



**SARAH LEAMON**  
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**Brief Prepared for the Standing Committee on Justice and Human Rights  
Consultation on Online Hate**

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***Introduction***

Canada has seen a disturbing increase in both online hate speech and hate crimes in recent times. Statistics Canada reported a forty-seven percent increase in police-reported hate crimes between 2016 and 2017.<sup>1</sup> The World Jewish Congress has reported that a new anti-Semitic post was added to social media every eighty-three seconds in 2016, while media marketing company Cision reported a six-hundred percent rise in the amount of intolerant hate speech posted online by Canadians.<sup>2</sup> Hashtags like #whitepower and #seighheil have become ominously commonplace on popular social media platforms.<sup>3</sup>

There is no doubt that the ubiquity of the internet and the omnipresent nature of social media plays a role in how widely and how rapidly hateful content can be shared. Now more than ever, opinions and false narratives are being presented as facts, accessible to anyone with an internet connection and a smart device. Inevitably, this has resulted in a dangerous spread of misinformation.

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<sup>1</sup> Statistics Canada, Canadian Centre for Justice Statistics, *Police-reported hate crime in Canada, 2017* by Amelia Armstrong, Catalogue No 85-002-X (Ottawa: Statistics Canada 2019) <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00008-eng.pdf?st=ACrRPnGo>> accessed 8 May 2019.

<sup>2</sup> Maclean. "Online hate speech in Canada is up 600 percent. What can be done?", (2 November 2017), online: *Macleansca* <<https://www.macleans.ca/politics/online-hate-speech-in-canada-is-up-600-percent-what-can-be-done/>>.

<sup>3</sup> *Ibid.*

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As Canadians, we have a vested public interest in halting this type of despicable behavior. Our society is founded on principles of multi-culturalism, inclusion and diversity. This type of abhorrent behavior can no longer be tolerated.

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**The following recommendations are therefore suggested:**

*(1) Removing the requirement for approval by the Attorney General for offences under sections 318, 319 and 320 of the Criminal Code*

*(2) Codifying aggravating factors for offences committed under sections 318, 319 and 83.221 of the Criminal Code*

*(3) Creating an alternative method by which to sanction more minor violations*

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*(1) Removing the Requirement for Approval by the Attorney General*

Under our current legislative scheme, the Attorney General's consent is required in order to approve charges under sections 318, 319 and 320 of the *Criminal Code*. This is meant to act as a pre-screening tool and maintain a system of checks and balances to ensure that members of the public are not being prosecuted without a legitimate basis to do so.

This requirement is an exceptional one that was originally implemented in order to aid in the protection of the public by deterring proceedings that were not being pursued in the best interests of the public.<sup>4</sup>

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<sup>4</sup> Department of Justice. "Part V Proceedings at Trial and on Appeal Chapter 16", (24 December 2008), online: *Public Prosecution Service of Canada* <<https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch16.html>> [Attorney General].

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While it does hold some merit, by theoretically ensuring that people are not met with stigmatizing criminal allegations as a result of airing unpopular opinions, it is out-dated, overly cumbersome and ultimately unsuited to our changing society.

Obtaining approval by the Attorney General is a multi-step, time-consuming process.

It first requires senior general counsel to review the request to lay charges. After doing so, they must prepare a recommendation for review by the Assistant Deputy Attorney General, who will review it and seek the opportunity for a further review by the Attorney General. If the recommendation is granted, and charges are approved, the Attorney General will sign off on the document and return it to the appropriate local authority so that proceedings may commence. This process can take an extraordinary amount of time and acts as a practical deterrent in contemplating charges of this nature from the very outset.<sup>5</sup>

Former Deputy Attorney General of Ontario Mark Freiman has shared his experience with this issue.<sup>6</sup> He has identified this procedural requirement as just one contributing factor in an overall culture of inaction and delay, with a particular emphasis on proceedings related to advocating and promoting hatred.<sup>7</sup>

By imposing an additional element of bureaucratic scrutiny, police officers and special investigators will undoubtedly be dissuaded from laying charges under sections 318 and 319. The requirement for approval under section 320 also impedes officers in exercising their discretion and duty in the course of such investigations and delays their ability to cease items and information which may only serve to pose additional harm to the public.

In modern society, technology moves fast. Criminal behavior can proliferate at the click of a mouse. The justice system must respond in an expedient manner and without delay.

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<sup>5</sup> *Attorney General, supra* note 4.

<sup>6</sup> Taylor, Jillian & Aidan Geary. "Public incitement of hatred charges, convictions rare, experts say following arrest of Flin Flon-area women | CBC News", (1 August 2018), online: *CBCnews*<<https://www.cbc.ca/news/canada/manitoba/manitoba-public-incitement-of-hatred-charges-1.4770631>>.

<sup>7</sup> *Ibid.*



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Proper training for police, prosecutors and support staff, coupled with the creation and enforcement of specific guidelines and protocols at both the investigatory and charge approval stage, will sufficiently serve the same purpose as approval by the Attorney General. Diligent oversight and understanding of the law by key, local players should adequately protect the public against unwarranted prosecutions while also protecting against the proliferation of hate speech.

It is therefore recommended that the requirement for approval by the Attorney General be removed from sections 318, 319 and 320 of the *Criminal Code* and that special public interest concerns be dealt with at an administrative level, using more typical charge approval processes.

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### ***(2) Codifying Aggravating Factors for Offences Related to Hate Speech***

Although sentencing is a unique and individualized process, the *Criminal Code* is capable of establishing clear, legal guidelines with respect to aggravating factors for consideration on particular offences.

For example, Bill C-46 recently amended impaired driving provisions under the *Criminal Code* to include an extensive list of aggravating factors on sentencing. These include factors such as considering whether the offender was driving a large motor vehicle at the time of the offence or whether they were operating the conveyance for the purposes of being remunerated.

There is nothing prohibiting the addition of aggravating circumstances for consideration on sentencing for crimes related to hate speech. Indeed, this would be a prudent and effective measure in ensuring that crimes committed by convicted offenders which have occurred online are dealt with in a more severe manner.

Online content has the unique capability of reaching more people, more efficiently. Within a very short period of time, millions of people risk being exposed to hateful, and ultimately

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harmful, content. There is a distinct risk that minors and other vulnerable persons may be exposed to such content. Moreover, online hate speech effectively proliferates hateful action. It allows hate groups to organize and mobilize.

For these reasons, crimes committed under sections 318, 319 and 83.221 of the *Criminal Code* should be treated as aggravated when committed online.

Codifying this as an aggravated factor on sentencing will create better certainty with respect to sentences and how sentences are imposed in courts across the country. The strong legislative message that is sent through codification in this manner will promote principles of fundamental justice and procedural fairness by ensuring that online crimes are treated in a similar manner, no matter the jurisdiction. This measure therefore promotes sentencing fairness and transparency.

Harsher sentencing principles for online hate speech crimes will result in harsher sentences for online hate speech crimes, which should also work to effectively deter the public from engaging in such behavior and to denounce such conduct on a whole.

Given the rise in both online hate speech and hate crimes, there is little argument against the notion that stronger denunciation is required. It is required in order to individually deter offenders and to generally deter general members of the public from engaging in such behavior on a whole.

Codifying that offences committed under sections 318, 319 and 83.221 using online means to be an aggravating factor that *must* be considered by the court on sentencing will work to ensure that this occurs. This approach is also more desirable than creating new offences under the *Criminal Code*, imposing mandatory minimum penalties for particular offences or elevating maximum penalties, all of which may be far more susceptible to *Charter* challenges.

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### *(3) Creating an Alternative Method by Which to Sanction More Minor Online Offenses*

Not all criminal behavior is dealt with by the criminal courts. While, as a rule, we should be extremely cautious about making use of administrative tribunals where courts are more appropriate, a truncated approach with non-criminal sanctions may be advisable in some instances.

There is no question that delay is rampant in the criminal justice system. Not only does this impact criminal proceedings on a whole, but where alleged criminal conduct has occurred online – and may continue to occur – an expedient approach by the justice system is required.

The creation of an administrative body, specialized to deal with minor violations involving online hate speech will allow more resources to be better allocated in the fight against online hate.

These tribunals may work hand-in-hand with law enforcement officials and/or social media networks in order to identify, review and remove hateful content in a prompt manner according to well-established principles and guidelines.

Monetary penalties for offending posts could be implemented against users, web hosts or administrators.

If this were to occur, it would be absolutely necessary to implement a thorough review process. This process would allow legal persons who do not agree with the allegations against them to dispute the administrative charges, review the evidence against them, proffer evidence for review in their defence and to ultimately be vindicated, where appropriate.

In order to uphold principles of fundamental justice and procedural fairness, the review process would have to be carried out by an independent, third party adjudicatory body and fulsome reasons for decisions should be granted in writing. These reasons would be subject to judicial review.



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If an administrative scheme is undesirable, creating a streamlined diversion process for more minor offenses related to hate speech should be considered.

The diversion process works well in British Columbia for more minor offences committed by first time offenders. In order to be eligible for the program, the offender must assume responsibility for their wrong-doing and voluntarily participate in the rehabilitation process.<sup>8</sup> A term of the diversion program is often the successful completion of rehabilitative counselling programs.<sup>9</sup>

For example, offenders charged with Theft Under \$5000, who are dealt with by way of the diversion program in British Columbia, must complete a counselling program that teaches them about the negative consequences and effects of theft in their communities. This is often an eye-opening experience for participants, who do not readily appreciate the rippling impact of their actions.

A counselling program about the negative consequences of intolerant and hateful speech could also be created. It could be aimed at addressing the issue online and could discuss the harmful effects of such actions on social media networks in particular. This could be taken as a valuable opportunity for early intervention and education. It could have an efficacious impact.

Aside from providing obvious benefits in the rehabilitation of the offender, diversion programs like these are also beneficial to the community at large. Diversion is often a very powerful tool for making amends within the community, creating a sense of justice in a meaningful and expedient manner.

While approaches like these endanger upon creating a two-tier system for hate speech offences, it may be necessary to appropriately address the sheer volume of online content and

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<sup>8</sup> Ministry of Public Safety and Solicitor General. "Alternative Measures - An Overview", (12 December 2017), online: *Province of British Columbia* <<https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/alternative-measures>>.

<sup>9</sup> *Ibid.*



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hate speech committed online and to diminish its proliferation it to a certain degree. It may also be necessary given the startling uptick in such offences.

It is important to note that other countries have recently made use of similar administrative or alternative mechanisms for crimes related to hate speech.

For example, in June, 2017, Germany passed the Act to Improve Enforcement of Rights on Social Networks, otherwise known as the Facebook Act.<sup>10</sup> This act aims to combat hate speech and misinformation on social media networks. It applies to public posts, but wisely does not apply to private messages between users.<sup>11</sup>

Under the so-called Facebook Act, authorities may impose monetary fines for offending public posts. They may also fine social network administrators for failing to remove offending posts or failing to respond to information requests in relation to offending posts.<sup>12</sup> In this way, it aims to hold social media networks themselves responsible for the content displayed on their websites. Social media networks risk fines up to \$74 million for failing to comply.<sup>13</sup> No doubt, this is an effective motivator in monitoring and responding to concerns without delay.

While creating a set of administrative or alternative mechanisms to deal with online hate speech may be effective may have its benefits, it will also have hurdles, some of which are briefly summarized below:

| Potential Benefits | Potential Problems |
|--------------------|--------------------|
|--------------------|--------------------|

<sup>10</sup> Gesley, Jenny. "Germany: Social Media Platforms to Be Held Accountable for Hosted Content Under 'Facebook Act' | Global Legal Monitor", (11 July 2017), online: *Global Legal Monitor* <<http://www.loc.gov/law/foreign-news/article/germany-social-media-platforms-to-be-held-accountable-for-hosted-content-under-facebook-act/>>.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.





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| - Ability to address & remove hate speech in an expedient manner   | - Discerning user identity and author offending content  |
| - Non-criminal measures require fewer judicial resources & will help combat delay in the criminal justice system | - Creation of potentially over-invasive, restrictive or unclear guidelines for offences may infringe of right to free speech |
| - Sends a strong message that such conduct will not be tolerated   | - Creation of a two-tier system for similar offences   |
| - Has the ability to meaningfully impact the offender and the community within a short time frame                | - Potential inability to make full answer & defence within the context of a truncated review process                         |

Between the creation of a specialized administrative review board and the implementation of more comprehensive diversion programs, there is a wide array of possibilities when it comes to establishing non-criminal mechanisms to deal with hate speech online. There are also a wide array of potential benefits and problems.

These possibilities should be thoroughly explored by our lawmakers

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***Conclusion***

Hateful words and messages are just one step away from actionable violence and discriminatory behavior.

There is little doubt that the social fabric of our communities has been altered by the pervasive availability of the internet and social media. With more and more people online, and with younger and more vulnerable users accessing social media platforms, we must be vigilant in guarding against the promotion and proliferation of hateful content.

Our current criminal laws must be updated in order to adapt.

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However, inherent delays and lags in the justice system require an alternative means by which to immediately address and deal with more minor offenses online. For this reason, alternative methods should also be strongly considered as a necessary supplement to our more conventional criminal justice system.

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**All of which is respectfully submitted,**

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**Sarah Leamon Law Group**

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Ms. Leamon acts as Board Chair with PACE Society, which provides front-line support services for marginalized individuals living in Vancouver's Downtown East Side. In 2018, she founded the Women's Association of Criminal Lawyer's B.C. and in the same year was named the winner of Business in Vancouver's Prestigious Forty Under 40 Award.