PARLIAMENTARY TOOLKIT ON HATE SPEECH

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COUNCIL OF EUROPE
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Council of Europe

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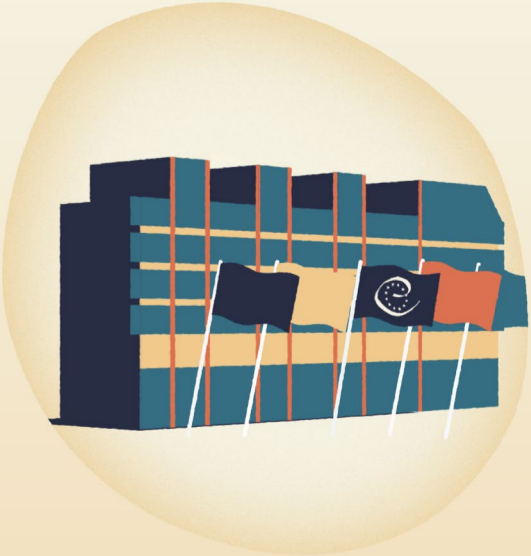


Council of Europe and hate speech in brief

The Council of Europe is the continent's leading human rights organisation. All the 46 member states have signed up to the European Convention on Human Rights (ECHR), a treaty designed to protect human rights, democracy and the rule of law. The Council of Europe has always actively promoted the protection from hateful and discriminatory speech.

Whilst under the ECHR there is currently no clear positive obligation on States to enact hate speech laws, the European Court of Human Rights has recommended that signatory countries review their domestic legislation to ensure that it complies with the need for hate speech provisions, and urges signatories to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which does impose a positive obligation on States to legislate for hate speech.

It is also clear that hate speech laws are compatible with freedom of expression under Article 10 of the ECHR. Article 10 gives citizens the right "to hold opinions and to receive and impart information and ideas without interference by public authority". However, Article 10 allows States to place limits on freedom of expression when "necessary in a democratic society … in the interests of … public safety, the prevention of disorder or crime, for the protection of … morals, for the protection of the reputation or rights of others". In a series of cases, the ECtHR has confirmed that hate speech laws can in principle be compatible with Article 10 so long as they are clearly worded and narrowly defined.

ECRI General Policy Recommendation N°15 on Combating Hate Speech, adopted on 8 December 2015 is a milestone in the Council of Europe's work in this area.

ECRI calls for speedy reactions by public figures to hate speech; promotion of self-regulation of media; raising awareness of the dangerous consequences of hate speech; withdrawing financial and other support from political parties that actively use hate speech; and criminalising its most extreme manifestations, while respecting freedom of expression. Anti-hate speech measures must be well-founded, proportionate, non-discriminatory, and not be misused to curb freedom of expression or assembly nor to suppress criticism of official policies, political opposition and religious beliefs.

The Parliamentary Assembly of the Council of Europe (PACE)

The Parliamentary Assembly brings together 612 members from the parliaments of the Council of Europe's 46 member states, as well as Observer[1] and Partner for Democracy[2] parliaments. It speaks on behalf of 675 million Europeans and represents the democratic conscience of the European continent.

Combating hate in all its forms has been a major policy concern for PACE. In 2015 the No Hate Parliamentary Alliance[3] was created by the PACE Committee on Equality and Non-Discrimination as a follow-up to Assembly Resolution 1967 (2014) on "A strategy to prevent racism and intolerance in Europe". The Alliance provides a network and platform for parliamentarians who wish to stand up to racism, intolerance and hatred. A number of activities, such as hearings, conferences, thematic events, round tables and awareness-raising campaigns have taken place in an effort to make combating hate a priority.

The Committee on Equality and Non-Discrimination appoints a General Rapporteur on combating racism and intolerance every year, for a one-year term, renewable once. The General Rapporteur coordinates the activities of the Alliance.

1. Canada, Israel and Mexico.
2. Jordan, Kyrgyzstan, Morocco, Palestine.
3. https://pace.coe.int/en/pages/no-hate.


NO
HATE

Why this handbook?

The aim of this handbook is to provide parliamentarians with a toolkit for effective protection of victims of hate speech.

It will outline how to ensure that existing or proposed hate speech laws are compatible with human rights, while protecting the victims of hate speech. This will require parliamentarians to ensure that their domestic legislation covers the right kind of behaviour and includes the right groups to be protected.

Particular attention will also be paid to combating online hate speech which is a growing area of concern, and requires placing greater emphasis on holding social media companies accountable as well as ensuring that rules against individual perpetrators are robust. It will also provide details of how best to ensure that existing laws are properly implemented and will highlight the importance of monitoring the effectiveness of the law.

In addition, it will highlight the importance of the role of parliamentarians in ensuring that they, and their parliamentary colleagues, discuss issues of importance in such a way that they model good behaviour to citizens and have proper rules in place to ensure self-regulation.

Finally, the handbook will also provide ideas on what types of non-legal measures should be employed in order to combat hate and to increase diversity and inclusion in society.

Should hate speech be illegal?

Whether or not hate speech should be illegal can be a controversial topic.

On the one hand, there are concerns about freedom of expression and questions over whether hate speech laws interfere with human rights. On the other, there are clear historical examples of hate speech turning into violence, and there is increasing evidence of the harm that hate speech causes to minorities and their ability to participate in civil society. This can lead to a paradoxical situation where "too much" free speech for some groups interferes with the free speech of other groups. Clearly a balance needs to be struck between these competing claims.

Within the European context, enacting hate speech laws is not controversial as we have a long history of legislating against hateful speech. This has been affirmed by the European Court of Human Rights which has confirmed the compatibility of hate speech laws with freedom of expression. Nevertheless, the Court has also highlighted the importance of its role in defending the limits of hate speech laws in order to ensure that such legislation is not used by States to stifle political debate or to silence political opponents. This makes enacting legislation in this area a delicate task, and this handbook seeks to provide guidance on how to frame legislation in order to ensure it is effective at countering hate speech, whilst also being compatible with freedom of expression.

In the modern era, the exponential growth of hate speech that appears online has added to the challenges in this area.

Some statistics on online hate speech

- People with ethnic or immigrant minority backgrounds in the EU face harassment and violence – both online & offline. One in four people surveyed (24 %) experienced at least one form of hate-motivated harassment, and 3 % experienced a hate-motivated physical attack
- 20% of the second generation migrant women surveyed felt discriminated against because of their religion or religious beliefs.
- 14% of respondents had been stopped by the police at least once in the 12 months preceding the survey. The groups most often stopped are people with a North African, Sub-Saharan African and Roma background.
- The reported grounds of discrimination were, in order of importance, the ethnic origin of the respondents (25%), skin colour and religion (both 12%), age (7%), gender (2%), disability (1%) and sexual orientation (0.2%).

Source: FRA, EU-MIDIS II 2016

It is important that existing legislation works well in the online world, and where it does not function appropriately, new legislation is enacted. It is also clear that the sheer level of hate that occurs online, as well as the anonymity that online platforms provide means that traditional policing methods are not enough to curb the spread of hate. It means that we have to re-orient responsibility towards social media companies without whom the fight against online hate speech cannot be won.

The policing of online hate also raises difficult jurisdictional questions. When victims and perpetrators of hate live in different countries, or when the location of servers or the headquarters of social media companies are spread across the world, it can make the policing of online hate even more difficult. An international response is what is needed in order to overcome jurisdictional issues. However, we are still far from reaching international agreements that would allow for these difficulties to be bypassed completely. There are considerable cultural, legal, political and ideological differences amongst Council of Europe member States about the role of hate speech laws which means that much more discussion is needed before agreement can be reached. We need to continue to work towards international solutions to these questions, but until then, we need to focus on what *is* possible within existing frameworks. This means continuing to use existing agreements between countries in relation to information-sharing and extradition. We should also ensure that these jurisdictional issues do not distract us from the fact that great progress can still be made at the national level. The main focus of attention should

continue to be the creation of strong but fair hate speech laws alongside effective implementation and educational tools to ensure a holistic approach to combating hate speech.

Hate crime or hate speech laws – what's the difference?

From the outset it is important to make a distinction between "hate speech" and "hate crime" laws.

Hate speech laws are concerned with generalised comments made about a particular group. Examples of this might be comments posted on Instagram about supposed "Jewish conspiracies", or tweets which promulgate theories of racial superiority. In the case of hate speech, there is no individual being targeted, but rather a group of people who fall into the categories of protected characteristics.

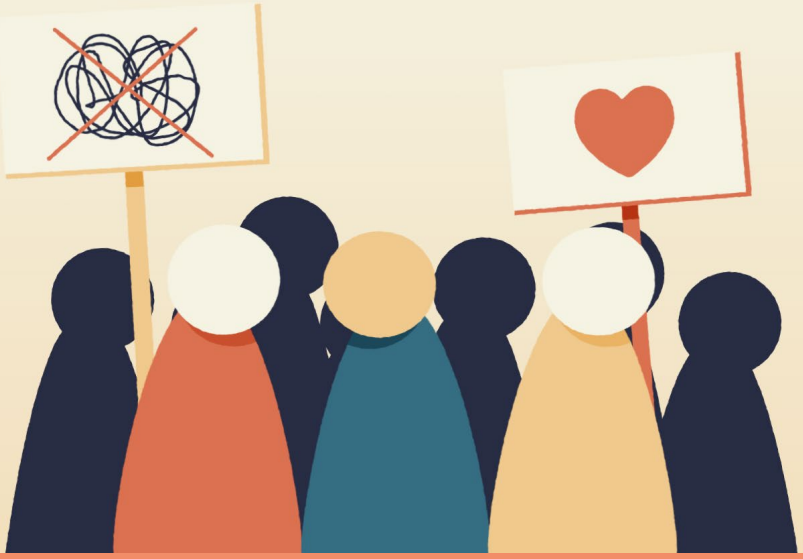
This is in contrast to hate crime offences which involve the commission of an existing offence – such as for example harassment – but which is motivated by or demonstrates hate against the victim based on their protected characteristics. For example, this might include intimidatory comments directed at a black sportsperson which include racist comments. In countries which have a hate crime framework, such an offence might attract greater punishment because of the racist element, but the behaviour would be an offence even if there were no racist element.

The reason why it is important to make this distinction is because the freedom of expression concerns are very different depending on whether we are discussing hate speech or hate crime offences.

In the case of "hate crimes", the speech is criminalised because it constitutes an existing criminal offence – such as harassment. Whilst the punishment for this behaviour might be more serious because of the hateful content, it is not the hate itself that is criminalised. As such, the freedom of expression concerns are less pronounced as the "expression" is not criminalised, but simply serves to increase punishment for existing criminal behaviour.

However, in the case of hate speech offences, there is no underlying offence and so it is the hateful content of the speech that is being criminalised. Thus, the freedom of expression concerns are at the heart of the issue as in such cases, it is the "expression" itself that is being criminalised.

Whilst the existence of an effective hate crime regime will be touched on in this report and will be seen as integral to the broader framework for tackling hate and discrimination, the focus here will be on *hate speech.*



Creating fair and effective hate speech provisions

In this section, we will look more closely at the Council of Europe texts available which can help guide parliamentarians on how to pursue law reform.

Article 10 – Freedom of expression

Under Article 10 of the ECHR, states are required to guarantee freedom of expression to citizens. Unlike other international obligations such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[4] or the International Covenant on Civil and Political Rights[5] (ICCPR), the European Convention on Human Rights does not create a corresponding positive obligation on states to legislate against hate speech.

However, Article 10 does not create an absolute right to freedom of expression either. Article 10 declares that everyone has the right to freedom of expression, but states can restrict this right if it is «necessary in a democratic society … in the interests of … public safety, the prevention of disorder or crime, for the protection of … morals, for the protection of the reputation or rights of others".

In considering the jurisprudence of the court itself, it is clear that whilst there will be scrutiny of hate speech laws, overall the court is supportive of such provisions.

In *Féret v. Belgium (2009),*[6] the Court found hate speech laws to be compatible with freedom of expression. These laws can be fairly broad in scope such as in *Vejdeland and Others v Sweden (2012)* where the court has made it clear that hate speech laws which outlaw incitement do not have to be limited to calls to violence.[7]

4. Under Article 4 of ICERD.
5. Under Article 20(2) of ICCPR.
6. *Féret v. Belgium#*, App. no. 15615/07, (ECHR, 16 July 2009), para. 73*Féret v. Belgium*, App. no. 15615/07, (ECHR, 16 July 2009), para. 73.
7. *Vejdeland and Others v. Sweden,* App. no. 1813/07 (ECtHR, 9 February 2012).

In determining whether hate speech laws are compatible with freedom of expression, the court will take into account a number of factors to determine whether an appropriate balance has been struck between freedom of expression on the one hand and the need to protect victims of hate speech on the other.

There has been some discussion about whether there is an evolving positive obligation to enact hate speech laws under Article 8 of the Convention (the right to respect for a private and family life). However, the case law on this is not strong enough to suggest a positive obligation to create hate speech laws, but it demonstrates a strong indication that the court considers hate speech laws a fundamental part of democracy.

In any case, a wider reading of Council of Europe texts strongly suggests that states should give very serious consideration to enacting hate speech laws. For example, the Committee of Ministers has recommended that signatory countries review their domestic legislation to ensure that it complies with the need for hate speech provisions and urges signatories to ratify the ICERD.[8] Furthermore, recommendations issued by ECRI, the Council of Europe's human rights monitoring body against racism and intolerance, clearly establish the existence of hate speech laws as integral to the fight against racism and the marginalisation of minorities. We will look at ECRI's recommendations on hate speech in more detail in the following section

ECRI General Policy Recommendations on hate speech

ECRI is the Council of Europe's human rights monitoring body against racism and intolerance, and it has issued an extensive list of recommendations in relation to hate speech in its General Policy Recommendation No 15 on combating hate speech (GPR 15). This is a comprehensive document containing advice to member states on measures they can adopt which will help to combat hate speech. These include the need for effective legislation as well as the necessity for broader measures that can ensure the effective implementation and enforcement of those laws.

GPR No. 15 and effective legislation

GPR 15 clearly envisages the use of a raft of measures to combat hate speech, rather than one single provision. As such, it recommends the use of the full range of legislative tools available: civil, administrative and criminal.

8. (Council of Europe, Committee of Ministers, Recommendation on Hate Speech, 1997).

This is an important point to note as most countries focus on the use of the criminal law in order to combat hate speech, and yet in some instances civil/administrative offences can also be effective tools.

An important benefit of using civil/administrative provisions is that it allows for a less punitive approach to the regulation of speech than the use of the criminal law, and so, therefore, the balance between freedom of expression and protection of victims is more easily achieved. In this way, the criminal law can be used for the most egregious forms of hate speech offending, whilst civil/administrative provisions can be used against a wider set of harmful behaviours.

Scope of the provisions

In order to ensure that the correct balance is maintained between freedom of expression and the protection of victims, there are a number of ways in which hate speech laws need to be restricted.

GPR15 sets out a definition of the kind of behaviour that can be made illegal as: ***the use of hate speech that can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination***.

It should be noted here that what is made illegal (whether through the criminal law or civil/administrative law) is not the *content of the speech*, but rather the *potential impact* that the speech might have on others. It should also be noted that the feelings of the target group are not the focus of legislation, but rather their safety and ability to live their lives free of intimidation, hostility or discrimination.

Furthermore, the speech does not have to be directed at the target group or at individuals who belong to the target group. Offences targeting the group itself or individuals within that group fall into the category of hate crime rather than hate speech. This is where existing offences such as those involving threats or intimidation against a person or group or individuals within a group are punished more harshly because of the existence of a hate element.

Difference between criminal, civil and administrative offences

The core behaviour for all offences is as identified above: ***the use of hate speech that can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination***.

However, there will be differences in the scope of the offences depending on whether they are civil, criminal or administrative.

The provisions will be distinguished in relation to the **remedies** available for infringement of the provisions.

> By way of example, criminal provisions could impose a prison sentence on perpetrators in the most serious cases, whilst administrative provisions could attract fines, warnings, or confiscation of the tools used to perpetrate hate or other penalties that do not involve incarceration. Meanwhile, civil provisions will provide civil law remedies such as compensation or specific performance.

GPR 15 recommends the use of a number of remedies in order to reflect the differing levels of blameworthiness. This also helps when considering the careful balancing act required here as the less onerous the punishment, the more likely a correct balance is struck between freedom of expression and protection of victims.

> Remedies can include anything from personal compensation, to token awards to groups whose reputation has been affected by the speech, to the removal of publications being disseminated.

However, the provisions will also be distinguished from each other in other ways. It is crucial that the criminal law should only be used where no other less restrictive measure would be effective. This reiterates the point made above that **the criminal law needs to be used as a last resort**, and administrative and civil provisions should be used where possible to cover most instances of hate speech.

Criminal provisions, therefore, need to be more restrictive than administrative or civil provisions. This can be achieved by limiting the criminal law to offending behaviour that:

- takes place in the **"public"** arena and
- where there is a **clear intention** that the speech will incite acts of violence, intimidation, hostility or discrimination.

Art 369 of the Romanian Criminal Code is a good example of a provision which covers the basic forms of harm as articulated in international obligations:

> **Article 369 Incitement to hatred or discrimination**
> inciting the public, by any means, to hatred or discrimination against a class of persons shall be punished with imprisonment from six months to three years or a fine.

Civil or administrative provisions also must not be overly broad and must be compatible with freedom of expression as outlined above, but can fall below the high threshold of criminal offences. Thus, civil or administrative provisions could be used in cases not involving "public" pronouncements, or where there is no intention that speech incites harm, but recklessness or a likelihood that it will do so.

Montenegro has created a stand-alone administrative offence under article 19 of the Law on Public Order and Peace which makes it a misdemeanour to insult someone on grounds of national, racial or religious or ethnic origins or other personal characteristics. This contrasts very clearly with the criminal provision which is based on incitement to hatred and violence (under Article 370 of the Montenegrin Criminal Code).

Another important part of the recommendation that needs to be emphasised is the fact that hate speech offences cannot be used to target official policies, political opposition or religious belief. Freedom of expression is very important to democratic processes, and citizens should be free to express their political opinions without the fear of prosecution. It is crucial that hate speech laws are not used by the State to stifle political dissent or to silence opposition. This is without doubt, a point that needs to be taken on board by all those involved in the regulation of hate speech, and must form a core part of the drafting of hate speech offences, as well as their implementation and enforcement.

However, it must also be stressed that this part of GPR 15 does not mean that politicians and those in the public sphere can engage in hate speech with impunity. This part of GPR 15 underlines the fact that the law needs to be clear that hate speech involves the incitement to hatred/discrimination/violence against certain groups, and is not a blanket ban on any speech that happens to be hateful. Any politician or public person who expresses opinions that fall into this definition of hate speech can and should be prosecuted in the same way as a civilian. Chapter Seven will deal with this in more depth.

On 20 May 2022, in Turin, the Committee of Ministers adopted Recommendation CM/Rec(2022)16 on combating hate speech. Consistent with the work of various parts of the Organisation in the area of countering hate speech, the Recommendation contains guidance for the authorities of member States on how to counter hate speech through civil, administrative and criminal law, as well as alternative measures, depending on the type and the severity of the cases. In addition to indications targeting State authorities, the Recommendation includes guidance for other actors, such as public officials, political parties, internet intermediaries, media and civil society organisations.

The Recommendation on combating hate speech contains a broad definition of hate speech (§2) and distinguishes different layers of hate speech (§3 of the Recommendation). It also provides factors for assessing the level of severity of hate speech and guidance for developing appropriate and proportionate responses for those different layers of hate speech (§§4 et seq. of the Recommendation).

The Recommendation pursues a comprehensive approach to preventing and combating hate speech. Therefore, it not only deals with the necessary legal framework for combating hate speech but also contains important guidance for addressing the root causes of hate speech through non-legal means, in particular through the recommendations made in Chapter 4 on awareness-raising, education, training and the use of counter- and alternative speech. The different constitutional and legal orders and the varying situations in the member States, will make it necessary to explore various avenues for implementing this Recommendation.

Effective enforcement of legislation

Legislation on its own will not be enough to ensure proper regulation in this area. There is also the need for strong enforcement of the legislation. There are a number of factors that need to be in place in order to ensure proper enforcement.

Standing and enforcement

In relation to the civil and administrative provisions,[9] standing can be given to equality bodies as well as to the individual targeted by hate speech.

Some countries already give standing to their designated equality bodies in varying degrees to help with the enforcement of hate speech laws. For example, in Serbia, complaints about administrative infringements can be submitted to the Commissioner for the Protection of Equality

9. Article 8d of GPR 15.

(this is the national equality body that has been set up in line with ECRI Standards). The Commissioner can decide on the complaint, whether that be against the state, a private individual or employer or enterprise and issue a recommendation. This recommendation does not have legal power as such, but the Commissioner can publish the fact of the infringement and the recommendation in the media.

Training

Effective and appropriate training for judges, lawyers, prosecutors and officials who deal with cases involving hate speech is necessary.[10] Opportunities should also be found for ensuring the sharing of good practice between these actors and for effective co-operation and co-ordination between police and prosecutors.[11]

When Anti-Discrimination Laws were introduced in Ukraine in 2012, it was crucial that all criminal justice actors were given training specifically on the law itself, but also on background context such as the role of the Court and the ECHR. Since this training has been initiated, judges are more likely to refer to ECtHR decisions and to show an awareness and understanding of the impact of discrimination and hate speech on victims and society.

Training can be undertaken by equality bodies in order to ensure that the training is contextual. For example, in Moldova, training is undertaken by the Ombudsman Office and the Equality Office.

Collection of data and statistics

It is imperative that states monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these.[12] Statistics should be collected in order to ensure that prosecutions

10. Paragraph 8f of GPR 15.
11. Paragraph 10g of GPR 15.
12. Paragraph 10 f of GPR15.

for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs.[13] If this does not already exist, states should consider setting up a nation-wide disaggregated data collection system to ensure that an appropriate evaluation and monitoring of the offences can be undertaken.

Countries such as Germany, Denmark and the UK already have a comprehensive and systematic approach to collecting national statistics from the police and prosecuting authorities. This makes it possible to gain an understanding of the effectiveness of hate speech provisions, and can highlight areas that require improvement.

However, in the absence of such a regime, it is still possible to map national responses to hate speech. For example, the Council of Europe has produced a number of reports in collaboration with national authorities from countries such as Moldova, Georgia, Spain and Armenia which use a systematic analysis to map how people are affected by hate speech and what tools of redress are available to them. This is not limited to legal remedies: it maps all the interactions an individual might have not just with the state and public bodies, but also with NGOs and other actors within the private sector. This produces a holistic map of the entire hate speech regime and can enable a state to identify areas of strength, as well as areas which require improvement. These sorts of reports also have the benefit of focusing on the effectiveness of non-legal measures, which in turn can help ensure that the criminal law is used as a last resort, and therefore can help protect freedom of expression.

Additional measures

Beyond the recommendations regarding criminal, civil and administrative measures, GPR No. 15, points out that legislative frameworks alone are insufficient to comprehensively address hate speech. Additional measures against the use of hate speech should comprise efforts that involve the following.

Awareness raising

Raising awareness of the harm that hate speech can cause, as well as highlighting the conditions in society that are conducive to hate speech is vital. Regular events can be organised to stress the importance of the need to combat hate speech, such as for example recognising 22nd July as the European Day for Victims of Hate Crime

13. Under para 10 c.

Campaigns such as the Council of Europe's No Hate Speech Movement can be a good way to raise awareness, particularly amongst young people about the dangers of hate speech. They can also serve to give information to affected groups about how to seek help and support, and about their options for legal redress where appropriate.

Supporting victims

Victims and targets of hate speech need to be protected and given support through access to legal advice, counselling and the provision of effective redress mechanisms.

Promoting reporting of hate speech offences

In order to ensure that offences are brought to the attention of the police and relevant authorities, hate speech laws need to be advertised clearly. Other actors, such as NGOs, can be central to improving reporting rates. They can be the first port of call for victims but can also themselves report to the police and relevant authorities. This is particularly important with hate speech, as there is often no identifiable victim but rather an entire group that is targeted by the speech. Online reporting is another way to encourage reporting.

This is something that is already possible In Denmark and the UK, and is an option that is currently being pursued by France. For an example of how this works, you can visit The Truevision website[14] which was set up by the UK police specifically to allow members of the public to report hate crimes and hate speech offences online. The website also offences general support and advice to victims of hate crime and hate speech as well as information.

14. https://www.report-it.org.uk/your_police_force

Combating online hate speech

In the previous section, we considered how GPR 15 can help guide us in creating effective hate speech laws. In this section, we will look more closely at measures needed to combat online hate speech. We will look specifically at two provisions here:

- **ECRI's General Policy Recommendation No. 6 (GPR 6)** which concerns the dissemination of racist material via the internet, and which urges governments to take the necessary measures to tackle racist, xenophobic and antisemitic speech online.
- PACE's Resolution 2144 (2017) and Recommendation 2098 (2017) ***Ending Cyberdiscrimination and online hate.***

These guidelines focus on legislation which works well in the online world, the regulation of social media companies and on the training and implementation measures needed to ensure the effectiveness of the law.

Legislation

Both texts emphasise the need to ensure that relevant national legislation applies also to offences committed via the internet, and that those responsible are prosecuted. Whilst GPR 6 focuses specifically on racist material, the PACE resolution emphasises the need to ensure that legislation also covers other protected characteristics such as sex, colour, ethnicity, nationality, religion, sexual orientation, gender identity, political or other opinion, disability or other status.

Ensuring that existing legislation on hate speech also applies to the online world is the least that can be done in this area. In some cases, this can be done in a fairly straightforward manner by inserting a provision into existing legislation to ensure that all offline hate speech offences apply equally online.

Article 510.3 of the Spanish Criminal Code has included explicit reference to online material in their hate speech provisions in order to make it clear that online material is also caught by these offences.

However, this is only a first step towards effective implementation of legislation, and the issue is not always as straightforward. Sometimes, there are aspects of the offline legislation which do not work well in the online world, and so existing provisions need to be tweaked in order to ensure their effectiveness when applied to internet offences.

Under hate speech provisions in the UK, a special defence exists[15] if the speech is committed inside a "dwelling" or directed at anyone inside a "dwelling". This defence clearly does not make sense if applied to the online world given that a large number of hate speech offences will be committed in someone's home. These offences need deeper reform in order to properly apply to the online world.

Ideally, further thought should go into whether offline offences are entirely appropriate for dealing with the sorts of speech that occurs online. There are certain characteristics of online speech that means that specially tailored offences may be required.

There are a number of characteristics of some forms of online hate that means that harm caused by such material is different to that caused by offline hate or is amplified.

- Online material is potentially permanent and can be found through search engines;
- Online communications are instantaneous and individuals can reach a platform of millions in just a few seconds;
- The anonymity afforded by social media platforms can mean that perpetrators are difficult if not impossible to track down;
- Furthermore, hate crosses traditional borders, which can create jurisdictional problems.

As such a different approach is needed.

Finally, the texts remind Member States to ratify, if they have not already, **the Convention on Cybercrime (ETS No. 185)** and its **Additional Protocol**, concerning the criminalisation of acts of racist or xenophobic nature committed through computer systems

15. For example under s.18(2) of the Public Order Act 1986.

The responsibility of social media companies

The sheer level of hate speech material online means that traditional policing methods cannot keep up.

In any case, the remedies available to individuals through traditional policing and legal methods are not always sufficient, as what is needed is removal of the material rather than merely punishment of a particular individual. As such, the role of social media companies in the policing of online hate speech has come to the fore, and much of the discussion in this area is about how to hold social media companies accountable for the material that appears on their platforms.

There are two main approaches that have been proposed in this area.

The first is to hold them accountable for the dissemination of illegal material. This can be done using existing provisions or creating specially tailored legislation that fines social media companies for not removing this material quickly enough when it is brought to their attention. This is often refered to as the "notice-and-take-down" and requires social media companies to be reactive.

Germany has been at the forefront of developments in the regulation of social media platforms and hate speech. In 2017, the German government introduced the Network Enforcement Act (known as NetzDG law) which imposes large fines on social media companies if they do not remove hate speech quickly enough from their platforms. This law was introduced because the German government believed that self-regulation and voluntary Codes of Conduct were insufficient to force these companies to take seriously their responsibilities towards illegal material. The law does not require companies to pro-actively search for illegal material, but they are required to remove material when notified of its illegality. Thus, the German approach is effectively about making the "notice and take-down" system more effective.

The second approach outlined in the texts is more wide-ranging, and involves setting up a national consultation body which can act as a permanent monitoring centre. This body can set up codes of conduct which internet intermediaries must abide by, and it can force platforms to establish clear and effective internal processes to deal with notifications regarding hate speech.

The UK Parliament is in the process of passing the Online Safety Bill, which aims to set up a new Online Safety Regulator which will create Codes of Conduct which internet companies (such as social media platforms) will need to abide by. It also sets out duties on internet companies to identify where their users are at risk, and requires them to show how they will protect their users from these harms. If these codes or duties are breached, the regulator can issue fines or use other remedies to force compliance.

As these initiatives involve using the law to regulate how platforms filter the types of speech that appear on their platforms, it is vitally important that Article 10 concerns are at the heart of any reforms. At all times an appropriate balance needs to be struck between protecting the rights of the victims and citizens' freedom of expression. This means that the focus must be on the potential harmful effects of speech, and not the offensiveness of the material or whether it is insulting to certain groups. It will therefore be important that any decisions about the kinds of material that need to be removed are made transparently, and that it is possible for all interest groups and viewpoints to be heard. It will also be important to ensure that reasonable debate is not stifled, and that issues that may be controversial, such as immigration or gay marriage, can be debated, but in a manner that does not amount to incitement to hatred against certain groups.

We are only at the very beginning of this conversation, and the debate about how best to regulate the online sphere is likely to dominate the debate about the regulation of hate speech in the coming years. Therefore, parliamentarians need to be prepared to engage with social media companies in order to collaborate on finding a way forward in this arena. It will also require a radical rethinking of our relationship with the online world, and how behaviour can manifest itself in ways that might defy traditional conceptions of criminal harm.

Training and implementation

As with offline hate speech laws, there will be a need to ensure that all the additional measures identified above also need to be adapted to legislation dealing with online behaviours.

In addition to this, Parliamentarians also need to support any self-regulatory measures taken by the Internet industry to combat racism, xenophobia and Antisemitism.

One such voluntary scheme is the EU Voluntary Code of Conduct.[16] This was established in 2016 by the European Commission in agreement with some of the giant social media companies such as Facebook, Twitter and YouTube. A voluntary code of conduct was set up which the companies promised to abide by. Their compliance with the Code is evaluated through regular monitoring exercises set up in collaboration with a network of organisations within the EU. These organisations flag up potentially illegal material to the companies through their regular complaints process, and the companies' responses are assessed.

However, it is important to remember that self-regulation is not sufficient on its own, and that Parliamentarians also need to push for legal reforms as outlined above.

International co-operation and working with enforcement authorities across the world should also be encouraged. However, as pointed out above, a unified international approach to online hate speech is far from realistic, and so the focus of attention should be on domestic legislation and what can be achieved at the domestic level.

Other measures recommended by the texts include launching programmes and supporting initiatives from civil society and other relevant agencies. The sorts of projects that should be encouraged are those which promote counter-speech initiatives, anti-bullying campaigns, and programmes which aim to have a lasting impact on people's attitudes to online hate and the responsible use of the internet. The Council of Europe strongly encourages the building of networks and alliances amongst different groups and agencies working alongside each other to combat online hate.

16. EU Code of conduct on countering illegal hate speech online


NO HATE

The responsibility of political leaders in combating hate speech

In the previous sections we looked at how we can use Council of Europe texts to help guide us in creating good legal provisions for both the online and offline world. In this section we will focus on one particular PACE resolution calling on the responsibility of political leaders in combating hate speech: ***The role and responsibilities of political leaders in combating hate speech and intolerance – Resolution 2275 (2019)***

This resolution highlights the vital role that political leaders have to play in combating hate speech and intolerance and emphasises the fact that they have a moral responsibility to do so. This is both in terms of political leaders themselves not engaging in hate speech, but also in speaking out when others in political office engage in such speech. The resolution also calls on parliamentarians to promote general democratic values and the ideals of diversity and inclusion.

In October 2021, Dutch politician and Secretary of State Broekers-Knol was publicly censured by a number of politicians in the Dutch Parliament for exaggerating the number of Afghan refugees who might arrive in the Netherlands. Her comments were deemed to be implicitly racist, and she was accused of citing large numbers in order to frighten people. Whilst a no-confidence motion against her failed, she was forced to publicly apologise and to clarify her statements.

One important aspect of the resolution is to encourage political movements and parties to self-regulate. This requires that there are clear rules of procedure that contain specific measures against hate speech that:

- Outline the complaints mechanisms for reporting breaches of the hate speech rules.
- Define the sanctions available for those who engage with hate speech.
- Include information to parliamentarians and other political actors on how to prevent, identify and react to both online and offline hate speech.

The Charter of European Political Parties for a Non-Racist and Inclusive Society, endorsed by the Parliamentary Assembly through Resolution 2443 (2022) provides guidance for the self-regulation of political parties in this area.

The Charter sets out five main principles it requires political parties:

- To defend basic human rights and reject racism and discrimination in all its forms;
- To refrain from disseminating or endorsing views which may stir up hatred or prejudice;
- To deal sensitively with controversial topics relating to vulnerable groups;
- To refuse to form political alliances with or cooperate with parties which incite hatred or prejudice;
- To aim for fair representation of all groups within the party, with a particular onus being placed on party leadership to ensure this.

The current Charter updates and expands a previous version drawn up in 1998. The Charter refers to a wide range of prohibited grounds of discrimination, namely "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation, social origin and other personal characteristics or status, and it includes a section on accountability, committing its signatories to applying disciplinary sanctions to their members for the case of non-compliance.

The Resolution also recommends the following actions to parliamentarians:

- **Promote information and awareness-raising activities** addressed to politicians and elected representatives at all levels, focusing on initiatives and measures adopted to counter hate speech and intolerance, including at international level, such as the Charter of European Parties for a Non-Racist Society and the No Hate Parliamentary Alliance;

- **Ensure that public officials are provided with training on fundamental rights, equality and non-discrimination**, particularly in institutions where discrimination may take place such as educational settings, the police force, the judiciary, the armed forces, legal services and the medical profession;
- **Encourage the media to provide accurate information**;
- **Promote awareness-raising activities targeting the general public** on racism and intolerance, and hate speech specifically;
- **Support the national committees of the No Hate Speech Movement campaign**;
- **Establish study groups** with the participation of parliamentarians, experts and civil society representatives, **to monitor hate speech and recommend measures to address it at national level**;
- Mobilise against hate speech and all forms of racism and intolerance, in particular through **participating in initiatives such as the No Hate Parliamentary Alliance** developed by the Assembly.

Appendix

PARLIAMENTARIANS

The following is a self-assessment tool that can be used by parliamentarians to assess their priorities for action.

- Does your country have hate speech laws?
  - If yes, which groups are protected? Does the list need to be expanded?
  - Do your hate speech laws cover the full panoply of legal tools: criminal, civil and administrative? If not, is there a case for creating stand-alone administrative or civil provisions?
  - Are your criminal provisions tightly worded enough to ensure freedom of expression?
  - Is it clear from the law itself or from its interpretation by the judiciary that it does not apply to political speech?
  - Are current provisions effective for the online world? If not, where are the gaps? Should you consider the regulation of social media in addition to the punishment of individual perpetrators?
  - Do you have information about how often these offences are used?
  - Does your State regularly evaluate the effectiveness of such provisions?
  - Do the police/prosecutors/lawyers have adequate training on enforcing these laws?
- If your country does not have hate speech laws:
  - Think about civil society groups that can help advocate in favour of hate speech laws.
  - Consider any cross-parliamentary alliances that you can mobilise.
  - What kind of hate speech laws would you like? Consider the full extent of legal tools at your disposal. Are there experts in your country who can help formulate such laws?
- Non-legal measures:
  - Is there sufficient support for victims of hate speech?

- Are victims of hate speech able to report crimes online?
- Are there hate speech campaigns you can support both nationally and internationally? Or do you need to encourage such campaigns to run in your country?
- Does your political party have clear rules relating to the self-regulation of hate speech?

DEFINITIONS

Definition of hate speech

There is no agreed definition of hate speech, either at the international or European level. Indeed, international frameworks such as the ICCPR and ICERD do not provide definitions of hate speech at all, but rather instruct states in very general terms to legislate against certain types of speech.

The 1997 Recommendation of the Council of Europe Committee of Ministers on Hate Speech (CM Recommendation) attempted for the first time a definition of hate speech which it set out as:

> "all forms of expression which spread, incite, promote or justify *racial* **hatred**, *xenophobia*, *anti-Semitism* or other forms of hatred based on **intolerance**, including **intolerant expression** by aggressive *nationalism* and *ethnocentrism*, **discrimination** and **hostility** against *minorities, migrants* and people of *immigrant* origin."

The words highlighted in this definition in **bold** demonstrate that hate speech covers more than just expressions of hatred and the words in *italics* show that it is not all hate speech that should be made illegal, but rather that aimed at *specific groups of people*. The CM Recommendation is fairly narrow as it applies only to race and ethnicity, but a wider range of protected characteristics is widely held to be relevant here including but not limited to: religion, gender, sexuality, disability, transgender identity and many others. Nevertheless, there are limitations to which groups can gain the protection of hate speech laws. This is because the rationale behind these laws is, broadly speaking, to give protection to groups of people who have been subject to discrimination both historically and in the present, and to target speech that is harmful because it exacerbates existing fault lines in society.

The definitional issue is compounded further when we recognise the distinction between *general* definitions of hate speech and *legal* definitions

of hate speech. The UN set out a general definition of hate speech in the UN Plan of Action on Hate Speech[17] as follows:

> "any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor."

This general definition is wider than the CM Recommendation and will include all sorts of speech that, whilst offensive and hurtful, is not necessarily speech that should be prohibited by law. Nevertheless, it still retains the two crucial elements identified above: the fact that the speech needs to be discriminatory or attacking, and the fact that it needs to be aimed at a group of people based on certain characteristics. Given the breadth of this definition, it is clear that when attempting to legislate for hate speech, it is not a *general* definition of hate speech that we are looking for, but instead an understanding of where the dividing line should be between speech that is hateful – but should remain lawful – and speech that is sufficiently serious and dangerous that it requires intervention by the law in a way that does not infringe freedom of expression.

Definition of Racism and the Other Protected Characteristics

There is no agreed definition of racism – or any of the other "isms" that might be included in hate speech legislation. However, in the context of hate speech legislation, a precise or agreed definition is not necessary.

This is because the concept of hate speech is much narrower than the concept of "racism". One could engage in racist talk (however that may be defined) without it necessarily constituting hate speech.

This is because hate speech is about the forms of expression which spread, incite, promote or justify "racial hatred". So, this means that the focus should be on what constitutes racial hatred, as opposed to "racism" which is a much broader concept. For example, making an assumption about someone on the basis of their race might be racist, but it is not sufficient to constitute hate speech.

This principle could be applied to the other protected groups. For example, it is not necessary to define exactly what is meant by homophobia. This is because hate speech provisions protecting the LGBTQI community are not protecting individuals against homophobic comments. It is protecting them

17. https://www.un.org/en/genocideprevention/hate-speech-strategy.shtml

against speech that stirs up hatred against them based on their sexual orientation and gender identity.

This means that the focus instead should be on defining more clearly:

- Which groups will be protected;
  - For example, in the context of race, will this include ethnicity, immigrant status, geographical background, membership of specific groups such as Roma?
- What they are being protected against;
  - Is it words that incite hatred, intolerance and/or discrimination? How are these words to be defined? Do definitions already exist in the law?

This does not obviate the need for definitions, but it does shift focus away from trying to define something as complex and difficult as "racism" towards more concrete decisions about which groups should be protected or how to define the harmful impact of words.

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The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. The Parliamentary Assembly, consisting of representatives from the 46 national parliaments, provides a forum for debate and proposals on Europe's social and political issues. Many Council of Europe conventions originate from the Assembly, including the European Convention on Human Rights.