



22 December 2020

**Hate Crime Laws  
Response to Public Consultation (Law Commission)  
Authors: Jacob Mchangama (Director), Natalie Alkiviadou (Senior Research Fellow),  
Justitia, Denmark**

**Justitia:**

Founded in August 2014, Justitia is Denmark’s first judicial think tank. Justitia aims to promote the rule of law and fundamental human rights and freedom rights both within Denmark and abroad by educating and influencing policy experts, decision-makers, and the public. Justitia’s [Future of Free Speech Project](#) focuses specifically on freedom of expression at the global level.

***Brief summary of our views:***

*Justitia is concerned about the freedom of expression implications of the manner in which ‘stirring up offences’ are conceptualised, the “scope creep” in terms of protected characteristics and the “censorship envy” that may be created as a result of the inclusion of some protected characteristics and not others.*

**Issue 1: Incorporating ‘stirring up hatred’ in the consultation on hate crimes**

The consultation document notes that hate crime can encompass verbal abuse and hate speech. It proceeds, in paragraph 1.25 to note that ‘every hate crime involves an action as well as a mental state. The law does not punish a neo-Nazi for his or her beliefs, but if those beliefs lead him or her to attack someone Jewish or desecrate a mosque, then the law rightly steps in.’ However, the consultation document does not only deal with attacks as hate crimes but also incorporates hate speech into its conceptual framework, with the two above positions set out in the consultation document being in antithesis with each other. Scholars have discussed the impact of hate crimes in comparison with other crimes, and particularly whether or not such crimes are more destructive than others and thus merit the element of aggravation. Bakken argues that there exists

no evidence demonstrating that hate crimes are more dangerous than other crimes (Bakken, 2000: 6). Others argue that victims of hate crimes suffer more psychological harm than victims of non-bias crimes. (Iganski and Lagou, 2016). In the 1990s, Garnets, Herek and Levin found that victims of homophobic crimes may reconsider disclosing their sexual orientation, (Hershberger & D'Augelli, 2009) change their comportment, dress and places of socialisations to avoid re-victimisation. Craig-Henderson, 2009). Iganski looked at the particular effects and needs of homophobic and transphobic violence on victims (Iganski 2016). Such consequences demonstrate that, beyond the direct physical and psychological harm, hate crime can impact its victims (but also their communities) on an existential level. Hate crimes can therefore create 'feelings of vulnerability, mistrust and fear among members of the community to which the victim belongs' (Herek, Cogan & Fillis, 2002, Lim, 2009) while having an impact on a broader framework beyond the community (Iganski and Sweiry 2016). This framework demonstrates the micro, meso and macro level of impact as well as the spatial elements of harm. Taking these three levels together, and the findings that exist on the psycho-social impact of hate crimes on a series of victims, could provide a framework through which the need to tackle hate and bias exists.

However, it must be noted that the above argumentation relates to physical violence and not speech. It is rather *concerning* that the current proposal amalgamates hate crime and hate speech into one document and entitles it 'Hate Crime' given that speech and physical violence are two separate themes which are dealt with differently also under international and European human rights law. To this end, we hold that the two should be assessed separately and hate speech should not be incorporated into any definition or conceptualisation of a hate crime which is an actual physical act against property or person. More particularly, we consider that hate speech and hate crime are two distinct phenomena with the treatment of the former incorporating a wide array of issues *vis-à-vis* freedom of expression.

## **Issue 2: Disregard of the United Nations Framework**

The consultation document notes the Commission seeks to ensure that any recommendations comply with, and are conceptually informed by, human rights obligations, including under articles 10 (freedom of expression) and 14 (prohibition of discrimination) of the European

Convention on Human Rights. However, no mention is made of Article 19 of the International Covenant on Civil and Political Rights or Article 20(2) of the same Covenant. We therefore draw the attention of the Law Commission to the United Nations Framework and documents including, General Comment No.34 of the Human Rights Committee on Freedom of Opinion and Expression, positions of the Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression and the Rabat Plan of Action discussed below as guides to ensure that the issue of freedom of expression is adequately dealt with in relation to stirring up offences. Reliance solely on the European Convention on Human Rights and accompanying case law is insufficient due to [limitations therein](#) in terms of freedom of expression protection in the realm of alleged hate speech. In relation to this, Justitia analysed 60 cases decided by the ECtHR and the European Commission of Human Rights' between 1979-2020. 57 of those cases were brought by the utterers under Article 10, and 3 by the victims of the alleged hate speech under Articles 8 and 14. Cases concern speech linked to homophobia and transphobia, ethnic hatred, religious hatred, violence, totalitarianism and genocide denial. Our analysis reveals that *61% of cases brought by the utterers resulted in the applicant's loss* through a finding of non-violation of Article 10 (21%) or due to the inadmissibility of decisions in 41% of cases (for example through the use of Article 17 in Holocaust denial cases) Only 39% of cases brought by the utterers have resulted in a finding in favour of the applicant. Thus, on average, free speech restrictions have been upheld in just over one out of three hate speech cases. The UN framework establishes a more robust protection of freedom of expression in the ambit of stirring up offences, advocacy for hatred and related phenomena. As noted by the UN's Human Rights Committee, any restrictions to free speech must meet the strict tests of necessity and proportionality<sup>1</sup> and must not be too broad.<sup>2</sup> As such, it is imperative that the Law Commission considers this framework and not only the Council of Europe.

### **Issue 3: Stirring up hatred, freedom of expression and the (non) requirement of intent:**

The consultation paper proposes that:

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<sup>1</sup> Velichking v Belarus, Communication no. 1022/2001 (20 October 2005) CCPR/C/85/D/1022/2001, reiterated in HRC General Comment 34: 'Article 19 – Freedom of Opinion and Expression' (2011) CCPR/C/GC/34, para. 22

<sup>2</sup> HRC General Comment 34: 'Article 19 – Freedom of Opinion and Expression' (2011) CCPR/C/GC/34, para. 34

1. Where it can be shown that the defendant intended to stir up hatred against a group, it would not be necessary to show that the words used were threatening (or in the case of race, abusive or insulting), but
2. Where intent to stir up hatred is not proved, the prosecution would need to show that the words or behaviour were threatening or abusive (not merely insulting) and that the offender knew or ought to have known that they were likely to stir up hatred.

The fact that in the case where intent can be shown, *insulting* is only reserved for race whereas for the other characteristics, the speech must be threatening or abusive (but *not insulting*) means that the consultation paper has already established a structural hierarchy of some characteristics receiving more ‘protection than others.’ Also the threshold of insulting is very low when considering Article 20(2) ICCPR and the Rabat Plan of Action discussed below. Further, the fact that intent is not even a requirement in some cases is contrary to the position of the United Nations with the 2012 Report of the Special Rapporteur defining advocacy (closest equivalent to ‘stirring up’ on a UN level) as ‘explicit, intentional, public and active support and promotion of hatred towards the target group.’<sup>3</sup> Further the vagueness associated to the consultation document’s *likeliness* that hatred could be stirred up could also pose a problem under European Convention on Human Rights since the law might not be sufficiently clear and accessible to satisfy the requirement that restrictions on Article 10 be ‘in accordance with law.’

In light of the above points and for purposes of adhering to freedom of expression, we argue that the (i) intent should be demonstrated in all cases (ii) the hierarchy of protection given to race with the lower threshold of abusive or insulting to contribute to the creation of a “censorship envy” and an unequal treatment of protected characteristics and (iii) insulting speech is by default of a low threshold and should be reconsidered if the freedom of expression is to be adequately protected. In this light, we would like to draw the Law Commission’s attention to the threshold test set out in the Rabat Plan of Action and two good practices established from national courts in South Africa and Norway discussed below.

### *2.1. The Rabat Plan of Action*

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<sup>3</sup> Ibid. para 44(b)

The Rabat Plan of Action was developed to provide a threshold test for Article 20(ICCPR) which prohibits ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ The test and principles set out in the RPA are also a coherent guidance for national provisions on incitement to hatred/stirring up hatred. The RPA states that there must be a high threshold when applying Article 20(2) of the ICCPR.<sup>4</sup> Further, as noted in the 2012 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ‘the threshold of the types of expression that would fall under the provisions of Article 20(2) should be high and solid.’ The current recommendations *vis-à-vis* stirring up hatred is not meeting UN thresholds and poses a risk to the protection of the freedom of expression for reasons extrapolated on below:

The Rabat Plan of Action (RPA) highlights that restrictions to the freedom of expression are to be clearly defined without an overly broad scope, must respond to a pressing social need and must be the least intrusive measures available and be proportional to their goal.<sup>5</sup> We find that by allowing criminal liability to insulting speech (in the case of race) and to speech which is threatening or abusive without the need to demonstrate intent does not fit withing the key principles of the RPA because:

1. Punishing speech without demonstrating intent does not allow for a clearly defined restriction of freedom of expression and is overly broad;
2. It does not appear that the Law Commission has taken into account the RPA’s requirement for the ‘least intrusive measure’ rule and the doctrine of proportionality since speech without the need for proving intention to stir up hatred is criminally liable;
3. The RPA clearly sets out a need for intent for the punishment of Article 20(2) of the ICCPR which is the UN equivalent for stirring up offences. In this ambit, the RPA notes that:  
‘Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for “advocacy” and “incitement” rather than the mere

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<sup>4</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 22

<sup>5</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 18

distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.’

The RPA has also underlined that ‘criminal sanctions related to unlawful forms of expression should be seen as last resort measures’<sup>6</sup> and that other types of action, such as civil and administrative sanctions and remedies, pecuniary and non-pecuniary damages as well as the right of correction and the right of reply must also be taken into account. We do not see this line of reasoning taken in the consultation document.

In sum, the Law Commission appears to have disregarded the above UN guidelines and embraced a low threshold of protection to freedom of expression by disregarding intent in some cases and not considering the proportionality of criminal penalties and their status as last resort measures when it comes to expression.

## *2.2. Good practice: The Norwegian Supreme Court:*

In a 2002 hate speech case, the Norwegian Supreme Court underlined that one cannot *assume* that what has been said is, in fact, hateful. The majority opinion held that:

‘...The rule of law, and especially the consideration of foreseeability, dictates restraint when it comes to an expansive interpretation based on context. When it comes to punishable expressions the point must be that you can only be punished for what you have said, not what could possibly have said. From this it follows, in my opinion, that in the interest of freedom expression no one should risk criminal liability through attributing to a statement viewpoint which has not been expressly made and which cannot with a reasonably high degree of certainty be inferred from the context.’<sup>7</sup>

## *2.3. Good practice: South Africa*

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<sup>6</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 22

<sup>7</sup> HR- 2001-01428 – Rt-2002-1618, (Saks nr. 361-2002) 17 December 2002 (our interpretation from Norwegian)

The South African courts have dealt with the questions of free speech and hate speech, contextualising their responses in the framework of their apartheid past when the government used hate-speech bans to prohibit criticism of apartheid. In one hate speech case, the South African Supreme Court of Appeal held that:

‘[A] court should not be hasty to conclude that because language is angry in tone or conveys hostility, it is therefore to be characterized as hate speech. Even if it has overtones of race and ethnicity.’

In another case, the Supreme Court of Appeal noted:

‘The fact that a particular expression may be hurtful of people’s feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection.’

We recommend that the Law Commission takes this position into account and reconsiders its current approach to intent and likeliness in relation to stirring up hatred offences, bearing in mind the severity of criminal penalties, especially in the ambit of expression. For the moment, the threshold of protection to freedom of expression is much too low since it extends criminal liability even to racist speech which is merely insulting and without intent. As noted in the 2012 Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ‘the threshold of the types of expression that would fall under the provisions of Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) should be high and solid.’<sup>8</sup>

### **Issue 3: Censorship envy**

The consultation paper considers the offences of stirring up hatred and proposes that the current protections should be extended to cover disability, transgender and sex/gender. The document also poses the question of adding the characteristic of sex/gender to hate crime laws and asks for stakeholder views in respect of the characteristics of “age,” “sex workers,” “homelessness,” “alternative subcultures,” and “philosophical beliefs.” We hold that this is the beginning of a never ending ‘censorship envy’ which, as defined by Eugene Volokh is the common reaction

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<sup>8</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 45

that, “If my neighbour gets to ban speech he reviles, why shouldn’t I get to do the same?” As well as creating a hierarchy of importance as to which group should or should not be protected and a subsequent feeling of resentment amongst those left out, the current approach may lead to a complication of ties between different marginalized groups. Although there are provisions on freedom of expression protection in relation to religion and sexual minorities, we cannot be sure that this Law will not be used to silence minorities. Examples could include, members of religious communities who are contrary to the development of gender identity issues or vis versa. Further, the proposals have the potential to ‘perpetuate and entrench the values of the dominant in-groups and further marginalize out- groups.’ This was reflected, in, for example, the application of the 1965 British Race Relations Act. The first person prosecuted for the offence of incitement to racial hatred was a black man whilst several other black citizens, including leaders of the Black Liberation Movement were prosecuted for anti-white hatred.<sup>9</sup>

More specifically, the consultation paper considers extending the offences of stirring up hatred to disability, transgender and sex/gender but does not consider other characteristics such as philosophical beliefs which it does consider in the ambit of hate crime laws. This is dangerous ground and the Law Commission should have a steady and consistent approach to the protected characteristics it seeks to incorporate. The Commission already establishes a hierarchy of importance by naming other characteristics such as homelessness for hate crimes but *not* for stirring up offences. Further, it demonstrates a drastic jump from characteristics such as race and religion which are anyhow incorporated in international human rights law to characteristics such as alternative subcultures. The questions that must be asked are: where will this list stop? Can it stop somewhere? What is the impact on other vulnerable groups which are not incorporated as protected groups in the law?

Moreover, the proposed amendments may lead to a complication of ties between different marginalized groups. Although there are provisions on freedom of expression protection in relation to religion and sexual minorities, we cannot be sure that this Law will not be used to

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<sup>9</sup> Michael Rosenfeld, ‘Hate Speech in Constitutional Jurisprudence: A Comparative Analysis’ (2003) 24 *Cardozo Law Review*, 1546-7

silence minorities. Examples could include members of religious communities who are contrary to the development of gender identity issues or vice versa.

#### **Issue 4: Online Platforms**

The consultation document poses the following question:

Under what circumstances, if any, should online platforms such as social media companies be criminally liable for dissemination of unlawful material that they host? If “actual knowledge” is retained as a requirement for platform liability, should this be the standard applied in other cases of dissemination of inflammatory material where no intention to stir up hatred can be shown?

We hold that online platforms should not be criminally liable for the dissemination of unlawful material. An infamous example is the 2017 German Enforcement Act which places pressure on social media companies to remove hate speech at risk of 50 million Euro fines. It must be underlined that the latter has been replicated by [authoritarian States](#). It is imperative for liberal democracies to stay away from creating such precedents. We argue that imposing criminal liabilities on platforms may lead private companies to take the ‘better safe than sorry route’ at the expense of free speech. Quantitative examples include the removal of 9.6 million pieces of ‘hateful’ content by Facebook in the first quarter of 2020 which rose to 22.5 million in the second quarter. That is [more than the removal number for 2019](#) which amounted to 21.2 million for the entire year and is double the number of total removals for 2018 which amounted to 11.3 million. It must be noted that, in the third quarter of 2019, 80.2% of hate speech cases, Facebook identified and removed the content before users reported it. The quantitative reality is also a result of a ‘scope creep’ that has impacted the development of social media community guidelines, with many having been extended, adopting a less speech protective approach.<sup>10</sup> Here, it must be noted that although news outlets,<sup>11</sup> politicians<sup>12</sup> and civil society<sup>13</sup> are talking about a

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<sup>10</sup> For example, in Facebook’s first (traceable) Terms of Service, reference was made to the review and deletion of content, which ‘*might be offensive, illegal, or that might violate the rights, harm, or threaten the safety of Members.*’ It was also prohibited to use the service to ‘*harass, abuse, or harm another person.*’ Today, Facebook defines hate speech a direct attack on people based on their protected characteristics (ranging from age to national origin to serious disease), whilst attack is not only a violent one but also, for example, a statement of inferiority

<sup>11</sup> See for example: The New Yorker, Ryan Lizza, ‘Twitter’s Anti-Semitism Problem’ (19 October 2016) available at: <<https://www.newyorker.com/news/news-desk/twitters-anti-semitism-problem>> [Accessed 30 November 2020]

dangerous rise in online hate speech, a 2020 study concluded that ‘only a fraction of a percentage of tweets in the American Twittersphere contain hate speech.’<sup>14</sup> A more limited study of Ethiopia showed a similarly low prevalence of hate speech on Facebook.<sup>15</sup> Further, studies have shown that far-right extremists and white supremacists move to alternative platforms when ousted from main stream social media platforms for violating hate speech rules.<sup>16</sup> This includes using encrypted messaging services like Telegram. This effect not only defeats the aims and objectives of laws such as the one discussed in this consultation but may also hamper counter-narratives as a tool to sustainably tackle online hate speech.

Further, we hold that the standard (of no liability) should be extended to the possession of inflammatory material where no intention to stir up hatred can be shown. For example, what if someone is possessing material which may, in fact, be insulting, for research purposes? What if that person wishes to share that material with a colleague for the same purpose? At what point do authorities intervene and determine the intention to communicate? How will this happen in practice? The lines – both conceptually and practically are blurred.

**As such, we are concerned with:**

(i) The freedom of expression implications of the consultation paper (ii) the integration of speech and actual physical violence under one law (iii) the lacking necessity of intent in relation to the former in some instances (iv) the particularly low thresholds attached to racial insults (v) the conflict between some of the recommendations and International Human Rights Law (vi) the variation of thresholds amongst protected characteristics (vii) the suitability of criminal law as a means to tackle prejudice and hate (viii) and the negative impact of the proposed amendments on ‘minorities’ (ix) the impact of the amendments on an already polarized climate. Moreover, we

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<sup>12</sup> See, for example: IGF 2018 Speech by French President Emmanuel Macron available at <<https://www.intgovforum.org/multilingual/content/igf-2018-speech-by-french-president-emmanuel-macron>> [accessed 30 November 2020]

<sup>13</sup> See, for example: Stop Hate for Profit available at: <https://www.stophateforprofit.org/> [Accessed 30 November 2020]

<sup>14</sup> Alexander A. Siegel, ‘Online Hate Speech’ in Nathaniel Persily & Joshua A. Tucker (eds) ‘*Social Media and Democracy: The State of the Field, Prospects for Reform*’ (1<sup>st</sup> edn. Cambridge University Press 2020) 66

<sup>15</sup> Ibid

<sup>16</sup> Aleksandra Urman & Stefan Katz (2020) ‘What They Do in the Shadows: Examining the Far-Right Networks on Telegram, Information’ *Communication & Society*, DOI: [10.1080/1369118X.2020.1803946](https://doi.org/10.1080/1369118X.2020.1803946)

wish to draw the Law Commission's attention to the findings of Joanna Williams who notes that even though the Police in England and Wales record over 100,000 hate crimes, there is the assumption that hate crime is on the rise. However, Williams argues that 'definitions of hate crime are subjective and depend upon the perception of victims and observers.'<sup>17</sup>In this light, all amendments and proposals and the Law Commission's stance should be tailored to reflect the actuality of hate crime occurrence rather than its perception.

*For more information please contact:  
Jacob Mchangama, Director, Justitia: [jacob@justitia-int.org](mailto:jacob@justitia-int.org)*

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<sup>17</sup> Joanna Williams, 'Policing Hate: Have we abandoned Freedom and Equality?' (1<sup>ST</sup> edn. CIVITAS 2020) available at: <http://www.civitas.org.uk/content/files/Policing-Hate.pdf> [Accessed 14 December 2020] 10