberty and human dignity.[38] In a companion case, the same Supreme Court judges noted, "it is well established that the association of sexual acts with a commercial transaction has a negative impact on Canadians' tolerance, because the persons involved in this type of transaction are generally exploited and experience a loss of dignity or autonomy."[39]

SUMMARY

Although "violent and degrading sexually explicit material" may engage freedom of thought and expression, restrictions on its use, ease of access, possession, production, and distribution are justifiable and constitutional, both under the *Charter* and a Federalism analysis, to the extent that such materials can be objectively linked to a reasonable apprehension of harm.

That harm can be demonstrated, for example, by evidence that those who view, or are involved in, the production of "violent and degrading sexually explicit material" are predisposed to anti-social behaviour, and/or are psychologically or physically harmed as a result.[40] Harm can also be demonstrated, for example, by evidence that establishes a connection between possession of "violent and degrading, sexually explicit material" and cognitive distortion of its viewers, that it fuels fantasies inciting criminal offences, that it is used for grooming and seducing victims of crime (particularly children), and that there is abuse involved in production.[41]

About Christian Legal Fellowship

Christian Legal Fellowship (CLF) is a national charitable organization representing over 700 lawyers, law students, professors and others who support its work. As Canada's largest association of Christian lawyers, CLF has members across Canada practicing in all areas of law and in every size of practice. It has chapters in 14 cities across Canada and student chapters in most Canadian law schools. While having no direct denominational affiliation, CLF's members represent more than 30 Christian denominations working in association together.

CLF is dedicated to advancing the public good by articulating legal and moral principles that are consistent with, and illuminated by, our Christian faith through court interventions and public consultations. Over nearly two decades, CLF has intervened in 19 separate proceedings involving Charter issues, including several before the Supreme Court of Canada, seeking to advance justice, protect the vulnerable, promote equality, and advocate for freedom of religion, conscience, and expression. This includes CLF's advocacy as a friend of the Court in Canada (Attorney General) v. Bedford, 2013 SCC 72 (and at the appeal and trial courts below) where CLF argued that morality is a valid criminal law purpose and that lawmakers have the right to legislate on the basis of a fundamental conception of morality. The CLF has appeared before Parliamentary committees and made representations to provincial governments on issues of conscience, religious freedom, inviolability of life, and human rights. CLF has also been granted Special Consultative Status as an NGO with the Economic and Social Council of the United Nations, and has been involved in numerous international matters.

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[37] *Assisted Reproduction* at para 50

[38] *Labaye* at para 149

[39] *R v Kouri*, 2005 SCC 81 at para 38, dissenting judgment

[40] In the case of vulnerable participants, it may be easier to infer psychological harm than in cases where participants operate on an equal and autonomous basis: *Labaye* at para. 59

[41] *Sharpe* at paras 85-92