THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Legal Remedies for Victims of Hate Speech

CANADIAN BAR ASSOCIATION
CONSTITUTIONAL AND HUMAN RIGHTS, CRIMINAL JUSTICE AND SEXUAL ORIENTATION AND GENDER IDENTITY COMMUNITY SECTIONS

October 2020

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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.

This submission was prepared by the CBA Constitutional and Human Rights, Criminal Justice and Sexual Orientation and Gender Identity Community Sections, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Constitutional and Human Rights, Criminal Justice and Sexual Orientation and Gender Identity Community Sections.

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I. INTRODUCTION

The Constitutional and Human Rights, Criminal Justice and Sexual Orientation and Gender Identity Community Sections of the Canadian Bar Association (CBA Sections) are pleased to comment on Justice Canada's consultation paper dated July 14, 2020.

Canada needs principled and effective civil and criminal legal remedies to combat online hate that balance the right to freedom of expression with the right to freedom from incitement to hatred and discrimination. Putting too much weight on freedom of expression unduly hampers the law against incitement to hatred, while putting too much weight on combating incitement unduly restricts the right to freedom of expression.

In Canada, we have had the misfortune of getting this balance wrong both in the civil and criminal law. The application of the criminal law leans too heavily in the direction of protecting freedom of expression, inhibiting efforts to combat hate speech. The civil law had leaned heavily in the direction of combating incitement to hatred, to the point that it was repealed for its undue inhibition of freedom of expression.

The CBA Sections are pleased that the Government of Canada is taking a fresh look at these laws and has a renewed chance to get the balance right. Like the consultation paper, our submission addresses general issues with a focus on online hate. Our recommendations for improving the civil remedy include giving the Canadian Human Rights Tribunal (Tribunal) the express power to award costs against all complainants and having the Canadian Human Rights Commission (Commission) screen cases. We also suggest changes to enhance the effectiveness of the criminal remedy including adopting criteria for the Attorney General's denial of consent for the willful promotion of hatred and removing the private communication exception from the *Criminal Code.* We offer other suggestions including encouraging communications from the public to the Commission and developing working definitions of hate for specific communities in consultation with stakeholders.

II. A CIVIL REMEDY

The *Criminal Code* is a general legal instrument for combating online hate. Criminal law is often an inadequate tool as the standard of proof is too high, the remedy of criminal punishment is often inappropriate, and enforcement is by a general criminal system rather than an expert human rights system.

While the CBA's Constitutional and Human Rights Law Section and Equality Committee supported the former section 13 of the *Canadian Human Rights Act* (CHRA)[1], the CBA Sections recognize that concerns about the section and its use led to its repeal. We recommend modifying the text of the former section 13 to offer greater procedural protections. With these changes, the civil remedy would more effectively balance protecting freedom of expression and combatting hate speech.

A. Process

The repealed section 13 was substantively sound but procedurally defective, leading to an undue limitation on freedom of expression. How do we prevent the easily offended from shutting down legitimate expression? How do we stop perpetrators from purporting to be victims and attempting to use the law to silence criticisms of their incitement by claiming that the criticism is incitement? Our answer is to reenact the substance of the former section 13 of the CHRA with additional procedural safeguards, so the law does not become a vehicle to harass legitimate expression as the previous section 13 had been.

1. Costs

One element of justice is equality of arms. Where human rights commissions interpose between complainants and respondents, complaints are cost-free while respondents may be put to great expense. There is no equality of arms.

Criminal complaints are different because of the strict rules of evidence and high standard of proof. There is a lower bar for a defendant in a criminal investigation to avoid proceedings compared to a respondent in a civil investigation.

Once a Commission begins an investigation, exoneration requires effort and expense from the respondent. The maxim of innocent until proven guilty beyond a reasonable doubt does not apply. While the onus in civil proceedings falls on the asserting party, a small matter can tip the

1 Bill C-304 Canadian Human Rights Act amendments (hate messages), Canadian Bar Association Constitutional and Human Rights Law Section and Equality Committee, 2012.

balance of probabilities from one side to the other when evidence is evenly matched. Respondents ignore complaints at their peril.

In civil proceedings in superior courts, costs generally go with the cause, which prevents litigation from being undertaken lightly. This is more than a brake on frivolous proceedings. Costs are awarded against the losing side even where a motion to strike for no reasonable cause of action fails and the case has some merit but not enough. When a party knows that the financial loss in an unsuccessful case is substantial, they will think twice before commencing or defending the proceedings.

Courts have the discretion not to award costs against an unsuccessful litigant where an issue of general significance is addressed and resolving it is a matter of public interest. Rather than relying on the common law of costs, legislation should set out principles for awarding costs in proceedings before the Tribunal. Under these principles, meritorious complaints addressing matters of public interest are not inhibited, but the procedure does not itself become a form of harassment (e.g. repeated frivolous complaints), or evasion (e.g. defences lacking merit).

The Tribunal needs the power to award costs against both individual complainants and the Commission in cases where it has assumed conduct of a case. The Tribunal should also have the power to require security for costs against individual complainants where the Commission does not assume conduct of the case.

In 2011, the Supreme Court of Canada decided that the Tribunal did not have the power to award costs under its statute.[2] The CBA intervened in that case, arguing that the principle of access to justice required an interpretation of the CHRA which would include reimbursement for legal costs.

Costs can be awarded where it is allowed by legislation. For instance, British Columbia's Human Rights Code gives the Human Rights Tribunal the power to award costs in several circumstances including against a party who engaged in improper conduct during the course of the complaint.[3] We recommend amending the CHRA to give the Tribunal express power to award costs against all complainants and respondents and to order security for costs against all except the Commission.

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2 Canada (Canadian Human Rights Commission) v. Canada (Attorney General) 2011 SCC 53.

3 Section 37(4)(a)

2. Screening

Human rights commissions have been overwhelmed by complaints. Investigating and conducting these cases have caused substantial delays. In British Columbia, the response was to first abolish the Commission and then to reinstate it in 2018 without the power to screen or assume conduct of complaints to the Tribunal.[4] The Ontario Human Rights Commission has been taken off case work, with a couple of exceptions. It initiates applications at the Ontario Human Rights Tribunal in the public interest with a focus on systemic issues. Ontario's Commission also intervenes in Ontario Human Rights Tribunal cases, when it thinks the outcome will affect a larger number of people.[5]

We recommend adopting these procedures for the Commission with a variation. The Commission should screen all complaints to determine whether to dismiss them at an early stage. The Commission should also be able to take ownership of the investigation and pursuit of select cases as it sees fit.

The Commission has discretion to refuse to deal with complaints that are trivial, frivolous, vexatious or made in bad faith. If complainants can go straight to a Tribunal this power will have less significance.[6] Respondents should be able to bring a motion before the Tribunal at an early stage to dismiss a complaint that is trivial, frivolous, vexatious or made in bad faith.

A more specific power is in anti-SLAPP [Strategic Lawsuit against Public Participation] legislation, which now exists in Ontario, British Columbia and Quebec. In September 2020, the Supreme Court of Canada reaffirmed the constitutionality of this legislation.[7] We suggest a test drawing on Ontario's legislation. It should include a determination of whether the harm suffered or likely to be suffered by an individual or the public interest as a result of the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.[8]

There needs to be a gatekeeper for access to the civil law remedy as there is for the criminal law remedy. Access to the criminal law remedy for hate speech is restrained by the requirement of consent by the Attorney General of Canada. A screening mechanism can prevent unrestrained access to the civil law remedy.

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4 Progress of Bills

5 *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53 (CanLII), [2011] 3 SCR 471

6 Section 41(1)(d)

7 *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 and *Bent v. Platnick*, 2020 SCC 23

8 *Ontario Courts of Justice Act* s.137.1(4)(b).

The standard of proof of a balance of probabilities in civil proceedings is lower than the criminal standard of proof of beyond a reasonable doubt. The higher standard in criminal proceedings acts as a brake on frivolous proceedings. Screening by the Commission is needed, in practice if not in law, to compensate for the lower standard of proof.

3. Election of forum

It is possible to pursue essentially the same human rights complaint in several Canadian jurisdictions simultaneously. Each forum addresses the substance of the complaint without considering that the same complaint has been filed elsewhere.

Injustices accumulate when there can be multiple frivolous complaints against the same respondent and the tribunals have no power to award costs to the successful side. Respondents rack up costs fighting off the same complaint in several forums at the same time.

Section 27(1)(c) of the CHRA states that the Commission:

> In addition to its duties ... with respect to complaints regarding discriminatory practices ... shall maintain close liaison with similar bodies or authorities in the provinces...to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction;

This section does not appear to give the Commission the power to refuse to consider a complaint on the ground that it is already being considered in another province. It refers to the obligation to avoid conflicts as something different from duties with respect to complaints. If this power existed, the Commission should have dismissed past simultaneous complaints on this basis, but it has not done so.

The ability to make several complaints in different jurisdictions against the same respondent enables a complainant to harass the object of a complaint. This avenue of harassment needs to be cut off. Complaints should be required to choose one venue. Once they make this choice, no other jurisdiction should be able to consider a complaint that is essentially the same.

4. Parties

While human rights commissions have the power to add parties, it is not clear that they have the power to remove parties. The CHRA gives the Chair of a Tribunal the power to add parties,[9] but not to remove them.

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[9] Section 48.9(2)(b)

Once someone is named a respondent, they remain a respondent. The complaint itself can be dismissed on its merits. But where the subject matter of the complaint is meritorious but has been made against the wrong respondent, the complaint goes to its conclusion against the wrong complainant. The Commission and Tribunal need to have the power to remove parties.

5. The right to know your accuser

There is nothing in the CHRA preventing the pursuit of anonymous complaints. A complaint can be based on rumour, and the source of the rumour need not be disclosed to the respondent. This is a defect in the legislation and is not respectful of human rights.

In his testimony before the Standing Committee on Public Accounts on December 12, 1989, then Canadian Privacy Commissioner John Grace stated that one of the rights conferred by the *Privacy Act*:

> . . .is to know what accusations against us are recorded in government files and who has made them. Whether such accusations are true and well intentioned, as some may be, or false and malicious, as other may be, it is fundamental to our notion of justice that accusations not be secret nor accusers faceless.[10]

There may be justification for anonymity in some cases. For instance, if there is:

(i) a serious possibility that the life, liberty or security of a person will be endangered if the identity of the complainant is disclosed;

(ii) a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure of the identity of the complainant outweighs the interest that an accused know their accuser; or

(iii) a real and substantial risk that disclosure of the identity of the complainant will adversely affect public security.

However, these justifications should be exceptions and not swallow the rule. The CHRA should require that those who make an accusation be identified to the respondent of the complaint subject to specific exceptions.

6. Disclosure

The CHRA should include a general right of disclosure to the respondent. Currently, the text of the comments that prompted the complaint need not be disclosed to the respondent.

If the Commission seeks an expert opinion during its investigation of a complaint, that opinion legally should be available to the respondent. This disclosure is not currently required.

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10 Minutes of Proceedings and Evidence on the Standing Committee on Public Accounts, Issue No. 20 (12/12/89), at p. 10

The CHRA should include a general principle of disclosure. The CHRA describes matters that should not be disclosed but not what should be disclosed.[11] In other federal legislation, specific prohibitions against disclosure are exceptions to a general principle of disclosure.

RECOMMENDATIONS

1. **The Tribunal should have the express power to award costs against all complainants and respondents and to order security for costs against all except the Commission.**
2. **The Commission should screen all complaints to determine whether to dismiss them at an early stage. The Commission should also be able to take ownership of the investigation and pursuit of select cases as it sees fit.**
3. **The Tribunal and Commission should have a mechanism similar to Ontario's anti-SLAPP legislation that includes a determination of whether the harm suffered or likely to be suffered by an individual or the public interest as a result of the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.**
4. **Complainants should be required to choose one venue for their human rights complaints.**
5. **The Commission and Tribunal should have the power to remove parties.**
6. **Accusers should be identified to respondents subject to specific exceptions.**
7. **The CHRA should include a general principle of disclosure and outline any exceptions to it.**

B. Contempt

The repealed section 13 of the CHRA addressed contempt as well as hatred:

> 13 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

[11] Section 33(2)

The prohibition of incitement to hatred is an international human rights standard in the *International Covenant on Civil and Political Rights*,[12] to which Canada is a state party.

There is no comparable international human rights standard about contempt. In *Whatcott*, the Supreme Court of Canada reasoned that the concept of contempt was included in the concept of hatred.[13] In light of that reasoning, the word should be omitted from a re-enacted provision.

RECOMMENDATIONS

8. The new civil remedy should not include an explicit reference to contempt.

C. A specific online hate remedy

While existing remedies not specifically addressed to the internet – section 12 of the CHRA, for instance – may be available to address online hate, we recommend adding a remedy specific to the internet. This would remove uncertainty and avoid litigation about the meaning of more generic legislation. It could also serve as a warning with an educational and preventive purpose. The government should not miss this opportunity.

A revised civil remedy needs to be directed not only against inciters, but also against publishers, including internet platforms. Internet providers should not have civil immunity for the material on their platforms.

Rather than removing liability of internet providers from individual defamation suits, we recommend that the Tribunal have legislated power to make legally binding orders on internet providers.

The repealed section 13 of the CHRA excluded internet providers from its ambit:

> (3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

A re-enacted section 13 should expressly say the exact opposite: when an internet provider allows a person to use their services, the provider is communicating what the person posts on the provider's platform.

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12 Article 20(2)

13 *Saskatchewan (Human Rights Commission) v. Whatcott,* 2013 SCC 11, [2013] 1 SCR 467 para 43

Major internet providers prohibit incitement to hatred and illegal content in their terms of service. Something considered incitement to hatred is removed globally. Something illegal in a particular country is blocked for that country.

Internet providers block content by IP address (the internet protocol address of a computer on the internet) where the law requires them to do so. IANA (the Internet Assigned Numbers Authority) assigns IP addresses by country. Blocking content in a country using IP addresses is technically straightforward.

While the terms of service of the major internet providers explicitly prohibit incitement to hatred, effort should be made to turn this stated policy into prohibition in practice.

There would be major obstacles to doing this. First, prohibiting and removing content works against the providers' business model of having as many users as possible and maximizing advertising revenue. While it may be commercially advantageous for some hate speech to be removed from a platform if it diminishes the provider's reputation, that is not always the case. Second, providers lack expertise in hate speech, so they often do not recognize it when they see it. A third challenge is the sheer volume of material on the internet. Even if providers are held responsible only for problematic content brought to their attention, the volume is very large.

The European Commission addressed the problems of expertise and volume with a system of trusted flaggers. In agreement with four major internet platforms—Facebook, Twitter, YouTube and Microsoft—the Commission adopted a code of conduct on countering illegal hate speech online. The companies agreed to review the majority of valid notifications for removing illegal hate speech in less than 24 hours and to remove or disable access to the content, if necessary.[14] Organizations in 27 European Union member states were accepted as trusted flaggers or reporters to notify companies of alleged illegal hate speech and report the reactions to the Commission. According to a January 2020 European Commission fact sheet, there are 39 trusted flaggers.[15]

The Commission should reach a similar agreement with the major internet providers and develop its own list of trusted flaggers. The work should be coordinated with the European Commission and the European trusted flaggers to avoid duplication of effort. Where companies comply voluntarily, legal restraints would be unnecessary.

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14 Code of Conduct on Countering Illegal Hate Speech, online, page 3 bullet 3.

15 January 2020 fact sheet from the European Commission

A fourth problem in implementing the terms of service of internet providers on prohibiting hate speech is that many major internet providers are headquartered in the US and are imbued with America's absolutist tradition on free speech. They often do not consider what those outside the US would consider hate speech to violate their terms.

Internet providers need not have the final word on what hate speech is. The Tribunal can make its own determination. If the Tribunal determines that an internet communication is hate speech, major internet providers will respect that determination for Canada, because they commit to respecting local laws. They will comply with the law in Canada even if they do not agree with the Tribunal. Once a Tribunal determines that something on a major internet provider's platform is hate speech, the provider will block that content for all computers with Canadian IP addresses. The law should empower the Tribunal to require providers to do so.

What is blocked would be effective for Canada but not globally. The existence and application of a Canadian law on online hate to Canadian territory would be a substantial advance from where we are now.

RECOMMENDATIONS

9. **An internet specific remedy should be added to the CHRA. This remedy needs to be directed not only against inciters, but also against publishers, including internet platforms and internet providers.**

10. **The Commission should reach an agreement with the major internet providers and develop a list of trusted flaggers as the European Commission has. The work should be coordinated with the European Commission and the European trusted flaggers to avoid duplication of effort.**

III. A CRIMINAL REMEDY

The *Criminal Code* prohibits the incitement to hatred, but it is not as effective as it could be. We have identified two problems.

1. Consent of the Attorney General

Consent is necessary for the criminal offence of incitement to hatred. Once consent is given, the prosecution can be conducted either by the Crown or a private prosecutor.

Generally, where consent of the Attorney General is not required, Crown prosecution of a crime will proceed if there is sufficient evidence to convict. Prosecutors have discretion not to proceed even where evidence could lead to a conviction, but they must exercise that discretion according to clear principles. For instance, prosecution may not proceed if the hardship to the accused would be disproportionate to the benefit to society.

The Attorney General consent requirement puts a brake on private prosecution. If private prosecutions are possible, anyone could prosecute anyone else for something they said that the private prosecutor thought was hate speech. Arbitrary prosecutions are as harmful to human rights as arbitrary refusals to prosecute.

The Crown will not prosecute unless it believes it has evidence to establish guilt beyond a reasonable doubt. Private prosecutors need not exercise similar restraint. They could launch a prosecution merely because they disagreed with the accused. This prosecution would not succeed, but it could amount to harassment of the accused.

The CBA Sections accept that the consent of the Attorney General is appropriate in this area, but consent or denial of consent must be exercised according to principle. In British Columbia, the Crown Counsel Policy Manual states that in almost all hate offences, the public interest applies in favour of prosecution (see an excerpt of the manual attached). [16]

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.

The exercise of prosecutorial discretion is not subject to judicial review. The courts have reasoned that if they either affirmed a decision to prosecute or overturned a decision not to prosecute, the decision might seem to favour the prosecution over the defence. To maintain an appearance of neutrality, they have declined to get involved at all in prosecutorial discretion.

16 British Columbia, Crown Counsel Policy Manual.

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 protected.

2. Religious expression

The *Criminal Code* offence of wilful promotion of hatred offers a defence for statements that:

> in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text.[17]

There were differing views among the CBA Sections on this defence. Some were of the view that a defence for religious expression was not needed. As with all *Charter* rights and freedoms, if there is a conflict between freedom of religion and freedom from wilful promotion of hatred, the rights need to be balanced against one another. Others believed that the defence was necessary so that sincerely held beliefs of religious minorities expressed in good faith are not subject to prosecution. We recommend further study of this issue.

3. No safe harbour provision

Section 320(1) of the *Criminal Code* states:

> A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

Even if were modified, this section would not be well suited to deal with hate on the internet, as it deals with material not yet communicated and anything on the internet has already been communicated. Section 320(1) also puts the initiative on the Court at first instance, rather than the owner or occupier of premises in which the offending material is kept for sale or distribution. For internet communications, the primary responsibility for reacting to complaints about hate speech on the internet should rest with the communicators, not the legal system.

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17 Section 319(3)(b)

Regulations under the *Broadcasting Act* state that no broadcaster licensed under the Act:

> shall distribute a programming service that the licensee originates and that contains ... any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;[18]

While the standard is worth emulating, it is not practical to fit internet providers into this framework because they are not licensed. The remedies for the enforcement of this standard include conditions on licencees and potential withdrawal of licences. For internet providers who are not licencees, these forms of enforcement are not available.

The US *Communications Decency Act* includes a safe harbour provision for hate on the internet:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[19]

This is a blanket immunity. It goes too far. There should be a defence of innocent dissemination, but internet providers should be liable for noxious content that is not innocently disseminated.[20]

To be able to rely on a defence on innocent dissemination, internet providers should:

1. provide a complaints system that generates a response in a reasonable time, and
2. on notice, remove, or take reasonable steps to remove, hate speech from their services.

As noted in our comments on an internet specific civil remedy, the CBA Sections believe there is value in enacting *Criminal Code* provisions dealing specifically with the internet, even if general provisions arguably provide a remedy. The *Criminal Code* hatred offences are against communicating hatred, not advocating for hatred. Internet service providers can be as guilty of these offences as any others engaged in the communication. They should be liable only for communication that is not innocent. This sort of liability rather than a variation of *Criminal Code* section 320(1) needs to be enacted.

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18 Broadcasting Distribution Regulations section 8(1)(b)

19 Section 230, Communications Decency Act 1996

20 Peter Leonard, "Safe Harbors in Choppy Waters Building a Sensible Approach to Liability of Internet Intermediaries in Australia" (2010) 3 Journal of International Media and Entertainment Law 221

4. Private conversation

Criminal Code prohibitions against incitement to hatred specify three types of communication: communication in a public place; communication in private conversation; and communication generally. Communication in a public place objectively amounting to incitement to hatred is prohibited.[21] Private conversation is exempted from liability. Communication that is neither leads to criminal liability only if the communication willfully promotes hatred.[22]

The exemption of private conversation is overbroad. The right to privacy is an aspect of liberty and security of the person under section 7 of the *Charter*.[23] However, the right to privacy should not trump the right to freedom from incitement to hatred. Like all other rights that may clash, they need to be balanced. How they are balanced will depend on the circumstances of the case.

Not all private communications whipping up hate should be immune from the law on the grounds of privacy. Where private communication of hate speech may not incite a person who receives the communication, the right to privacy would arguably prevail. In other cases, a private communication of hate speech may incite the recipient to grave acts of violence against people identified by characteristics protected by the legislation.

We recommend removing the exception of private communication from the *Criminal Code*. This would not amount to a denial of the right to privacy protected by the *Charter*: that would have to be considered when applying the *Code* even if it is not explicitly mentioned. Removing the right to privacy exception would allow balancing privacy rights against the right to freedom from incitement to hatred in the *Code*.

RECOMMENDATIONS

11. The Attorneys General or Directors of Public Prosecution should adopt criteria for denial of consent for the prosecution of willful promotion of hatred, so it cannot be denied arbitrarily without explanation. Approval for alternative measures should be given only if:

(a) Identifiable individual victims are consulted and their wishes considered;

(b) The offender has no history of related offences or violence;

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21 Section 319(1)

22 Section 319(2)

23 *Edmonton Journal v. Alberta (Attorney General),* 1989 CanLII 20 (SCC), [1989] 2 SCR 1326 at page 1377

(c) The offender accepts responsibility for the act; and

(d) The offence was not of such a serious nature as to threaten the safety of the community.

12. There should be further study of the religious expression defence to wilful promotion of hatred in the *Criminal Code.*

13. The exception of private communication should be removed from the *Criminal Code.*

IV. OTHER OPTIONS

A. Addressing the gap in data collection and tracking online hate

1. The police

Statistics Canada releases annual reports on police reported hate crimes.[24] Police reporting is often underreporting because of the police focus on the criminal act instead of the motivation for the act. Deciphering which speech is hate speech requires expertise many police forces do not have. While NGOs engage in incident reporting, hate speech reporting should not be left to them. Police reporting should continue.

While there are questions about the reliability of police reporting due to the tendency to under-report, underreporting is a vehicle for identifying the absence of police expertise and a means of remedying it. When police know that their hate crimes efforts will be scrutinized and compared with NGO reports, their efforts to address hate crimes are likely to be enhanced. To remedy the problem, we need to know the extent of the problem.

2. The public

Some NGOs run 24-hour hotlines or online reporting systems allowing anyone to report a hate incident relevant to the mandate of the NGO. These reports are a basis for action and an important source of data for public reports.

The Commission does not engage in this type of activity. Under the CHRA, the Commission is expected to develop and conduct information programs to foster public understanding of the CHRA and its principles, and the Commission's role and activities.[25] This provision encourages one way communication from the Commission to the public.

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24 Statistics Canada, Police-reported hate crime in Canada, 2018.

25 Section 27(1)(a)

The CHRA should also encourage communication from the public to the Commission, particularly when it comes to the internet. It takes many eyes to see the high volume of content on the internet. To instill confidence that the Commission is capturing abuse on the internet, there should be an active public education campaign encouraging members of the public to report online hate to the Commission.

B. Formulating definitions of hate

Definitions of incitement to hatred that are specific to identity groups can help agencies determine what types of expression amount to hate. For example, the International Holocaust Remembrance Alliance has endorsed a definition of antisemitism that the Canadian government and many other member states of the Alliance have adopted. The definition is a guideline only and is not binding on law enforcement. The Alliance is currently working on a comparable definition for anti-Roma expression.

Similar definitions should be developed for all forms of hate. It would be useful for the Commission to develop these definitions in consultation with stakeholders. Specific definitions would assist those who do not closely follow the victimization of a group in identifying what amounts to incitement to hatred. The discourse used in stereotyping and incitement to hatred varies depending on the victim group targeted. To identify incitement to hatred, a reader or listener may need to know things which are not obvious in the statement.

Working definitions relevant to each victim group would be helpful in all aspects of anti-hate laws, including the Attorney General's consent for prosecution.

C. An international treaty

Much of the internet Canadians access comes from outside Canada. The effort to combat online hate must be a global effort requiring international cooperation.

On July 8, 2005, the Canadian government signed the Council of Europe Additional Protocol to the Convention on Cybercrime.[26] The protocol addresses the criminalization of acts of a racist and xenophobic nature committed through computer systems. Fifteen years later, the Protocol has yet to be ratified.

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26 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 2003.

The federal government introduced a bill[27] in 2010 to create the legislative framework for Canada to ratify the Convention and Protocol.[28] The bill never got beyond first reading.

It is long overdue for Canada to ratify this treaty. Signing a treaty means intent to ratify and comply with the treaty.

Ratifying the treaty would enable Canada to cooperate with other state parties through treaty-based mechanisms to realize its goal. After ratification, Canada could credibly encourage other states to sign and ratify the treaty and promote the international fight against online hate.

D. Ongoing consultation

The CBA Sections welcome this consultation. If the law is changed to allow the Commission and Tribunal to address online hate, we recommend that the government undertake further consultations on implementation of the law.

The Commission should be mandated to establish formal consultations with stakeholders on the operation of the law, as their experience would be a useful resource for the Commission in applying the law. It would also increase the Commission's transparency in dealing with online hate. Regular consultation (e.g. through internet roundtables) would help stakeholders understand issues, concerns and obstacles that the Commission might face in applying the law.

RECOMMENDATIONS

14. **The CHRA should encourage communications from the public to the Commission, particularly when it comes to the internet. The Commission should conduct an active public education campaign encouraging members of the public to report online hate to it.**
15. **The Commission should develop working definitions of hate specific to communities in consultation with stakeholders.**
16. **Canada should ratify the Council of Europe Additional Protocol to the Convention on Cybercrime**
17. **The Commission should be mandated to establish formal consultations with stakeholders.**

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27 Bill C-51, House of Commons of Canada, 2010

28 Bill C-51 Bill Narrative/ Descriptor, Parliamentary Budget Officer

V. CONCLUSION

Striking a balance between the right to freedom of expression and the right to freedom from incitement to hatred and discrimination requires remedies that are accessible enough to be workable but not so easy to access that they become vehicles to harass legitimate expression.

The previous section 13 of the CHRA went too far in one direction, with easy access that led to harassment of legitimate expression. We recommend reintroducing the substance of section 13 to have a civil tool to combat online hate speech with modifications to avoid the problems that prompted the repeal of this section.

The *Criminal Code* goes too far in other direction and does not catch enough incitement to hatred. Our recommendations would enhance the effectiveness of the criminal remedy.

It is easy to support respecting a human right where its opposition amounts to a human rights violation. The task is more difficult where one human right requires balancing against another human right. With the prevalence and harm of online hate, this task is urgent.

SUMMARY OF RECOMMENDATIONS

A Civil Remedy

1. **The Tribunal should have the express power to award costs against all complainants and respondents and to order security for costs against all except the Commission.**
2. **The Commission should screen all complaints to determine whether to dismiss them at an early stage. The Commission should also be able to take ownership of the investigation and pursuit of select cases as it sees fit.**
3. **The Commission and Tribunal should have a mechanism similar to Ontario's anti-SLAPP legislation that includes a determination of whether the harm suffered or likely to be suffered by an individual or the public interest as a result of the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.**
4. **Complainants should be required to choose one venue for their human rights complaints.**
5. **The Commission and Tribunal should have the power to remove parties.**

6. **Accusers should be identified to respondents subject to specific exceptions.**
7. **The CHRA should include a general principle of disclosure and outline any exceptions to it.**
8. **The new civil remedy should not include an explicit reference to contempt.**
9. **An internet specific remedy should be added to the CHRA. This remedy needs to be directed not only against inciters, but also against publishers, including internet platforms and internet providers.**
10. **The Commission should reach an agreement with the major internet providers and develop a list of trusted flaggers as the European Commission has. The work should be coordinated with the European Commission and the European trusted flaggers to avoid duplication of effort.**

A Criminal Remedy

11. **The Attorneys General or Directors of Public Prosecution should adopt criteria for denial of consent for the prosecution of willful promotion of hatred, so it cannot be denied arbitrarily without explanation. Approval for alternative measures should be given only if:**
    - **(a) Identifiable individual victims are consulted and their wishes considered;**
    - **(b) The offender has no history of related offences or violence;**
    - **(c) The offender accepts responsibility for the act; and**
    - **(d) The offence was not of such a serious nature as to threaten the safety of the community.**
12. **There should be further study of the religious expression defence to willful promotion of hatred in the *Criminal Code.***
13. **The exception of private communication should be removed from the *Criminal Code.***

Other Options

14. **The CHRA should encourage communications from the public to the Commission, particularly when it comes to the internet. The Commission**

should conduct an active public education campaign encouraging members of the public to report online hate to it.

15. **The Commission should develop working definitions of hate specific to communities in consultation with stakeholders.**
16. **Canada should ratify the Council of Europe Additional Protocol to the Convention on Cybercrime**
17. **The Commission should be mandated to establish formal consultations with stakeholders.**

Policy:		
Hate Crimes		
Policy Code:	Effective Date:	Cross-references:
HAT 1	March 1, 2018	ALT 1 CHA 1 VIC 1 VUL 1 YOU 1.4

"Hate crimes" are criminal offences that are motivated by, and generally involve the selection of victims based on, the offender's bias, prejudice, or hate towards others. They are driven by bigotry and intolerance for others and are regarded as serious matters.

The *Criminal Code* contains specific offences and sentencing provisions relating to hate crimes. The offence provisions prohibit certain types of hate-motivated conduct and define specific sentencing parameters for that conduct. For all offences, the *Criminal Code* provides that when an offence was motivated by hate that motivation is an aggravating factor on sentencing.

Generally, the public interest factors outlined in the policy on *Charge Assessment Guidelines* (CHA 1) favour prosecution for hate crimes particularly where:

- considerable harm was caused to a victim
- the victim was a vulnerable person
- the offence was motivated by bias, prejudice, or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor
- there are grounds for believing that the offence is likely to be continued or repeated

All Reports to Crown Counsel involving hate crimes should be referred by the Administrative Crown Counsel to a Regional Crown Counsel, Director, or their respective deputy for charge assessment.

A Regional Crown Counsel, Director, their respective deputy, or a designated senior Crown Counsel, should consult with their regional Resource Crown Counsel on Hate Crimes prior to concluding the charge assessment.

A. Specific Hate Crime Offences – Charge Assessment and Consent of the Attorney General

Hate Propaganda – Sections 318 and 319 of the *Criminal Code*

Section 318 of the *Criminal Code* creates the offence of advocating or promoting genocide against an identifiable group. Section 319(1) creates the offence of communicating a statement in any public place that incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace. Section 319(2) creates an offence for communicating statements, other than in private conversation, which wilfully promote hatred against any identifiable group. All of these provisions define "identifiable group" as, "any section of the public distinguished by colour, race, religion, national, or ethnic origin, age, sex, sexual orientation, gender identity or gender expression or mental or physical disability." None of them requires proof that the communication caused actual hatred.

Consent of the Attorney General Required

Prosecutions under sections 318 and 319(2) of the *Criminal Code* require the consent of the Attorney General. The Assistant Deputy Attorney General is authorized to provide the requisite consent on behalf of the Attorney General.

Before a charge is laid, Administrative Crown Counsel should review the report to Crown Counsel and provide a recommendation on whether to seek consent to a Regional Crown Counsel, Director, or their respective deputy, who will review the decision and recommendation and, if appropriate, seek the consent of the Attorney General.

Hate-Motivated Mischief – Property for Religious Worship and used by Identifiable Groups

Section 430(4.1) of the *Criminal Code* creates a hybrid offence for committing mischief in relation to property described in paragraphs (4.101)(a) to (d) if the commission of the mischief is "motivated by bias, prejudice or hate based on colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression or mental or physical disability." The types of property described in paragraphs (4.101)(a) to (d) include a building or structure (as well as an object in or on the grounds of the building or structure) that is primarily used for religious worship (4.101(a)), or a building or structure (as well as or an object in or on the grounds of the building or structure) that is primarily used by an identifiable group as defined in subsection 318(4) as an educational institution (4.101(b)), for administrative, social, cultural, or sports activities or events (4.101(c)), or as a residence for seniors (4.101(d)).

B. All Offences involving Motivation by Hatred – Aggravating Factor on Sentencing

At sentencing proceedings for all offences, where Crown Counsel concludes there is a reasonable likelihood that the court will make a determination that an offence was "motivated by bias, prejudice, or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, gender identity or gender expression or any other similar factor," Crown Counsel should ensure evidence necessary to prove the motivation beyond a reasonable doubt has been led and, if that evidence is admitted, take the position on sentencing that the motivation be treated as a statutorily imposed mandatory aggravating factor under section 718.2(a)(i) of the *Criminal Code*.

Where, in the prosecution of a specific offence under sections 318, 319(1), 319(2) or 430(4.1), there was evidence of a motivation of bias, prejudice, or hatred beyond that which was required to make out the elements of the offence, Crown Counsel should consider submitting to the court that the additional motivation is an aggravating factor under section 718.2(a)(i) of the *Criminal Code*. These can be separate aggravating circumstances even if the offence is already one of hate.

C. Victim Impact Statements and Community Impact Statements

Crown Counsel should attempt to obtain a Victim Impact Statement pursuant to section 722 of the *Criminal Code* prior to sentencing in accordance with the policies *Victims of Crime – Providing Assistance and Information to* (VIC 1) and *Vulnerable Victims and Witnesses – Adults* (VUL 1).

In addition, pursuant to section 722.2 of the *Criminal Code*, "an individual on a community's behalf" may file a Community Impact Statement at the court registry. Such impact statements may be especially helpful to ensure sentencing courts are fully aware of the social effects of hate crimes.

D. Removal of Hate Propaganda – *In Rem* Provisions

Sections 320 and 320.1 of the *Criminal Code* create *in rem* provisions authorizing a court to order the deletion and destruction of hate propaganda when such material is contained in a written publication that is kept for sale or distribution or stored in a computer system that makes such material available to the public. Because these sections require the consent of the Attorney General, Administrative Crown Counsel should review the matter and provide a recommendation on whether to seek consent to a Regional Crown Counsel, Director, or their respective deputy. They will then review the recommendation and, if appropriate, seek the consent of the Assistant Deputy Attorney General.

E. Alternative Measures

For adults and young persons, the policies *Alternative Measures for Adult Offenders* (ALT 1) and *Youth Criminal Justice Act – Extrajudicial Measures* (YOU 1.4) apply to all hate crimes. In addition to their general provisions, policies ALT 1 and YOU 1.4 provide the following specific guidance for the approval of alternative measures for hate crimes (excerpt from ALT 1):

> *"A Regional Crown Counsel, Director, or their respective deputy must approve any referral of a person for alternative measures consideration and also the specific alternative measures recommended in any Alternative Measures Report."*

In addition, for hate crimes, such approvals should be given only if the following conditions are met:

- identifiable individual victims should be consulted and their wishes considered
- the accused should have no history of related offences or violence
- the accused should accept responsibility for the act or omission that forms the basis of the alleged offence
- the offence must not have been of such a serious nature as to threaten the safety of the community