

July 14, 2020

CONSULTATION PAPER—ONLINE HATE

As Canadians spend more time online than ever, we must grapple with the double-edged nature of the Internet and social media platforms; on one hand, they bring tremendous opportunities for connection, expression and empowerment, but on the other hand, as the Standing Committee on Justice and Human Rights (“Justice Committee”) concluded in its 2019 study of online hate, “online platforms and the Internet are being used to spread hate and to radicalize, recruit and incite people to hate.” The spreading of hate has never been easier, and the problem of online hate has become a fact of life for a growing number of Canadians, including marginalized people who are already victimized by racism, discrimination and sexism. Perpetrators often act with impunity while victims of online hate struggle to find viable remedies.

Recognizing that freedom of expression and open public debate are the cornerstone of democracy, our government has committed to confront the problem of online hate using a multipronged and measured approach. Minister Lametti was mandated to develop options for legal remedies for victims of hate speech and to work with other Ministers to combat online hate and harassment. Though some aspects of combatting online hate fall outside the purview of the Department of Justice (e.g. Canadian Heritage has been mandated to regulate hate speech on social media platforms), we want to canvass your views in order to develop options for legal remedies for victims of online hate that fall squarely within the portfolio of the Minister of Justice. In addition to the three sets of questions below, the recommendations of the Justice Committee in its report, titled “Taking Action to End Online Hate”, will also be guiding these consultations. We encourage you to consult this document, which can be found [here](#).

I. Consideration of civil remedy to combat online hate

In its report, the Justice Committee recommended “That the Government of Canada develop a ... civil remedy for those who assert that their human rights have been violated under the *Canadian Human Rights Act*, irrespective of whether that violation happens online, in person, or in traditional print format. This remedy could take the form of reinstating the former section 13 of the *Canadian Human Rights Act*, or implementing a provision analogous to the previous section 13 within the *Canadian Human Rights Act*, which accounts for the prevalence of hatred on social media.”

1. Is a civil remedy under human rights law needed to help combat the spread of online hate?
2. If so, in your view what type of civil remedy would be appropriate? (For example, should a complaints-based mechanism like section 13 of the *Canadian Human Rights Act* be reinstated? What should such a remedy look like)?
3. Should there be an additional screening mechanism for complaints about online hate? (Note that section 41(1)(d) of the *Canadian Human Rights Act* currently empowers the Commission to elect not to deal with complaints that are “trivial, frivolous, vexatious or made in bad faith”.)
4. Should individuals be empowered to pursue complaints, or should all complaints be initiated by the Canadian Human Rights Commission (based on reports and tips from the public)?

5. If individual complaints are allowed, should complainants be allowed to remain anonymous? In what circumstances and to what extent?
6. How do we ensure responsible use of the complaint system? (e.g. Should the Canadian Human Rights Tribunal be empowered to award costs where it finds that a party has abused the process?)

II. Amending section 319 of the *Criminal Code*

Sections 318 and 319 of the *Criminal Code* lay out hate propaganda offences, including, inciting hatred against an identifiable group in a public place that is likely to lead to a breach of the peace, and the wilful promotion of hatred against an identifiable group. (Identifiable group is a defined term in subsection 318(4) of the *Criminal Code*.) A prosecution for the wilful promotion of hatred cannot proceed without the express consent of the appropriate Attorney General, in order to prevent trivial prosecutions—whereas inciting hatred in a public place that is likely to lead to a breach of the peace does not require the Attorney General’s consent because of the increased danger to public safety, for example, by a riot or unlawful assembly.

7. Should subsection 319(6) of the *Criminal Code* be amended to remove the requirement of obtaining the Attorney General’s consent before proceeding with a prosecution for the wilful promotion of hatred?
8. Alternatively, should the federal government work with the provinces to establish guidelines on when the appropriate Attorney General ought to provide his or her consent to such a prosecution?

III. Adding a peace bond to the *Criminal Code*

Peace bonds under sections 810 - 810.2 of the *Criminal Code* offer protections intended to prevent criminal conduct before it occurs by allowing a person to apply to a court when they have reasonable grounds to fear that another person will commit certain conduct. There is also a common-law power to impose peace bonds. A peace bond requires the defendant to keep the peace and abide by conditions that ensure good conduct/good behaviour (e.g. conditions could include electronic monitoring, restrictions on the use of computers and/or the internet, restrictions on access to weapons, reporting to police). A failure to follow those conditions can result in criminal charges.

In addition to the general peace bond powers, there are 6 specific peace bonds in the *Criminal Code*, which deal with things like personal injury offences (to a spouse, intimate partner or children, or damage to their property), intimidation of a participant in the justice system (e.g. a juror or a journalist) or a criminal organization offence, terrorism offences, forced marriage and childhood marriage offences, sexual offences against children, and serious personal injury offences.

9. Should a new peace bond be added to the *Criminal Code* in relation to promoting hatred/hate crimes?

10. If so, should the consent of the Attorney General be required before an individual could obtain such a peace bond?
11. Alternatively, should the federal government work with provinces to establish guidelines on when the appropriate Attorney General ought to provide consent for such a peace bond?

IV. Other options

The Justice Committee report includes the following recommendations, some of which are reflected in the above questions as well as other options for combatting online hate:

Recommendation 1—Funding for Training on Online Hate

That the Government of Canada increase funding for law enforcement, crown attorneys and judges to ensure that they receive sufficient training and orientation on the importance, and the need to combat online hatred, including being sensitive to complainants

Recommendation 2—Sharing Best Practices

That Justice Canada develop materials and best practices on collecting data and combatting online hate to be distributed to law enforcement agencies across Canada.

Recommendation 3—Addressing the Gap in Data Collection

That the Government of Canada adopt a two-pronged approach to address the gap in data collection that recognizes the fact that members of marginalized groups often feel more comfortable reporting hate incidents and hate crimes directly to civil society organizations which reflect their community rather than law enforcement officials:

- Firstly, resources need to be allocated to assist in the collection of data, by both governmental institutions as well as civil society organizations. This will ensure that we have a more complete understanding of the extent of hatred in Canada, particularly hatred that is directed online.
- Secondly, in order to facilitate the reporting of hate crimes, it is paramount that agents of the state, including police forces, reflect the racial, religious, LGBTQ2 and general diversity of the populations they represent. Police forces, particularly their hate crimes units, must work collaboratively alongside civil society organizations including utilizing the data collected by such organizations, to fully address incidents of hate motivated incidents and crimes, including those occurring online

Recommendation 4—Tracking Online Hate

That the Government of Canada implement the recommendations regarding the tracking of online hate formulated by the Standing Committee on Canadian Heritage in its report entitled “Taking Action Against Systemic Racism and Religious Discrimination Including Islamophobia”, dated February 2018:

- Recommends that the Government of Canada establish 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 - Recommendation 5.

- Recommends that the Government of Canada create a national database to retain and analyze hate crime and hate incident data - Recommendation 6.
- Recommends that the Government of Canada mandate relevant departments and encourage partners at the provincial and municipal levels and within civil society to create additional reporting options for victims of hate crimes and hate incidents, in addition to reporting to law enforcement - Recommendation 8

Recommendation 5—Preventing Online Hate

That the Government of Canada work with the provincial and territorial governments and community organizations who combat hate on appropriate requirements to educate the population as to what on the Internet constitutes hate. Federal organizations such as the Canadian Race Relations Foundation and the Canadian Human Rights Commission should be utilized to provide models of best practices on combatting online hate.

Recommendation 6—Formulating a Definition of Hate

That the Government of Canada formulate a definition of what constitutes ‘hate’ or ‘hatred’ that is consistent with Supreme Court of Canada jurisprudence. It is critical that this definition acknowledges persons who are disproportionately targeted by hate speech including but not limited to racial, Indigenous, ethnic, linguistic, sexual orientation, gender identity, and religious groups

Recommendation 7—Providing a Civil Remedy

That the Government of Canada develop a working group comprised of relevant stakeholders to establish a civil remedy for those who assert that their human rights have been violated under the *Canadian Human Rights Act*, irrespective of whether that violation happens online, in person, or in traditional print format. This remedy could take the form of reinstating the former section 13 of the *Canadian Human Rights Act*, or implementing a provision analogous to the previous section 13 within the *Canadian Human Rights Act*, which accounts for the prevalence of hatred on social media.

Recommendation 8—Establishing Requirements for Online Platforms and Internet Service Providers

That the Government of Canada establish requirements for online platforms and Internet service providers with regards to how they monitor and address incidents of hate speech, and the need to remove all posts that would constitute online hatred in a timely manner.

- These requirements should set common standards with regards to making reporting mechanisms on social media platforms more readily accessible and visible to users, by ensuring that these mechanisms are simple and transparent.
- Online platforms must have a duty to report regularly to users on data regarding online hate incidents (how many incidents were reported, what actions were taken/what content was removed, and how quickly the action was taken). Failure to properly report on online hate, must lead to significant monetary penalties for the online platform.
- Furthermore, online platforms must make it simple for users to flag problematic content and provide timely feedback to them relevant to such action

Recommendation 9—Authentication

That online platforms be encouraged to provide optional mechanisms to authenticate contributors and digitally sign content, and couple this with visual indicators signifying that given user or content is authenticated, and provide users options for filtering non-signed or non-authenticated content.

We welcome your feedback on the Justice Committee’s recommendations as well as on other options for legal remedies or justice policies that should be considered for inclusion in the government’s approach to combatting online hate.

ANNEX – KEY PROVISIONS

Repealed section 13 of the *Canadian Human Rights Act*

Hate messages

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.

Interpretation (2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

Interpretation (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.

Sections 318 - 319 of the *Criminal Code*

...

Definition of *identifiable group*

(4) In this section, *identifiable group* means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.

Public incitement of hatred

319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Wilful promotion of hatred

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Defences

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, 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;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Forfeiture

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

Exemption from seizure of communication facilities

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

Consent

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

Definitions

(7) In this section,

communicating includes communicating by telephone, broadcasting or other audible or visible means; (*communiquer*)

identifiable group has the same meaning as in section 318; (*groupe identifiable*)

public place includes any place to which the public have access as of right or by invitation, express or implied; (*endroit public*)

statements includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations. (*déclarations*)