



CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL
CROWN COUNSEL POLICY MANUAL

ARCS/ORCS FILE NUMBER: 57110-00	EFFECTIVE DATE: October 12, 2010	POLICY CODE: HAT 1
SUBJECT: Hate Motivated Offences and Hate Propaganda		CROSS-REFERENCE: ALT 1 CHA 1 VIC 1 Practice Directive

POLICY

Cases in which criminal activity is motivated by bigotry and intolerance for others are regarded as serious matters.

Where Crown Counsel concludes, after consultation with Regional or Deputy Regional Crown Counsel, that there is a reasonable likelihood that the court will make a determination on sentencing 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 or any other similar factor, Crown Counsel should lead the evidence necessary to prove the motivation beyond a reasonable doubt and, if that evidence is admitted, take the position on sentencing that the motivation must be treated as an aggravating factor under section 718.2(a)(i) of the *Criminal Code*.

In almost all cases where offences are motivated by bias, prejudice or hate as described above, the public interest factors outlined in the policy on Charge Assessment Guidelines – CHA 1 apply in favour of prosecution.

Under the policy on Alternative Measures for Adult Offenders – ALT 1, for hate motivated or hate propaganda offences, Regional or Deputy Regional Crown Counsel must approve any referral of a person for alternative measures consideration and also the specific alternative measures recommended in any Alternative Measures Report.

In all cases the above approvals should be given only if the following conditions are met:

1. Identifiable individual victims should be consulted and their wishes considered.
2. The offender should have no history of related offences or violence.
3. The offender should accept responsibility for the act or omission that forms the basis of the alleged offence.

4. The offence must not have been of such a serious nature as to threaten the safety of the community.

Before a charge is laid under any of the hate propaganda offence provisions in sections 318 or 319 of the *Criminal Code*, Administrative Crown Counsel should review the charge assessment decision and provide a recommendation to Regional or Deputy Regional Crown Counsel.

Under the Practice Directive entitled Consent of the Attorney General, it is the Assistant Deputy Attorney General who provides the requisite consent of the Attorney General to prosecutions for advocating genocide under section 318 and for wilfully promoting hatred against an identifiable group under section 319(2).

DISCUSSION

Hate Motivated Offences

Hate motivated offences differ from other crimes because they are committed with the purpose of harming and terrifying not only a particular victim, but the entire group to which the victim belongs.

Section 718.2(a)(i) of the *Criminal Code*, which was introduced as a response to public concerns regarding hate motivated offences, states that a court shall take into consideration that 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, as an aggravating factor on sentencing. Generally, this provision applies to offences against the person and property. Assaults based on perceived sexual orientation or mischief to property, such as spray painting, are examples of offences in which the above factors should be considered by the court.

The preferred view of the law is that section 718.2 does not apply to the hate propaganda offences (sections 318, 319, 320, 320.1) as they exist as discrete offences with their own sentencing parameters. As well, there are fewer identifiable groups mentioned within the Hate Propaganda provisions. A recent amendment to the *Criminal Code* brought into effect section 430(4.1), mischief to religious property, which has a different set of identifiable groups from sections 718.2 and the Hate Propaganda sections but arguably would be subject to section 718.2.

In 1996, the B.C. Hate Crime Team was created. The Hate Crime Team's provincial mandate is to ensure the effective identification, investigation and prosecution of hate motivated offences. The Hate Crime Team includes members of the Ministry of Attorney General and Ministry Responsible for Treaty Negotiations (Crown Counsel, Policy and Legislation), Ministry of Public Safety and Solicitor General (Policy and Legislation, Police Services), Ministry of Community, Aboriginal and Women's Services, the Royal Canadian Mounted Police serving as the provincial police force and the Vancouver Police Department representing municipal police

forces. The role of the Crown Counsel on the team is to provide legal advice, information and support to police and Crown Counsel in the province on hate motivated cases. The role of the police and Crown Counsel on the team in tracking hate motivated offences is central to the team's mandate.

Crown Counsel are requested to advise Crown Counsel on the Hate Crime Team of the existence and outcome of hate motivated cases in their regions. The Hate Crime Team has developed a database in an attempt to monitor all charges of hate motivated offences in the province. Resultant case law is made available to Crown Counsel in the province.

Hate Propaganda

Hate propaganda offences are set out in sections 318 and 319 of the *Criminal Code*. Section 318 creates an offence where an accused is advocating or promoting genocide against an identifiable group. An "identifiable group" is defined in section 318(4) as any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation. Section 319(1) creates an offence for everyone who communicates statements in any public place which 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 willfully promote hatred against an identifiable group. Prosecutions under sections 318 and 319(2) require the consent of the Attorney General.

Sections 320 and 320.1 require the consent of the Assistant Deputy Attorney General before the commencement of proceedings. These "*in rem*" provisions provide for the removal of hate propaganda written material pursuant to section 320, or, pursuant to section 320.1, of hate propaganda that is stored on and made available to the public, including via the internet, through a computer system that is within the jurisdiction of the court. In section 320.1 the burden of proof on the Crown is on the balance of probabilities.

Not all incidents of bigotry and intolerance for others constitute criminal offences. There are other avenues that may be taken to deal with such matters in cases where the charge assessment standard is not met under policy CHA 1.

The *Human Rights Code* R.S.B.C. 1996, c.210, prohibits discriminatory practices in the context of publications, employment, residential tenancy, and the use of public facilities.

Section 7 of the *Human Rights Code* prohibits the publication, issue or display of discriminatory material in the form of statements, publications, notices, signs, symbols, emblems or other representations the expression of which indicate discrimination or an intention to discriminate against a person or a group or class of persons, or that is likely to expose them to hatred or contempt because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, or age of that person, or that group or class of persons. It does not apply to a private conversation or to a communication intended to be private.

The *Human Rights Code* does not contain an offence provision and the *Offence Act* does not apply. However, the Code does provide a means of redress for those persons who are discriminated against contrary to the Code.

The *Civil Rights Protection Act* R.S.B.C. 1996, c.49, also exists as a remedy. The Act has yet to be tested, despite being in force since 1981. The Director, Legal Services should be consulted before any charges are considered for approval under this Act.

Cases under s.319(2):

R. v. Harding (1998) O.J. No. 2603, affirmed in Ontario Court of Appeal, 160 CCC (3d) 225; 48 C.R. (5th) 1 – Anti-Muslim hate propaganda.

R. v. Nicholson July 11, 2002, Merritt Registry, 10621, B.C. Prov. Ct. – first prosecution in Canada of hate propaganda distributed on the internet.