

ANALYSIS AND RECOMMENDATIONS REGARDING LEGISLATION, INVESTIGATION AND PROSECUTION, AND DATA COLLECTION ON HATE CRIME, HATE SPEECH AND DISCRIMINATION IN MONTENEGRO



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I. EXECUTIVE SUMMARY AND INTRODUCTION

The Project “Promotion of diversity and equality in Montenegro” is part of the Horizontal Facility for the Western Balkans and Turkey II, a joint programme of the Council of Europe and the European Union aiming at supporting South East Europe and Turkey to comply with European standards. The project is focused on supporting beneficiaries in Montenegro on countering hate speech and hate crime; promoting and protecting rights of LGBTI persons; strengthening anti-discrimination institutions/mechanisms and coordination in line with standards of the Council of Europe, notably the recommendations of the European Commission against Racism and Intolerance (ECRI).

This report reviews the legal and implementation frameworks relating to hate crime and criminal forms of hate speech and discrimination based on interviews with key stakeholders during a three-day field visit, and on desk-based analysis of relevant legal and policy documents.

The analysis and recommendations particularly focus on the following areas of policy and practice: legislative frameworks; building institutional capacities for the recognition, investigation and prosecution of hate crimes, hate speech and discriminatory offences; recording and data collection and establishing a governance framework for the regulation of hate speech.

The analysis reveals a limited legislative framework and an incomplete recording and data collection framework. Montenegro’s current hate crime provisions set a high threshold for prosecution, requiring evidence of ‘hatred’ to apply. They also do not fully comply with ECRI’s recommendations.¹ A key hate crime provision, Article 42A is an aggravating circumstances provision. As indicated in interviews and during the data collection phase, there is not a shared understanding between the prosecution service and the courts regarding at which point its application should be considered in the criminal justice process. These issues undermine the applicability of the law and is likely to be a factor in why only a small number of cases have been considered by the courts to date. There is evidence of an overapplication of misdemeanor charges to cases that are potentially more serious. At the same time there is evidence of under-application of misdemeanor provisions of the Law on the Prohibition of Discrimination in cases of discrimination. There are gaps and inconsistencies in the national legislative framework, and a lack of successful prosecutions in the areas of hate crime, hate speech and discrimination.

The recognition of and responses to hate speech across the wide range of bodies, agencies and organizations with responsibilities in this area is also limited and uncoordinated. Finally, very limited data is captured on hate crimes, hate speech and discrimination in Montenegro, precluding a full picture of the prevalence and impact of these harms. For example, no hate crime data has been submitted to the OSCE Office for Democratic Institutions and Human Rights for inclusion in their annual hate crime reporting since at least 2014.² This suggests that it is difficult to track hate crime cases across the system and key information about victims needs and evidence that is central to the application of relevant laws is missed and falls between the gaps.³

LGBTI communities have been the focus of Montenegro’s human rights strategy and action to date. Other minority groups, including religious minorities, Roma and Egyptian communities, and people with disabilities have received less attention. This is for a number of reasons including political sensitivities relating to addressing hate crimes based on religious identity, a lack of political will to address hate crimes against Roma and Egyptian communities and a lack of visibility and

1 See ECRI (2017) and (2020)

2 see <https://hatecrime.osce.org/montenegro>

3 See section IV about current gaps in Montenegro’s hate crime recording and data collection system.

understanding of hate crimes against people with disabilities. An area of concern is the limited focus of strategies and programmes to date on Roma communities and people with disabilities' experiences of hate crime and hate speech suggesting a lack of political will to understand and address these harms.

There are several positive aspects to efforts to monitor hate crime, hate speech and discrimination by various actors in Montenegro. These include the sustained strategic commitment to securing rights and improved outcomes for LGBTI communities since 2013, most recently relating to the implementation of 'the Strategy for Improving the Quality of Life of LGBTI Persons in Montenegro 2019-2023'. Relevant strategic objectives include police, prosecutor and judicial training, and improving data collection on hate crime. The openness of the Montenegrin authorities to input from intergovernmental organizations and agencies through training and capacity-building is also to be commended.

There are also promising opportunities to move forward. The Rulebook on Special Records, which sets out how data on discrimination offences are captured across the system provides a very useful basis for further guidance, forms and training. The Judiciary Information and Communication Technology Strategy 2016-2020 envisages „development of a software solution for the unique justice information system“, which should support these efforts. The work of the police 'Trust Teams', which cooperate with LGBT NGOs to enhance information exchange and support with victims, could be further developed to cover all areas of the country and to involve prosecutors.

Recommendations focus on the need to review evidence of the under-use of existing hate crime provisions, including Article 42A and to develop investigation and prosecution guidance - based on lessons learned from national and high profile cases - to address this and other issues relating to hate speech and discrimination recording and case handling. The full implementation of the rulebook on data collection relating to discrimination - including supplementary guidance on recording and data collection is also addressed. Concrete proposals are offered on practical ways to monitor the diverse range of protected characteristics contained in the national law, while avoiding an onerous and unworkable burden on the police and other agencies. The report sets out a framework of principles on which to develop the Montenegro's effort in the areas of recording and data collection. Briefly, they highlight the need for any recording and data collection system to be victim focused, transparent, inclusive, comprehensive and in line with international norms and standards.

Overall, the report aims to support national stakeholders to:

- have a shared understanding of the strengths and limitations of the current system
- agree shared priority actions for improvement in national systems
- agree how the Council of Europe, within the mandate of the project, is best able to assist stakeholders in achieving their identified priorities.

II. METHODOLOGY

The report's findings and recommendations are based on interviews with key stakeholders, conducted during a 3-day (21-23 January 2020) field mission; a review of the current sanctioning policy and mechanisms to respond to hate crime, hate speech and discriminatory offences; an analysis of available data on reporting, recording and data collection and case handling and an assessment of the national situation against international norms and standards.

The field mission stage:

During the three-day field mission stage the national and international expert met with representatives of Judiciary, Police, Ministries, NGOs. The interviews allowed a clearer understanding of how current systems function and the constraints or difficulties experienced by key stakeholders:

- **Ms Blanka Radošević Marović** - Director General for Promotion and Prevention of Human Rights and Freedoms
- **Mr Radule Kojović**, Judge and President of Criminal Law Department at Supreme Court
- **Mr Miloš Šoškić**, Prosecutor at High State Prosecution Office in Podgorica
- **Ms Tamara Pavićević**, Head of the Department for Prevention and Work of the Police in Community
- **Ms Vesna Simović Zvicer**, President of Judicial Council
- **Ms Nada Bjeković**, President of the Misdemeanour Court Podgorica
- **Mr Ognjen Mitrović**, Head of the Directorate for International Judicial Cooperation and OSCE Hate Crime Contact Point
- **Mr Siniša Bjeković**, Ombudsman
- **Mr Ms Zeljka Jovović**, President of the Basic Court Podgorica
- Representatives of NGOs Juventas, Queer, Forum Progress, Spektra, LGBTIQ social centre

In all the meetings, the experts received full cooperation from the participants to perform its mission, all showing genuine interest and commitment, always with constructive debate about the best solutions that should be adopted.

The analysis stage

Relevant legislation, strategies and policies were reviewed, including:

- Constitution of Montenegro.
- Criminal Code
- The Law on Prohibition of Discrimination
- Public Order and Peace Law
- Media Law
- Law on Electronic Media
- Report (2017) and Conclusions (2020) issued by ECRI
- Annual reports by Supreme Court, Supreme Prosecution Office, Judicial Training Center
- Studies and statistical data related on hate speech, discrimination and hate crimes

International norms and standards were drawn upon to situate Montenegro's approach and to recommend actions for closer alignment with the normative framework.

Full references are provided throughout the report and in the reference annex.

This report also incorporates comments from colleagues from the Council of Europe. The final version will incorporate feedback from national stakeholders as appropriate.

III. LEGISLATIVE FRAMEWORK AND STRATEGIC BACKGROUND

Legal Framework

The **Constitution of Montenegro**⁴ provides the legal basis for promoting, strengthening and improving the protection of fundamental human rights and freedoms and reaffirms Montenegro's obligation to respect international standards in this context. The basic provisions of the Constitution provide a general guarantee of the protection of human rights and freedoms, prohibit the incitement of hatred or intolerance on any grounds and prohibit discrimination on any grounds. In addition, the Constitution establishes that ratified and promulgated international treaties and generally accepted rules of international law form an integral part of the domestic legal order and that they have primacy over domestic law and apply directly when relations govern otherwise than domestic law.

The Constitution of Montenegro contains several provisions that guarantee non-discrimination and equality.

- Direct and indirect discrimination on any grounds is prohibited. (Art. 8)
- The introduction of special measures aimed at creating conditions for the realization of national, gender and overall equality and protection of persons who, on any grounds, are in unequal position, according to the Constitution of Montenegro, shall not be considered discrimination (affirmative action);
- The Constitution guarantees the equality of citizens, regardless of any specificity or personal attribute. (Art. 17)
- The Constitution guarantees the equality of women and men and is obliged to develop a policy of equal opportunities (Article 18).
- Everyone has the right to the equal protection of his rights and freedoms (Article 19)

Specific anti-discrimination guarantees include:

- When a restriction of rights and freedoms is permitted by the Constitution, the restriction must not be made based on gender, nationality, race, religion, language, ethnic or social origin, political or other belief, property status or any other personal capacity. (Art. 25)
- The competent court may prevent the dissemination of information and ideas through the media only if it is necessary for the purpose of: ... preventing the propagation of racial, national and religious hatred or discrimination. (Art. 50)
- Political parties' actions that are aimed at provoking national, racial, religious or other hatred are prohibited. (Art. 55)

4 Constitution of Montenegro, „Official Gazette of Montenegro“, no. 1/2007 of 25.10.2007, 38 / 2013-1.

*Mechanisms to respond to hate crime, hate speech and discrimination crimes have been established through the criminal legal framework, **Criminal Code**⁵, as well as a number of laws which prohibit discriminatory, hate crime or hate speech behavior and stipulate such behavior as an offence.*

The national *criminal legal framework* of Montenegro includes several criminal offences in the Criminal Code, in relation to protection against hate crime/hate speech/discrimination and provides structured protection at multiple levels:

- Direct criminal legal protection through a range of *offenses which are motivated by 'hatred' towards specified protected characteristics* (hate crimes, hate speech and discrimination crimes *per se*). (Causing National, Racial and Religious Hatred, Article 370)
- Criminal offences committed *out of hatred, among other forms of commission of concrete criminal offence* (e.g. Torture, Article 167, Violent behavior in a sports event or public gathering, Article 399a)
- A *specific or severe form* of basic/primary criminal offence *motivated out of hate*. (Endangering Safety, Article 168 par. 2). Also, defined as one of two of more concrete aggravating circumstances or manner of commission of criminal offence.
- Finally, the legislative amendments to the Criminal Code in 2013 and 2017 expanded the range of protection against hate crime introducing *special circumstances of sentencing for a criminal offence committed out of hatred*⁶. This sentencing provision applies to all offences in the criminal code, allowing the court to treat any criminal offense that is proven to be motivated by hatred on the grounds of race, religion, national or ethnic origin, disabilities, gender, sexual orientation or gender identity of another person, as an aggravating circumstance. The Court will treat these circumstances as *aggravating* except where these circumstances constitute an element of a basic or more serious form of a criminal offense (Article 42a of the criminal Code). Where a criminal offence is committed against a particularly vulnerable category of persons⁷, the Court is obliged to take this circumstance as aggravating. (Paragraph 2 of the same article)

Such a diverse and complicated structure produces many issues when it comes to securing an effective and efficient fight against hate crime, especially in the manner of how to record and keep track of hate crime cases and criminal proceedings.

ECRI REPORT ON MONTENEGRO (fifth monitoring cycle) from 2017, recognized the efforts of Montenegrin authorities to secure improved protection against hate crime through a new provision making racist, homo and transphobic motivation an aggravating circumstance. However, criminal, civil and administrative legislation should be brought in line with ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination. ECRI recommends that the authorities bring the Criminal Code into line with its General Policy Recommendation (GPR) No. 7 as indicated in the preceding paragraphs; in particular they should

- *include in all criminal law provisions aimed at combating racism and intolerance the*

⁵ Criminal Code, Code is published in the Official Gazette of the Republic of Montenegro, no. 70/2003, 13/2004, 47/2006 and „Official Gazette of Montenegro“, no. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017, 49/2018 and 3/2020.

⁶ Criminal Code, Article 42a

“(1) Where a crime was committed out of hatred of another person because of national or ethnic affiliation, race or religion, or absence of such affiliation, sex, sexual orientation or gender identity, such circumstances will be taken into account as aggravating circumstances, except where these circumstances constitute an element of a basic or more serious form of a criminal offense.

(2) If the offense was committed against a person belonging to a particularly vulnerable category of persons (children, persons with disabilities, pregnant woman, the elderly, refugees), the court will take this circumstance as aggravating.” By second paragraph Criminal Code has been amended at 2017, introducing particularly vulnerable categories, as well as persons with disabilities at paragraph one.

⁷ (children, people with disabilities, pregnant women, the elderly, refugees)

grounds of language and citizenship, as well as sexual orientation and gender identity,

- *criminalize racist insults against a person or a group of persons, irrespective of their domicile, and*
- *criminalize the public dissemination or distribution, or the production or storage aimed at public dissemination or distribution, with a racist aim, of written, pictorial or other material containing racist manifestations.*

In the area of misdemeanor protection against discrimination are the Law on Prohibition of Discrimination and Public Order and the Peace Law. In practice, of Misdemeanor Courts in Montenegro, hate crimes/offences have been initiated and heard only under Public Order and Peace Law.

The Law on Prohibition of Discrimination⁸ is harmonized with the EU acquis⁹, prohibits direct or indirect discrimination, provides multiple protection against discrimination through inspection procedures, criminal investigation and prosecution before the police and prosecution, court (criminal, civil and misdemeanor) proceedings and establishes the Protector of Human Rights and Freedoms of Montenegro as an institutional mechanism for protection against discrimination. This **Law on Prohibition of Discrimination** also prohibits hate speech, as a special form of discrimination (**Article 9a**). Beside hate speech, other forms of special discrimination have been defined, such as, racial discrimination and discrimination on the basis of gender identity, sexual orientation and/or intersex characteristics.

The Public Order and Peace Law¹⁰ defines offenses that violate public order and peace in a public place and prescribes penalties and protective measures for such offenses. Only one offence hate speech per se (article 19) and no other offences could be considered hate crime or discriminatory offences. The Public Order and Peace Law does not establish the general provision on aggravating circumstances relating to hatred or intolerance, similar to provision of Article 42a of the Criminal Code, which could be used in cases when other prescribed offences have been committed out of hatred.

The Media Law and the **Law on Electronic Media** are important when it comes to the prohibition of hate speech through provisions which stipulate the possibility to ban a media organization/ platform or to sentence a media organization to pay a fine where they have been found to distribute or broadcast media content calling for the violation of guaranteed freedoms and rights of man and citizen, or provoking national, racial or religious intolerance or hatred.

Recommendation: Substantial implementation of hate crime, hate speech and discrimination offences as correlative concepts should be conducted systematically at legislation level, with harmonization among concrete laws and within the specific laws.

- Overlapping among different laws and provisions should be avoided.
- Grounds for committing hate crime, hate speech and discrimination offences should be updated, according ECRI Recommendation, and be unified for all offences.

⁸ *Law on Prohibition of Discrimination*, Law is published in the Official Gazette of Montenegro, no. 46/2010, 40/2011 - Second Law 18/2014 and 42/2017.

⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2004/113 / EC of 13 December 2004; Directive 2006/54 / EC of the European Parliament and of the Council of 5 July 2006

¹⁰ *Law on Public Order and Peace*, Law is published in the Official Gazette of Montenegro, no. 64/2011 of 29.12.2011.

Hate Crime

The Criminal Code of Montenegro represents the core law on hate crime establishing several different forms of crime which generate hate as a motive. As was previously presented, **Article 42a at Criminal Code, introduced an aggravating circumstances provision** for hate crimes. This general sentencing provision indirectly establishes a definition of hate crime and provides the possibility to prosecute any criminal offence in the Criminal Code as a hate crime, except in a case when such aggravating circumstances constitute an element of a basic or more serious form of a criminal offense.

It is important to note that the language of the Article 42a of CC is “out of hatred”. ‘Hatred’ sets a high bar for hate crime prosecutions, as it is necessary to prove that the offender acted out of hatred towards a protected characteristic. International good practice suggest that lower thresholds suggested by the ‘discriminatory selection model’ of hate crime law increase the chance of successful prosecutions. Language such as “because of intolerance” or “because of bias” are examples of this approach.

Article 42a is a general provision but still limited from the aspect of grounds at the national or ethnic affiliation, race or religion, or absence of such affiliation, disability, sex, sexual orientation or gender identity.¹¹

As explained in international guidelines on hate crime law, aggravating circumstances provisions such as Article 42a allows for a broader response on hate crime because it can apply to any criminal offence. However, the nature of this provision as an aggravating circumstance to be applied at the sentencing stage can introduce confusion as to which agency is responsible for gathering evidence for its application. Interviews in Montenegro suggested different views, between the court and the prosecution service relating to at which point in criminal proceedings it may be relied upon, in a formal sense. It is the view of the court that the prosecutor may invoke the provision of Article 42a only in the closing arguments at the main trial, and that it is the court that essentially implements this provision, while assessing all the circumstances of the case when sentencing. On the other hand, certain individuals in the prosecution service indicate that Article 42a should be relied upon by the prosecution when identifying, recording and treating a case as a hate crime from the very beginning of procedure till the very end. The potential discrepancy between the prosecution service and the courts relating to how potential hate crimes should be treated and how Article 42a should be relied upon and applied raises significant questions about how the hate crime concept is understood by key actors at the national level. This point is returned to in the section on ‘case handling’.

This dilemma affects the data collection and recording of hate crime prosecutions in relation to Article 42a. If it is not possible to identify potential hate crimes that are not already substantial offences (i.e those cases where Article 42a potentially applies) then it is very difficult to follow individual cases or the development of responses to hate crime at different levels/phases/institutions. Options for addressing this issue are presented in the section on hate crime recording and data collection.

The Criminal Code establishes a number of offences which can be committed out of ‘hate’, which include *reasons based on discrimination*. As it is mentioned in this analysis, there is no clear distinction between the terms of discrimination and hate. The term “discrimination” is a relic of some old concept from before 2013, when Criminal Code started to adopt the concept of hate crime. Examples can be found in relation to two specific offences, Torture (**Article 167**) and Endangering Safety (**Article 168**). Namely, **Torture** will be committed by “*anyone who inflicts severe pain or heavy suffering, whether bodily or mental*, in order to obtain from him or a third party a confession

11 According to ECRI’s GPR No. 7 § 18c the grounds of language and citizenship are lacking.

or other information or in order to unlawfully punish or intimidate him, or to exert pressure over him or to intimidate or exert pressure over a third party, **or does so for other reasons based on discrimination** shall be punished by a prison term from six months to five years”.

On other hand, the offence of **Endangering Safety**, with amendments 2013 can be committed as severe form of “endangering the safety of another person by threatening to attack his life or body or a person close to him”, **out of hatred**.

Amendments of the Criminal Code 2013 established a new criminal offence **Violent behavior in a sports event or public gathering** (Article 399a), which can be committed if “by **conduct or banners shown** in a sports event or public gathering *provokes ethnic, racial, religious or other hatred or intolerance on discriminatory grounds, which leads to violence or physical confrontation with participants*”¹². Within the same provision, we have mixture of different terminology.

The Criminal Code establishes two specific crime offences, **Violation of Freedom of Expression of National or Ethnic Affiliation (Article 160)** and **Violation of Freedom of Worship and Practice of Religious Ceremonies (Article 161)** protecting *right to expression of national or ethnic affiliation or culture*¹³ and *freedom of confession or worship*¹⁴.

The Law on Prohibition of Discrimination establishes two misdemeanor hate crimes (Article 34a, para. 1) and 2)) prohibiting “*any undesirable conduct, including harassment through audio and video surveillance, mobile devices, social networks and the Internet, aimed at, or resulting in, the violation of personal dignity, fear, humiliation or insult, or making hostile, degrading or abusive environments*” (Harassment) and “*any unwanted, verbal, non-verbal or physical conduct of a sexual nature that seeks to violate the dignity of a person or group of persons, or by which such effect is achieved, especially when such behavior causes fear or creates hostile, degrading, intimidating, degrading or offensive environment*”. For such offence a legal entity shall be fined between EUR 1,000 and EUR 20,000 and natural person for shall also be fined in the amount of 150 EUR to 2,000 EUR.

Harassment and sexual harassment are specific forms of discrimination (Article 7), misdemeanor offences committed by harassment or sexual harassment are mixed hate crime and discrimination offences.

The lack of a systematic approach towards introducing the concept of hate crime into the criminal legislation has led to shortcomings which affect hate crime investigation, prosecution and sentencing practice. Provision 42a raises different issues in its application.

The Criminal Code provides for a number of offenses that, in their special or serious form, may

¹² Although the act of committing this crime could be classified as hate speech, given its nature, the objective condition of incrimination, that is, the consequence of violence and conflict, this crime should be treated as a hate crime.

¹³ “(1) Anyone who denies other person the right to express his national or ethnic affiliation or culture shall be punished by a fine or a prison term up to one year.

(2) The punishment referred to in para. 1 above shall also apply to anyone who forces other person to declare his national or ethnic affiliation.

(3) Where the offence referred to in paras 1 and 2 above was committed by a public official while acting in his official capacity, the perpetrator shall be punished by a prison term up to three years.

¹⁴ (1) Anyone who denies or restricts the freedom of confession or worship shall be punished by a fine or a prison term up to two years.

(2) The punishment under para. 1 above shall also apply to anyone who prevents or obstructs the practice of religious ceremonies.

(3) Anyone who forces another person to declare his religious beliefs shall be punished by a fine or a prison term up to one year.

(4) A public official who commits the offence under paras 1 to 3 above shall be punished by a prison term up to three years.

qualify as hate crimes, but it does not appear that the key crimes, which are most often committed out of hatred, have a specific form which constitute hate as a motive. Such as: Serious murder, Coercion, abuse, Rape, Female genital mutilation, Injury.

Recommendation: the notion of hate crime (at article 142 of Criminal Code) and hate speech should be defined according to international standards.

Recommendation: the threshold for the hate crime should be reconsidered to be lower than “hatred”. For example, the following terms could be considered: “because of intolerance” or “because of bias”.

- **Hate motive should be introduced as a ground for special or serious form of crimes, which are most often committed out of hatred, such as: Serious murder, Coercion, Abuse, Rape, Female genital mutilation, Violent Behaviour, Injury.**

Hate Speech

Within Montenegrin legislation, hate speech is defined and forbidden by a number of laws. As the key law on discrimination **The Law on Prohibition of Discrimination** defines hate speech as *“any form of expression of ideas, statements, information and opinions that spreads, propagates, incites or justifies discrimination, hatred or violence against a person or group of persons because of their personal characteristics, xenophobia, racial hatred, anti-Semitism or other forms hatred based on intolerance, including intolerance expressed in the form of nationalism, discrimination and hostility against minorities”*¹⁵. **Hate speech as such has been defined as a form of special discrimination.**

Law on Prohibition of Discrimination against Persons with Disabilities¹⁶ also considers hate speech, and disparaging people with disabilities, as **discrimination** on grounds of disability (Article 9), with definition of hate speech as *“any form of expression of ideas, statements, information and opinions spread, promote or justify discrimination, humiliation, hatred or violence against a person with a disability or a group of persons with disabilities, because of their personal characteristics, based on the rejection of diversity and intolerance”*. As hate speech and disparaging people with disabilities as discrimination on grounds of disability shall also be understood the conduct of campaigns or the use of terminology that spreads, encourages and violates human rights and equality of persons with disabilities, as well as denigrates those persons. It is also important to note that the inclusion of the term ‘violence’ could be interpreted as a hate crime provision, as committing violence against another person is a prima facie criminal offence. Committing violence on the grounds of intolerance towards disability would be a hate crime. Overall, this provision contains a number of diverse components that would be more easily implemented as separate discrimination, hate speech and hate crime provisions.

The Criminal Code establishes hate speech as specific crime of *Causing National, Racial and Religious Hatred* (Article 370) as *“publicly incites to violence or hatred towards a group or a member of a group defined by virtue of race, skin color, religion, origin, national or ethnic affiliation”*. Perpetrators shall be punished by a prison term from six months to five years (para. 1). This is a **specific offence, which excludes grounds other than race, skin color, religion, origin, national or ethnic affiliation.** This

¹⁵ According to ECRI’s GPR No. 15 on combating Hate Speech, “hate speech” shall mean the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of „race“, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status.

¹⁶ Law on Prohibition of Discrimination against Persons with Disabilities, Law was published in the Official Gazette of Montenegro, no. 35/2015 of 7.7.2015. and 44/2015 and came into force on 15.7.2015.

construction limits the power of the Criminal Code as a mechanism in the fight against hate speech. As a second form of this offence hate speech includes where anyone *"publicly approves, renounces the existence, or significantly reduces the gravity of criminal offences of genocide, crimes against humanity and war crimes committed against a group or a member of group by virtue of their race, skin color, religion, origin, national or ethnic affiliation in a manner which can lead to violence or cause hatred against a group of persons or a member of such group, where such criminal offences have been established by a final judgment of a court in Montenegro or of the international criminal tribunal"* (para. 2).

If the above given offences are *"committed by coercion, ill-treatment, endangering of safety, exposure to mockery of national, ethnic or religious symbols, by damaging property of another person, by desecration of monuments, memorials or tombs, the perpetrator"* the perpetrator shall be punished by a prison term from one to eight years (para. 3).

The most severe form of hate speech will be established if it is committed by the *"misuse of office or where such offence result in riots, violence or other severe consequences for the joint life of nations, national minorities or ethnic groups living in Montenegro"*. The punishment for the offence under para. 1 above is a prison term from one to eight years and for the offence under para. 2 and 3.

Even though by its name and basic form at paragraph 1 and 2, the criminal offence of Racial and other discrimination, Article 443 of the **Criminal Code**, is a criminal discrimination offence. Paragraph 3 establishes a **hate speech offence**, defining it as *"spreads of ideas about the superiority of one race over another, or promotes hatred or intolerance based on race, gender, disability, sexual orientation, gender identity or other personal characteristics or incites racial or other discrimination"*. For this offence the perpetrator shall be punished by imprisonment for a term between three months and three years.

Whoever commits the offense referred to above with the abuse of office or if such acts resulted in disorder or violence, he or she shall be punished by imprisonment for six months to five years.

Article 199 of Criminal Code sanctions public exposure to the mockery of nation, national minority or another minority ethnic group living in Montenegro. "This provision seems to be a restriction compared with GPR No. 7 § 18b, according to which racist insults should also be punishable if they are directed against any person or grouping of persons, irrespective of their nature and place of residence."¹⁷

The Law on Prohibition of Discrimination based on definition given above (Article 9a) establishes hate speech as misdemeanor offence (Article 34), which can be committed *"by expression of ideas, statements, information, opinions, encourages or justify discrimination, hatred or violence against a person or group of persons because of their personal characteristics, xenophobia, racial hatred, anti-Semitism, or other forms of hatred based on intolerance, including intolerance expressed in the form nationalism, discrimination and hostility against minorities"*. A fine of 1000 EUR to 20,000 EUR shall be imposed for this misdemeanor offence to a legal person, and natural person in the amount of 150 EUR to 2,000 EUR.

The Law on Public Order and Peace at Article 19 establishes the misdemeanor offence of hate speech which can be committed *"when in public by speaking, sign, symbol, or otherwise offending another on the basis of national, racial or religious affiliation, ethnic origin or other personal attribute"*, with punishment with a fine of 250 euros to 1,500 euros, or by imprisonment not exceeding 60 days. As the hate speech provisions at other laws, this provision is also partially specified regarding grounds but also a general as do not list all possible grounds.

According to the **Media Law**¹⁸ the competent court may, at the motion of the State Prosecutor, prohibit the distribution of broadcast media content calling for violent overthrow of the constitutional order, violation of the territorial integrity of the Montenegro, violation of guaranteed freedoms and rights of man and citizen, or **provoking national, racial or religious intolerance or hatred** (Article 11), and temporarily prohibit distribution of the published program content of the media until the decision on the ban is final (Article 12).

Article 23 of Media Law defines as “forbidden to publish information and opinions that incite discrimination, hatred or violence against persons or groups of persons because they belong to or do not belong to a race, religion, nation, ethnic group, gender or sexual orientation”. This provision also excludes grounds other than *race, religion, nation, ethnic group, gender or sexual orientation*. Article 11 excludes even more grounds, such as *gender or sexual orientation, covered by Article 23*.

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recommend “amending the relevant provision of the Media Law in such a way as to prohibit hate speech against persons with disabilities or against any person or group distinguished from others on the basis of their personal capacity, since it is unjustified to protect them from speech hate only those who share the same race, religion, nation, ethnic group, gender, and sexual orientation”.

The founder of the media and the author shall not be liable, if the published information and opinions are part of a scientific or author’s work dealing with a public matter and are published:

- without intent to incite discrimination, hatred or violence and form part of an objective journalistic report;
- with the intention of critically stating that discrimination, hatred, violence or acts which constitute or may constitute incitement to such behavior.

Where the court determines that published information and opinions are contrary to Article 23, the founder/owner of the media organization shall be fined from twenty to fifty times the minimum wage in the Montenegro (Article 43).

Hate speech has been defined and prohibited through various laws and on different levels (criminal and misdemeanor). These provisions lack a unique definition with recognition of all grounds foreseen by international standards.

On other hand we have overlapping of protective objects of particular laws caused by unclear distinctions in protective objects of specific provisions, e.g. correlation between Criminal code (Article 370) and The Law on Prohibition of Discrimination (Article 43). Finally, hate speech is regulated with different laws, indicating a misunderstanding of the concept and nature of hate speech, at least according the standards of ECRI and OSCE, particularly referring to distinctions among the terms, discrimination and hate speech, or hate crime and hate speech.

Recommendation: Introduce a specific definition of hate speech, and hate speech offences, in line with ECRI GPR no. 15, with the particular aim of broadening of specific offences and protected characteristics, as well as differentiation from hate crime and discriminatory offences.

Recommendation: Provisions of article 370 should be revised in order to include all possible grounds of hate speech.

¹⁸ Media Law, the Law was published in the Official Gazette of the Republic of Montenegro, no. 51/2002 and 62/2002., 46 / 2010-19., 40 / 2011-1.

Discrimination Crimes/Offences

The Law on the Prohibition of Discrimination, Article 2, prohibits discrimination on any ground, defining it as *“any legal or factual making a difference or unequal treatment or omission of treatment of one person or group of persons in relation to other persons, as well as exclusion, limitation or giving priority to one person in relation to other persons, based on race, skin color, ethnicity, social or ethnic origin, relationship with a minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender change, gender identity, sexual orientation and / or intersex characteristics, health status, disability, age, wealth, marital or family status, group affiliation, or assumption of affiliation with a group, political party, or other organization, as well as other personal attributes”*.

Under the article 34 of **The Law on Prohibition of Discrimination**, beside hate speech and harassment already presented in hate crime and hate speech sections, establishes misdemeanor discrimination offences, in e.g. *“disables, restricts or impedes employment, work, education or unjustifiably differentiates or treats a person or group of persons unequally, on the grounds of health (in relation to Article 12)”*.

Also, the **Law on Prohibition of Discrimination against Persons with Disabilities**, as *lex specialis* establishes a number misdemeanor discrimination offences (Article 29), e.g. *“separation of a person or group of persons with disabilities and merging them into one or more groups in a particular situation, when in the same or similar situation that separation and merger is not performed with another person or group of persons (Paragraph 1. in relation to Article 10)”*; or failure to provide the Braille inscription for persons with disabilities in public buildings and public spaces and areas (Paragraph 2. in relation Article 12 paragraph 2). For such offence, a legal person shall, be pay a fine of EUR 10,000 to EUR 20,000, a responsible person in a legal entity, a responsible person in a state body, a state administration body and an organ of a local self-government unit shall also be fined from EUR 1,500 to EUR 2,000.

The natural person shall be fined from EUR 5,000 to EUR 6,000.

Criminal Code of Montenegro establishes three discriminatory criminal offence, two of them general and blanket criminal offences, *Violation of equality* (Article 159) and *Racial and other discrimination* (Article 443), and *Breach of Equality in Employment* as specific and blanket offence (Article 225).

Violation of Equality will be prosecuted when, *“anyone who on the grounds of his national or ethnic affiliation, affiliation with a race or religion, or on the ground of absence of such an affiliation, or on the grounds of the differences with respect to his political or other beliefs, sex, language, education, social status, social origin, sexual orientation, gender identity, disability, financial standing or other personal characteristic denies or restricts to another person his human rights and freedoms provided for by the Constitution, laws or other regulations or general legal acts or ratified international treaties or, on the grounds of such differences, grants privileges or exemptions”*. For this offence perpetrator shall be punished by a prison term of up to three years.

If such offence was committed out of hatred towards a member of a group designated on the grounds of race, skin color, religion, origin, national or ethnic affiliation, the perpetrator shall be punished by a prison term from three months to five years.

If the offence was committed by a public official while acting in his official capacity, the perpetrator shall be punished by a prison term from one to eight years.

As a specific offence, in relation to *violation of equality in employment*, *anyone who knowingly breaches regulations or otherwise denies or restricts a citizen's right to freedom of employment in the territory of Montenegro on equal terms* shall be punished by a fine or a prison term up to one year.

Racial and other discrimination offence is a basic/general discriminatory offence which shall be applied in the case of “violation of fundamental human rights and freedoms guaranteed by generally accepted rules of international law and confirmed by international treaties by Montenegro, because of national or ethnic origin, race or religion or absence or affiliation or differences in political or other persuasion, gender, language, education, social status, social origin, sexual orientation, gender identity, disability, property state or any other personal attribute”. It shall be punished by imprisonment for a term between six months and five years.

A special form of this offence is regulated at paragraph 2 in case when “whoever persecutes organizations or individuals for their advocacy for equality of persons”.

Paragraph (3) is elaborated at the Hate speech section as it not a discriminatory offence, but rather a hate speech.

Whoever commits the *Racial and other discrimination* offense referred above with abuse of office or if such acts resulted in disorder or violence, he or she shall be punished by imprisonment for one to eight years. (Paragraph 4)

Consumer Protection Law¹⁹ prohibits advertising that discriminates against consumers based on gender, racial, national or religious affiliation or disability, offends consumer dignity, incites violence or behavior that is detrimental to safety and consumer health or the environment. (Article 29).

A fine of EUR 700 to EUR 10,000 shall be imposed on a legal person - a merchant, if he has advertised goods and services in a manner contrary to the Article 29. This offence beside discrimination can generate a hate crime as well.

Strategic Background

Starting from the challenges identified in the analysis of the situation, **the Strategy for Improving the Quality of Life of LGBTI Persons in Montenegro 2019-2023** has been defined and adopted. It has been based on the results realized through Strategy 2013-2018.

The drafting of the new LGBTI Strategy considered the recommendations of the European Commission against Racism and Intolerance - ECRI issued as part of its Montenegro Report of September 2017, as well as the Committee of Ministers' Recommendation to Member States on measures to combat discrimination based on sexual orientation or gender identity CM / Rec (2010)5.

The Strategy defined the following strategic and specific goals to be achieved, as well as the measures that will be achieved through their implementation:

- ❖ *Operational Objectives 2.1, 2.2, 2.3:* Increased level of training of police officers, prosecutors and judges for the effective and efficient implementation of the normative framework for the protection of the human rights of LGBTI persons.
 - Measures: Educate judges about specific issues relating to sensitized work with LGBTI persons, recognition and prosecution of hate crimes against LGBTI persons with particular focus on the application of Article 42a of the Criminal Code of Montenegro.
- ❖ *Operational objective 2.5:* Preconditions created for effective monitoring of the application of criminal and misdemeanor legislation from the aspect of protection of LGBTI persons from discrimination and violence.

¹⁹ The Law was published in the Official Gazette of Montenegro, no. 2/2014, 6/2014, 43/2015, 70/2017 and 67/2019

- Measure 2.5.1: Analyze the implementation of the Law on Prohibition of Discrimination from the perspective of protection of LGBTI persons from discrimination.
- Measure 2.5.2: Conduct impact assessments of training for the processing of hate crimes against LGBTI persons.
- Measure 2.5.3: Initiate a dialogue with judicial authorities to establish a functional system for collecting disaggregated data regarding prosecuted cases of hate crime against LGBTI persons.

Judiciary Information and Communication Technology Strategy 2016-2020 envisages „development of a software solution for the unique justice information system“ which should improve not only the efficiency and security of recorded data but also content of records in line with international standards and national legislation. In connection to Article 33 of the Law on Prohibition of Discrimination ICT system will need to be introduced with desegregated data regarding hate crime/hate speech/discrimination cases.

All other Strategies related to vulnerable groups (Minority Policy Strategy 2019-2023, Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016 – 2020, Strategy for Protection of Persons with Disabilities and Promotion of Equality 2017-2021) **do not foresee activities in order to improve response of authorities and mechanisms to fight against hate crime, hate speech and discriminatory offences in the form that LGBTI Strategy do. Only in some extent, at most cases indirectly, listed Strategies refer to hate crime, hate speech and discriminatory offences.**

In that sense **Strategy for Protection of Persons with Disabilities and Promotion of Equality 2017-2021** refer to Legislation's compliance with the Law on Prohibition of Discrimination against Persons with Disabilities in Montenegro proposing to amend the relevant provision of the Criminal Code (implement in 2017), Media Law and Consumer Protection Law in order to persons with disabilities will be recognized as vulnerable group.

As part of the **Strategy for Social Inclusion of Roma and Egyptians in Montenegro 2016 – 2020**, SOCIAL STATUS AND FAMILY PROTECTION addresses a whole set of questions that cover different aspects of social issues that may involve hate crimes. Strategic goals in this regard are: 6.1 Combating domestic violence and violence against women, 6.2 Prevention and suppression of begging, 6.3 Combating trafficking in human beings. All these goals are defined through measures of social campaigns, and none of measures are entitled to direct response of authorities toward hate crime, hate speech or discrimination offences against Roma and Egyptians population.

Recommendation: Strategy documents for other vulnerable groups (Minorities, Roma and Egyptian people, disability persons) should pay special attention to this issue and include goals, measures and activities regarding responses to hate crime, hate speech and discriminatory offences in relation to their target groups.

IV. DATA

The national situation

The Ombudsman is the main institution with the overview of data recording and collection. The Ombudsman of Montenegro is an independent and autonomous institution whose task is to protect and promote human rights and freedoms when violated by an act or omission of public authorities. Its competence relates to the *entire private and public sector* in relation to protection against discrimination. The Law on the Protector of Human Rights and Freedoms of Montenegro establishes the Ombudsman as an institutional mechanism for protection against discrimination and a national mechanism for the protection of persons deprived of their liberty from torture and other forms of cruel, inhuman or degrading treatment or punishment. **Among other competences, the Ombudsman also collects and analyzes data on discrimination cases**, which includes hate crime, hate speech and discrimination offences.

Data collected by authorities

According to the **Law on Prohibition of Discrimination** (Article 33) *courts, the state prosecutor's offices, misdemeanor courts, the authority responsible for police affairs and inspection authorities* are obliged to keep separate records on filed complaints, initiated proceedings and decisions taken within their own jurisdiction in relation to discrimination.²⁰

Such separate recorded data should be delivered to the Ombudsman not later than 31st January of the current year for the previous year, and at the request of the Ombudsman, the listed public authorities shall deliver the data from these records as well for a certain shorter period during the year.

At this point, for the previous years, recorded data haven't been delivered to Ombudsman (according Article 33), and no recording and collecting disaggregated data system has been introduced by a relevant institution except the State Prosecution office, which partially collects data on crime victims.²¹ The Misdemeanor Court in Podgorica collects data on discrimination offences, but not through the Judicial Information System (PRIS) and without a systematically developed methodology, or according to disaggregated categories prescribed by the Rulebook on Special Records.

Courts, beside Misdemeanor courts²², use the Judicial Information System (PRIS) which will be changed according ICT Strategy by 2021. According to information given by the Judicial Council and the courts representatives visited by experts in JanuaryT 2020, the existing Judicial Information System (PRIS) does not collect any data on hate speech and hate-motivated violence or discrimination crimes. The only information that can be provided is related to concrete criminal offences by articles of the Criminal Code, which have been heard by the court in a specified period. This means that the Judicial Information System (PRIS) can partially record data regarding hate

²⁰ Article 33 paragraph 2 "The authorities referred to in paragraph 1 of this Article shall deliver data from the separate records to the Protector not later than 31st January of the current year for the previous year, and at the request of the Protector they shall deliver the data from these records as well for a certain shorter period during the year."

²¹ Article 34b "A fine of 100 EUR to 2,000 EUR shall be imposed on the responsible person in the state authority, authority of state administration and authority of the local self-government if:

1) it does not keep separate records on filed complaints, initiated proceedings and decisions taken within its own jurisdiction in relation to discrimination (Article 33 paragraph 1);

2) it fails to deliver the data from the separate records to the Ombudsman within the deadlines referred to in Article 33, paragraph 2 of this Law."

²² With the new Law on Courts from 2015, misdemeanor courts get the status of courts in judiciary system of Montenegro, however, since then haven't been introduced in Judicial Information System (PRIS).

crime, hate speech and discrimination crimes and only in relation to hate crimes per se. All other criminal offences which could be motivated out of hatred, especially in relation to article 42a CC, cannot be recorded.

The information system of the **State Prosecutor's Office** (IBM Case Management System) was installed and completed testing in 2016. This information system can collect and analyze data related to hate crime, hate speech and discrimination solely through the criteria of a crime victim. Namely, the characteristics of the victim, which can be determined by gender, age, in relation to a specific category, e.g. LGBTI or Roma population. Information on the characteristics of the victim is standalone data and as such does not indicate the motive for the commission of the specific crime. IBM Case Management System can provide the same data as the PRIS in relation to criminal offences which are hate crimes per se.

The **Police Directorate** does not have specific reporting or data collection procedures for hate crimes. The issue that can undermine possible data recording within the Police, could be fact that according Montenegrin criminal law system State prosecutor is the body which classified criminal offence and Police would not do any classification of reported act before Prosecutor take over a case. It could be a solution that Police record offences as *potential hate crime*, before introducing it to Prosecutor. Nevertheless, role of the police is important to recognize potential hate crime and to approach victim and collect evidence in the best manner and to report the relevant evidence to the state prosecutor to support an effective prosecution. For these reasons the position of Police should be strengthened when it comes to hate crime, hate speech and discriminatory offences.

The weaknesses of the existing information subsystems have been identified under Strategic Pillar II of the ICT Strategy 2016-2020, and in addition to establishing an information system single platform at the judicial level, there is a need to increase the number and categories of data that must be collected. "Judicial statistical reports are becoming an important tool used by other state institutions and international bodies, and in this regard they require the inclusion of additional data sets and the production of statistical reports that should serve them for the adoption of various strategic plans, action plans and other relevant documents for Montenegro."

The **Ministry of Human and Minority Rights** continuously collects data from various institutions, on discrimination cases against LGBTI population and annually makes an analysis of the situation in the field of criminal and misdemeanor protection. Considering the previously highlighted deficiencies in information systems regarding the collection of data in cases of hate crime, the Ministry's data are not comprehensive, but they point to certain trends and indicate the state of play regarding activities and practices of judicial authorities (police, prosecution and courts) in connection with the reported and processed cases of discrimination, violence and other forms of attacks against members of the LGBT population. Data collected by the Ministry are not disaggregated by hate crime, hate speech, discrimination and do not include other particularly vulnerable category of persons.

In its 'Conclusions on the implementation of the recommendations in respect of Montenegro', ECRI welcomed efforts to improve disaggregated data collection taken by the authorities outlined in this section, however it concluded that its recommendations for improvement have yet to be implemented, and stated, 'there is still no system in place with a view to collecting disaggregated data and providing a coherent as well as integrated view of the cases of racist and homo/trans-phobic hate speech and hate-motivated violence.'²³

23 ECRI (2020) 'ECRI Conclusions on the Implementation of the Recommendations in Respect of Montenegro Subject to Interim Follow-up', available online at <https://rm.coe.int/ecri-conclusions-on-the-implementation-of-the-recommendations-in-respe/16809e8273>

Options for addressing these shortcomings and taking forward the recommendations outlined in this section are discussed below.

Data collected by NGOs

The data collected and stored by non-governmental organizations, as evidenced by the fact that these organizations mostly report to the police and the prosecutor's office, are a very significant indicator of the nature, severity and frequency of hate-motivated verbal and physical attacks against the LGBTI population. In addition to keeping track of reported and non-violent attacks, these organizations publish the most significant examples of violations of LGBTI rights, giving details and context to the nature, background and severity of the attack.

Recommendation: available data NGO should be consulted for the purpose of analyzing the risks and prevalence of hate crime, hate speech and discrimination offences.

The international framework on data collection regarding hate crime, hate speech and discrimination.

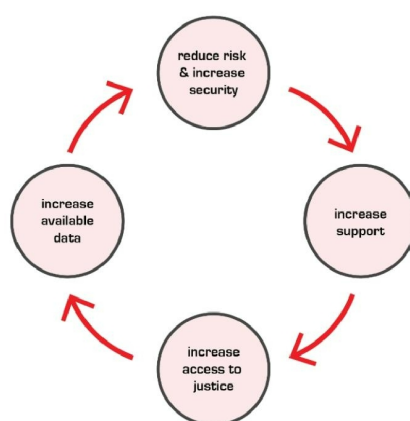
When considering hate crime and hate speech recording systems, it can be easy to get lost in the technical details. It is therefore recommended that relevant and useful guiding principles are adopted by stakeholders.

Recording and data collection systems should:

1. have a victim focus;
2. take a comprehensive approach: be connected to other key elements of a comprehensive approach to understanding and addressing hate crime, hate speech and discrimination;
3. seek international alignment: be aligned with international norms and standards;
4. be transparent: produce accurate data that is easily accessible to the public;
5. reflect an understanding of prevalence and context: be implemented in the context of a commitment to understand the 'dark figure' of the phenomena;
6. be implemented in the context of a strong commitment to cooperation across criminal justice agencies, relevant government ministries, with relevant civil society organisations and academics with relevant expertise;

Figure one: a victim and outcome-focused approach to recording and data collection²⁴

A victim and outcome-focused framework for improving recording and increasing reporting



**FACING
FACTS**

Principle one: A victim focus

As set out in figure one, hate crime, discrimination and hate speech recording and data collection systems should contribute to the following outcomes for victims and affected communities:

- a reduction in risk of occurrence and seriousness of re-victimization, and/or social breakdown escalation;
- an increase in support;
- an increase in access to justice and the effective application of relevant laws;
- an increase in reporting by victims and communities.²⁵

Within this principle should be the commitment to avoid unnecessary bureaucratic burdens on operation police and prosecution staff. As far as possible, these recording systems should be integrated into existing systems.

Principle two: taking a comprehensive approach

Effective recording and data collection systems are one part of a comprehensive approach to addressing hate crimes, hate speech and discrimination.²⁶ High quality training, investigation and prosecution guidelines, guidelines on handling discrimination cases and an inclusive legal and policy framework supporting by sustainable funding are each equally important pieces of the puzzle.

Principle three: seek international alignment

Hate crime, hate speech and discrimination recording and data collection, training, policy and law are supported by a relatively comprehensive international framework of norms and standards. National law, policy and training should be aligned with this framework as far as possible.²⁷ Specifically, the concepts of hate crime, hate speech and discrimination should be clearly delineated and data collected and reported separately. At the practical level, this ensures that the resulting data is more easily submitted to regular requests from intergovernmental organizations (see ODIHR annual hate crime reporting requirements for example) and that the correct application of the law is effectively operationalized in investigation, prosecution and other legal approaches.²⁸

Principle four: seek transparency

The general public and affected communities are key stakeholders in efforts to understand and address hate crime, hate speech and discrimination in the Montenegro. It is essential that data on the nature and impact of these harms, as well as information about the steps that the authorities are taking to address them, including training and guidelines, are easily available and accessible.²⁹

25 Perry, J. (2020), Facing all the Facts European Report

26 See Hate Crime Data Collection and Monitoring Mechanisms: A practical guide, (2014), OSCE, <https://www.osce.org/odihr/datacollectionguide?download=true>

27 See bibliography for references on key norms and standards

28 See for example Hate Crime Laws, A Practical Guide, ODIHR (2009), which builds on the OSCE Ministerial Council Decision 9/09 to define hate crimes as 'criminal offences committed with a bias motivation' (as distinct from hate speech and discrimination) and the recent Guidance Note, European Commission (2018), which defines the separate concepts of hate crime and hate speech and recommends these are adopted at the national level to support the effective application of relevant law and procedure.

29 See FRA Opinion, 'Collecting and publishing disaggregated hate crime data', which states, 'As FRA's reports repeatedly highlight, the collection of detailed and disaggregated data on hate crime – at minimum, by bias motivation and by type of crime – is necessary to monitor the effectiveness of the police response to the phenomenon, and to prepare effective and targeted policies. Publication and dissemination of, and easy access to, the data all help to assure victims and communities that hate crime is taken seriously and sends a message to the public that hate crime is monitored, addressed and not tolerated', FRA (2018), p. 11; see also OSCE/ODIHR's Key Observation for Montenegro for 2018: 'ODIHR observes that Montenegro has not periodically reported to ODIHR the number of hate crimes recorded by police, <https://hatecrime.osce.org/montenegro>; See also ODIHR's publication, Hate Crime Data collection and Monitoring Mechanisms, A practical guide (2014) p. 43. See also relevant ECRI GPRs and OSCE Ministerial Commit-

Principle five: understanding prevalence and context

Evidence suggests that only a small percentage of hate crimes and incidents of hate speech are reported to and recorded by the authorities.³⁰ Various actions can be taken to understand the 'dark figure' or the actual prevalence of hate crime and hate speech, including organizing national surveys and reviewing data collected by relevant civil society organizations.³¹

Principle six: commitment to cooperation

The success of a joint approach is predicated on a commitment to cooperation across criminal justice agencies, ombudsman's offices, NHRIs, government ministries and with relevant civil society organizations. For example, effective police recording system will be severely limited if there is no connection with prosecution and judicial approaches. Likewise, failing to cooperate with civil society organizations that are expert in hate crime, hate speech and/or discrimination, and in supporting victims with their practical and legal needs, will result in a lack of knowledge and information about the prevalence and impact of unreported hate crime, hate speech and discrimination.³² Such cooperation is more likely to succeed if it is underpinned by cross-government protocols and frameworks with clearly set out roles and responsibilities.³³

Recording cases of hate crime, hate speech and discrimination: Securing a joint approach

This section brings together the national findings and international principles to look at how to secure a successful system for hate crime, discrimination and hate speech data collection. Achieving this goal relies on speaking a *common language* and sharing a joint *approach* across Montenegro's criminal justice, civil and administrative systems. Several specific steps need to be taken to get to this position.

As recommended above, the policy and technical framework that Montenegro adopts to record and collect data should be fully aligned with international concepts of 'hate crime', 'hate speech' and 'discrimination' (in line with Principle Three above, 'securing alignment').³⁴ Using this approach will improve case handling by prosecutors and improve data quality and facilitate the sharing of information with international agencies.

In order to 'operationalize' this new framework, and allow effective cooperation across the system, this report proposes shared definitions of 'potential hate crimes', hate speech and discrimination to be adopted by the relevant agencies with responsibility to record and collect data on these phenomena, followed by practical recommendations on the type, form and timing of coordination. As set out above, the focus is on criminal forms of these harms.

ments.

30 See FRA (2018)

31 See victimization surveys, including EU-MIDIS I and EU-MIDIS II; see also FRA Opinion, 'Designing and carrying out crime victimization surveys that include hate crime-specific questions' in which FRA states, 'Designing crime victimization surveys that include hate crime-specific questions would allow authorities to shed light on the 'dark figure' of crime – that is, the number of crimes that are not reported to the police – and to understand victim experiences, trends and emerging issues,' p. 12, FRA (2018); see also ODIHR's recommendations 20-24, which detail how victimization surveys can be carried out and what they should cover, in 'Hate Crime Data Collection and Monitoring Mechanisms: A practical guide', (2014), pp. 33-39.

32 Also see ECRI GPR No 15 on "Combating Hate Speech" recommends to state authorities to support the monitoring of hate speech by civil society, equality bodies and national human rights institutions and promote cooperation in undertaking this task between them and public authorities.

33 See FRA (2018) on cooperating with civil society, and ODIHR (2014) on setting up cross government frameworks. In this context 'relevant civil society organizations' includes those organizations that have a track record in robust and transparent recording and data collection on hate crime/hate speech and/or discrimination.

34 See section III and annex one for a full review of Montenegro's legal framework relating to hate crime and hate speech.

At the moment, there is a lack of clarity about the concepts of hate crime, hate speech and discrimination in relevant national policy strategy and guidance. For example, the 'Rulebook on the content and manner of keeping a special record of cases of reported discrimination' does not define or distinguish between hate crime, hate speech and discrimination offences or list the relevant sections of the criminal code in its instructions. This is likely to lead to confusion and mistakes among those responsible for compiling this information and is likely to be a contributing factor to its lack of implementation. The following sections suggest definitions of 'hate crime', 'hate speech' and 'discrimination', to be used as recording definitions by the relevant agencies.

Montenegro's Hate Crime concept

The Republic of Montenegro's current hate crime framework is explained in detail above. There are several factors to consider in the context of establishing a comprehensive recording and data collection system:

- The legislative framework covers a broad number of characteristics, reflecting international good practice.³⁵
- The 'bias threshold' (how 'hate'/'bias' is defined) is quite high, requiring proof of 'hatred' as opposed to 'bias' or 'prejudice', which are lower thresholds and identified as preferred legislative frameworks by the OSCE.³⁶ This high threshold potentially excludes common forms of hate crime.
- There is a lack of clarity about when section 42A should be applied in the criminal justice process. The courts are more likely to consider that it is applicable only at the court and sentencing stage. The High State Prosecution Office is more likely to understand that the provision could apply at the stage that prosecutors are considering the case.
- While 42A sets a high threshold for 'bias', in its use of the term 'hatred', other similar provisions use suggest a lower threshold. For example, as explained the situational analysis, the terms 'reason based on discrimination'³⁷, 'intolerance on discriminatory grounds'³⁸ are also used in hate crime provisions of the criminal code of Montenegro. These provisions potentially offer the opportunity for stakeholders to adopt a definition of 'potential hate crime' for recording and case handling purposes that has a lower threshold of 'hatred', that is more in line with international norms. For example, the internationally recognized definition of 'hate crime' is provided by the OSCE and developed by the OSCE Office for Democratic Institutions and Human rights: Hate Crime is a criminal act committed with a *bias* motive. While the situational analysis rightly recommends legislative changes, it is possible for stakeholders to agree a shared recording definition, which will allow cases to be recorded as early as possible, take a more internationally aligned approach to defining 'hate crime' and allows evidence of bias motive to be gathered at the earliest stages.

³⁵ Criminal Code, Article 42a

"(1) Where a crime was committed out of hatred of another person because of national or ethnic affiliation, race or religion, or absence of such affiliation, sex, sexual orientation or gender identity, such circumstances will be taken into account as aggravating circumstances, except where these circumstances constitute an element of a basic or more serious form of a criminal offense.

(2) If the offense was committed against a person belonging to a particularly vulnerable category of persons (children, persons with disabilities, pregnant woman, the elderly, refugees), the court will take this circumstance as aggravating." By second paragraph Criminal Code has been amended at 2017, introducing particularly vulnerable categories, as well as persons with disabilities at paragraph one.

See the Situational Analysis for a full review.

³⁶ See ODIHR (2009), 'Hate crime laws: A practical Guide', <https://www.osce.org/odihr/36426>.

³⁷ Article 167; Article 168

³⁸ Article 399a

Adopting a joint definition of ‘potential hate crime’ for recording purposes

Adopting and implementing a joint definition of hate crime for case handling and monitoring purposes is one of the most significant steps that can be taken to ensure that cases are identified, evidence is gathered, victims get support and reliable data can be generated. Being ‘on the same page’ across the police, prosecution service and courts doesn’t just ensure higher quality data, but also that vital evidence that a crime might be a hate crime and information about victims’ safety and support needs is passed and addressed from one agency to another. Ultimately this approach allows the highest quality, most detailed evidence to be presented to the court for its consideration.

Of course, it is important to remember that effective training, leadership and joint working with relevant civil society organizations are all essential to ensure that this vital information is actually acted upon.

As explained in the Situational Analysis, and above, the Criminal Code of Montenegro is inclusive in the range of characteristics that are covered, however, the threshold of ‘hatred’ is high.

As explained above, the international recognized definition of hate crime is a criminal offence committed with a bias motive. The OSCE Office for Democratic Institutions and Human Rights defines ‘bias’ as,

‘preconceived negative opinions, stereotypical assumptions, intolerance or hatred directed to a particular group that shares a common characteristic, such as race, ethnicity, language, religion, nationality, sexual orientation, gender or any other fundamental characteristic. People with disabilities may also be victims of hate crimes.’

This definition allows national stakeholders to consider a more inclusive definition of hate crime as an informal recording definition.

Recommendation: the police and relevant ministries should consider and adopt one of the following definitions of potential hate crime or recording purposes:

‘Any crime in the Criminal Code of Montenegro *perceived by the victim or any other person* to be committed based on bias towards “race”, colour, language, religion, citizenship, national or ethnic origin, sexual orientation or gender identity, whether real or presumed except where these circumstances constitute an element of a basic or more serious form of a criminal offence.

Or

Any offence *where bias indicators suggest* that an offence was committed based on bias towards “race”, colour, language, religion, citizenship, national or ethnic origin, sexual orientation or gender identity, whether real or presumed except where these circumstances constitute an element of a basic or more serious form of a criminal offence.

Commentary: these definitions are suggested as alternatives. Once adopted, guidance should direct the police to any incident that falls within the definition as a ‘potential hate crime’. The first option is based on ECRI’s General Policy Recommendation 11 to incorporate the perception of the victim and any other person into the recording of hate crimes. In order to ensure equality and consistency, the definition proposed in this paper extends beyond ‘race’ to all protected charac-

teristics. Further, the term ‘potential hate crime’ is introduced to allow for the fact that most police services are reluctant to automatically record a crime as a ‘hate crime’ based on the perception of the victim/any other person alone.³⁹

This approach recognizes the centrality of a perception-based approach, is aligned with ECRI’s GPR No. 11 and allows for flexibility at the national level.

The second definition uses the concept of bias indicators, or, ‘objective facts, circumstances or patterns connected to a criminal act that, alone or in conjunction with other indicators, suggest that the offender’s actions were motivated in whole or in part by bias, prejudice or hostility. For example, if a perpetrator uses racial slurs while attacking a member of a racial minority, this could indicate a bias motive and be sufficient for the responding officer to classify a crime as a likely hate crime. By the same token, the desecration of a cemetery or an attack on a gay pride parade may be bias indicators of anti-religious or anti-LGBT motivation.’⁴⁰ Victim perception is also a bias indicator.

Both definitions incorporate offences motivated ‘in whole or in part’ by intolerance/bias/prejudice etc. and based on ‘actual or perceived’ membership of a protected group.⁴¹

Both definitions reflect ECRI’s recognition of the OSCE definition of hate crime in its sixth monitoring cycle⁴² and includes the inclusive list of protected characteristics proposed by ECRI’s 2017 report on Montenegro.⁴³

The next step is to ‘operationalize’ this definition in the work of the police, prosecutions service and the courts. Specific monitoring definitions are proposed below.⁴⁴

It is recommended that relevant stakeholders should discuss and agree in principle that a recording definition should be adopted and, which option.

It is important to note that whichever option is adopted, evidence of victim perception alone is not sufficient for a hate crime **prosecution** to be taken forward, and normal rules of evidence apply. It is always for the courts to decide if the relevant hate crime provision applies on a case by case basis. These points are discussed further below when case handling is considered.

Recommendation: the prosecution service should adopt the following definition of a ‘potential hate crime’ in pre-investigation records:

Any offence, referred by the police, *where bias indicators suggest* that it was committed based on bias towards “race”, colour, language, religion, citizenship, national or ethnic origin, sexual orientation or gender identity, whether real or presumed except where these circumstances constitute an element of a basic or more serious form of a criminal offence.

39 The United Kingdom is currently the only country in the world that has fully adopted a perception-based policy for hate crime recording.

40 p. 15, Hate Crime Data Collection and Monitoring Mechanisms: A practical Guide, ODIHR, 2014

41 See Hate Crime Laws: a practical guide, ODIHR (2009) and European Commission, 2018; see also any national guidelines, including draft guidelines prepared by the prosecutor’s office.

42 See for example, ECRI (2020) Report on Albania (sixth monitoring cycle), page 14, available online at <https://rm.coe.int/report-on-albania-6th-monitoring-cycle-/16809e8241>.

43 See ECRI (2017) Report on Montenegro, para 7, available online at <https://rm.coe.int/second-report-on-montenegro/16808b5942>

44 It is also recommended that the police record sub criminal hate incidents, in other words, any incident that is based on bias towards the listed protected characteristics but that does not reach the threshold of a criminal offence. This approach has the following benefits: it allows the authorities, and the police in particular to monitor patterns before they escalate in seriousness, it also allows closer cooperation with relevant civil society groups that are also monitoring such incidents.

It is recommended that the prosecutor's office also records the number of cases received from investigators marked as 'Potential Hate Crimes' as this could provide useful comparative data for executives to consider the gap between victims perception and those cases with tangible evidence to proceed to a court. The definition should also be applied at the point than an indictment has been made.

Recommendation: the courts should adopt the following definition of a 'sentenced hate crime'

Any case where it has been proven that that an offence was committed based on bias towards *"race", colour, language, religion, citizenship, national or ethnic origin, sexual orientation or gender identity, whether real or presumed* except where these circumstances constitute an element of a basic or more serious form of a criminal offence.

Commentary

These definitions, alongside the mapping in annex 1, provide a conceptual framework to allow cases to be traced across the criminal justice process and incorporated into existing and planned electronic recording systems. The following section considers the practical steps that should be taken to implement a joint approach.

Monitoring definitions for hate speech and discrimination.

Recommendation: the police, prosecution service and the courts adopt the following recording definition of hate speech, in line with ECRI GPR 15.

'one or more particular forms of expression - namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression - that is based on a non-exhaustive list of personal characteristics or status that includes *"race", colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.*' (see annex one table three)

Recommendation: the police, prosecution service and the courts adopt the following definition of criminal discrimination for recording purposes'

„discrimination“ shall mean any offence of differential treatment based on the grounds set out in Montenegro's criminal discrimination offences, which have no objective and reasonable justification" (see annex one, table four).

Implementing joint definitions of hate crime, criminal hate speech and criminal discrimination ⁴⁵

There are a number of issues to consider when deciding how to implement a joint definition of hate crime, hate speech and discrimination which are set out below.

Disaggregation

International norms and standards guide States to ensure that hate crime, hate speech and dis-

⁴⁵ This section takes into account recommendations from the baseline study and situational analysis commissioned by the Council of Europe in preparation for this project to identify the steps that need to be taken to implement this approach. It should be read in conjunction with those reports.

crimination data can be disaggregated by bias motivation and crime types.^{46,47}

The basis for disaggregation could be as follows:

For hate crime:

By crime type: any criminal offence in the Criminal Code of Montenegro and any specified offence in table one annex one. These could be further grouped under more general crime categories, including homicide, serious assault, property damage, etc.⁴⁸

By bias motivation: all bias motivations set out section 42a of the criminal code.

It is further recommended that the National Point of Contact to the OSCE agrees with the Office of Democratic Institutions and Human Rights which meta-categories should be reported as part of the Montenegro's annual data return and which excluded categories should be recorded nationally but not to the OSCE.

For hate speech and discrimination: by criminal offence and bias motivations as set out by Montenegrin law

It is also recommended that the Rulebook is amended to incorporate agreed definitions.

Recommendation: amend the 'Rulebook on the content and manner of keeping a special record of cases of reported discrimination' to clarify the specific harms and offences to be captured according to the above definitions;

Recommendation: develop accompanying recording forms and guidelines and deliver training to all relevant roles to ensure its effective use and implementation.

As explained above, there are two main technical purposes for flagging hate crimes, hate speech and discrimination across the system in line with clear definitions. 1. To ensure that investigators are able to flag cases as soon as possible, to increase the chance of unmasking bias motive during the investigation and, to ensure that evidence and victim needs to be highlighted as early as possible when transferring to the prosecution stage; 2. To ensure that performance management information and statistics that are created by these flags and other data sets are as complete and comparable as possible. In other words, it is possible to trace a case from the investigation to prosecution to sentencing stages and pinpoint weaknesses in the system.

If the current recording system does not allow for the police to record the necessary flags and bias indicators at the time a report is made to them, a template report could be created and added to the police report for both case handling and statistical purposes.

Creating the connections to allow the sharing of data as set out above is also dependent on the current crime recording system in Montenegro, which should be amended to allow the creation of a (potential) hate crime, hate speech and discrimination flags that can be shared across the prosecution and sentencing stages and that allow the Ombudsperson's Office to have the full picture in order to fulfil its legal mandate, and for all stakeholders to produce disaggregated statistics on hate crime. The authorities of Montenegro should make the consideration of the flags mandatory in both the initial statement taking by the police as well as at the statistical stage in order to increase the chance that bias indicators

46 See relevant OSCE Ministerial Council Decisions, ECRI GPRs, and FRA (2018)

47 Crime types should mirror existing categories used to distinguish crimes particularly identifying levels of violence homicide etc.

48 In determining crime categories, stakeholders should follow crime categories already established in Montenegro's general crime recording system.

and victims needs are considered and addressed *and* to increase the quality of their statistics.⁴⁹ It should also be possible to flag more than one bias motive. In the absence of a shared electronic system, the transfer of the 'flag' between the investigation and prosecution stages might need to take place manually between specialist units in the two agencies.⁵⁰ In addition, the prosecutor's office and courts service will need to create a statistical module to allow the production of prosecution and sentencing statistics according to the definitions set out above.

What this means in practice is that at the time of receiving a report of a potential hate crime, criminal hate speech or discrimination case the police should be able to capture the following information from the reporter.

- the type of base or ordinary criminal offence based on the criminal code of Montenegro (e.g. assault, property damage, etc.)
- the bias motivation/ 'intolerance ground', specifically defined in the recording forms (referring to the above 'meta' categories)
- a brief description about what happened
- the specific bias indicators, including the perception of the victim or any other person.
- risk indicators and necessary action
- victim needs, including whether they have been or need to be referred to support
- the connection between the victim/witness and alleged perpetrator,
- location of crime
- age, and other related data
- the police should then be able to assess whether the incident is a potential hate crime or a criminal hate speech or discrimination incident and capture this in their report using the right 'flag'.

The statistical system should be able to capture the flags and key information recorded by the police in their report, including the disaggregated crime type and bias motive and other data deemed necessary by national stakeholders.

The police system should be able to transfer the 'flag' and relevant information to the prosecution stage and the prosecution stage should be able to receive this information.

It is important that, where possible, the recording systems are embedded into existing recording processes that are designed to trigger consideration of recording and create the least possible bureaucratic demands on operational staff. The table below presents the information that is currently recording and collected and suggests specific improvements based on the criteria listed above.

Statistical and monitoring departments within the police, prosecution service and the courts should be able to extract information that supports an understanding of the prevalence and impact of hate crime and the effectiveness of responses to it. More precisely this includes:

- The number of reported crimes that are flagged as hate crimes, criminal hate speech or criminal discrimination (crime recording stage)
- The number of investigations flagged (pre-investigation stage by prosecutor)
- The number of prosecutions flagged as prosecutions

49 This practice is currently in place in Ireland, Spain, Sweden and the United Kingdom, and elsewhere.

50 For example, in the Republic of Georgia the Human Rights Unit in the Ministry of Internal Affairs (Police) refers flagged cases of hate crime to the Human Rights Unit in the Prosecutors Office.

- The number of court outcomes flagged sentences
- The reasons for why investigations and/or prosecutions did not progress (e.g. victim drop out, acquittal, etc.).
- The number of investigations, prosecutions and sentences broken down by bias motivation and crime type

Stakeholders could also consider introducing the practice of regular word searches within the text or descriptive sections of police records, based on key search terms related to hate crimes, etc. as a way to identify potential hate crimes for statistical purposes. This approach can help implement new systems, however, as it is done retrospectively it is less useful for case handling purposes.

Recommendation: Establish a specific record of cases of reported hate crimes, hate speech and discrimination offences that will be unique to the courts (criminal and misdemeanor), the State Prosecutor's Office and Police, in order to enable complete and accurate data to be collected. As a result, the relevant methods of reporting to the courts, police and the public prosecutor's office should be updated.

- **Amend the Rulebook on discrimination to include the agreed, shared definitions of hate crime, hate speech and discrimination**
- **Amend the relevant recording and data collection forms and processes.**
- **Establish electronic, separate, disaggregated data bases according the revised Rulebook on special records**
- **Develop guidance and training, in cooperation with NGOs**
- **Ensure regular reporting by police, courts and prosecution office, on hate crime, hate speech and discrimination offences to Ombudsman.**

Recommendation: guidance to support the implementation of the Rulebook should consider the following specific issues:

- specific examples of hate crimes, criminal cases of hate speech and discrimination related to all protected characteristic set out above co-developed with relevant civil society organizations. Focusing on the concepts of 'discrimination by association', 'mistaken perception', 'mixed motive' and 'multiple biases'. This will help ensure that the police and prosecutors are clear about what type of cases can be considered within the definition and increases the accuracy of recording and the chance that the courts will accurately apply relevant provisions.
- future discussions with Ministries and Prosecutors should agree whether monitoring should focus on LGBT communities or whether other specific 'monitored' categories that have the greatest impact on communities, should be prioritized for monitoring, for example:
 - Evidence suggests a problem of crimes based on intolerance or bias towards Roma communities. At a minimum there should be a particular focus on developing comprehensive case examples of and bias indicator sets relating to the full range of groups that are covered in the Montenegro's hate crime legislation.
- clearly designated responsibilities at each level
- a list of bias indicators⁵¹ that must be identified by any party to identify and record

hate crimes, and that can be used as evidence to prove that a crime was a hate crime, also based on existing case law, or known cases, where available;⁵²

- specific definition of the terms explained in this section to be incorporated into relevant guidance, guidelines and training;⁵³
- In developing recording and data collection guidelines, current examples of good practice can be drawn upon:

‘Hate Crime Data Collection Guidelines and Training Manual’, prepared by the Law Enforcement Support Section and the Crime Statistics Management Unit of the US Federal Bureau of Investigation.⁵⁴ This document sets out proposed roles and responsibilities for all law enforcement agencies in the US on hate crime recording and data collection, It includes specific examples of each type of monitored hate crime to support law enforcement to identify the diverse range of hate crimes covered by legislation and proposed a ‘two tier’ review system. Frontline law enforcement are responsible for identifying potential hate crimes and crime management personnel are responsible for reviewing and confirming or revising the initial classification.⁵⁵

The United Kingdom’s College of Policing guidance for the police explains hate crime recording policy, which takes a perception-based approach, in line with ECRI’s policy recommendation 11. It also includes illustrative examples of all hate crimes covered by UK law to aid the police in identifying potential hate crimes.

‘Categorizing and investigating hate crimes in Ukraine: a practical guide’, ODIHR (2019) <https://www.osce.org/odihr/419891?download=trueODIHR%20Ukraine%20manual%20->

Recommendation: consider available guidance and tools from FRA and OSCE/ODIHR’s joint workshops on hate crime recording and data recording. Consider requesting assistance from ODIHR’s INFAHCT programme which provides a detailed review of police hate crime recording and direct capacity-building with technical leads to set up flagging and recording systems.

V. CASE HANDLING

The national situation

Despite the fact that hate crime, hate speech and discrimination data are not collected systematically, based on disaggregated methodology, or provided by all authorities, they can give some information on the types of offences as well as how cases have been handled.

Table 1. No. disaggregated cases of discrimination, violence and other forms of attacks against members of the LGBT population (Provided by Ministry of Human and Minorities Rights)

that, alone or in conjunction with other indicators, suggest that the offender’s actions were motivated in whole or in part by bias, prejudice or hostility. For example, if a perpetrator uses racial slurs while attacking a member of a racial minority, this could indicate a bias motive and be sufficient for the responding officer to classify a crime as a likely hate crime. By the same token, the desecration of a cemetery or an attack on a gay pride parade may be bias indicators of anti-religious or anti-LGBT motivation (p. 15, Hate Crime Data Collection and Monitoring Mechanisms: A practical Guide, ODIHR, 2014).

⁵² See also FRA (2018)

⁵³ Take into account current approach recommended in PAHCT and in ODIHR’s Hate Crime Laws, a Practical Guide (2009).

⁵⁴ <https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf>

⁵⁵ <https://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf>

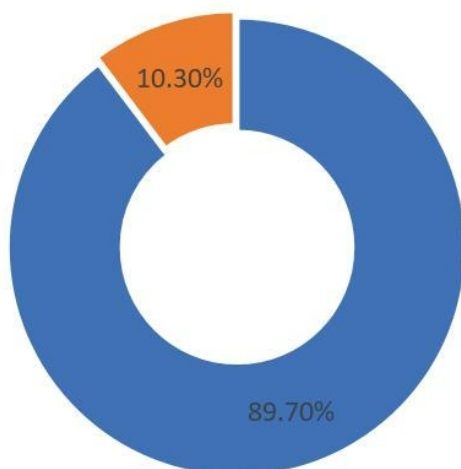
	Police directorate re- corded cases	Prosecution Office cases opened upon the filed criminal re- cords	Misdemeanor courts processed cases	Criminal courts pro- cessed cases
2015	15	9	10	4
2016	49	11	3	2
2017	242	35	48	1
2018	104	7	_*	_*
2019	100	_*	24**	_*

*At the moment of delivering this analysis data haven't been available; ** Available data for Misdemeanor Court in Podgorica (include department in Niksic, Danilovgrad and Cetinje)



From the submitted data in the Table 1. and Chart 1. (for period 2015-2017), there is a clear difference in the number of reported cases of discriminatory treatment of LGBTI to police compared to the number of prosecuted cases (in smaller number reports have been filed directly to the state prosecutor). Unfortunately, insufficient statistical data for 2018 and 2019 prevent tracking the correlation between the number of reports filed and prosecuted cases, which could indicate a potential better quality of reports filed.

Grafikon 2.



- Postupci pred sudom za prekršaje
- Postupci pred sudom za krivična djela

The percentage of recorded prosecuted cases is the highest in misdemeanor proceedings (89.7%), compared to a very small number of criminal proceedings (10.3%) – for period 2015-2017 (*data for 2018 and 2019 are not complete to be comparable*).

It is important to note that the police do not carry out an assessment of the legal qualification of the offense (i.e. whether it is *misdemeanor or criminal*). It's always assessed by the prosecutor, after the information has been provided by the police. Following the prosecutor's decision whether it is a misdemeanor or a criminal act, the police file a motion to initiate misdemeanor proceedings or the prosecutor takes over the case.

The largest number of reports to the police were filed by NGOs⁵⁶ which protect the rights of the LGBTI population (about 90%) and all of them are related to the comments that people published at Facebook profiles. This information could explain the discrepancy between the number of misdemeanor and criminal proceedings, and indicate that a reason for a low rate of criminal procedures is not as a result of not proper handling the above mentioned cases but rather a lack of recognition and identification of a hate motive among other prosecuted criminal cases or because cases have not been recorded due to a deficient data recording system. This highlights the importance of taking action to improve hate crime recording as a precondition to better analysis on possible lack of hate crime proceedings, including investigations and prosecutions. Police and Prosecution authorities should explore reasons for the low number of identified and prosecuted hate crimes, including whether is it for recording reasons, i.e. cases are not noted by the case management system and/or whether there is significant under reporting.

The number of reports submitted by NGOs to the police reached its highest benchmark in 2017, after which it dropped by more than 50% in 2018 and 2019. The initiation of proceedings before state authorities by NGOs is of the utmost importance. The decrease in the number of reported cases in 2018 and 2019 is partly a result of the cooperation of NGOs and the police, which led to a more specific understanding on the part of NGOs as to what behavior is likely to be qualified as a hate crime.

Recommendation: As reported and prosecuted misdemeanor and crime offences are mostly dealt with through misdemeanor procedures, based on some type of offence committed over social networks, the authorities should be more proactive to identify and prosecute hate motive according to article 42a and across the range of criminal cases.

In a number of cases, despite the measures taken, the police were not able to identify the perpetrator, as Facebook profiles were shut down by the perpetrator, or it was found that persons were abroad (*around 30% of reported cases, per year*).

According to data provided by Misdemeanor Court in Podgorica (include department in Niksic, Danilovgrad and Cetinje), in 2019, **32 cases** (24 offences sexual orientation motivated (against LGBTI Community) and 8 nationality or religious motivated) had been heard by the court and all of them for misdemeanor offences under Law on Public Order and Peace, and none under Antidiscrimination Law⁵⁷. Antidiscrimination Law stipulates diverse forms of discriminatory offences, which

⁵⁶ Juventas, Queer, Forum Progress, Spektra, LGBTIQ social centre

⁵⁷ Almost all cases have been processed for misdemeanor offence under article 19 **Law on Public Order and Peace** "When in public by speaking, sign, symbol, or otherwise offending another on the basis of national, racial or religious affiliation, ethnic origin or other personal attribute, shall be punished with a fine of 250 euros to 1,500 euros, or by imprisonment not exceeding 60 days." **Antidiscrimination Law** impose several misdemeanor offences as hate crime, hate speech od discriminatory verbal or physical violent behavior motivated with prejudice (exp. "Unwanted behavior, including harassment through audio and video surveillance, mobile devices, social networks and the Internet, which has the purpose or effect of which is a consequence of outrages upon personal dignity, causing fear, feelings of humiliation or offended or creating a hostile, degrading, humiliating or offensive environment" (Article 7/1) – **All registered**

hasn't be used in practice by Police which initiate procedure at front of Misdemeanor Courts. The evidence suggests that the Police are more likely to use the offences set out in the Law on Public Order and Peace than those set out in Antidiscrimination Law. On the other hand, the court (misdemeanor judge) is not bound by the Police/Prosecutor proposal and can change the assessment of the legal qualification of offenses, when facts of the case so stipulate, and apply the applicable law. It's not only important to impose sanctions to perpetrator but also under the principle of legal certainty and the rule of law the, appropriate laws should be applied.

Recommendation: Handling of the misdemeanor cases show a lack application of the Law on prohibition of discrimination provisions, when the circumstances fit the provision of this Law. Law enforcement agencies should put efforts to more frequently use these provisions when processing misdemeanor cases.

Recommendation: In order to improve implementation of hate crime, hate speech and discriminatory provisions of Law on Prohibition of discrimination – tailored trainings should be conducted for the representatives of Police and Prosecution Office.

In the cases at the front of Misdemeanor Court in Podgorica (in 2019) when accused were found guilty, only in one case court had imposed a fine which was above the special minimum of 250 euros (500 euros). In all other cases the court imposed an admonition or a fine of at minimum prescribed amount or even lower. Given statistics may lead to the conclusion of a mild penal policy in cases of misdemeanor proceedings for discriminatory behavior.

Table 2. Structure of Judgment at the front of Misdemeanor Court in Podgorica (in 2019)

	Conviction	Acquittal/dismissal of proceedings	In Progress
	8	4/3	17
%	25	12.5 / 9.38	53.12

According to information provided by Ministry and the Misdemeanor Court in Podgorica, 90% of discrimination offence cases⁵⁸ in Montenegro have been prosecuted in this court. Cases in 2019 show that the number of convictions and acquittal or dismissal of proceedings are almost equal (Table 2.). In addition, the numbers are low, suggesting under-reporting and under-recording and, at an average length of more than ten months, cases are taking significant time to be resolved by the courts.

Recommendation: Having in mind that most of hate crime/hate speech cases are committed through the internet, the capacities of cyber units should be applied and possibly upgraded, if needed, in order to detect and prosecute such offences.

Recommendation: As the efficiency in misdemeanor cases is around 50% for one year, reasons for such percentage should be analyzed and addressed.

records at the Police in 2019 refer to comments made by citizens on Facebook profiles.

or "Hate speech, expression of ideas, statements, information and opinions, which spread, incite, promote or justify discrimination, hatred or violence against individuals or groups because of their personal characteristics, xenophobia, racial hatred, anti-Semitism or other forms of hatred based on intolerance including intolerance expressed nationalism, discrimination and hostility against minority (Article 9a)", punishable by article 34)

⁵⁸ Generic term for all misdemeanor offences (hate motivated) used by Misdemeanor court in Podgorica as there are no disaggregated data collection.

Case handling in the international context

To summarize, evidence suggests that there are several case handling issues that need to be better understood by key stakeholders in Montenegro.

- hate crime laws and article 42A in particular are not always effectively applied.
- a lack of application of the Law on Prohibition of Discrimination in misdemeanor cases
- a low conviction rate in misdemeanor cases
- a low rate of aggravated sentencing provisions applied in misdemeanor cases

It is important to note that these issues need to be further explored at the national level.

Recommendation: specialists from law enforcement, the prosecutor's office and the courts (misdemeanor and criminal) and the Ombudsman's Office should agree to review issues in the handling of hate crime, criminal hate speech and discrimination cases. In the first instance it is recommended that hate crime cases (see annex one, table one) involving bias against LGBT are examined. This priority reflects the concerns of interviewees from LGBT NGOs and the strategic policy focus set out in 'the Strategy for Improving the Quality of Life of LGBTI Persons in Montenegro 2019-2023'.

Stakeholders might also consider reviewing specific and high-profile cases to identify lessons learned in the area of investigation, case handling and community engagement.⁵⁹

As explained in the above section, it is important to have conceptual clarity across 'hate crime' 'hate speech' and 'discrimination' to ensure proper identification and recording of cases. It is also important in order to ensure the proper application of the law. In other words, that the right charge is selected for the offence that has been committed.

The introduction of a flag, according to the definitions suggested in the previous section should be of great assistance. In addition, recently developed practical guidance for the police and other agencies in Ukraine could also be a very useful resource.⁶⁰

VI. HATE SPEECH GOVERNANCE

During the field mission phase, interviewees identified the problem of a confusing set of sanctions (from criminal to self-regulation) for hate speech, and uncoordinated and insufficient efforts to record, monitor and respond to incidents. Several interviewees raised concerns about what they perceived as an increase in hate speech related to a newly proposed law on Religious Freedom. A number of actors have roles to play, including law enforcement, broadcasters, the print media, regulators social media companies, schools, the Ombudsman's Office and the court, among others. The Ombudsman raised the importance of improving responses to hate speech at the national level, including the need for training, and identified the role of his office as very important in the area of prevention.

Considering the high-volume nature of hate speech and the impracticality of aiming for measures that can identify and address all incidents, a coordinated and strategic response is key. A first step could be to map current efforts and gaps and to identify the priority areas for action and coordi-

⁵⁹ See for example the [Alkovic v Montenegro](#) judgement by the ECHR (no.66895/10, 5.12.2017). The court found a violation is under Article 8 in conjunction with Article 14 that concerned the failure of the authorities to effectively investigate a series of ethnically and/or religiously motivated attacks.

⁶⁰ <https://www.osce.org/odihr/419891?download=true>

nation along with the related responsibilities of stakeholders.

The key importance of the role of the police cybercrime unit in investigating and addressing hate speech crimes was highlighted by a number of interviewees during the field mission stage. One interviewee recommended that the existing handbook on cybercrime is reviewed and supplemented by practical guidelines for investigators and prosecutors.

The recently published Council of Europe 'Models of Governance of Online Hate Speech'⁶¹ to develop a hate speech governance and action plan is an excellent resource for national stakeholders to consider and identify national strategic governance issues and to implement the necessary frameworks at the levels of moderation, oversight and regulation.

Recommendation: The Ombudsman's Office could lead the coordination of stakeholders and efforts to map gaps opportunities and actions in the regulation and governance of on-line hate speech, drawing on available guidance and good practice, including the recently published Council of Europe 'Models of Governance of Online Hate Speech'.^{62,63}

Recommendation: In reviewing and developing the role of the cyber police and prosecutor function, draw on section IV F and IV I of the recently published Council of Europe 'Models of Governance of Online Hate Speech'

VII. Training

In addition to establishing a normative framework for protection against discrimination against LGBTI persons, numerous trainings have been implemented to strengthen institutional capacities to provide protection against discrimination and to sensitized work with LGBTI persons, for various target groups. The main partners in this process are Ministry of Human and Minority Rights, Ombudsman, Police Academy, Judicial Training Center and NGOs, and Council of Europe.

According the **Final Report on the Implementation of the Strategy for Improving the Quality of Life of LGBT Persons in Montenegro 2013-2018**, by implementation of Action plans, 5-7% members of the Police Directorate have been involved in these trainings, about 25% prosecutors, 18% judges, 18% employees in misdemeanor courts.

Education of Police and Judiciary was organized, and foreseen as continuous training as set out in the Strategy 2019-2022, through two models - *Education for sensitized work with LGBTI persons* and *Education to identify and prosecute hate crimes against LGBTI persons with particular focus on the application of Article 42a of the Criminal Code of Montenegro*.

Table 3. Education state of play and planned results (indicators) at the end of Strategy 2019-2023 implementation.

61 Alexander Brown, (2020) 'Models of governance of online hate speech', Strasbourg: Council of Europe, available online at- https://rm.coe.int/models-of-governance-of-online-hate-speech/16809e671d?fbclid=IwAR1kB_iSQc-Zo9bLaonb-td3Azfc_OqpWoaDJ71AJE2lZq0XybK5f1vuljHw, accessed on 31 May 2020.

62 Alexander Brown, (2020) 'Models of governance of online hate speech', Strasbourg: Council of Europe, available online at- https://rm.coe.int/models-of-governance-of-online-hate-speech/16809e671d?fbclid=IwAR1kB_iSQc-Zo9bLaonb-td3Azfc_OqpWoaDJ71AJE2lZq0XybK5f1vuljHw, accessed on 31 May 2020.

63 Stakeholders can also draw on , Equinet (2019). 'Developing strategies to combat hate speech', available online at https://equineteurope.org/wp-content/uploads/2019/05/final_developing_strategies_to_combat_hate_speech.pdf

Strategy 2019-2023	Education for sensitized work with LGBTI persons		Education to identify and prosecute hate crimes against LGBTI persons with particular focus on the application of Article 42a of the Criminal Code of Montenegro	
	2018	2023	2018	2023
Police	5%	15%	0%	10%
Prosecutors	25%	50%	8%	30%
Judges (criminal and misdemeanor courts)	18%	50%	3%	30%

According to data given in the Strategy and provided by the Police Academy and the Judicial Training Center, the first focus of training aimed improving the sensitivity of the police and judiciary towards LGBTI persons and in the context of investigations and court processes. The second stage includes practically-orientated training with the aim to educate police and judiciary to identify and prosecute hate crimes against LGBTI persons and efficiently and effectively implement normative framework for the protection of the human rights of LGBTI persons, with particular focus on the application of the Criminal Code and Misdemeanor Laws.

The types of training were tailored to the target group, so that, in addition to general training, representatives of the police and the judiciary also received specialized training to a certain extent, and trained trainers in this area to a certain extent.

Training programmes, used the train the trainer model and included:

- **TAHCLE (Training Against Hate Crime for Law Enforcement) program**, developed and implemented by OSCE-ODIHR, in which police officers as the first who approach to the crime scene are trained for handling and identifying a Hate Crime.

Judicial Training Center of Montenegro organized several trainings events in cooperation with international organizations in field of hate crime and hate speech, for judiciary, as follow:

- **HELP Training developed and implemented by CoE** (blended courses (combination of seminars and distance learning)), 2016, 2017, 2018 - 15 participants successfully completed the course (5 judges, 3 judicial advisors, 4 state prosecutors and 1 prosecutorial advisor, as well as 2 representatives from the Ombudsman's Office).
- **Prosecutors and Hate Crimes Training (PAHCT) – OSCE-ODIHR**
 - Two judges and two prosecutors trained for the trainers, 2017
 - Judicial Training Center during 2018 organised three Hate Crime PAHCT events (*The concept of hate crime; Legal framework and criminal protection in cases of hate crimes in Montenegro; Criminal prosecution in cases of hate crimes in Montenegro and case studies*) with Montenegrin trainers, supported by OSCE-ODIHR - 73 participants completed the course (19 judges, 28 judicial advisors, 24 state prosecutors and 3 prosecutorial advisor).
- **Hate speech had been tackled through several trainings for judiciary dedicated to ECHR, concretely discrimination and freedom of expression, during 2016, 2017 and 2018.**

From the aspect of promoting international standards for the protection of human rights and freedoms of LGBTI persons, a large number of educational and informational publications have been published and distributed to professionals as well as to the general public. In regard to scope of analysis the following should be mentioned: „Security and Fundamental Rights: Dimensions and Perspectives on the Security of LGBT Persons“⁶⁴, „Police, Tolerance and Acceptance of Identity“⁶⁵, „LGBT Rights: Standards and Case Law“⁶⁶, „Handbook for Practitioners - Gender Identity and Sexual Orientation in Theory and Practice“, „Handbook on Police Conduct in the Case of Homo/Transphobic Violence“, „Legal protection of LGBT persons: Role and actions of the prosecutor's office“⁶⁷. With continuation of training proves, Strategy 2019-2023 foresee publishing guidelines for the actions of police officers during prosecution of hate crimes against LGBTI persons. The measure (2.1.26.) involves the development and publication of practical guidelines to ensure proper conduct of police officers during the prosecution of hate crimes against LGBT people, both in terms of investigation activities, and in communication with the victim of violence.

Recommendation: Continuous training of police, prosecution and courts should be more focused on how to identify and prosecute hate crimes against LGBTI persons but also to other vulnerable groups and persons in Montenegro. This training should be conducted in parallel with ongoing training on sensitized work with vulnerable categories of people/victims of hate crime, hate speech and discrimination offences.

Recommendation: Education should be provided as well in regard to data recording on the level of practitioners but also the staff at these authorities which dealt with data and statistics, in order to implement an effective methodology of data recording and collection.

Recommendation: In line with the general principles set out above, training – including case studies - should be fully aligned with existing and planned police, prosecutors and judicial guidelines and policy.

Recommendation: undertake a review of training needs is also undertaken and programmes adapted and implemented.

VIII. COOPERATION AND COORDINATION

This report has identified several areas for action that require a coordinated response and cooperation across a range of across. Other national responses have benefited from setting up inter-institutional working groups and structures to develop and implement the right strategies and actions.

Cross government and inter-institutional working groups

Working groups function best with representatives from all relevant government agencies or departments, independent bodies and NGOs dealing with any aspect of hate crimes, hate speech

⁶⁴ <http://www.mmp.gov.me/rubrike/Publikacije/167598/Bezbjednost-i-osnovna-prava-Dimenzije-i-perspektive-sigurnosti-LGBT-osoba.html>

⁶⁵ <http://www.mpa.gov.me/biblioteka?alphabet=lat%3Fquery%3DUnesite+pojam%3A%3Fquery%3DUnesite+pojam%3A&sortDirection=Asc&pagerIndex=10>

⁶⁶ <https://lgbtprogres.me/publikacije/lgbt-prava-standardi-i-sudska-praksa/>

⁶⁷ <https://lgbtprogres.me/publikacije/legal-protection-of-lgbt-persons-role-and-actions-of-the-prosecutors-office/>

and discrimination.⁶⁸ In agreeing the work and composition of the group, it is recommended that stakeholders draw on good practice in other countries for example a recently established working group and inter-agency agreement in Greece.⁶⁹ Stakeholders should also consider nominating one body to lead on organizing meetings and agendas. In the context of Montenegro, it is recommended that the Ombudsman's Office take the lead. For reference, in Spain, the equality body and national human rights institution, OBERAXE plays this function. Stakeholders might also consider agreeing a rotating chair for the group. This means that stakeholders would take turns in chairing the meetings and working with the coordinator on the agenda and any follow up. This approach helps to ensure that accountability is shared and political leadership is engaged across government departments and agencies.

The Inter-agency Working Group should also establish a number of, possibly time-limited, working sub-groups that could be grouped according to the recommendations in this report. For example, subgroups of legal reform, recording and data collection, training and case handling guidelines and policy could be established.

Cooperation with relevant civil society organizations

It is essential that specialist civil society organizations with strong community relationships and skills in victim support and hate crime and hate speech monitoring are considered equal partners in national efforts.

The LGBTI community in Montenegro is the most advanced in recording, reporting, monitoring hate crime, hate speech and discrimination, supporting victims and working with state authorities. As the LGBTI population is the most represented in criminal and court processes in Montenegro (over 90% of cases) it is in a good position to generate support and political will.

The cooperation of LGBTI non-governmental organizations, first and foremost with the police, is at a high level, especially embodied through the Trust Team, which identifies ways to strengthen cooperation with an aim to address potential cases of discrimination, hate crime and hate speech in a more adequate, rapid and effective manner. Moreover, the Trust Team should contribute to a greater degree of police work sensitive to needs of the LGBTIQ community and to contribute to solving the most serious cases of discrimination with a particular focus on victim protection. Through this form of cooperation, an intensive exchange of information between stakeholders on cases of violence and discrimination against LGBTI persons is facilitated, cooperation between the LGBTI community and the police on the realization of joint educational activities and the development of publications and manuals for the conduct of police officers in dealing with LGBTI persons. If needed, the Trust Team includes representatives of the judiciary and other interested institutions at its meetings.

LGBT contact police officers have been established in all police stations to ensure adequate responses to violent attacks against the LGBT community. In most cases these contacts are established through NGOs which often provide a contact point for victims when the contact police officer for particular cases are not fully reachable. LGBTI NGOs find very satisfying support provided by contact police officers but still find as a final goal that all police officers which can get in communication with LGBTI persons should be trained to be sensitive to needs of the LGBTIQ community.

Recent research found that civil society data is and should be understood as an integral part of

⁶⁸ Based on the baseline and situational analysis reports, it is recommended that The recently established Greece protocol can be drawn as a reference - <https://www.osce.org/odihr/402260?download=true>

⁶⁹ <https://www.osce.org/odihr/402260>

any national hate crime recording and data collection system.⁷⁰ This has been given effect at the national level in *Identoba and others v Georgia* when the European Court of Human Rights held that the Georgian authorities should have been aware of the threat posed to LGBT+ communities based on available civil society data. As a result, those civil society organisations that record and monitor hate crime based on clear, transparent and robust methodologies should be treated as equal partners to the police, prosecution service and judiciary in national efforts to understand and address hate crime, discrimination and hate speech. Stakeholders should consider ways to deepen cooperation in the area of hate crime recording and data collection. In addition to the benefit of accessing civil society data (in accordance with relevant protections for victim data and confidentiality) this cooperation can increase the quality and depth of relationships, which, in turn can increase the chance that victims will remain engaged in the criminal justice process and develop confidence in the authorities. It is also necessary to work closely with relevant civil society organizations to review, develop and adopt specific awareness-raising and victim-outreach strategies that also address evidenced barriers to reporting including poor police responses and lengthy delays in investigations.⁷¹

The EU Fundamental Rights Agency identifies four types of cooperation with civil society, which are built on by the recommendations in this report:

- exchanging relevant data and information;
- working together to uncover the 'dark' figure of hate crime;
- setting up working groups;
- and co-developing guidelines on, for example, recognizing key bias indicators.⁷²

Recommendation: Set up a cross government working group, coordinated by the Ombuds-person's Office to oversee the implementation of a joint approach to hate crime, hate speech and discrimination recording and data collection as well as other elements of a comprehensive approach to understanding and addressing these harms with representatives across relevant ministries, agencies, independent bodies and NGOs.

Recommendation: The appropriate NGOs should be invited to join the proposed inter-institutional working group and relevant subgroups as full partners and in line with recommendations by FRA and others.

Recommendation: Consider the permanent involvement of prosecution service in work of Trust Team, as well as the nomination of one prosecutor per prosecution office responsible for hate crime cases.

Recommendation: consider reviewing and identifying other areas for improvement in the Trust Teams

Recommendation: NGOs which support other vulnerable groups should follow the approach of LGBTI NGOs in order to better recognize and tackle issues of hate crime, hate speech and discriminatory offences against their groups.

⁷⁰ Perry, J. (2019)

⁷¹ See also opinions from FRA (2018) in and specific section on cooperation with civil society, p17 and p. 27. See Hate Crime Data Collection and Monitoring Mechanisms: A practical guide, (2014), OSCE, <https://www.osce.org/odihr/datacollectionguide?download=true>; see also ECRI GPR No. 11 in relation to the police, 'To establish frameworks for dialogue and co-operation between the police and members of minority groups'.

⁷² See FRA, 2018.

Other considerations

Stakeholders will need to acknowledge that a measure of successful implementation will be a significant increase in recorded hate crimes. It takes leadership to welcome this development as an indicator of improvements in recording by the police and other authorities and an increase in confidence of victims and communities to report them. Adopting this approach should be part of a wider strategy to improve transparency, including regularly publishing data and information about the steps that the authorities are taking to understand and address the problem. This issue should be acknowledged and fully discussed as early as possible.⁷³

IX. KEY RECOMMENDATIONS

This section lists the key recommendations across the main section of the report:

Legislation, data, case handling, hate speech governance, training, and coordination and cooperation.

Legislation:

Recommendation: the notion of hate crime (at article 142 of Criminal Code) and hate speech should be defined according to international standards.

Recommendation: the threshold for the hate crime should be reconsidered to be lower than “hatred”, as it’s a case in other countries: “because of bias”.

- Hate motive should be introduced as ground for special or serious form of crimes, which are most often committed out of hatred, such as: Serious murder, Coercion, Abuse, Rape, Female genital mutilation, Violent Behaviour, Injury.

Recommendation: Introduce a clear definition of hate speech offences, in line with ECRI GPR no. 15, which take due account of the need for a criminal sanction to be applied with the particular aim of broadening protected characteristics, as well as differentiation from hate crime and discriminatory offences.

Recommendation: Provisions of article 370 should be revised in order to include all possible ground of hate speech.

Data

Recommendation: available data NGO should be consulted for the purpose of analyzing the risks and prevalence of hate crime, hate speech and discrimination offences.

Recommendation: the police and relevant ministries should consider and adopt one of the following definitions of potential hate crime or recording purposes:

‘Any crime in the Criminal Code of Montenegro perceived by the victim or any other person to be committed based on bias towards “race”, colour, language, religion, citizenship, national or ethnic origin, sexual orientation or gender identity, whether real or presumed except where these circumstances constitute an element of a basic or more serious form of a criminal offence.

⁷³ Draw on the work of the UK in this regard. This can involve reviewing examples of press releases from senior leaders explicitly welcoming increases in recorded hate crime.

Or

Any offence *where bias indicators suggest* that an offence was committed based on bias towards “race”, colour, language, religion, citizenship, national or ethnic origin, sexual orientation or gender identity, whether real or presumed except where these circumstances constitute an element of a basic or more serious form of a criminal offence.

Recommendation: the prosecution service should adopt the following definition of a ‘potential hate crime’ in pre-investigation records:

Any offence, referred by the police, *where bias indicators suggest* that an offence was committed based on bias towards “race”, colour, language, religion, citizenship, national or ethnic origin, sexual orientation or gender identity, whether real or presumed except where these circumstances constitute an element of a basic or more serious form of a criminal offence.

Recommendation: the courts should adopt the following definition of a ‘sentenced hate crime’: Any case where it has been proven that that an offence was committed based on bias towards “race”, colour, language, religion, citizenship, national or ethnic origin, sexual orientation or gender identity, whether real or presumed except where these circumstances constitute an element of a basic or more serious form of a criminal offence.

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Recommendation: the police, prosecution service and the courts adopt the following recording definition of hate speech, in line with ECRI GPR 15.

‘one or more particular forms of expression - namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression - that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.’

Recommendation: the police, prosecution service and the courts adopt the following definition of criminal discrimination for recording purposes’

„discrimination“ shall mean any offence of differential treatment based on the grounds set out in Montenegro’s criminal discrimination offences, which have no objective and reasonable justification“.

Recommendation: Establish a specific record of cases of reported hate crimes, hate speech and discrimination offences that will be unique to the courts (criminal and misdemeanor), the State Prosecutor’s Office and Police, in order to enable complete and accurate data to be collected. As a result, the relevant methods of reporting to the courts, police and the public prosecutor’s office should be updated.

- Amend the Rulebook on discrimination to include the agreed, shared definitions of hate crime, hate speech and discrimination
- Amend the relevant recording and data collection forms and processes.
- Establish electronic, separate, disaggregated data bases according the revised Rulebook on special records

- Develop guidance and training, in cooperation with NGOs
- Ensure regular reporting by police, courts and prosecution office, on hate crime, hate speech and discrimination offences to Ombudsman.

Case handling:

Recommendation: As reported and prosecuted misdemeanor and crime offences are mostly dealt with through misdemeanor procedures, based on some type of offence committed over social networks, the authorities should be more proactive to identify and prosecute hate motive according to article 42a and across the range of criminal cases.

Recommendation: Handling of the misdemeanor cases show a lack application of the Law on prohibition of discrimination provisions, when the circumstances fit the provision of this Law. Law enforcement agencies should put efforts to more frequently use these provisions when processing misdemeanor cases.

Recommendation: Having in mind that most of hate crime/hate speech cases are committed through the internet, the capacities of cyber units should be applied and possibly upgraded, if needed, in order to detect and prosecute such offences.

Recommendation: Guidelines with practical advice on recognizing, recording and investigating hate crimes, should be developed, with an emphasis to implementation of Article 42a of CC.

Recommendation: As the efficiency in misdemeanor cases is around 50% for one year, reasons for such percentage should be analyzed and addressed.

Recommendation: specialists from law enforcement, the prosecutor's office and the courts (misdemeanour and criminal) and the Ombudsman's Office should agree to review issues in the handling of hate crime, criminal hate speech and discrimination cases.

Hate speech governance:

Recommendation: The Ombudsman's Office could lead the coordination of stakeholders and efforts to map gaps opportunities and actions in the regulation and governance of online hate speech, drawing on available guidance and good practice, including the recently published Council of Europe 'Models of Governance of Online Hate Speech'.⁷⁴

Recommendation: In reviewing and developing the role of the cyber police and prosecutor function, draw on section IV F and IV I of the recently published Council of Europe 'Models of Governance of Online Hate Speech'

Training

Recommendation: In order to improve implementation of hate crime, hate speech and discriminatory provisions of Law on Prohibition of discrimination – tailored trainings should be conducted for the representatives of Police and Prosecution Office.

Recommendation: Continuous training of police, prosecution and courts should be more focused on how to identify and prosecute hate crimes against LGBTI persons but also to other vulnerable groups and persons in Montenegro. This training should be conducted in parallel with ongoing training on sensitized work with vulnerable categories of people/victims of hate crime, hate speech and discrimination offences.

Recommendation: Education should be provided as well in regard to data recording on the level of practitioners but also the staff at these authorities which dealt with data and statistics, in order to implement an effective methodology of data recording and collection.

⁷⁴ Alexander Brown, (2020) 'Models of governance of online hate speech', Strasbourg: Council of Europe, available online at- https://rm.coe.int/models-of-governance-of-online-hate-speech/16809e671d?fbclid=IwAR1kB_iQc-Zo9bLaonb-td3Azfc_OqpWoaDJ71AJE2lZq0XybK5f1vuljHw, accessed on 31 May 2020.

Recommendation: In line with the general principles set out above, training – including case studies - should be fully aligned with existing and planned police, prosecutors and judicial guidelines and policy.

Recommendation: undertake a review of training needs is also undertaken and programmes adapted and implemented.

Cooperation and coordination

Recommendation: Set up a cross government working group, coordinated by the Ombudsman's Office to oversee the implementation of a joint approach to hate crime, hate speech and discrimination recording and data collection as well as other elements of a comprehensive approach to understanding and addressing these harms with representatives across relevant ministries, agencies, independent bodies and NGOs.

Recommendation: The appropriate NGOs should be invited to join the proposed inter-institutional working group and relevant subgroups as full partners and in line with recommendations by FRA and others.

Recommendation: Consider the permanent involvement of prosecution service in work of Trust Team, as well as the nomination of one prosecutor per prosecution office responsible for hate crime cases.

Recommendation: consider reviewing and identifying other areas for improvement in the Trust Teams

Recommendation: NGOs which support other vulnerable groups should follow the approach of LGBTI NGOs in order to better recognize and tackle issues of hate crime, hate speech and discriminatory offences against their groups.

Other

Recommendation: Strategy documents for other vulnerable groups (Minorities, Roma and Egyptian people, disability persons), besides LGBTI should pay special attention to this issue and include goals, measures and activities regarding responses to hate crime, hate speech and discriminatory offences in relation to their target groups.

X. ANNEXES

Annex one: Relevant law and information about recording and data collection practices in the Montenegro in the context of international norms and standards

Background and general approach⁷⁵

Many national legal frameworks contain some discrepancy and conflation across the hate crime, hate speech and discrimination concepts. As set out in the main report, systems and tools to record and monitor these harms are patched together using different, incompatible and often manual systems. Evidence suggests that offences where aggravated sentencing provisions apply, such as 42A of the Criminal Code of Montenegro are rarely identified, applied and captured across the system.

In order to address these issues, the main report recommends specific principles are followed, shared monitoring definitions of hate crime, hate speech and discrimination are adopted and used to improve outcomes for victims and to produce disaggregated data.

To assist in understanding how the recording and data collection system of Montenegro can be better aligned with international norms and standards, and shared definitions adopted at the national level, the tables below map national criminal code against internationally agreed definitions. This should help the national legal framework to better integrate with international conceptual definitions. The main document builds on this and proposes specific definitions for the various agencies, institutions, organizations and government ministries.

The main recommendations document sets out in detail how Montenegro can set up and implement a joint hate crime, hate speech and discrimination recording and data collection system by agreeing joint definitions, guidelines and training, shaped by overarching principles. This appendix sets out relevant provisions in the criminal code of Montenegro, as well as relevant administrative and civil code provisions according to internationally agreed definitions of the hate crime, hate speech and discrimination concepts. The fit is awkward in places, splitting single criminal code provisions and there is room for discussion across stakeholders on the best approach. For the first draft, the aim is to illustrate how legal provisions might be organized in the proposed recording and data collection system in a way that meets international norms and standards.

⁷⁵ Also see Baseline Study and Situational Analysis reports prepared for this project, along with the Criminal Code of Montenegro.

Table one: Hate crime definition and Hate crimes offences

<p>Hate crime defined as,</p> <p><i>A criminal act committed out of hatred (list of crime types and protected characteristics)</i></p>	<p>Comments</p>
<p>Article 42a Criminal Code, <i>Special circumstances for fixing punishment for a hate crime:</i></p> <p>Pursuant to Article 42a</p> <p>“(1) Where a crime was committed out of hatred of another person because of national or ethnic affiliation, race or religion, or absence of such affiliation, disability, sex, sexual orientation or gender identity, such circumstances will be taken into account as aggravating circumstances, except where these circumstances constitute an element of a basic or more serious form of a criminal offense.</p> <p>(2) If the offense was committed against a person belonging to a particularly vulnerable category of persons (children, persons with disabilities, pregnant woman, the elderly, refugees), the court will take this circumstance as aggravating.” By second paragraph Criminal Code has been amended at 2017. “</p>	<p>General sentencing provision; broadest application in CC, forms the basis of proposed shared hate crime definition.</p> <p>It could be considered to introduce such definition in Article 142 of the CC - The meaning of the terms in this Code</p> <p>Important point to note – the terminology in the Article 42a of CC is “out of hatred”. A lower threshold than “hatred” should be considered as it’s a case in other countries, “because of intolerance” or “because of bias”.</p> <p>Situational analysis suggests that there are general problems with the identification, recording, and application of article 42a across the criminal justice system.</p>
<p>Torture</p> <p>Article 167, Criminal Code</p> <p>(1) Anyone who inflicts severe pain or heavy suffering, whether bodily or mental, in order to obtain from him or a third party a confession or other information or in order to unlawfully punish or intimidate him, or to exert pressure over him or to intimidate or exert pressure over a third party, or does so for other reasons based on discrimination shall be punished by a prison term from six months to five years.</p>	<p>Comparing the provisions of Article 167 (Torture) and Article 168 (Endangering security) in part of the grounds, indicates inconsistencies in the legal text, i.e. identification of different terms, in this case discrimination and hatred. This may be due to a partial amendment to the text of the law and a lack of a systematic approach to the improvement of the Criminal Code as part of a comprehensive legal recognition of hate crimes.</p>

Endangering Safety

Article 168, Criminal Code

(1) Anyone who endangers the safety of another person by threatening to attack his life or body or a person close to him shall be punished by a fine or a prison term up to one year.

(2) Anyone who commits the act under para. 1 above against more than one person, or the act that has caused anxiety of citizens or other grave consequences **or was committed out of hatred** shall be punished by a prison term from three months to three years.

Violent behavior in a sports event or public gathering

Article 399a, Criminal Code

(1) Anyone who physically assaults or engages in physical confrontation with participants in a sports event or public gathering, who provokes violence or acts violently, who brings into a sports facility or throws onto the sports field, among the viewers or participants of the public gathering the objects, inflammatory devices, or other explosive, incendiary or harmful substances that may lead to bodily injury or that may endanger health of participants in a sports event or public gathering, who enters without authorization the sports field or the audience area intended for the opponent fans and provokes violence, damages the sports facility, its equipment, devices and installations, who by his **conduct or banners** shown in a sports event or public gathering **provokes ethnic, racial, religious or other hatred or intolerance on discriminatory grounds**, *which leads to violence or physical confrontation with participants* shall be punished by a prison term from six months to five years and a fine.

(2) The punishment referred to in paragraph 1 shall also apply to a person who physically assaults or engages in physical confrontation with participants of a sports event or public gathering, who provokes violence or acts violently, or damages property whose value exceeds ten thousand euros on their way to and from the sports event or public gathering.

(3) Leaders of the groups who commit the offences under paragraphs 1 and 2 above shall be punished by a prison term from three to twelve years.

(4) Where the commission of offences under paragraphs 1 and 2 above resulted in disorders which lead to grave bodily injuries or damage to property whose value exceeds forty thousand euros, the perpetrator shall be punished by a prison term from two to ten years.

(5) A public official or a responsible officer who in organising a sports event or public gathering fail to take security measures in order to prevent disorders thus endangering life or body of a large number of persons or property whose value exceeds twenty thousand euros shall be punished by a prison term from three months to three years and a fine.

Specific offence: Includes **ethnic, racial, religious** ground **but also with general provision imply possibility of other discriminatory grounds**.

Although the act of committing this crime could be classified as hate speech, given its nature, the objective condition of incrimination, that is, the consequence of violence and conflict, this crime should be treated as a hate crime.

Violation of Freedom of Expression of National or Ethnic Affiliation

Article 160

(1) Anyone who denies other person the right to express his national or ethnic affiliation or culture shall be punished by a fine or a prison term up to one year.

(2) The punishment referred to in para. 1 above shall also apply to anyone who forces other person to declare his national or ethnic affiliation.

(3) Where the offence referred to in paras 1 and 2 above was committed by a public official while acting in his official capacity, the perpetrator shall be punished by a prison term up to three years.

Violation of Freedom of Worship and Practice of Religious Ceremonies

Article 161

(1) Anyone who denies or restricts the freedom of confession or worship shall be punished by a fine or a prison term up to two years.

(2) The punishment under para. 1 above shall also apply to anyone who prevents or obstructs the practice of religious ceremonies.

(3) Anyone who forces another person to declare his religious beliefs shall be punished by a fine or a prison term up to one year.

(4) A public official who commits the offence under paras 1 to 3 above shall be punished by a prison term up to three years.

Anti-discrimination Law

Harassment and sexual harassment

Article 7

Harassment of any person or group of persons on any of the grounds referred to in Article 2, paragraph 2 of this Law is any undesirable conduct, including harassment through audio and video surveillance, mobile devices, social networks and the Internet, aimed at or resulting in violation of personal dignity, provoking fear, feeling humiliated or offended, or creating a hostile, degrading or abusive environment and is considered discrimination.

Discrimination is also considered to be any unwanted, verbal, non-verbal or physical conduct of a sexual nature that seeks to violate the dignity of a person or group of persons, or which achieves such an effect, especially when such behavior causes fear or creates hostile, degrading, frightening, degrading or abusive environment.

Misdemeanors

Article 34a

A legal person shall be fined between EUR 1,000 and EUR 20,000 for:

1) commits any undesirable conduct, including harassment through audio and video surveillance, mobile devices, social networks and the Internet, aimed at, or resulting in, the violation of personal dignity, fear, humiliation or insult, or making hostile, degrading or abusive environments (Article 7 paragraph 1);

2) commits any unwanted, verbal, non-verbal or physical conduct of a sexual nature that seeks to violate the dignity of a person or group of persons, or by which such effect is achieved, especially when such behavior causes fear or creates hostile, degrading, intimidating, degrading or offensive environment (Article 7, paragraph 2);

For misdemeanour referred to in paragraph 1 of this Article the entrepreneur shall also be fined in the amount of 150 EUR to 2,000 EUR.

Other offences defined by Article 34 of Anti-discrimination Law, except one hate speech offence, are discriminatory offences.

Even harassment and sexual harassment have been settled as special form of discrimination (Article 7), misdemeanor offences committed by harassment or sexual harassment established at article 34, paragraph 1) and 2) are hate crime offences.

Table two: Hate speech

Monitoring definition of hate speech defined as:	Comments/ recommendations
<p>Anti-discrimination Law Hate speech Article 9a Hate speech is any form of expression of ideas, statements, information and opinions that spreads, stirs up, encourages or justifies discrimination, hatred or violence against a person or group of persons because of their personal characteristics, xenophobia, racial hatred, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed in form of nationalism, discrimination and hostility against minorities.</p> <p>Law on Prohibition of Discrimination against Persons with Disabilities Hate speech and belittling Article 9</p> <p>Discrimination on grounds of disability is considered hate speech and disparaging people with disabilities.</p> <p>Hate speech is any form of expression of ideas, statements, information and opinions spread, promote or justify discrimination, humiliation, hatred or violence against a person with a disability or a group of persons with disabilities, because of their personal characteristics, based on the rejection of diversity and intolerance.</p> <p>Disparaging is the perception of persons with disabilities as less valuable and less able members of society.</p> <p>Discrimination within the meaning of paragraph 1 of this Article shall also be understood as the conduct of campaigns or the use of terminology that spreads, encourages and violates human rights and equality of persons with disabilities, as well as denigrates those persons.</p> <p><i>No explicit misdemeanor offences foreseen for the breaching provisions under article 9.</i></p> <p>Legal provisions</p>	<p>The Hate speech has been defined by Anti-discrimination Law and Law on Prohibition of Discrimination against Persons with Disabilities as a form of discrimination!</p>

Tarnishing Reputation of Nations, National Minorities and Other Minority Ethnic Groups

Article 199

Anyone who publicly exposes a nation, national minority or other minority ethnic group living in Montenegro to mockery shall be punished by a fine ranging from three thousand to ten thousand euros.

Criminal Code

Causing National, Racial and Religious Hatred

Article 370

(1) Anyone who publicly incites to violence or hatred towards a group or a member of a group defined by virtue of race, skin color, religion, origin, national or ethnic affiliation shall be punished by a prison term from six months to five years.

(2) The punishment under para. 1 above shall also apply to anyone who publicly approves, renounces the existence, or significantly reduces the gravity of criminal offences of genocide, crimes against humanity and war crimes committed against a group or a member of group by virtue of their race, skin color, religion, origin, national or ethnic affiliation in a manner which can lead to violence or cause hatred against a group of persons or a member of such group, where such criminal offences have been established by a final judgment of a court in Montenegro or of the international criminal tribunal.

(3) Where the offence under paras 1 and 2 above was committed by coercion, ill-treatment, endangering of safety, exposure to mockery of national, ethnic or religious symbols, by damaging property of another person, by desecration of monuments, memorials or tombs, the perpetrator shall be punished by a prison term from one to eight years.

(4) Where the offence under paras 1 to 3 above was committed by misuse of office or where such offence result in riots, violence or other severe consequences for the joint life of nations, national minorities or ethnic groups living in Montenegro, the perpetrator shall be punished for the offence under para. 1 above by a prison term from one to eight years and for the offence under paras 2 and 3 by a prison term from two to ten years.

Specific offence: Excludes ground other than **race, skin color, religion, origin, national or ethnic affiliation**

Racial and other discrimination, Criminal Code

Article 443, Paragraph 3

(3) Whoever spreads ideas about the superiority of one race over another, or promotes hatred or intolerance based on race, gender, disability, sexual orientation, gender identity or other personal characteristics or incites racial or other discrimination,

shall be punished by imprisonment for a term between three months and three years.

(4) Whoever commits the offense referred to in paragraphs. 1 to 3 of this Article with **abuse of office** or if such acts resulted in disorder or violence, he or she shall be punished for the offense referred to in para. 1 and 2 of this Article by imprisonment for one to eight years, **and for the offense referred to in paragraph 3 of this Article by imprisonment for six months to five years.**

Anti-discrimination Law

Misdemeanor offence

Article 34

A fine of 1000 EUR to 20,000 EUR shall be imposed for

misdemeanor on a legal person, if:

4) by expression of ideas, statements, information, opinions, encourages or justify discrimination, hatred or violence against a person or group of persons **because of their personal characteristics**, xenophobia, racial hatred, anti-Semitism, or other forms of hatred based on intolerance, including intolerance expressed in the form nationalism, discrimination and hostility against minorities (Article 9a)

For misdemeanor referred to in paragraph 1 of this Article the entrepreneur shall also be fined in the amount of 150 EUR to 2,000 EUR.

Law on Public Order and Peace

Misdemeanor offence

Article 19

When in public by speaking, sign, symbol, or otherwise offending another on the basis of national, racial or religious affiliation, ethnic origin **or other personal attribute**, shall be punished with a fine of 250 euros to 1,500 euros, or by imprisonment not exceeding 60 days."

Even though provision of Paragraph 3 is settled as form of *Racial and other discrimination* criminal offence, it's a Hate speech offence and not a discrimination offence.

Media Law

Article 11

The competent court may, at the motion of the State Prosecutor, prohibit the distribution of broadcast media content calling for violent overthrow of the constitutional order, violation of the territorial integrity of the Republic, violation of **guaranteed freedoms and rights of man and citizen, or provoking national, racial or religious intolerance or hatred.**

Article 12

The competent court may, at the proposal of the State Prosecutor, in accordance with Article 11 of this Law, issue a decision on temporary prohibition of distribution of the published program content of the media until the decision on the ban is final.

The court shall decide on the proposal referred to in paragraph 1 of this Article within 24 hours of its submission.

The competent court is obliged to immediately deliver the decision on the temporary injunction to the founder, printing company and distributor.

Article 23

It is forbidden to publish information and opinions that incite discrimination, hatred or violence against persons or groups of persons because they belong to or do not belong to a **race, religion, nation, ethnic group, gender or sexual orientation.**

The founder of the media and the author shall not be liable, if the published information and opinions referred to in paragraph 1 of this Article are part of a scientific or author's work dealing with a public matter and are published:

- without intent to incite discrimination, hatred or violence and form part of an objective journalistic report;
- with the intention of critically stating that discrimination, hatred, violence or acts which constitute or may constitute incitement to such behavior.

Article 43

The founder of the media shall be fined **from twenty to fifty times the minimum wage** in the Republic if:

- 3) publish information and opinions contrary to Article 23 of this Law;

Article 11: Exclude ground other than **national, racial or religious intolerance or hatred.**

Article 23: Exclude ground other than **race, religion, nation, ethnic group, gender or sexual orientation.**

Law on Electronic Media

Prohibitions

Article 48

(2) The AVM (AUDIOVISUAL MEDIA SERVICES) service shall not encourage hatred or discrimination on the basis of race, ethnicity, color, gender, language, religion, political or other belief, national or social origin, wealth, union membership, education, social status, marital or family status, age, health, disability, genetic inheritance, gender identity or sexual orientation.

Prohibited activities relating to the provision of commercial audiovisual communications

Article 85

(3) The following shall be prohibited through commercial audiovisual communication:

- 1) endangering human dignity;
- 2) Promoting hatred or discrimination on the basis of gender, race, nationality, religion or belief, disability, age or sexual orientation;

Even though given provisions do not get under the scope of this analysis gives confirmation to not comprehensive protection against hate speech, as do not recognised all possible ground.

No explicit misdemeanour offences foreseen for the breaching provisions under article 48 paragraph 2 and article 85 Paragraph 3.

Article 48 specify the most grounds for hate speech in relation to other hate speech provisions.

Article 23: Exclude ground other than **gender, race, nationality, religion or belief, disability, age or sexual orientation.**

Table three: Discrimination

Montenegrin law has a mix of criminal (crime or misdemeanor) offences falling within the proposed definition of discrimination.

By the Anti-discrimination Law, the following institutions are obliged to keep separate records of complaints filed, proceedings initiated and decisions taken in their jurisdiction regarding discrimination:

- The Ombudsman
- The Courts,
- Public prosecutor's offices,
- Misdemeanor courts,
- Police administration, and
- inspection bodies.

Anti-discrimination Law definition of discrimination	Comments/ recommendations
<p>Prohibition of Discrimination</p> <p>Article 2</p> <p>Any form of discrimination, on any ground, shall be prohibited.</p> <p>Discrimination is any legal or factual difference or unequal treatment or omission of treatment of one person or group of persons in relation to other persons, as well as exclusion, limitation or giving priority to one person in relation to other persons, based on race, skin color, ethnicity, social or ethnic origin, relationship with a minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender change, gender identity, sexual orientation and / or intersex characteristics, health status, disability, age, wealth, marital or family status, group affiliation, or assumption of affiliation with a group, political party, or other organization, as well as other personal attributes.</p> <p>Legal provisions</p>	

Criminal Code Violation of Equality

Article 159

(1) Anyone who on the grounds of his national or ethnic affiliation, affiliation with a race or religion, or on the ground of absence of such an affiliation, or on the grounds of the differences with respect to his political or other beliefs, sex, language, education, social status, social origin, sexual orientation, gender identity, disability, financial standing or other personal characteristic denies or restricts to another person his human rights and freedoms provided for by the Constitution, laws or other regulations or general legal acts or ratified international treaties or, on the grounds of such differences, grants privileges or exemptions shall be punished by a prison term of up to three years.

(2) Where the offence referred to in para. 1 above was committed out of hatred towards a member of a group designated on the grounds of race, skin color, religion, origin, national or ethnic affiliation, the perpetrator shall be punished by a prison term from three months to five years.

(3) Where the offence referred to in para. 2 above was committed by a public official while acting in his official capacity, the perpetrator shall be punished by a prison term from one to eight years.

Criminal Code Breach of Equality in Employment,

Article 225

Anyone who knowingly breaches regulations or otherwise denies or restricts a citizen's right to freedom of employment in the territory of Montenegro on equal terms shall be punished by a fine or a prison term up to one year.

As pursuant paragraph 1. We have discriminatory crime, by paragraph 2. Could be seen as a hate crime.

In this crime, they are not explicit stated personal attributes as a basis of unequal treatment, but the principle of equality which is promoted by this provision implies and discriminatory treatment of the basis of some personal attributes.

Racial and other discrimination, Criminal Code**Article 443**

(1) Who on because of national or ethnic origin, race or religion or absence or affiliation or differences in political or other persuasion, gender, language, education, social status, social origin, sexual orientation, gender identity, disability, property state or any other personal attribute violates fundamental human rights and freedoms guaranteed by generally accepted rules of international law and confirmed by international treaties by Montenegro,

shall be punished by imprisonment for a term between six months and five years.

(2) The punishment referred to in paragraph 1 of this Article shall be imposed on whoever persecutes organizations or individuals for their advocacy for equality of persons.

Paragraph (3) is presented at the Hate speech table.

(4) Whoever commits the offense referred to in paragraphs. 1 to 3 of this Article with abuse of office or if such acts resulted in disorder or violence, he or she shall be punished for the offense referred to in para. 1 and 2 of this Article by imprisonment for one to eight years, and for the offense referred to in paragraph 3 of this Article by imprisonment for six months to five years.

Under the article 34 a of Anti-Discrimination Law, discrimination forms, beside hate speech and harassment already presented in hate crime and hate speech tables, prescribe misdemeanor *discrimination offences*, such as:

9) disables, restricts or impedes employment, work, education or unjustifiably differentiates or treats a person or group of persons unequally, on the grounds of health (Article 12);

Also, by Law on Prohibition of Discrimination against Persons with Disabilities misdemeanor *discrimination offences* have been defined, such as:

Article 29

A fine of EUR 10,000 to EUR 20,000 shall be imposed on the legal person for the offense if:

1) Separate a person or group of persons with disabilities and merge them into one or more groups in a particular situation, when in the same or similar situation that separation and merger is not performed with another person or group of persons (Article 10);

2) fails to provide the inscription on Braille for persons with disabilities in public buildings and public spaces and areas (Article 12 paragraph 2);

...

For a misdemeanor referred to in paragraph 1 of this Article, a responsible person in a legal entity, a responsible person in a state body, a state administration body and an organ of a local self-government unit shall also be fined from EUR 1,500 to EUR 2,000.

The entrepreneur shall be fined from EUR 5,000 to EUR 6,000 for the offense referred to in paragraph 1 of this Article.

Annex two: Rulebook on the content and manner of keeping a special record of cases of reported discrimination

Pursuant to Article 33, paragraph 3 of the Law on Prohibition of Discrimination (Official Gazette of Montenegro 46/10 and 18/14), the Ministry of Human and Minority Rights issued

The Book of Rules is published in the Official Gazette of Montenegro, no. 50/2014 of 28.11.2014. and entered into force on 6.12.2014.

Article 1

This Rulebook prescribes the detailed content and method of keeping separate records of submitted complaints, the procedures and decisions taken regarding discrimination (hereinafter: special record) in the courts, public prosecution, misdemeanour bodies, the administrative authority for policing and inspection bodies.

Article 2

The terms used in this Rulebook for natural persons in the male gender imply the same terms in the female gender.

Article 3

The special records kept by the courts shall include information on cases relating to discrimination, namely:

- 1) the number of lawsuits filed to establish discriminatory treatment, to prohibit the conduct of an act that threatens discrimination, or to prohibit the repetition of discrimination, to eliminate the consequences of discriminatory treatment, to compensate for the damages resulting from discriminatory treatment and to publish a judgment finding discrimination in the media, the number of private prosecutions of the injured party as a prosecutor, bill of indictment or indictments;
- 2) the date of filing a lawsuit or bill of indictment, or the indictment for discriminatory treatment;
- 3) the number of lawsuits or convictions adopted;
- 4) the number of dismissed lawsuits, the number of dismissed lawsuits, bill of indictment or indictments and the number of discontinued proceedings for discriminatory treatment;
- 5) the number of decisions imposing an temporary measure to prevent the risk of irreparable harm, especially grave violation of the right to equal treatment or prevention of violence resulting from discriminatory treatment;
- 6) the number of final judgments rendered for discriminatory treatment;
- 7) the number of revisions filed for discrimination cases;
- 8) the duration of the proceedings before the court for discrimination cases;
- 9) number of discrimination cases received;
- 10) grounds for discrimination; i
- 11) sex and age of the discriminated person.

Article 4

The special records kept by the State Prosecutor's Offices include information on discrimination cases, namely:

- 1) information on the person who filed criminal charges for discriminatory treatment;
- 2) the date of filing criminal charges for discriminatory treatment;
- 3) the number of criminal charges received for discriminatory behavior;
- 4) the number of criminal charges dismissed for discriminatory treatment;
- 5) the number of bill of indictments and indictments raised for discriminatory treatment;

- 6) the number of bill of indictments and indictments confirmed for discriminatory treatment;
- 7) the number of bill of indictments and indictments rejected for discriminatory treatment;
- 8) the number of orders issued to terminate or suspend an investigation for discriminatory treatment;
- 9) the duration of the proceedings before the State Prosecutor's Office for discrimination cases;
- 10) grounds for discrimination; i
- 11) sex and age of the discriminated person.

Article 4

The special records kept by the authorities for misdemeanors shall include information on cases related to discrimination, namely:

- 1) information on the person initiating misdemeanor proceedings, or misdemeanor warrant for discriminatory treatment;
- 2) the date of filing the request for initiating the misdemeanor procedure for discriminatory treatment;
- 3) the number of requests for initiating the misdemeanor proceedings for discriminatory treatment;
- 4) the number of adopted requests for initiating misdemeanor proceedings for discriminatory treatment;
- 5) the number of rejected requests for initiating misdemeanor proceedings for discriminatory treatment;
- 6) the number of final decisions taken for discriminatory treatment;
- 7) date of the final decisions for discriminatory treatment;
- 8) the duration of the proceedings before the misdemeanor authorities for discrimination cases;
- 9) grounds for discrimination; i
- 10) sex and age of the discriminated person.

Article 6

The special records kept by the administrative authority in charge of police affairs shall include information on discrimination cases, namely:

- 1) information on the person who press charges for discriminatory treatment;
- 2) date of submission of the charges for discriminatory treatment;
- 3) the number of charges received for discriminatory treatment;
- 4) the number of accepted charges for discriminatory treatment;
- 5) number of rejected applications for discriminatory treatment;
- 6) date of filing of criminal charges for discriminatory treatment;
- 7) the duration of the proceedings before the administrative authority competent for police affairs for cases related to discrimination;
- 8) grounds for discrimination; i
- 9) sex and age of the discriminated person.

Article 7

Specific records kept by inspection bodies shall include information on discrimination cases, namely:

- 1) information on the person who press charges for discriminatory treatment;
- 2) date of submission of the charges for discriminatory treatment;
- 3) the number of charges received for discriminatory treatment;
- 4) the number of accepted charges for discriminatory treatment;
- 5) number of rejected applications for discriminatory treatment;
- 6) date of filing of request for initiating misdemeanor proceedings for discriminatory treatment;

- 7) the duration of the proceedings before the inspection bodies for discrimination cases;
- 8) grounds for discrimination; i
- 9) sex and age of the discriminated person.

Article 8

Special records are an electronically maintained database that provides immediate access to data to the Protector of Human Rights and Freedoms of Montenegro. The data in the separate records are systematized and kept in the form of a register.

Article 9

On the day this Rulebook enters into force, the Rulebook on the Content and Manner of Keeping Records of Cases of Reported Discrimination („Official Gazette of Montenegro“, No. 23/11) shall cease to be valid.

Article 10

This Rulebook shall enter into force on the eighth day after its publication in the Official Gazette of Montenegro.

No: 01-2962-1 / 14

Podgorica, 12 November 2014

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ENG

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