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COUNCIL OF EUROPE COMMITTEE OF EXPERTS ON HATE CRIME

(PC/ADI-CH)

Draft Explanatory Memorandum to Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member States on Combating Hate Crime

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INTRODUCTION

1. Hate crime is a particularly serious form of crime. It interferes with the safety of individuals and groups that are targeted by it, undermines the principles of equality and human dignity guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), and destroys democratic values, social stability and peace, thereby threatening the very basis of democratic societies and the rule of law. Combating and preventing hate crime is challenging: both the concept and the scale of the problem are elusive. Hate crime lacks an internationally binding definition. It is also under-reported by victims, and when it is, it may not be distinctly recorded as a hate crime. Recording, collection of data, and responses to hate crime can differ markedly between member States, and so official statistics at national level may not reflect the reality of the prevalence of hate crime.

2. Hate crimes are committed because of a belief on the part of the perpetrator, that the target represents "the Other" – that the victim represents a group of people that are different, and undeserving or unwelcome in society. Hate crimes are a product of societal and individual prejudices, where a criminal act is typically perpetrated, not because of who a person is, but rather what or who they represent to the perpetrator. Hate crimes can take place on an occasional or regular basis. To resolve and repudiate these engrained and sometimes widely-held prejudices at the level of the individual as well as across society as a whole requires a complex and multifaceted response. This Recommendation thus calls for member States to take a comprehensive approach to preventing and combating hate crime and to protecting, supporting and empowering victims of hate crime.

3. This Recommendation recognises that individuals and groups can be targeted by hate crime on different grounds, or intersecting grounds, and that such persons and groups need special protection and support to ensure their effective access to justice. It also recognises that hate is manifested with different degrees of severity and acknowledges that the occurrence of hate crime can be a direct consequence of the escalation of hate speech. The Preamble (recitals f and s) make direct reference to the relevance of the Committee of Ministers' earlier Recommendation CM/Rec(2022)16 on combating hate speech for the implementation of the strategies proposed in this Recommendation. The forms of hate speech which should, given their gravity, attract criminal liability in accordance with the conditions specified in Recommendation CM/Rec(2022)16 should also be considered hate crimes for the purposes of this instrument. Reference is made in particular to paragraphs 11 and 12 of Recommendation CM/Rec(2022)16.

4. The rights of the victim, and their particular needs and views, should remain central to the response to hate crime. While recognising the capacity of the criminal justice system to address hate crime, this Recommendation calls upon member states to comply with the principles of legality and proportionality and acknowledges the potential of restorative justice as a tool to address the harms of hate crime and prevent future offending.

5. Many different actors should be involved in preventing and combating hate crime. They comprise: public entities including elected bodies and authorities at the federal, regional and local levels and their representatives and staff, in particular in the fields of education, media regulation, policing, and the judiciary, national human rights institutions and equality bodies, but also other stakeholders such as political parties, public figures, internet intermediaries, public or private media including commercial, local and minority media, professional associations, civil society organisations, and particularly those civil society organisations that work with minority communities, individuals and groups at risk of hate crime, victims of hate crime, human rights defenders, faith-based actors, representatives of minority and other groups, social partners, academia and research institutes. The Recommendation aims to guide member States and all those stakeholders in developing comprehensive policies, strategies and action plans for preventing and combating hate crime in an effective way.

6. The Recommendation has been developed by the Committee of Experts on combating hate crime (PC/ADI-CH), which was established as a subordinate body to the Steering Committee on Anti-discrimination, Diversity and Inclusion (CDADI) and the Steering Committee on Crime Problems (CDPC). In line with its terms of reference, the Recommendation builds on the case law of the European Court of Human Rights (hereafter "the Court"), which has, under Article 32 of the Convention, final jurisdiction to interpret and apply the Convention and its Protocols through its case law. Its judgments not only serve to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing, in line with its Article 19, to the observance by the member States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, No. 5310/71, 18 January 1978, § 154). The Recommendation complements existing Council of Europe relevant instruments, including CM/Rec(2022)16 on combating hate speech and CM/Rec(2019)1 on preventing and combating sexism.

7. The following principles and guidelines are organised into [12] chapters. Each chapter sets out relevant measures that member States and other relevant actors are recommended to take to prevent and combat hate crime in order to fulfil their duties and responsibilities under the Convention. The implementation of these principles and guidelines ensures the protection of the relevant human rights and fundamental freedoms, in particular those addressed in Articles 2, 3, 6, 7, 8, 10, 13 and 14 of the Convention, Article 1 of its Protocol 1 and Article 1 of its Protocol No. 12, in full respect of the principle of the rule of law and the positive obligations that member States have in this respect. Its prompt and full implementation should be regularly reviewed.

Scope, definition and approach

On paragraph 1

8. The recommendation aims to assist member States in combating hate crime in a comprehensive way. It contains legal and non-legal measures to address not only hate crime off and online, but also its drivers. It recognises the need for a multi-stakeholder

approach and outlines key means by which particular partners and interested parties, and in particular, civil society, can contribute to building trust in the system.

9. The Recommendation approaches hate crime as part of a continuum of hate, from everyday stigmatisation and manifestations of intolerance, verbal abuse and microaggressions through to discrimination, hate speech, violence and hate crimes, and ultimately to terrorism or genocide. As such, in combating hate speech, it is equally possible to prevent and so combat hate crime and vice versa. The Recommendation and the Explanatory Memorandum therefore complement CM/Rec(2022)16 on combating hate speech.

10. Accordingly, and as regards the criminalisation of hate speech, the provisions of this instrument have been drafted in harmony with the approach set out in the earlier Recommendation and should be read in the light of it. That said, the focus of this Recommendation is on the manner in which the authorities should address the commission or attempted commission of a criminal offence, typically against the person or property, where a hate element (see further, paragraphs [14 - 17] below), is present. It may be the case that proof of the hate element may result from prior or contemporaneous forms of expression used by the perpetrator in respect of the victim or victims. Where the authorities are minded to investigate and prosecute suspected perpetrators also in respect of criminalised hate speech, regard should be had to the principles contained in Recommendation CM/Rec(2022)16.

On paragraph 2

11. At European and international levels, hate crime is more often described than defined. In many circumstances, the description is limited to understanding hate crime through a particular legal model, or otherwise highlights the particularities of what the legal system must do to address hate crime rather than define it as a term. Equally, a broad approach which includes criminalised hate speech is taken by some; or a narrower one taken by others which restricts the understanding of hate crime to only existing criminal offences committed with an additional hate element. It can also be conceptually challenging to define an outer limit of a "hate crime", i.e. as distinct from acts of terrorism and violent extremism, war crimes, genocide, and other international crimes which are also situated on the continuum or spectrum of "hate". In certain cases, the hate element as broadly defined in the Recommendation would also be present in these crimes, such that they could on occasion be understood as falling within the scope of the Recommendation. However, whilst this instrument aims to be comprehensive, its recommendations are not intended to and should not be understood as catering to the specific needs and challenges arising in the context of those crimes. Reference should be made to more specific legal frameworks, notably at European and international level, that apply to those groups of crimes, including international cooperation, criminal justice and law enforcement, prevention, victims' rights, and monitoring.

12. With respect to international standards, there are a number of key instruments to draw from. Article 4 of the International Convention on the Elimination of All Forms of Racial

Discrimination requires States Parties to declare as an offence publishable by law "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin." Article 4 of the European Union Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law requires member States to *inter alia* "ensure that racist and xenophobic motivation is considered an aggravating circumstance" and its Article 1 sets out a range of offences – largely constituting hate speech which should be criminalised – which member States must ensure are punishable. The Explanatory Memorandum of the Steering Committee for Human Rights (CDDH) on Recommendation CM/Rec(2010)5 states that hate crimes "are crimes committed on grounds of the victim's actual or assumed membership of a certain group…". Paragraph 21 of ECRI's General Policy Recommendation No 7 recommends that national legislation should provide that "racist motivation constitutes an aggravating circumstance", and paragraphs 18 on hate speech and 19 on genocide specify a number of acts which should equally be penalised through the criminal law. The Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law A/CONF.234/L.6. recognises hate crime as a "new, emerging and evolving form of crime", committing States Parties to "develop effective strategies, including by enhancing the capacity of criminal justice professionals, to prevent, investigate and prosecute hate crimes, as well as engage effectively with victims and victim communities to build public trust when engaging with law enforcement to report such crimes."

13. The case law of the Court with respect to hate crime emanates primarily from cases brought before it under Articles 2, 3, 6, 8 and 14 of the Convention. The Court is not prescriptive as to how "hate crime" should be defined, though it variously describes hate crime, as involving "wilful discriminatory motive" (BV v Croatia, No. 38435/13, 15 December 2015); "racially biased ill-treatment", "racially biased crimes", and "racially-motivated violence", "racially induced violence and brutality", cases that have "racist overtones" (*Balázs v. Hungary*, No. 15529/12, 20 October 2015); "violent incidents triggered by suspected racist attitudes", "racist motives", (*Škorjanec v. Croatia*, No. 25536/14, 28 March 2017); "racist overtones", "ill-treatment; and most recently, "discriminatory motives", "discriminatory violence", "hate-motivated crimes" (Case of Women's Initiatives Supporting Group and Others v Georgia, Nos. 73204/13 and 74959/13, 16 December 2021). In *Sabalić v. Croatia* No. 50231/13, 14 January 2021, the Court noted that hate crime includes, "not only acts based solely on a victim's characteristics … perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to" (see also, *Nachova v. Bulgaria*, Nos. 43577/98 and 43579/98, 6 July 2005; *Škorjanec*, ibid.).

14. The core definition of hate crime in the Recommendation reflects the common understanding that hate crimes are a category of criminal offences which involve hate, bias or prejudice relating to the (actual or perceived) personal characteristics or status of the victim. The Recommendation uses the term "hate element" as an umbrella term in order to be consistent with a range of national and international approaches. Notably, the

definition is intended to be compatible with the widely-adopted approach taken by the Organisation for Security and Cooperation in Europe (OSCE), which defines hate crime in its Decision No 9/09 as "criminal offences committed with a bias motive" where the criminal offence already exists in the ordinary criminal law of that jurisdiction.

15. The Recommendation provides member States discretion to legislate against hate subject to criminal sanctions in accordance with relevant principles, such as the principles of lawfulness and proportionality. In considering the legislative models that can be introduced at a statutory level, and the means by which the criminal law can produce responses which are compliant with the Convention, paragraph 2 should be read in conjunction with paragraph [17 and 18] of the Recommendation.

16. The broad definition of "hate crime" is intended to ensure that there is no ambiguity. While certain organisations and member States use the term "bias motivation" as an operational framework for hate crime, the term "hate element" as used in the definition is broader and encompasses not only the animus model which uses motivation as the legal test, but also the discriminatory selection model. The discriminatory selection (or "group selection") model requires that the offender intentionally selected his or her victim from the protected group, but unlike the animus model, proof of prejudice, bias, hostility, or hatred is not necessary to formally establish for liability to ensue. Thus, the term "hate element" ensures that hate crime legislation based on the "animus" model as well as legislation based on the discriminatory selection model are incorporated into the definition. With regard to the criminal law, in line with paragraph 17 and 18 of the Recommendation, member States should address hate crime in compliance with the requirements of Article 7 of the Convention through the different models incorporating the hate element into their national law.

17. The Recommendation defines "hate" broadly as including bias, prejudice and contempt. This definition does not exclude the use of equivalent terms such as "hostility" or "intolerance" in accordance with relevant domestic legislation. While the terms used can be interpreted as evidencing "hate, bias or prejudice", equally they should not be interpreted overbroadly to include, without any connection to personal characteristics or statuses of the victim or others, for instance, personal disputes or conflicts, or criminal activity predominantly motivated by general hostility to other human beings, as well as offences with primarily financial or economic interests. However, this does not mean that the underlying motivation for a hate crime is entirely separate from other interests, or that the individual motivations are singular. A hate crime offender may have no negative feelings towards the individual victim but may act due to hostile sentiments towards the group or identity to which the target belongs, or even more broadly to all persons who do not share the perpetrator's identity. Furthermore, perpetrators may also commit crimes against individuals or places because they believe the victim(s) to be representative of a policy, ideal or principle connected to a personal characteristic or status, such as gender equality, immigration, diversity or a certain sexual orientation or gender identity.

18. With respect to the case law of the Court, drawing on Article 14 of the Convention, the term hate crime has been found to apply across a range of characteristics over time.

Earlier case law focused on hate crime directed at the religion, ethnicity or racialised identity of the victim (eg *Nachova v. Bulgaria*, ibid.; *Milanović v Serbia*, No. 44614/07, 14 December 2010) with a range of cases highlighting the particularly poor treatment of Roma by state authorities (eg *Balogh v. Hungary*, No. 36630/11, 9 February 2016; *Lakatošová and Lakatoš v. Slovakia*, No. 655/16, 11 December 2018). The Court has also dealt with a number of cases concerning domestic violence under Articles 2 and 3, in conjunction with Article 14, where the Court considered domestic violence to be a form of gender-based violence (e.g. *Opuz v. Turkey* No. 33401/02, 9 June 2009, *Tkhelidze v. Georgia* No. 33056/17, 8 July 2021; *Talpis v. Italy* No. 41237/14, 2 March 2017), among others). In *Identoba v Georgia* No. 73235/12, 12 May 2015 and *Aghdgomelashvili and Japaridze v. Georgia* No. 7224/11, 8 October 2020, the Court found that similar obligations applied in the context of homophobic and transphobic violence, respectively.

19. The personal characteristics in paragraph 2 of the Recommendation largely follows the comparable list found in paragraph 2 of CM/Rec (2022)16 on combating hate speech. Additional amendments have been made with regards to "gender", "gender expression" and "sex characteristics", which are included as standalone grounds to supplement the grounds of "sex", "gender identity" and "sexual orientation" in Recommendation CM/Rec (2022)16. These inclusions are in line with the case law of the Court (see, for instance, *Y v. France*, No. 76888/17, 31 January 2023, as well as *Semenya v. Switzerland*, No. 10934/21, 11 July 2023, where the Court explicitly states that "sex characteristics" are covered by the term "sex" in Article 14) and certain trends in international law (see, for example, PACE resolution 2417(2022) Combating rising hate against LGBTI people in Europe; the Yogakarta principles; EU LGBTIQ Equality Strategy 2020-2025; and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012). Furthermore, this reflects Council of Europe standards to address discrimination on grounds of sex and gender expressed in the form of sexist hate crime, as outlined in the Committee of Minister's Recommendation (2019)1 on preventing and combating sexism (cf. its Preamble and paragraphs I.A.1, I.A.10, II.B.1, II.C.3, II.F.2, II.H.3).

20. The personal characteristics identified in the Recommendation are not considered to be a closed list, but are rather intended to guide member States as to the characteristics that have been identified as important to comprehensively combating hate crime. The list is open-ended to allow for further grounds to be added by member States. The open-ended list allows for the adaptation of responses to hate crime with respect to evolving societal developments. The definition provided in the Recommendation is to be interpreted in line with the evolutive nature of the rights of the Convention, notably Article 14. While in some cases, such offences may be dealt with under specific legislation dealing with, for example, gender-based violence or domestic violence, the list of personal characteristics is designed to provide the widest margin of protection. The Court has given some guidance on this point, making clear that there are some limits to the breadth of hate crime legislation in this regard. In *Savva Terentyev v. Russia* No. 10692/09, 28 August 2018, where the national court had interpreted hate crime legislation to include police officers within its scope, the Court noted that when considering whether a group should come within the framework of such laws, one should ask whether the group is "an unprotected minority or group that has a history of oppression or inequality, or that faces deep-rooted

prejudices, hostility and discrimination, or that is vulnerable for some other reason, and thus may, in principle, need a heightened protection from attacks" (§ 76).

21. The use of the language "actual or perceived" (or "real or attributed") personal characteristics or status is related to cases where a hate crime offender may be mistaken or confused about the actual identity, characteristics or status of the victim, but perceives them in a particular way. In such a case, even if the hate element is erroneously attributed to the victim, the presence of such a hate element would qualify the offence as a hate crime. The Court in *Skoranjec v. Croatia* No. 25536/14, 28 March 2017 held that the Convention obligations with respect to unearthing a link between racist attitudes and violence exists, "not only with regard to acts of violence based on the victim's actual or perceived personal status or characteristics but also with regard to acts of violence based on the victim's actual or perceived association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic". Affiliation with a person or group possessing or perceived to possess a particular status or characteristic is also therefore envisaged within the scope of the Recommendation. Mutable statuses require particular attention where an individual is, for example, in a place of detention or working in an irregular industry.

On paragraph 3

22. It is recognised that the experiences of those targeted by hate crime are not necessarily limited to a single aspect of their identity, but that the experiences of people can be understood as also operating on multiple, intersecting grounds, as well as through the interlocking of different groups and situated in mutually constitutive and overlapping systems of discrimination and domination. Intersectional considerations have also been taken by the Court in several cases, notably in *B.S. v. Spain* No. 47159/08, 24 July 2012, where the Court stressed the importance of effectively investigating multiple aspects of the applicant's complaint regarding perceived discrimination on grounds of both racial heritage and gender. Paragraph 3 of the Recommendation recognises and facilitates efforts to address the experiences of intersectional hate crime victimisation. This is a key component of how the Recommendation should be understood and implemented. Accordingly, where references are made to support, training, and processes in this Recommendation, they should be interpreted as responding to the impacts of crimes experienced on an intersectional basis, recognising the cumulative nature of victimisation and the needs and rights of victims who experience crimes on that basis, and made operative on this basis.

23. Intersectional approaches have been recognised as a vital standard in a number of Council of Europe documents and instruments in recent years, though not all member States use such a term in their national law. For instance, the Committee of Ministers' Recommendation CM/Rec(2019)1 on preventing and combating sexism underlines that women and girls can be subject to multiple and intersecting forms of discrimination and sexism, including sexist hate speech. These latter experiences of victimisation in view of the impact of intersectionality may in turn lead to them being further marginalised both within society and through state and civil society responses to hate crime, as recognised

in ECRI GPR No. 2 on equality bodies to combat racism and intolerance at national level, where ECRI considered that the mandate of equality bodies should also cover intersectional discrimination, GPR No. 5 (revised) on preventing and combating anti-Muslim racism and discrimination, and GPR No. 9 (revised) on preventing and combating Antisemitism. ECRI has been using an intersectional approach in its country monitoring work, which highlighted the specific vulnerabilities experienced by, for instance, Roma women, Black men or Muslim women, as well as in its new standards, as was the case in its GPR No. 5 (revised) on preventing and combating anti-Muslim racism and discrimination and GPR No. 9 (revised) on preventing and combating Antisemitism. GPR No. 14 on combating racism and racial discrimination in employment also contains a definition of intersectionality in its Explanatory Memorandum and GPR No. 17 on preventing and combating intolerance and discrimination against LGBTI persons has a strong focus on intersectionality.

On paragraph 4

24. Paragraph 4 sets out in detail the different policy areas that are recommended to be taken into account by member States when developing and implementing policies, legislation, strategies or action plans against hate crime.

25. The Recommendation highlights the importance of understanding that hate crime can occur both online and offline, and that there often very unclear legal and practical boundaries between them. There is an increasing body of jurisprudence emerging across Council of Europe member States on online harms and criminal activity online, which may be investigated and prosecuted as a hate crime where the hate element is present. Furthermore, in an increasing number of criminal cases, digital evidence can be crucial in understanding the context and intention of a suspected perpetrator in the commission of a particular hate crime (noting the relevance of the Second Additional Protocol to the Cybercrime Convention on enhanced co-operation and disclosure of electronic evidence (CETS No. 224).

26. The Recommendation encourages member States to develop a state-wide multi-agency, cross-sectoral and proactive approach to challenging and combating hate crime. While it is important that there is effective and proportionate criminalisation and a criminal justice response to hate crime, it should not operate in isolation but rather operate in tandem with a range of policies which prevent and respond to hate crime. Such approaches should be evidence-based and be enforced and underpinned by clearly established implementation measures. Appropriate human and financial resources should be allocated to the implementation of any policies deemed necessary, including by adequately supporting and financing relevant civil society organisations.

27. When developing policies, strategies or action plans to prevent and combat hate crime, member States should involve and consult with all relevant stakeholders including, for example, representative civil society organisations. Representative civil society organisations should be involved in the process from the earliest stages where possible, in order to help situate the targeted persons' experiences and needs at the centre of the

process. Though some member States may choose to pursue a strategy with regard to hate crime as part of a broader effort to combat hatred, it is important for member States to ensure that such strategies and action plans are effective, i.e. being time-bound, with clear objectives, targets, indicators and lines of responsibility, and with relevant stakeholders included. Gender-sensitive and intersectional approaches should also underpin any such means and measures where appropriate.

28. In this context, ECRI's General Policy Recommendation (GPR) 4 recommends that governments of Member States take steps to ensure that national surveys on the experiences and perceptions of racism and discrimination from the point of view of victims are organised, to "gain a picture of the problems of racism and intolerance from the point of view of actual and potential victims." The surveys conducted by the European Union Fundamental Rights Agency (FRA) may also be considered exemplars in this regard. Case law of the Court regarding the features of an adequate state response in the context of criminal justice matters is discussed below (see paragraphs [80 – 81]). Local/regional level surveys and surveys with particular communities should also be supported to enable a focused response to local needs.

29. Understanding the experience of victimhood is essential to understanding the impact of hate crime and so to developing appropriate policies and strategies against it. Hate crime can be differentiated from other forms of criminality by its impact not only on the victim of the crime, but also on wider groups and communities, that is, the identity community with the shared targeted characteristic. Recognising this, the Recommendation calls for a "circles of harm" approach to be considered. This approach recognises the impacts of hate crime on several main categories of persons: 1) the individual victims (including immediate family), 2) the community or group to which they belong or are seen to represent, 3) other persons who share similar personal characteristics or status with the victim, and, 4) those who are affiliated with or support the victim (i.e. persons in solidarity with the victim or others who may strongly sympathise with the victim, but do not share the same personal characteristics or status). Victims of hate crime may not have the same experience as other victims of crime and can often suffer additional effects over and above the impact of the crime itself. It is widely acknowledged that many incidents of hate crime, when compared with other types of victimisation, can be associated with a higher degree of physical and psychological trauma. As hate crime targets the victim's identity, affiliations, heritage or beliefs, the effects of hate crime can travel through the various communities or groups to which the victim belongs, and beyond. This is variously described as the "ripple effect", the "resonating nature of hate crime" or the "*in terrorem* effect of hate crime".

30. The Recommendation highlights the importance of raising public trust in the criminal justice system (and other actors involved in addressing hate crime) in order to improve reporting and responses on the one hand, while also seeking to reduce significant internal problems that may exist such as institutional biases and discrimination with the same bodies on the other. A major obstacle in combating hate crime is that victims of hate crime often lack confidence in the criminal justice system, believing that those working within it either cannot or will not respond to their experiences of victimisation. Member States

should develop strategies to improve system responses, address the institutional bias that may exist within them and increase the trustworthiness of these institutions generally. There may be a particular need to address, for example, gender, LGBTI and racial biases. ECRI General Policy Recommendation 11, "Combating racism and racial discrimination in policing" is also particularly relevant. As per that recommendation, member States should *inter alia* uncover and address racial profiling, racial discrimination and racially-motivated misconduct by the police; and document and explore the relationship between the police and members of protected groups. In doing so, States should measure levels of trust by such groups in the police as well as any indicators of prejudice within policing institutions to those groups. A fear of re-victimisation by the police is also a reason for the underreporting of hate crime. "Secondary victimisation" is victimisation that occurs due to the response by state and non-state agencies to the original crime, and stems from a failure to uphold victims' rights and a lack of understanding of the suffering of victims. This can leave victims feeling both isolated and insecure, losing faith in the help available from their communities and the professional agencies. It can also occur where there is a failure on the part of these organisations to respond to the original victimising event, or by failing to respond in an appropriate manner, including by neglecting to, to use the language of the Court, "unmask" (see paragraph [33] below) the hate element of the crime. As institutional biases may also play a significant factor in instances of secondary victimisation, the Recommendation also highlights the need to acknowledge, identify and address biased or prejudicial behaviour by law enforcement and other criminal justice practitioners under paragraph 25 (see paragraphs [86 – 87] below). Re-victimisation is when a victim has already been a victim of hate crime. Fear of re-victimisation is linked to perceptions of the legitimacy and trustworthiness of authorities, often in relation to the police.

Basic principles

31. The term hate crime can encompass the most serious of crimes as well as those that are deemed minor infractions of the criminal law. What they have in common are that they are criminal offences: for this reason, a significant amount of attention is placed on criminal justice responses to hate crime. However, this could be seen to mask the broader issue: the vast majority of hate crime goes underreported, and is anything but unusual for its victims, who typically experience repeat instances of hate incidents and hate crime. The individuals impacted often do not have knowledge of where the legal boundaries of hate crime exist, what rights they have, and where they can seek support for the resultant trauma. Furthermore, the impact of hate crime cannot be thought as proportional in a direct way to the perceived seriousness of the crime. In the case of hate crime, victims report significantly more emotional and psychological distress than victims of other crimes, particularly due to the compounding issues of intersectionality, re-victimisation, secondary victimisation and fear of reporting the incident which can amplify the traumatic response of victims.

On paragraph 5

32. Because of the complexities in the manner in which hate crime is defined, experienced, and perpetrated, responsibility for state action in the context of hate crime cannot rest with one agency or government department. Rather, it requires a holistic and multi-faceted approach which may be underpinned by a national action plan or strategy within broader efforts to combat hatred, discrimination and intolerance. Central to both the development and the implementation of such an action plan is the role of civil society, which often has the expertise required to understand and support victims and draw from their experience in preventing further incidents. As victims of hate crime may distrust authorities, many will rely upon community or peer-led organisations for information and support regarding hate crime. Civil society organisations therefore have a crucial role in providing expertise around the specific needs of victims. However, while a properly funded civil society can play a vital supporting role, the primary responsibility for combating hate crime rests with the State.

On paragraph 6

33. Criminal law plays a key role in addressing and responding to manifestations of hate crime. Criminalisation of such acts reflects the need to continually reassert society's condemnation of hate crime. Effective criminal law procedures and institutions are vital to ensuring the proper administration of justice in a democratic society, recognise the nature of hate crime as particularly destructive of fundamental rights, as well as generating and maintaining the confidence of actual and potential victims in the ability of state authorities to protect them from hate crimes. The naming of hate crime as a particular manifestation of criminality in legislation is vital to ensuring that it is recognised by criminal justice agencies, and addressed through the legal system, as well as sending a message of protection to victims and one of deterrence to potential perpetrators. To that end, member States should ensure the effective implementation of the criminal law, including in the unmasking of the hate element(s) of a crime as this is the main constitutive element that differentiates hate crimes from standard criminal offences. Indeed, a failure to do so – that is, treating violence "with a discriminatory intent" on an equal footing with violence without such intent could constitute a violation of Article 14 of the Convention (*Sabalić v. Croatia*, ibid.). Effective criminal law provisions will have several dimensions. "Unmasking", drawing from the case law of the Court, means that authorities should do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a hate motive (*Nachova and Others v. Bulgaria*, ibid., §§ 156-159). Additionally, the duty to respond appropriately to such crimes extends to the judicial proceedings in which it is decided whether and how to convict and punish the alleged perpetrators (ibid., § 97). There is a duty in judicial proceedings to respond *appropriately* to hate crime, in determining whether and how to convict and punish the alleged perpetrator (*Sabalić v. Croatia*, ibid.) and attach "tangible legal consequences" to the hate element of the crime (*Stoyanova v. Bulgaria*, No. 56070/18, 14 June 2022). In *Stoyanova,* although the Bulgarian courts had clearly established that the reason behind the attack had been the perpetrators' hatred for homosexuals, there had been no tangible legal

consequences as the Bulgarian Criminal Code did not provide for homophobia as a specific aggravating factor in respect of the crime of murder. At the same time, member States should ensure that the rights guaranteed by Articles 6, 7, and 10 of the Convention of anyone suspected or charged with a hate crime are protected throughout the process and considered when developing legislation.

34. Paragraph 6 identifies some of the most important aspects that should be taken into consideration when drafting legislative provisions regarding hate crime. This often requires a distinction to be made between hate-based offences and other crimes and the tangible legal consequences attaching to their commission. States should also take all reasonable steps to investigate and unmask any possible hate element accompanying the commission of a criminal act and ensure the imposition of an effective, appropriate and proportionate criminal response with respect to offenders, including by the determination of adequate criminal penalties. Notably, the principle of legality requires the offences and corresponding penalties to be clearly defined by law and thus embodies the safeguard that the criminal law must not be construed to the accused's detriment. The concept of "law" within the meaning of Article 7, as in other Convention articles (for instance Articles 8 to 11), comprises qualitative requirements, in particular those of accessibility and foreseeability (*Del Río Prada*I. *Spain* [GC] No. 42750/09, 21 October 2013 § 91; *Perinçek v*. *Switzerland* [GC] No. 27510/08, 15 October 2015 § 134). These qualitative requirements must be satisfied as regards both the definition of an offence (*Jorgic v. Germany*, No. 74613/01, 12 January 2007 §§ 103-114) and the penalty the offence in question carries or its scope. Insufficient "quality of law" concerning the definition of the offence and the applicable penalty constitutes a breach of Article 7 of the Convention (*Kafkaris v. Cyprus* [GC] No. 21906/04, 12 February 2008 §§ 150 and 152). In this regard, there is a positive obligation on States to clearly define the hate element in domestic law, as well as clearly set out how such tangible legal consequences are to attach (*Stoyanova v. Bulgaria,* ibid.).

On paragraph 7

35. In accordance with the principles and case law of the Court, domestic authorities have a specific duty to investigate and prevent hate-motivated violence. In particular, States should "unmask" the hate motive to the best of their capacity. As such, when domestic authorities are confronted with, for example, *prima facie* indications of violence motivated or at least influenced by the victim's sexual orientation, this requires the effective application of domestic criminal law mechanisms capable of elucidating the possible hate motive with homophobic overtones behind the violent incident and of identifying and, if appropriate, adequately punishing those responsible (*Identoba and Others v. Georgia*, ibid., § 67; *M.C. and A.C. v. Romania* No. 12060/12, 12 April 2016, § 113; *Aghdgomelashvili and Japaridze v. Georgia*, ibid., § 38; *Genderdoc-M and M.D. v. the Republic of Moldova,* No. 23914/15, 14 December 2021 § 37; *Women's Initiatives Supporting Group and Others v. Georgia*, ibid., § 63; *Sabalić v. Croatia*, ibid., § 105). These requirements also stem from other international obligations such as the United Nations International Convention on the Elimination of All Forms of Racial Discrimination.

36. Accordingly, where there is a suspicion that discriminatory attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of such acts and to maintain the confidence of protected groups in the ability of the authorities to protect them from the discriminatory motivated violence. Compliance with the State's positive obligations requires that the domestic legal system must demonstrate its capacity to enforce the criminal law against the perpetrators of such violent acts (*Sabalić v. Croatia*, ibid., § 95 and *Oganezova v. Armenia*, Nos. 71367/12 and 72961/12, 17 May 2022, § 85). Moreover, when the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of Article 3 of the Convention (*M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016, § 112). While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow grave attacks on physical and mental integrity to go unpunished, or for serious offences to be punished by excessively light punishment (*Sabalić v. Croatia*, ibid. § 97).

37. The authorities' duty to prevent hate-motivated violence, as well as to investigate the existence of a possible link between a discriminatory motive and the act of violence, can fall under the procedural aspect of Articles 2 and 3 of the Convention, but may also be seen to form part of the authorities' positive obligations under Article 14 of the Convention to secure the fundamental value enshrined in Articles 2 and 3 without discrimination (ibid., § 91; *Identoba and Others v. Georgia*, ibid., §§ 63-64; *M.C. and A.C. v. Romania* ibid., § 106; *Aghdgomelashvili and Japaridze v. Georgia*, 2020, § 36, *Genderdoc-M and M.D. v. the Republic of Moldova,* ibid., § 34, and *Women's Initiatives Supporting Group and Others v. Georgia*, ibid., § 57, discussed below, where the Court proceeded to a simultaneous examination under Article 3 taken in conjunction with Article 14 of the Convention).

38. The Court has held that, without a strict approach from law enforcement authorities, prejudice or hate-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to, or even connivance with, hate crimes (*Identoba and Others v. Georgia*, ibid., § 77, with further references, and *Oganezova v. Armenia,* ibid., § 106). Thus, according to the Court, treating violence and brutality arising from discriminatory attitudes on an equal footing with violence occurring in cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. Moreover, a failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (*Aghdgomelashvili and Japaridze v. Georgia*, ibid., § 44).

On paragraph 8

39. Given the complexity of comprehensively addressing and preventing hate crime, the number of actors and institutions involved, the sensitive issues involved, and the

challenges in encouraging and facilitating cooperation on matters such as monitoring, reporting, data collection and community engagement, holistic national action plans and strategies are strongly advised by the Recommendation.

40. In some member States, similar action plans are in place which address either particular manifestations of hate (such as extremism), or prejudice against particular communities. For example, Belgium and Germany have action plans to combat homophobic and transphobic violence; Cohesive Estonia 2030, and the Moldovan Action plan and other strategies under the EU Framework for National Roma Integration inclusion strategies are in support of the Roma population. Other member States have adopted approaches to target extremism, such as the Danish national ~~action plan~~strategy for Preventing and Countering Extremism and Radicalisation and the Czech Strategy for Combating Extremism. The Norwegian Government's Action Plan against Radicalisation and Violent Extremism (2020) includes provisions against hate speech and other hate crimes, and has multiagency collaboration as a core approach. Greece takes a broad approach, where its National Action Plan (NAP) against Racism and Intolerance seeks to eliminate any kind of racism or discrimination and is focused on four main areas, including awareness-raising, education, social integration policies and justice. ~~including the incorporation of targeting hate into the Greece Human Rights Action Plan 2014-2016, a national action plan against racism and intolerance, and a national strategy for LGBTI equ~~. Georgia similarly addresses hate crime in its National Human Rights Strategy.

41. Other member States have adopted a cross-community approach which addresses racist, homophobic and transphobic hate crime and hate speech, highlighting in particular the tools for data collection in this context. There is merit in considering how to address experiences of prejudice, hate, and marginalisation that persist across a community, through for example, a national LGBTI+ strategy, a migrant integration strategy, or a Roma and Traveller strategy. Hate crime cuts through these pillars of protection, however, demanding a cross-cutting and multisectoral approach, and thus a national strategy is recommended which addresses all aspects of the Recommendation in a comprehensive and collaborative manner.

On paragraph 9

42. Policies and measures for establishing an effective national system for supporting victims of hate crime should be included in action plans, alongside measures supporting the effective criminalisation of hate crime.

43. Support processes, including those provided through the criminal justice process, should be designed and delivered in such a way that recognises the impact of hate crime on victims and the wider community. Such support systems should have adequate resources and funding in order for the support to be effective. These processes should be sensitive to the needs and status of the victims to ensure that they provide effective responses. Crucially, support services should be provided to victims who choose not to engage with the criminal justice process but who nonetheless require support to address the impact of a hate crime. This is important because the unwillingness of hate crime victims to report their experiences is a significant barrier to addressing hate crime in society and

relatedly providing victim support where needed. As a result, all support services should be provided equally to victims of hate crime.

44. Trauma is a significant issue for victims of hate crime in a number of ways. Victims are often traumatised by the hate crime itself and the impact of trauma is cumulative (the more it happens the greater the impact). As a result, it is important to recognise that previous experience of victimisation (revictimisation) adds to this cumulative impact and so some people face a higher risk of experiencing a greater impact from hate crime. In addition, in circumstances where these needs are not addressed, victims may be further harmed by the process of engaging with the criminal justice system (secondary victimisation).

45. Trauma awareness is a central aspect of hate crime. Trauma is an emotional response to a distressing event, and thus refers to a range of behavioural, cognitive and emotional reactions to such an event or events, which can have long term effects on an individual's well-being. Secondary trauma refers to the experience of trauma that develops from close contact with someone who has experienced a distressing event (e.g. family, community member, friend, support worker). Victimhood and trauma are highly integrated experiences, but not all victims will have a trauma response. Regardless, being trauma aware, and ultimately trauma informed should be the aim for all criminal justice institutions. Trauma awareness means being cognisant of and sensitive to what trauma looks like, how to respond to individuals experiencing trauma, and how to prevent antagonising a trauma experience. Building on this, a trauma-informed approach goes further and places an emphasis on understanding and appropriately responding to the effects of trauma at all levels, particularly at an institutional level. The aim of being trauma informed is to avoid retraumatising an individual and empowering them in their healing journey.

On paragraph 10

46. Where victims seek to have their experiences recognised and addressed by those in positions of power or authority – for example through the criminal justice process, housing agencies, or frontline medical personnel – it is crucial that they are not re-victimized via that process. Victims will be more likely to access justice when they trust an institution to act in their best interests, and when they are treated respectfully and in a manner which upholds their rights. This trustworthiness can be earned when agencies accept and recognise institutional bias where present and address it through training and practices. Establishing and maintaining relationships between criminal justice organisations and protected groups, ensuring they are part of criminal justice institutions (i.e. staff) and developing trauma-aware and trauma-informed organisational cultures will increase trust and confidence of victims.

47. Institutional bias can be covert or overt and can manifest and reside in the policies, procedures, practices and processes – formal and informal, codified and tacit – of public and private institutions. This can result in the routine, systematic, or repeated treatment of those having specific personal characteristics or statues differently because of their

identity (see e.g. Explanatory Memorandum to ECRI GPR No. 12, paragraph 6 footnote 4; Secretariat of ECRI 2022, Submission to the call for inputs on patterns, policies, and processes leading to incidents of racial discrimination and on advancing racial justice and equality (UN Human Rights Council resolution 48/18)). Such institutionalised bias can result in behaviour which amounts to a violation of Article 14 of the Convention taken in conjunction with Article 3, such as occurred in *Lingurar v. Romania,* No. 48474/14, 16 April 2019. Through recognising, naming, and challenging institutional bias and discrimination, and fostering a culture of inclusion which promotes and celebrates difference, criminal justice institutions can increase their trustworthiness in the eyes of those exposed to hate crime.

48. The Explanatory Memorandum to ECRI GPR No. 11 on combating racism and racial discrimination in policing deals with a particularly harmful form of institutional racism, racial profiling, which results from institutional policies and practices, and the Court has found that racial profiling has the capacity to constitute a violation of Article 14 of the Convention taken in conjunction with Article 8. The Court has also stressed the importance of effective investigations into alleged cases of racial discrimination by the police. In *Basu v Germany* No. 215/19, 18 October 2022 the Court noted that this is essential, "in order for the protection against racial discrimination not to become theoretical and illusory in the context of non-violent acts falling to be examined under Article 8, to ensure protection from stigmatisation of the persons concerned and to prevent the spread of xenophobic attitudes" (§ 35). ECRI GPR No. 11 on combating racism and racial discrimination in policing sets out key areas of action for police, central to which is ECRI's definition of racial profiling: "the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities." Paragraph 5 of ECRI GPR No. 11 then provides that member States should ensure that legislation prohibiting direct and indirect racial discrimination covers the activities of the police. While the Court in *Basu* was not explicit about the nature of the investigatory process required, ECRI GPR No. 11 suggests that support and advice mechanisms should be made available for victims of such behaviour on the part of police; that effective investigations into alleged cases should be ensured; and that a body, "independent of the police and prosecution authorities" should be entrusted with the investigation of such cases. According to paragraph 3 of ECRI GPR No. 11, national authorities should also introduce a reasonable suspicion standard, whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria. In its 5th cycle monitoring report on the Netherlands at § 102, ECRI recommends that as long as such a reasonable suspicion standard is not introduced, the police should at least define and describe in detail the objectifiable grounds that would allow a control even in the absence of any suspicion. Another way of preventing racial profiling would be to introduce stop and control forms, in which police agents register every such control together with the reasons and objectifiable grounds for its execution, the outcome and the relevant personal data of the person.

49. Chapter 2 of the ECRI GPR No. 11 concerns racial discrimination and racially-motivated misconduct by the police and/or security forces. Where the alleged perpetrator of a hate

crime is a law enforcement official, standard positive obligations apply with respect to the investigation of that offence, but the Court has stated that in such cases, the requirement of independence in the investigation and prosecution of the offence is of particular importance. Independence in this regard denotes not just institutional and hierarchical independence but independence in practice. The meaningful investigation which must take place must explore "a possible causal link" between the prejudice and the commission of the offence (see, e.g. *Nachova v. Bulgaria,* ibid.). In this context, the Cypriot *Independent Authority for the Investigation of Complaints and Allegations concerning the Police* was highlighted by ECRI in its fourth monitoring report on Cyprus as a means of addressing this issue. The Romanian General Prosecutor's Office issued a strategy to enhance the effectiveness of criminal investigations conducted into allegations of ill-treatment by law enforcement officials.

50. Research shows that institutional bias exists in various forms. However, in order to address it, criminal justice institutions should acknowledge, uncover, understand and measure such bias by using an established survey tool for measuring prejudice across the institution as a whole. Following this measurement, the institutions must acknowledge that institutional bias and discrimination, including racial profiling, exists. Only at that stage can such bias be addressed.

51. Regarding the need to foster inclusive societies in general, the Recommendation also refers to Recommendation CM/Rec(2022)16. In particular reference should be made to its paragraph 28 which calls upon public officials, particularly those in leadership positions, given their position of influence, to avoid engaging in, endorsing or disseminating hate speech. It also encourages them to publicly promote a culture of human rights and to condemn hate speech firmly and promptly, while respecting freedom of expression and information. Public officials and politicians should however be mindful to not eagerly label any critical voices as hate speech. Freedom of expression applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (*Handyside v. United Kingdom* 5493/72, 7 December 1976, § 49).

Victim support

52. The Recommendation is written in harmony with Recommendation CM/Rec(2023)2 on the Rights, Services and Support for Victims of Crime, but equally recognises the particular rights, needs, and vulnerabilities of victims of hate crime as compared to victims of other crimes. Thus, it is important to specifically identify victims of hate crime at the earliest stage, either of the criminal process, or where the victim does not report the crime to the authorities, through support services.

On paragraph 11

53. Victim support is a crucial aspect of the Recommendation, recognising that while all victims of crime should be supported to access their rights and services, there may be specific considerations and approaches needed in the case of victims of hate crime. As such, this paragraph should be read in conjunction with applicable Council of Europe standards in this area, notably Recommendation CM/Rec(2023)2 of the Committee of

Ministers to member States on rights, services and support for victims of crime. In line with this instrument, the Recommendation identifies more types of harm: physical, mental, emotional and economic harm. Recognising that hate crime, as in most forms of crime, is both a wrong against society as well as a violation of an individual's rights, victims in this context are however understood to be those with a direct causal connection between the harm experienced and the criminal offence. This may extend to immediate family members, dependents and certain others, in accordance with national legislative approaches.

54. At the international level, a number of relevant standards have also been considered. Notably, the European Union's Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victims' Directive) can be seen as a key standard which underpins many national approaches across Council of Europe member States.

55. Understanding the experience of victimhood is essential to understanding the impact of hate crime. Justice and support processes should be designed and delivered in such a way that recognise the varying impact on victims. However, as further elaborated under Paragraph 13 below, there may be a number of reasons why a particular victim does not wish to engage with criminal justice authorities in the aftermath of a hate crime. Victim support services should be made available free of charge to all regardless of whether those victims of hate crime report their experiences to the authorities or not. Where a report is made, such support should continue to be available following the investigation or finalisation of any criminal justice proceedings, and compensation should be provided in accordance with national law. Importantly, the impact of the hate crime is unrelated to the likelihood an individual will report it to police.

On paragraph 12

56. This paragraph acknowledges the need for an intersectional and comprehensive approach that can provide suitable support services with due regard to the intersectional needs of victims of hate crime. This may require carrying out, upon first contact with the victim, an assessment of individual needs and risks (see paragraph [35] of the Recommendation); determining corresponding protection and support interventions; identifying special protection needs during criminal proceedings; and ensuring effective victim referrals. Such an assessment should be continuously updated throughout the life cycle of a case. The need for an intersectional approach recognises that victims who are targeted on intersectional grounds require special protection and support to ensure their effective access to justice. Such multifaceted experiences and responses should be borne in mind during assessment and planning of suitable support services.

57. Furthermore, this assessment should consider who is best placed to deliver interventions especially in the case of vulnerable victims. Particular regard should be given to previous victimisation, culture, religion, gender, disabilities, family status, and neurodiversity as appropriate. In addition, regard should be had to the nature and circumstances of the

criminal offence, and other factors such as the risks posed by the offender. In order to offer victim support, it is fundamental that the needs of victims are understood.

On paragraph 13 and 14

58. The practical recommendations in paragraphs 13-14 are intended to create conditions in which victims feel safe and by which they can be assured that they can access effective support and remedies in respect of their experience. There may be many reasons why victims do not report crime to competent local or national authorities. For instance, while victims often report crime in order to see perpetrators held accountable, this only occurs in circumstances where the individual feels safe to report the crime and where they have some level of confidence in the criminal justice system. Other factors may influence whether people report crimes to police, such as the perceived severity of the crime, whether or not violence occurred, the identity of the perpetrator, the impact of the crime (e.g. injury), perceptions of the police, and the identity of the victim (immigration status, membership of a protected group are all relevant). In the case of hate crime, if a victim believes an incident is not important or significant, they are less likely to report it to police.

59. The Recommendation emphasises the importance of ensuring that the needs of victims are properly addressed and that they can effectively participate in the criminal justice system without fear of re-victimising experiences by state authorities. Paragraph 13 sets out the main principles for authorities to create environments where victims feel safe and are treated with appropriate respect and sensitivity. As many victims of hate crime come from marginalised or disadvantaged groups that will already have experiences of discrimination, prejudicial attitudes or mistreatment, efforts to build trust and confidence in the authorities is key to avoiding instances of secondary victimisation or the withdrawal of the victim from the criminal justice process. A supportive, accessible and safe environment for victims will also have trained specialists who can engage victims of hate crime in an empathetic and considerate manner, as further outlined in paragraphs [12 - 14] of the Recommendation.

60. Operating in tandem with Recommendation CM/Rec(2023)2, which also emphasises the rights of victims to be informed about proceedings and about their case, the Recommendation outlines the main practical steps in cases involving hate crime. Given that victims of hate crime may need help in navigating the criminal justice system, action should be taken at first contact to provide victims, in so far as possible and upon their request, with all necessary information in a language and format that they understand regarding their case and its progress. Victims should be given practical information on available supports. Victims should also be given the details of any available specialised supports, specialist service providers or civil society organisations, and, where possible, refer victims to those entities. Particular clarity should be provided to victims with respect to the hate element of the crime.

61. Paragraph 13 also calls for member States to develop policies to ensure that victims do not unjustly suffer adverse consequences or repercussions as a result of reporting hate

crime. This follows ECRI's GPR No. 16 on Safeguarding irregularly present migrants from discrimination (echoing Article 4(3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210) (Istanbul Convention)), which calls for the creation of "firewalls" to prevent certain public authorities, but also some private-sector actors, from effectively denying some human rights to irregularly present migrants by means of a clear prohibition on the sharing of personal data of, and other information about, migrants suspected of irregular presence, with immigration authorities for purposes of immigration control and enforcement. This recommendation will also be important in the context of criminalised or irregular industries, where victims may be discouraged from reporting a hate crime occurring because of a fear of consequences with regard to their work.

62. Addressing the underreporting of hate crime is of crucial importance in combating hate crime. Removing internal and external barriers to reporting hate crime requires member States to take a range of measures to address underreporting. With due regard to data protection standards, member States should introduce the following reporting options set out in the Recommendation:

- Online police reporting, as well as a means for anonymous reporting (paragraph [33]);
- Specialist police officers, such as diversity officers (paragraph [38]);
- Third party reporting paragraph [48]);
- Reporting for online hate material (cf. Recommendation (2022)16);
- Providing for universal access to reporting, for example, by making available interpreters, allowing for the presence of third parties in reporting, and other independent accompaniment services (cf. paragraph 4(f)).

For further consideration, the European Union High Level Group on combating hate speech and hate crime has developed key guiding principles for improving the reporting of hate crime to police. That said, these mechanisms will likely be more effective when supported by widely-distributed information regarding the range of reporting options, made available in a variety of languages and using a range of access options, such as online videos, infographics, and pamphlets. Equally, as a means of awareness raising, bystanders and the general population of member States should be made aware of the harms of hate, as well as reporting options through public awareness campaigns. Such campaigns could, for example, denounce behaviour that amounts to hate crime; provide information as to what a hate crime is (and distinguish it, for example, from workplace discrimination); and make available information as to how the police address hate crime once reported.

63. Ensuring that victims have access to justice is a complicated endeavour. There may be a number of barriers or obstacles that need to be addressed throughout the criminal justice process, which can be both stressful and challenging for victims to approach. Access to both legal aid and suitable representation, as well as court accompaniment, can be critical in ensuring that victims access justice, particularly when victims are participating in criminal proceedings, or when providing testimony or victim impact statements.

64. Victims of hate crime often have specific needs which may need to be addressed by specialised victim support services (see, for example, Recommendation (2023)2 on rights, services and support for victims of crime, Article 19(6)). Member States have pursued different approaches for the organisation of such services, either by providing victim support through public bodies, civil society organisations, or a combination of both. The Recommendation does not touch upon the structure of such services, but focuses on the need to ensure that such services are available to victims and have the capacity to effectively address the needs of hate crime victims. It should be noted however that in circumstances where states do not directly provide victim support services, they should provide funding for civil society to do so. There may be a need for States to establish victims' rights-based quality standards for civil society organisations to meet, as well as to ensure that effective mechanisms are in place to coordinate and cooperate with civil society organisations. This is particularly important in cases involving hate crime given their often sensitive and traumatic nature.

On paragraph 15

65. Member States should facilitate universal access to targeted support and reduce any obstacles or barriers in accessing justice for victims, such as those arising from their social status or stigmatised status. It is essential that victims understand their rights, receive information about their cases upon their request, and can follow-up with any specific support services they may need. This paragraph should be interpreted broadly as a means to accommodate victims to the fullest extent in navigating what can be complex systems, thereby providing them with assistance to support their ability to follow relevant proceedings concerning their case or situation. Information should be provided in a language and format that they can understand, either orally, in writing, or by other forms such as images or video, as appropriate.

66. Member states should consider providing or funding support hubs and provide for an individual, family and community systems approach to addressing the harms of hate. No matter what infrastructure is put in place through which the support is provided, member states are encouraged to include the provision of legal advice, legal representation, accompaniment services, clinical supports, media supports and psycho-social supports free of charge. Information regarding these supports, and the right to such supports, should be made widely available through public information campaigns which run on an iterative basis.

67. The principles of universal access should apply in the provisions of such services. All services should be accessible regardless, for example, of physical, intellectual or developmental ability, language, or communication abilities. Where access cannot be assured, alternative equivalent (e.g. home visits) services must be provided.

68. In relation to referrals, member States are encouraged to consider a mandatory opt-out referral system between police and victim support services. An opt-out system requires a police officer to send the victim's contact details to victim support services unless the victim objects. In an opt-out system, referrals are more efficient, consistent, and adequate

and result in a much higher uptake of support services. Referral mechanisms should ensure robust data protection systems and confidentiality.

On paragraph 16

69. Given the particular impacts of hate crime on its victims, and to allow victims' experiences of victimisation, as well as the impacts of that victimisation, to be communicated to the court, it is recommended that all victims of hate crime, in accordance with their position under national law, have the opportunity to be heard and provide testimony in court as to their experiences. As well as on their own initiative, there may also be an obligation on the victim, in certain circumstances, to provide such testimony. In order for this to be achieved in a manner which is consistent with the rights of the accused or convicted individual, legal advice or representation should be provided to victims to support their engagement in this way. The way in which such statements are communicated to the court will vary according to court procedures in each member State, and so cognisant of these differences, such victim impact statements can be made orally by the victim, or sent in writing to the court and be introduced in the proceedings. Where there is no trial or proceedings, such statements may, where appropriate and as determined by national law, be facilitated at the sentencing stage. Given the community impacts of hate crime, it is envisaged that community impact statements are particularly apposite, and member States should facilitate the provision of community impact statements in these cases, particularly where the victim is unable or unwilling to do so. Again, such statements can be made orally or in writing, by members of the community with which the victim of the crime identifies.

Legislative models and range of offences

70. In order for States to discharge their obligations to victims of hate crime appropriately, criminal justice systems need to be "properly equipped" with the tools required to both unmask the hate element and to ensure that tangible legal consequences attach to the commission of such an offence (see *Stoyanova v. Bulgaria*, 2022). To do so in a manner which is also compliant with Article 7 (see paragraph [6]), it is recommended that specific hate crime legislation be introduced in one or more of the forms outlined in Paragraph 17: that is, that specific legislation should be introduced to comprehensively address hate crime. What is important is that the principle of legality, as defined by the ECHR, is complied with, in particular that the criminal law is not construed extensively to the detriment of the accused (*Del Río Prada v. Spain* [GC], § 78.). Member states are also encouraged to consider the principle of minimal criminalisation in developing legislation.

71. Hate crime manifests in different ways across diverse communities. Indeed, within characteristic categories, there are differences. For example, in the broad category of religion, the OSCE/ODHIR data from 2021 suggests that the majority of crimes recorded with an antisemitic or anti-Christian element are crimes against property (56% of crimes recorded with an antisemitic element were categorised as crimes against property, and 90% of crimes recorded with an anti-Christian element were categorised as crimes against property). By contrast, only 46% of crimes recorded with an anti-Muslim element

were categorised as crimes against property, with 21% of anti-Muslim crimes categorised as crimes against the person (as compared to 5% of anti-Christian crimes and 15% of antisemitic crimes). In legislating against hate crime, member States should consider the broad array of offences that can be committed with a hate element based on one or more real or attributed personal characteristics or status, and how these can manifest across communities: in particular, member States should be conscious that, for example, sexual offences, theft and fraud offences, and offences against the person can be committed with a such a hate element. Equally, legislators should be aware that minor offences which attract a criminal penalty, and the most serious crimes on the statute book can be committed with such a hate element.

On paragraph 17

72. Paragraph 17 provides several alternative options for States to address standard hate crime within their legislation. As such, the Recommendation provides that member States should explicitly address hate crime in legislation by providing:

    a) a general provision which provides that a hate element constitutes an aggravating circumstance for all criminal offences at sentencing;
    b) a substantive provision which attaches the hate element to any criminal offence at the point of the criminal charge
    c) standalone equivalents of base criminal offences which include the hate element as a constituent part;
    d) a combination of the above.

    These legislative models reflect the range of approaches taken by member States across the Council of Europe in addressing standard hate crime. The key difference between the approaches outlined in a) and b) is when the hate element is considered by criminal justice authorities, i.e. whether the hate element is considered primarily as a means to adjust the offender's sentence following their conviction for the base criminal offence, or whether it is identified and recorded in the early stage of criminal proceedings, and typically reflected in the criminal record of the defendant. Depending on the legal system in question, it is equally the case that the maximum penalty may or may not be increased using the approach in (b), but is possible and standard in the approach articulated in (c).

73. When considering which approach should be taken, or whether reforms to current legislation may be necessary, member States, while taking steps in keeping with their criminal law tradition, should ensure that their legislative measures are coherent and proportional with the objective of preventing and combating hate crime in all its forms and manifestations. In practice, more than two thirds of the Council of Europe member States have introduced a provision based on the approach outlined in a). This is also recommended in § 21 of ECRI GPR No. 7.

74. With respect to hate crimes which take the form of expressions of hate speech subject to criminal liability – that is, hate crime which takes the form of criminalised hate speech – the Recommendation advises member States to make sure that their approach to hate

crime is in line with paragraph 11 of CM/Rec(2022)16 on combating hate speech. In such forms of criminalised hate speech, a different legislative model is commonly used, whereby the "hate element" is the constituent and operating part of the offence (such as incitement to hatred; genocide denial; or incitement to genocide).

75. When it comes to specific corresponding duties, such as data recording, monitoring and reporting on hate crime within a jurisdiction, the Recommendation encourages member States to separate criminalised hate speech from other manifestations of hate crime in order to more coherently and consistently approach these issues at national and international levels. Furthermore, drawing from the jurisprudence of the Court, there are a different set of factors involved when approaching criminalised hate speech. Notably, the concerns are evaluated through the lens of Articles 8, 10, 14 and 17, with a particular emphasis on whether an expression is excluded from the protection of the Convention (Article 17), and otherwise, whether the provision in question fulfils the requirements of Article 10(2).

On paragraph 18

76. The definition of the hate element provides an opportunity to clarify the legal thresholds that must be met for the purposes of establishing the existence of a hate crime, or when charging or convicting a person for a hate crime. The meaningful investigation which must take place must explore "a possible causal link" between the prejudice and the commission of the offence (see, e.g. *Nachova v. Bulgaria*). Thus, it is important to ensure that, in developing hate crime legislation, there is a causative connection, "causal link", or proximity between the hate element and the commission of the offence and to develop guidance or case law on how to unmask and prove this causal link, for example through the use of bias indicators.

On paragraph 19

77. Paragraph 19 specifically addresses the various potential targets of hate crime, including the immediate victims, as well as situational hate crime, which broadly refers to hate crime that is targeted at spaces, artifacts, facilities or events associated with persons and groups. Situational hate crime is a specific manifestation of hate crime which requires particular attention on the part of criminal justice systems across the different member States. Sometimes referred to as "desecration offences" these occur where a symbolic space, artifact, facility or event associated with a protected group is targeted. These acts can be seen as "message" offences, particularly when the perpetrators target sites (such as graveyards, monuments, commemoration sites), events (such as marches, religious ceremonies, parades, drag shows) or facilities (such as community centres, houses of worship, LGBTQI-affiliated venues), in order to spread a message of hate or contempt among the particular target group. The Recommendation also recommends specific prevention measures to improve the safety and security of these situations in paragraph [59] (see paragraph[140]).

On paragraph 20

78. Member States should take the necessary measures to ensure that where a defendant is found guilty of a hate crime and where the hate element is not a constituent part of the offence, unless there are good reasons to the contrary, the hate element will be taken into consideration as an aggravating factor in sentencing: it should be possible to "attribute specific weight" to the hate element at sentencing stage (*Stoyanova v. Bulgaria* ibid., § 72); and the sentencing authority should be explicit in highlighting the hate element of the crime in its decision.

Criminal justice system

On paragraph 21

79. Where there is a suspicion that discriminatory attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of such acts and to maintain the confidence of individuals or groups exposed to hate crime in the ability of the authorities to protect them from the discriminatory motivated violence.

80. This paragraph is a restatement of the State's positive and procedural obligations with respect to hate crime in the context of the criminal justice system. It reflects the case law of the Court under Articles 2, 3, 8, and Article 14 of the Convention, as well as the standards drawn up by other bodies within the Council of Europe. These principles include a requirement for law enforcement authorities to take a strict approach to hate crime: being indifferent to such manifestations of criminality would be tantamount to official acquiescence to, or even connivance with, hate crimes (*Identoba and Others v. Georgia*, ibid., § 77, with further references, and *Oganezova v. Armenia,* ibid., § 106). Treating hate crimes in the same way as crimes which have "no such overtones" would, according to the Court, be turning a blind eye to the specific nature of such acts that are particularly destructive of human rights. Indeed, a failure on the part of the State to distinguish between the manner in which crimes with a hate element and crimes committed in the absence of such an element are handled may, the Court has found, constitute unjustified treatment irreconcilable with Article 14 of the Convention (*Aghdgomelashvili and Japaridze v. Georgia*, ibid., § 44). The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, to explore all practical means of discovering the truth, and to deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by identity-based hate (*Identoba and Others v. Georgia*, ibid., § 67; *M.C. and A.C. v. Romania* ibid., § 113; *Aghdgomelashvili and Japaridze v. Georgia*, ibid., § 38, *Genderdoc- M and M.D. v. the Republic of Moldova*, ibid., § 37, *Women's Initiatives Supporting Group and Others v. Georgia*, ibid., § 63).

81. Compliance with the State's positive obligations requires that the domestic legal system must demonstrate its capacity to enforce the criminal law against the perpetrators of such violent acts (*Sabalić v. Croatia*, ibid., § 95 and *Oganezova v. Armenia*, ibid., § 85). Moreover,

when the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of Article 3 of the Convention (*M.C. and A.C. v. Romania*, ibid., § 112). Where proven beyond a reasonable doubt, the national courts should not under any circumstances be prepared to allow grave attacks on physical and mental integrity to go unpunished, or for serious offences to be punished by excessively light punishment (*Sabalić v. Croatia*, ibid., § 97)

On paragraph 22

82. Whilst the introduction of hate crime legislation has the capacity to ensure that the hate element of a crime is not lost or that it disappears through the process, further policies and mechanisms are needed to ensure that this is effective in practice. Indeed, legislation will likely be ineffective unless supported by policies embedded by training across criminal justice institutions, and in particular those (police) officers who are in charge of the initial steps of the investigation and upon whose diligence the collection of evidence in the form of bias indicators depends. For this reason, those working within criminal justice institutions, as well as the institutions themselves, need support to ensure that the hate element of a crime is adequately recorded within institutions, as well as transmitted between institutions. Consistent and effective communication within, between institutions, and across institutions is vital to ensuring that this will occur. Such communication can be supported through the operation of a shared understanding of hate crime, embedded through the criminal justice system. ~~For example, the Belgian COL13/2013: joint circular for the police divisions of the Integrated Police and the prosecutors was highlighted by the European Union FRA as a promising practice in this regard. It provides a framework to the police and prosecutors to combat hate crime, on how to register hate crime, sets standards for victims of hate crime; and provides for how to improve cooperation and exchanges between judicial staff, police officers and the national equality bodies.~~ ECRI highlighted in its 6th cycle monitoring report on Belgium as good practices the introduction of a checklist for police officers and prosecutors including indicators with which to identify cases of violence motivated by hatred. Standard questionnaires have also been devised.

On paragraph 23

83. This paragraph speaks of the need to avoid or reduce as far as possible adverse consequences following the reporting of hate crime victimisation, particularly when such adverse consequences are likely to re-victimise or re-traumatise an individual and their community who may already be experiencing vulnerable circumstances. This is particularly important in cases where the person reporting a hate crime may be undocumented or in an irregular migration situation or criminalised work, as explored at paragraph [61] above, with reference to ECRI's GPR No. 16, according to which the policing function of the State with respect to hate crime should be separate from its immigration function, in order to avoid adverse legal consequences on the person reporting the offence.

84. Where the crime is committed by state agents, it is particularly important that the victim does not suffer adverse consequences by state agents, such as police retaliation or harassment by state bodies.

On paragraph 24

85. This paragraph echoes Paragraph 12 of CM/Rec(2023)02 on rights, services and support for victims of crime, which calls for member States to ensure access to legal aid, in accordance with applicable conditions and procedural rules under national law, particularly when victims have the status of parties to criminal proceedings in a manner similar to that of Article 13 of the EU Victim Directive. As such, "legal aid" is understood to include legal advice, assistance and representation, as well as concepts such as legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes. A core aspect of this paragraph is the principle that legal aid for victims is not only for the protection and safeguarding of victims' rights and interests, but that such legal aid can meaningfully contribute to the goal of justice as well. While domestic law should provide clear procedures and requirements on who can access legal aid and under what conditions, the Recommendation encourages member States to at least consider providing legal aid, such as legal advice, assistance and representation, to victims of hate free of charge, without a means test, to all victims with participatory rights, though States may decide to impose certain limits, for instance, by only providing free legal aid to victims without sufficient financial means.

On paragraph 25

86. The impact of institutional bias on victims of hate crime at an individual level, but also potentially at a collective level between institutions and protected groups has been discussed at paragraphs [46 – 49] above. As well as ensuring that institutional biases are identified and addressed, member States should also ensure that there are appropriate measures put in place to prevent biased behaviour and combat impunity on the part of law enforcement and other criminal justice practitioners, as well as respond to such behaviour. Criminal justice institutions must earn the trust of protected groups by challenging any prejudiced behaviour at an institutional and individual level. This includes putting in place independent complaints mechanisms to investigate allegations of misconduct on the part of criminal justice professionals. Combating impunity also requires positive action, through training and by example, to promote a culture where resort to ill-treatment on the part of state officials which takes the form of hate crime is regarded as unacceptable and as a gross violation of human rights.

87. Practitioners should be trained in the operation of hate crime legislation as per paragraph [99] below. Practitioners should also be sensitised to the experiences that protected groups have of both victimisation and in their interactions with the criminal justice process as a whole. This training and sensitisation should take the form of evidence-based training, which is formed following consultation with and in association with members of groups or individuals exposed to discrimination. ~~The Ministry of the Interior of the~~

~~Republic of Lithuania was highlighted by FRA as having a promising practice in this regard with "Building trust between national public authorities and the vulnerable communities".~~ For example, as highlighted in ECRI's 6th cycle report on Bulgaria, the Ministry of Interior has worked with an LGBTI NGO on training investigative police officers on recognising anti-LGBTI hate crimes, while another course on this topic was created with the National Police Academy. Similarly, ECRIs 5th cycle monitoring report on Andorra observed that training courses on human rights and tackling discrimination have been run for judges, prosecutors, lawyers and civil servants in order to raise their awareness of racism and intolerance. ~~Equally, the EU FRA highlighted a Bulgarian project, which took an evidence-based approach to developing the skills and knowledge of police officers, especially those working in multi-ethnic environments including Roma communities.~~

On paragraph 26

88. One means by which the harm of hate can be repaired, as well as by which future criminality can be prevented, is through restorative justice and restorative practices. Recommendation CM/Rec(2018)8 defines restorative justice as "any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party". Taking various forms, these processes can take place parallel to the criminal process, as an alternative to the criminal process, or post-conviction as part of the sentencing process. Crucial to the process is volunteerism: that is, the parties to the process must freely consent to participating in the process, as per the principles of CM/Rec(2018)8. For instance, in the United Kingdom, Brighton and Hove has committed itself to being a restorative city, and has committed to providing an opportunity to all those harmed by crime and conflict to engage in restorative practices. Essential to the successful operation of such practices is the dedication of resources and expertise to restorative justice processes, but also establishing the trust and confidence of victims in the process.

On paragraphs 27-28

89. Paragraphs 27 and 28 address particular recommendations in the context of children and young people. The terms "children", "young people" or "youth" should be understood as in the legal and constitutional framework of each member State, while also taking into account the practice of the Council of Europe, which understands "child" as under 18 and "young person" from 13 to 30 years old. Whether victims or perpetrators, the fundamental principle which should operate for all children engaged with any part of the criminal justice system, is that the best interests of the child, assessed on an individual basis, should be the primary and paramount consideration. In this regard, a family systems approach to meeting the needs of children and young people, when engaging with the criminal justice system is encouraged, where appropriate. A family systems approach involves understanding that the family unit, not just the individual child, may be in need of support.

90. States have particular obligations with respect to protecting children from hate crime, and children must be allowed to enjoy their rights free from discrimination (see for example United Nations Convention on the Rights of the Child (UNCRC), Article 2).The safety and well-being of children must be respected and protected without any discrimination (CM/Rec(2009)10), and the particularly damaging impacts of hate crime on young people must be recognised and addressed. Integrated national strategies for the protection of children from violence should be adapted to include particular considerations for child victims of hate crime, with bespoke processes in place for reporting and supporting child victims where required. Such reporting mechanisms should be developed in a manner which is accessible to all children, and which triggers appropriate supports.

91. The Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (CM/Del/Dec(2010)1098/10.2abc-app6) should also be considered in this context. These standards provide that child-friendly justice is: accessible; age appropriate; speedy; diligent; adapted to and focused on the needs of the child; respect the right to due process; respect the right to participate in and to understand the proceedings; respect the right to private and family life and respect the right to integrity and dignity. In assessing the best interests of children in particular cases, the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice particularly provide that member States should make concerted efforts to establish "multidisciplinary approaches" in order to obtain a comprehensive understanding of the child, and assess their "legal, psychological, social, emotional, physical and cognitive situation" (Art 16).

92. Children who are involved with the process as suspects or perpetrators, have rights to access justice in a manner consistent with their age. Where children perpetrate hate crime, they should be given opportunities to learn from their mistakes and be supported in understanding the impact of their offence, in an effort to prevent recidivistic behaviours. Measures for supporting child suspects outside judicial proceedings should be considered where appropriate or desirable, providing that their human rights and legal safeguards are fully respected (cf. UNCRC Article 40(3)(b)). Alternative justice mechanisms referenced in Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice include mediation, diversion and alternative dispute mechanisms. In this context, particular emphasis should be placed on diversionary schemes, as well as restorative justice and restorative practice for children, though only by specially trained youth justice practitioners with particular considerations for volunteerism, power imbalances, and safety. Youth victim offender mediations (e.g. in Belgium, the Netherlands) and youth conferences (e.g. Northern Ireland) are models to consider in adopting restorative practices to youth justice.

93. It should be recalled that all behaviours and activities on the continuum of hate should be attended to by States, but in the context of children and young people, the Recommendation on measures aimed at protecting children against radicalisation for the purposes of terrorism CM/Rec (2021)7 should be particularly recalled, having as its focus the protection of the child, and the aim of encouraging member States to support families

and caregivers of children in meeting the needs of the child and to protect the child from risks, exposure and harm related to violent extremist ideas and activities. Where a child has been engaged in criminality involving a hate element, particular attention should be paid to the protection of that child in relation to their exposure to radicalisation.

On paragraph 29

94. This paragraph recognises that persons deprived of their liberty can be in particularly vulnerable situations with regard to experiencing hate crime, especially from staff, personnel and other officials, as well as persons held in the same facilities. Such facilities include, for example, police custody, institutions of compulsory confinement, immigration detention centres, and psychiatric institutions and social care settings and include both *de facto* and *de jure* detention. This follows, for example, guidance from the CPT, and also, for example, Rule 13 of the European Prison Rules which outlaw discrimination on unjustified grounds. It also notes that protection for vulnerable groups is not to be confused for discrimination but is often needed to appropriately protect these groups from harm. At the level of the Court, in the case of *Stasi v. France* (No. 25001/07, 20 October 2011), in which a prison inmate alleged that they had been subject to hate-motivated violence by other prisoners, the Court noted that prison authorities should take appropriate measures to protect inmates from violence and that domestic law should provide effective and sufficient protection against physical harm.

95. There are several criteria that should be met if any investigations involving a person in detention are to be seen as effective and capable of leading to the identification and punishment of those responsible for ill-treatment, for example, as identified by the European Committee for the Prevention of Torture (CPT) in its 14th General Report (CPT/Inf (2004)28), at paragraphs 25 to 42. However, given the particularly egregious nature of hate crime committed on the part of state officials with respect to those in the care and protection of the state, it is of paramount importance that the principles of this Recommendation regarding unmasking the hate element and responding to hate crime are adhered to. These experiences may be compounded by difficulties in reporting hate crime and accessing justice to address their experiences. Member States should identify, understand, and address the particular reasons for underreporting of hate crime by those deprived of their liberty and should ensure that complaint mechanisms for reporting hate crime are introduced which reflect the recommendations of the CPT in its report CPT/Inf(2018)4-part. Member States should recognise and combat the particularly insidious nature of hate crime perpetrated against detainees and protectees by officials, including by acting on the CPT recommendations in CPT/Inf(2004)28-part.

Enhancing the effectiveness of the criminal justice system

On paragraphs 30-34

96. In order for the criminal justice system to respond effectively to hate crime, a system-wide approach should be established within member States to ensure that there is a sharing of understandings, policies, and practices across institutions. The objectives of an effective process should be to increase the trustworthiness of the system on the part of victims; reduce underreporting of hate crime; increase reporting of hate crime;

appropriate investigation of hate crime; addressing hate crime at the sentencing process; and improved case handling and strengthened cooperation and coordination between criminal justice institutions. These objectives are more likely to be met where policies and processes are shared across institutions, and where an evidence-based approach is taken to overcoming barriers to effectiveness, which should be developed in association with civil society where needed.

97. This principle is part and parcel of operationalising the State's positive obligation to protect life and limb from a real or immediate threat of violence, including hate induced violence (see *Opus v. Turkey,* No. 33401/02, 9 June 2009, and *Kurt v. Austria,* No. 62903/15, 4 July 2019, as regards gender-based violence).

98. As a matter of fact, data is collected differently across member States and within criminal justice systems (see further United Nations Office on Drugs and Crime *International Classification of Crime for Statistical Purposes Version 1.0*, 2015). For this reason, it is vital that criminal justice agencies adopt workable solutions to understanding how hate crime moves through a process (§ 12 of ECRI GPR No. 11). In order to link data across criminal justice institutions, ideally the same counting units will be used across the system as a whole. As an alternative, at least in the short term, an approach could be taken by States in which they "flag" or "tag" a crime which has been identified as having a hate element so its progress through the system can be tracked and counted.

99. All law enforcement and criminal justice professionals should receive practical information and training relevant to their role within the process, with those having specialist roles in the investigation of hate crime having bespoke, intensive, and ongoing training to support their roles. Article 25 of the European Union Victims' Directive provides that officials likely to come into contact with victims should receive "general and specialist training to a level appropriate to their contact with victims to increase their awareness of their needs and enable officials to support them in a manner which is 'impartial, respectful and professional.'"

100. Underreporting of hate crime, often a product of a lack of trust on the part of protected groups in law enforcement, is a significant barrier to member States in combating hate crime. For this reason, it is important to ensure that victims are given multiple pathways to reporting, including to independent institutions. Bespoke online reporting mechanisms, for example, the platform UNI-FORM, cited as a promising practice in ECRI 6th cycle monitoring report on Hungary, or True Vision in the United Kingdom, can help to overcome such barriers, by providing victims a range of avenues to report their experiences. Online reporting allows the victim to report their experiences to law enforcement without going to a police station. Typically, victims will enter their personal details and then a short narrative of their experience, which will be analysed by police officers and responded to. For example, An Garda Síochána, the Irish police service, provide a means by which victims of hate crime can report their experiences, which are then examined by members of the National Diversity and Integration Unit for the purposes of assessing support needs and referring investigations to local units. Crucially, in Ireland, victims can report their experience anonymously through this process, with

the stated proviso on the reporting mechanism that this will place considerable limitations on the ability of the service to investigate the incident and prosecute the offender. However, where victims wish to make police aware of their experience without a desire for a formal prosecution, this option to anonymously report online can be good practice. Member States should determine whether should anonymous reports are sufficient for the purposes of recorded crime data, but all such reports should be stored and used for intelligence purposes. Such actions could be further complemented by, for example, targeted campaigns and empowerment initiatives, and cooperation with civil society organisations, as set out in detail in the European Commission High Level Working Group on combating hate speech and hate crime 2021 Key Guiding Principles on encouraging reporting of hate crime.

101. Transparency in policies, processes, and functions is crucial to the operation of justice, and to ensuring access to justice on the part of everyone. The Recommendation calls on member States to make publicly accessible and available relevant protocols, guidelines, and policies, as far as possible under existing data protection standards, which can help practitioners and the wider public better understand and determine the manner in which hate crime is addressed within and through the criminal justice process, including guidance on the treatment of victims and protected groups more generally.

Police

102. The police are often the first point of contact for those targeted by hate crime. As a general approach, all police officers should respond to victims of hate crime in a supportive, unbiased and non-judgmental way, showing respect for, and openness and understanding of, their experiences. The police officers in charge of the initial investigation of potential hate crimes also bear a particular responsibility regarding the unmasking of hate elements and securing relevant evidence for bias indicators. Within member States there should be a common approach to recognising, unmasking and recording hate crime, as well as ensuring that non-crime hate incidents are appropriately recognised as per the guidance provided by ECRI GPR No. 11.

On paragraph 35

103. As noted in the Recommendation, policies should be developed with respect to victim support, particularly with respect to individual needs assessment (INAs). As the needs of victims are unique to each individual, understanding the needs through the use of an INA is widely considered to be an important part of the engagement between victims and the criminal justice system. An INA should be conducted with each victim who reports their experience to the police and should be carried out by individuals with suitable training via various means, including telephones or face to face interviews, or videoconferencing at a time and date suitable for the victim, where possible. INAs are a good practice allowing for the early identification of victim support and protection needs. Such assessments should be conducted in a manner which is sensitive and responsive to gender, disability and other protected characteristics and describe the key responses required from the criminal justice system to address the needs of the victim at the earliest stage in the process and trigger the provision of the same. As the needs of victims change

over the duration of their engagement with the criminal justice system, depending on either their personal circumstances or the progress of the investigation and criminal proceedings instituted, the assessment should be iterative, with the initial needs being reviewed and responded to over time. It should also be responsive enough to capture both static and dynamic needs. In particular, INAs can also help to mitigate against the potential of an institution to re-victimise victims further through inappropriate systemic processes.

104. ECRI GPR No. 11 recommends in § 14 that the operational definition of a hate crime on the part of the police should incorporate what is commonly referred to in member States such as the United Kingdom as the "perception test" or the "Macpherson test" and is drawn from the Stephen Lawrence Inquiry Report. Broadly, this test provides that the police should record a crime as a hate crime where it is perceived as such by the victim or any other person – that a hate crime is "any incident which is perceived as [racist, homophobic, disablist, transphobic etc] by the victim or any other person." This approach to the recording of crime is potentially significantly different to the manner in which crime is generally recorded across member States – some will record an offence upon the completion of an investigation (known as "output statistics"); others will record offences when first informed of same (known as "input statistics"), or cases may be recorded after an initial assessment by hate crime police specialists as having a possible hate element. Equally, the range of protected characteristics to which the hate element can be attached in police data, can either be drawn precisely from the legislation (see example); include characteristics not identified in the legislation (e.g. the so-called "Merseyside model" in which the police recorded hate crimes against sex workers in the absence of such a category in the definition of hate crime); or indeed allow for the recording of hate crime in the absence of legislation (e.g. An Garda Síochána's Diversity and Integration Strategy 2019–2021, highlighted by the EU FRA as a promising practice).

105. Where such an approach is taken to recording hate crime, as is stated in paras. 74-75 of the Explanatory Memorandum to the ECRI GPR No. 11, it has a threefold objective. First, it sends a message to victims that their voice will be heard, increasing reporting and encouraging trustworthiness. Second, it improves the recording and monitoring of racist and other hate crime incidents, and third, ensures that the police investigate all hate crimes thoroughly. Crucially, it ensures that the police cannot "overlook" the hate element of ordinary offences. Clear guidance should equally be provided as to the circumstances in which the hate crime "flag" is removed from the record where it is associated with a suspect, particularly where such a flag will appear on the criminal or police record of an individual. The manner in which crime is recorded on police systems should be adapted to allow for the recording of hate crimes disaggregated by group(s) and for the production of disaggregated data.

On paragraph 36

106. One way of supporting the unmasking of the hate element of crimes is through the formulation and operationalisation of "bias indicators" or more broadly "hate indicators" in policing. Such indicators are suggestive of a hate element in a crime, and should prompt

police officers to further investigate the presence of a hate element. They can vary according to the protected characteristic in question, as well as from member State to member State, and so should be developed carefully using an evidence-based approach and in association with civil society working in the area of hate crime.

107. The term is defined by the OSCE/ODIHR in *Hate Crime Laws: A Practical Guide (Second Edition)* as "objective facts, circumstances, or patterns attending a criminal act(s), which, standing alone or in conjunction with other facts or circumstances, suggest that the offender's actions were motivated, in whole or in part, by any form of bias." Bias indicators are highlighted by the European Union High Level Group on combating racism, xenophobia and other forms of intolerance Subgroup on Methodologies for Recording and Collecting Data on Hate Crime *Improving the Recording of Hate Crime by Law Enforcement Authorities: Key Guiding Principles* (2017) as a tool which should be used in law enforcement training on how to identify and record hate crimes, with emphasis in such training on "providing guidance to officers on what they should actively look for" in order to identify the hate element in police investigations. Crucially, they are not conclusive evidence of the presence of a hate element in a crime, but rather "should be analysed and understood in their context and in relation to each other" (OSCE/ODIHR, *Using Bias Indicators: A Practical Tool for Police* (2019). A range of such indicators have been developed by criminal justice agencies, which can be used as indicative indicators for member States, but the cultural and social context of hate crime must be reflected in the bias indicators developed within and across police services.

108. Highlighted by the EU FRA as a promising practice, in Germany, for *all* violent crimes – not just those where there are bias indicators, or where the victim believes the crime had a hate element – the police are duty-bound to investigate and document "*whether or not* there is evidence that a bias motive has prompted an offence."

On paragraphs 37-38

109. Given the expertise in training required in order to both support victims and investigate hate crimes, it is recommended that specialists in hate crime policing be developed (§ 67 of the Explanatory Memorandum to ECRI GPR No. 11). The European Commission, in its report to the European Parliament on the implementation of the Council Framework Decision on combating racism, observes that the existence of specialist police hate crime units were particularly useful in supporting the implementation of legislation. Such units can incorporate specialist investigators as well as community support officers who have particular training in victim support and trauma-informed policing. While all members of police services should have training in hate crime, specialist investigators require further training in the investigation of hate crimes, supporting impacted victims and communities, and preventing hate crime by monitoring patterns of hate incidents and intervening appropriately. Specialist hate crime investigators may also have roles in disseminating their expertise to the entire police force through training programmes and other forms of dissemination.

Prosecutors

On paragraph 39

110. The relationship between the investigatory and prosecutorial processes is crucial to ensuring that those who commit hate crimes are brought to justice. Within States, the prosecutorial function can be carried out by different criminal justice professionals depending on the severity of the criminal offence in question.

111. There is no obligation for prosecutions to result in convictions in order for these obligations to be met, but where there is evidence of a hate element, it must be presented and addressed during the trial, ensuring that the court can appropriately punish hate crimes (*Sabalić v. Croatia*, ibid., § 97). Given the range of institutions potentially engaged in the prosecution of offences, it is vital that States develop standard policies for the prosecution of offences, keeping in mind the positive and procedural obligations which arise from the case law of the Court in this regard. Such policies should include the development of a common approach within member States for the recognising, recording and prosecution of hate crime, which should all be included on crime databases.

On paragraph 40

112. Prosecutors responsible for prosecuting hate crime should have training in the prosecution of hate crime, including means by which the hate element of a crime should be unmasked and established in court. Where discretion applies to the prosecution of a hate crime, clear guidelines should be developed for the decision-making process. Such guidelines should include circumstances in which prosecutors can refrain from bringing charges or reach an agreement with the accused. One example is from the Crown Prosecution Service of England and Wales (CPS), where in accordance with the Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise, it is not CPS policy to accept pleas to lesser offences, or a lesser basis of plea, or omit or minimise admissible evidence of a hate element for the sake of expediency.

On paragraph 41

113. As with the policing function of the State, it is recommended that specialist hate crime prosecutors be introduced in member States, tasked with ensuring that hate crimes are appropriately prosecuted and that prosecutorial services handle cases of hate crime in a manner that is respectful towards victims. Such specialist prosecutors could be usefully linked to the specialist police units (above paragraph [109]). As positively identified in ECRI country monitoring reports, in Greece a Public Prosecutor for the prosecution of acts of racist violence was appointed, in the Slovak Republic specialised units within the police and prosecution service have been tasked with combating hate crimes and in France, the Central Office for Combating Crimes Against Humanity and Hate Crimes was provided with a division of specialised hate crime investigators.

On paragraph 42

114. For a variety of reasons, not all hate crimes reported to the police will be prosecuted. The Recommendation encourages member States to consider developing guidelines to ensure that a decision not to prosecute can be communicated to the victim, as well as the reasons why the criminal offence was not prosecuted (see e.g. Article 6 EU Victims' Directive). Such information should be sufficient to allow a victim to decide whether to request a review of the decision not to prosecute, and a review process should be available to victims.

Judges

On paragraph 43

115. As with all other criminal justice professionals, judges play an important role in ensuring that the hate element of a crime is unmasked and appropriately addressed in the criminal justice system. Without prejudice to the independence of the judiciary, the Recommendation advises that member States ensure that targeted training is available for judges. It is also suggested that member States consider encouraging judges to exchange on practices with regard to sentencing of hate crime. This could take place through information-sharing or judicial training which may include detail on the weight that may be ascribed to the hate element of a crime in sentencing, as well as how that weight may be articulated. In accordance with the case law of the Court, for example, the sentencing court should explain its justification for the sentence imposed, to demonstrate that the case was subjected to careful scrutiny (*Sabalic v. Croatia*). Building on the case law of the Court, the judge should explain the reasons for not taking into account a hate element, or for imposing a sentence which, on the face of it, appears manifestly disproportionate to the gravity of the hate crime (see *Stoyanova v. Bulgaria*, mutatis mutandis). Approaching decision-making in this way may be an important means of ensuring that tangible legal consequences are, as a matter of transparency, attached to the hate element of a crime (*Stoyanova v. Bulgaria,* ibid). More broadly, member States may also consider including information on institutional bias and discrimination; sensitising the judiciary to hate crime victimisation; and how legislation, case law and other guidelines on sentencing and drafting judgments and other decisions regarding hate crime should be implemented.

Post-conviction services and measures

On paragraph 44

116. The Recommendation calls for the development of guidance and material for the handling, processing, and assessment of hate crimes offenders at the post-conviction stage. This may require investing in further policies and programmes aimed at rehabilitation, targeted interventions in prison settings, and preparation for release and reintegration into society.

On paragraphs 45-46

117. Hate crime offenders may require specific interventions in prison and probation contexts due to the particular nature of the offence. Preventing recidivism and reoffending should be at the forefront of these efforts, alongside ordinary rehabilitation objectives found in such settings. In Europe, an increasing number of member States have started programmes and interventions in prison and probation settings aimed at violent extremists and terrorist offenders, which entail either reducing commitment to the underlying ideology and its justifications of violence (often referred to deradicalisation) and reducing the social links or cutting ties with extremist organisations and groups (often referred to as disengagement or tertiary/exit work). However, these programmes may only capture a small subset of wider hate crime offenders who may not have committed the offence within the context of a structured or organised extremist or ideological movement, but within the course of "everyday" life. While this has been complicated by the rise of loosely-organised or "leaderless" extremist movements operating primarily through digital channels and online communications, a distinction may still be drawn between dedicated adherents to a hateful ideology and non-affiliated offenders who hold, or held, hateful, bigoted views which led to the commission of a hate crime. In any case, rehabilitation and targeted interventions should aim to support offenders in addressing, as far as possible, their hateful attitudes and prejudices as well as psychological and behavioural issues that lead to their offending, while also fostering pro-social behaviour, a reduction in capacity and willingness for violence, and other measures in preparation for reintegration into society following the completion of their sentence and/or release.

On paragraph 47

118. Where an individual is found guilty of an offence, that finding will typically be entered on the criminal record of that individual. Where an individual has been reasonably suspected, but not convicted of a hate crime, clear protocols should be put in place, in legislation where appropriate, to provide for when the fact of a reasonable suspicion should be made available in police vetting or clearance where an individual applies for a position to work with groups targeted by hate crime: see for example, Article 11-2 of the French Code of Criminal Procedure.

Third Party Reporting, Monitoring and Data Collection

Third party reporting

On paragraph 48

119. When understanding and responding to the needs of victims of hate crime, official statistics may provide an incomplete picture and thus cannot be fully relied upon to provide a sufficient evidence base for policy decisions. Third party sources can provide an expanded information set as well as more direct links to communities and civil society organisations supporting victims of hate crime through various means. Furthermore, regular international, national or regional victimisation surveys, many of which are cited in ECRI country monitoring reports, may be necessary to provide a more complete picture

of hate crime in a specific locality. Responses to crime at the individual, community and societal level should be evidence-based both in terms of responding to those in need, but also in terms of the effectiveness of any legislative responses to crime.

Monitoring and Data Collection

On paragraph 49

120. Victimisation surveys are essential to understanding the experience of crime and particularly for hate crime where victims may be less likely to report incidents to the police. Victimisation survey data is important because the experience of crime and fear of crime directly impacts on one's sense of wellbeing and quality of life. However, accessing populations for the purpose of conducting surveys can be difficult. A specific method of sampling for hate crime data needs to be considered as it is likely that certain groups in society will be more difficult to sample. In the case of hate crime, it is possible that some of the groups at increased risk of victimisation (e.g. members of certain groups) may not be included in general sampling, and so should be the focus of specially designed methodologies in order to ensure their experiences are included. An example of such an approach is purposive sampling, this means that individuals who are members of a specific relevant group (e.g. Roma, disability group) are sought out and contacted to ensure their participation. Victimisation surveys can provide information on levels and trends of crime, fear of crime, perceptions of threat, incidences of repeat victimisation, as well as highlight levels of trust in the criminal justice system. It is recommended that they be repeated over time to see progress and assess law and policy. Victimisation survey data should be comparable across jurisdictions, and so a consolidated methodology is ideal. Victimisation surveys should also routinely include a core module on hate crime and ensure a representative sample of protected groups are included. A good example would be the FRA LGBTI and EU-MIDIS surveys that contain detailed data of victimisation, as well as the Third FRA survey on discrimination and hate crime against Jews and the Roma survey.

On paragraphs 50-54

121. Effective monitoring of hate crime across society is essential in order to properly calibrate responses at all levels. This process may require regular data collection from a variety of institutions and actors throughout the State. This administrative data (e.g. police recorded crime, court data and prison data) in combination with victimisation survey data is for example used by ECRI in its country monitoring reports to form the closest approximation of the actual crime level. The gap between the number of reported crimes and the actual incidence of crime is sometimes referred to as the "dark figure of crime", with the actual crime level including administrative data on crime plus the dark crime figure. Without such victimisation survey data, it is very difficult to have a realistic picture of actual crime levels.

122. As well as being able to approximate the actual crime level, it is important to be able to link hate crime data in a meaningful and consistent manner. For example, in order to understand the attrition of incidences of crime in the criminal justice system, there is a need to be able to follow the data on reporting (how many incidences of hate crime were

reported), through to charging (how many individuals were charged), to prosecution (how many individuals were prosecuted, and for what), to imprisonment (how many individuals were sentenced, for what and for how long?), at least through the use of specific hate crime tags. Monitoring of such crimes in some jurisdictions have identified very sharp declines from the number of crimes reported to the number of individuals sanctioned. By sharing administrative data in a meaningful and standardised manner, States can understand and respond to this trajectory and share relevant information across jurisdictions. The Recommendation furthermore makes clear that such data should only be collected and shared in a way that is in compliance with relevant data protection standards.

123. In the case of hate crime, a key gap in administrative data is the crimes that are not reported to police. In addition to this, additional gaps exist given that some instances that are reported are not recorded as hate crimes (but are recorded as misdemeanours, for example). Those working with victimisation survey data should be aware that they might also have gaps, for example, they will likely exclude children (under 18), and they may not capture all of the population (e.g. individuals without legal residential status). Furthermore, victimisation surveys rely on an individual or household recognising their experience as a crime and being willing to share this information.

124. Effective monitoring and follow-up is necessary to ensure that policies and actions targeted or responding to hate crime are effective, proportionate and sustainable. Robust data collection is often needed to provide sufficient clarity on the full range of measures addressing hate crime. Disaggregated data, identifying such factors as crime type and personal characteristics, can help facilitate the mapping of how hate crime manifests in particular, as well as see whether there are different impacts across groups targeted by hate crime. Such data can support the development and operationalisation of specific preventative measures to improve protection of these groups. In keeping with the principles of open access, such data should be made publicly available as far as possible and in line with data protection standards. Equally, good practice would indicate that any such data, as well as criminal justice policies and procedures, be made available for scrutiny by relevant actors on a cyclical basis.

Prevention

On paragraphs 55-56

125. The prevention of hate crime can be understood in multiple ways. In the broadest sense, addressing the underlying drivers and factors conducive to hate in society can be a key part of prevention efforts (sometimes called “root factors”). Equally, prevention can entail a range of specific measures and means to prevent certain instances of hate crime from occurring, or reoccurring, or to prevent an assessed threat from manifesting in a hate crime incident. However, as noted by various ECRI country monitoring reports and General Policy Recommendations, the dynamics of exclusion are strongly context-dependent and can vary over time and across different spaces. As such, there are a range of context-specific forms of hatred, prejudice, stigmatisation and exclusion which can manifest in both individual attitudes and actions, but also structurally in policies or

institutional settings (cf., for example, para. 10 of ECRI GPR No. 5(rev)). The underlying factors are also often multi-layered and intersectional, overlapping with a range of negative sentiments towards persons, characteristics, identities, behaviours, beliefs, communities and "others" which may be present in a society.

126. History informs us that horrific acts of hate crime are more likely to happen in societies where negative and hateful discourse about minorities is mainstream and socially acceptable. Long-term and fundamental changes towards full inclusion, increased respect and reduced group-hatred are slow, non-linear cultural processes, but evidence has shown that sustained activism, education and political efforts are necessary to produce positive, durable changes.

127. Today, hate speech and hateful ideologies are mainly spread through social media and other online platforms. Hate groups are increasingly moving most of their activities from streets to social media, which has become the main arena for recruitment and radicalisation. Some take the step from online talk to offline violence. One approach to restrict the spread of hate ideologies and networks is by closing hate sites on social media or other propaganda outlets. However, the latter approach may conflict with principles of freedom of expression (Article 10 of the Convention) and freedom of association (Article 11 of the Convention). Monitoring such sites, which is often carried out by security services, law enforcement, journalists as well as civil society organisations, is a useful way to detect and disrupt plots or other signs of radicalisation or emerging threats, as well as for making prevention efforts more targeted (see CM/Rec(2022)16).

128. Shifting the preventive approach from addressing contextual or societal conditions to people, a useful distinction can be made between universal (or primary) prevention, selective (or secondary) prevention, and indicated (or tertiary) prevention. *Universal prevention measures* target entire population groups, such as all school children, with the aim of fostering good lives and promoting pro-social and democratic values – thereby developing resilience against prejudice, group hatred or extremism. *Selective prevention measures* target groups and individuals at risk of developing biased or hateful attitudes towards certain groups, usually due to being exposed to a range of possible risk factors, such as social marginalisation, school failure, victimisation of bullying, anti-social friends, or extremist narratives and other influences. Many of those risk factors can be addressed through directed interventions at as early stage as possible. *Tertiary prevention measures* target those that are actively involved with hate groups or hate crimes. Interventions aim at modifying negative behaviour through deterrence or disruption of hate crimes, incapacitation of offenders, or banning hate groups – but also through more positive measures to facilitate deradicalisation from hateful attitudes and ideologies, disengagement from hate groups and activities, and reintegration into mainstream society. There are no sharp boundaries between these three levels of prevention, as some measures may impact e.g. those at risk as well as those actively engaged in hate activities and crimes.

129. Concerning universal prevention, building normative barriers and resilience against hateful ideas and attitudes, preventing bias, stereotyping, and other

forms of group-hatred is a shared task for many institutions and actors in society: families, schools, religious institutions, political bodies, and a wide range of civil society organisations. Organisations and institutions promoting human rights, tolerance, anti-discrimination, and minority support are at the frontline in the struggle against group-hatred and should receive financial and other support.

130. Although hateful attitudes do not automatically lead to hateful behaviour, harbouring hatred against certain categories of people may motivate acts of hate crimes against members of those groups. Building empathy, democratic values and understanding of human rights may serve as a vaccine against intolerance, discrimination and hate crimes. The main avenues for building such positive values and normative barriers against hatred are through general socialization of children and youths in family, school and a broad range of civil society institutions, organisations, and pro-social activities. Education is a primary arena to build democratic and civic values among children and youths. Human rights, democracy, tolerance, and critical thinking should be integrated as cross-cutting topics in school curricula at all levels.

131. People do not necessarily join hate groups because they hold hateful views; they frequently join such extremist groups (or online sites) for a variety of social reasons and subsequently adopt hateful or extremist views as a consequence of being socialized into the group or milieu. As young participants are mainly driven by social needs rather than by ideology, youths at risk may be diverted towards more prosocial groups or settings if their social needs can be better fulfilled there. Identifying such vulnerable youths requires relevant knowledge and skills by teachers, youth workers, police, and other professionals.

132. There are many possibilities for addressing the social and political conditions that may lead individuals to foster feelings of prejudice and hatred. Several approaches are outlined in the Recommendation, broadly aimed at raising public awareness, education, training and the use of counter-speech measures which support wider action to proactively identify factors and conduct conducive to hate crime. One of the main approaches is to focus on the educational measures and early interventions. This may rely on identifying and addressing the psychological and sociological causes that can lead people to foster biased, prejudiced and hateful feelings towards others. Research has suggested that the susceptibility of an individual to developing hateful attitudes is contingent on exposure to such beliefs and ideologies, and can be amplified by environmental factors, notably the prevalence of hateful narratives, ideas or milieus. As such, developing hateful attitudes towards certain groups is frequently caused or influenced by a variety of ideologies and doctrines promoting hostility towards outgroups. Such ideas might be countered by rational arguments and counter-narratives as well as by dialogue and positive encounters with members of the target community. More research is needed to identify facilitating factors and drivers of hate crime, and in particular on how various proactive and reactive interventions impact on the behaviour of (potential) hate crime offenders.

133. Resolving and repudiating these engrained prejudices is not an easy task (cf. para 100 of the Explanatory Report to ECRI GPR No. 15 on Combating Hate Speech), hence the

call in the Recommendation for effective strategies and research into the drivers of hate. Individuals and groups are targeted for hate crime for a multiplicity of prejudicial reasons which are sometimes overlapping, sometimes unconscious, and sometimes deeply engrained in society as a whole. These can include where people and groups are targeted due to their real or perceived social marginalisation; because they are perceived to have too much power or influence in society; or because they are considered to contravene certain societal norms or expectations.

134. Another approach may include means to reduce the social marginalisation of affected groups and fostering equality and promotion of understanding and diversity of combined identities (intersectionality). These measures may broadly be aimed at improving inter-cultural understanding, as well as by improving efforts to positively include marginalised communities in social and civil spaces, such as policies aimed at improving participation in education, employment, community or politics.

On paragraph 57

135. Civil society organisations play key roles in promoting social inclusion and democratic participation. This can happen as an indirect result of participation in social activities, groups or networks, for example, even where the primary aim of the organisation is focused on sport, leisure or culture. On the other hand, some civil society organisations have as their primary role the support of individual victims, community support, awareness-raising of prejudice in society. As such, they typically support individual victims, offer community support and raise awareness of prejudice in society, as well as advocate or try to influence public discourse and promoting diversity and human rights in society in the longer term. Given the important role these groups have in the wider effort to prevent hate crime, the Recommendation encourages States to financially support and encourage civil society organisations and their efforts to promote social inclusion, tolerance and human rights.

On paragraph 58

136. Although all acts of hate crime should be properly investigated, this is particularly important concerning the most serious acts of violent hate crimes. Successful investigations may not only bring perpetrators to justice but also prevent future violent attacks by groups or lone actors. Serial killings directed at minorities have been the modus operandi for some of the cruellest hate crime offenders in Europe, and they have continued their murderous campaigns until they were caught and incapacitated. Cases include lone actor serial killers in Austria and Sweden, an anti-Roma death squad in Hungary, and the National Socialist Underground in Germany. A recurring issue has been that the police failed to recognise these attacks as cases of hate crime or extreme right terrorism but continued to investigate them as related to gang or family conflicts or organised crime – which was exactly what the perpetrators sometimes intended in order to mislead the police and stigmatise the victims (cf. ECRI's 5th cycle country monitoring report on Germany, §§ 50 et seq.). Such failed investigations have cost many lives, and highlight that responses to hate crime victims should be needs based rather than linked to the formal categorisation of a crime as a hate crime.

137. Another challenge in recent years has been mass shootings carried out by lone actors, often radicalised to violence, sometimes through online interactions. Like the serial killings described above, these mass shooting attacks could be classified as both hate crimes and acts of terrorism, being inspired by hate while also aiming to spread fear and terror in a particular targeted community – for example, the fatal shooting attacks in Halle and Hanau in Germany; in Oslo and Utøya in Norway; and in Bratislava in Slovakia, targeting Jewish centres, Muslims, LGBTQ+ community spaces and political opponents. These cases have highlighted the challenges law enforcement and security services face in detecting and disrupting these terrorist plots in advance, thereby preventing the perpetrators from carrying out their attack plans. Although many violent hate crime plots have been detected and stopped in time, there have also been several intelligence failures where police and security services have been unable to "connect the dots". Given that plots of this nature may involve physical preparations as well as offline and online communication and "leaks" that might serve as warning signals of possible hate crime, the fact that these plots were not discovered in time may be due to insufficient data, a lack of imagination or insufficient competences, a lack of exchange of relevant information with other services, or not having taken preventive operational measures that could have disrupted the plot or at least reduced the risk.

138. In recent decades, law enforcement and intelligence attention has been largely focused on potential terrorists associated with or directed or inspired by Al-Qaida or ISIL (Da'esh), which has potentially led to insufficient focus on threats emanating from violent far-right groups or ideologies or hate crime offenders. Law enforcement services, intelligence agencies, counter-terrorism professionals and experts in preventing or countering violent extremism (P/CVE) may thus have suffered from too narrow a perspective and institutional biases concerning where possible threats of hate crime or hate-fuelled violence might arise from. This has changed recently, and many European police and security services now seem to consider the potential for these two main forms of contemporary terrorism on a relatively equal footing (see e.g. ECRI's 5th cycle monitoring report on Germany, § 53). Furthermore, it is also important to consider age-related factors in hate crime perpetration, and note that recorded hate crime has been found to involve perpetrators of all ages. That said, early disruption and possibly incapacitation is the most relevant preventive strategy towards such actors.

139. Proactive investigation and intelligence work require special investigative techniques, such as various forms of surveillance, wiretapping, and infiltration. Such investigative methods are covered in Recommendation CM/Rec (2017)6. According to that Recommendation, "special investigation techniques" means techniques applied by the competent authorities in the context of criminal investigations for the purpose of preventing, detecting, investigating, prosecuting and suppressing serious crimes, aiming at gathering information in such a way as not to alert the target persons. Regarding the use of special investigation techniques at national level, paragraphs 3 and 4 of the Recommendation CM/Rec (2017)6 indicate that member States should, in accordance with the requirements of the Convention and the relevant case law of the Court, "ensure that the circumstances in which, and the conditions under which, the competent

authorities are empowered to resort to the use of special investigation techniques are provided for by law with sufficient clarity" (paragraph 3). Furthermore, "Member States should take appropriate legislative measures to allow the use of special investigation techniques with a view to making them available to their competent authorities to the extent that this is necessary in a democratic society and indispensable for efficient criminal investigation and prosecution. Domestic legislation should afford adequate and effective guarantees against arbitrary and abusive practices, in particular with regards to the right to a fair trial, the right to respect for private and family life, including the right to protection of personal data, freedom of expression and communication, the right to an effective remedy, and protection of the right of property as enshrined respectively in Articles 6, 8, 10 and 13 of the Convention and in Article 1 of Protocol 1 to the Convention (paragraph 4).

On paragraph 59

140. The Recommendation acknowledges that many forms of hate crime are not targeted directly against individuals or communities, but at spaces, facilitates and events associated with a particular target group. This can include sites of religious worship, community centres, recreational or entertainment spaces, cultural sites, as well as business and enterprises owned or operated by members of a particular community, among many others. So-called "situational prevention" is a strategy which aims at reducing opportunities for crime through measures that make it more demanding and difficult to carry out attacks, or by increasing the chances of detection and thus disruption. Notable spaces and buildings such as mosques, churches, synagogues, refugee centres, LGBTI bars, pride parades, religious celebrations and similar facilities or events associated with minorities are particularly exposed for attacks by hate groups. In particular, the State should respond to threats made against these spaces with speed and due diligence, in particular by facilitating the installation of protective measures including but not limited to access control, hardened doors or other physical barriers, surveillance areas, security guards and police presence. Protective measures are aimed at both discouraging and deterring potential perpetrators, but also to protect potential victims. Law enforcement, security services and other public and private bodies should seek to assist and support institutions, spaces and buildings potentially exposed to hate crime to implement relevant security measures to increase their safety and security. Responses should be tailored to the appropriate level of threat and can include appropriate technical or structural measures. Other measures should be considered to deliver long term effectiveness, such as education and security awareness, training for staff and communities that use such spaces. Importantly, due to the symbolic nature of violence against a cultural or key identity site, it should be recognised that the harm experienced by the associated community is not to be dismissed. The same applies to securing events that might provide opportunities for committing violent attacks or other hate crimes.

Recommendations concerning key actors

On paragraph 60

141. While the criminal justice system may be one of the more visible means by which the State addresses hate crime, combating hate must be a task of society as a whole. Through its national strategies on combating hate, racism and other forms of intolerance, Member States should provide for the establishment of a state-wide approach to addressing hate including through healthcare providers, educational sectors, restorative justice services and frontline responders. Such institutions must develop polices and embed trauma-informed principles into their work, ensuring that those impacted by hate and hate crime are appropriately supported. Understanding hate across a continuum which includes hate speech and hate crime, paragraphs 29-43 of CM/Rec(2022)16 should be seen as broadly applying to hate crime with respect to recommendations addressed to public officials, elected bodies and political parties; internet intermediaries, the media, and civil society organisations.

Public officials, elected bodies and political parties

On paragraph 61

142. For the purposes of the Recommendation, the term 'public officials' includes members of the legislature, the government, the judiciary, and other public bodies, as well as to community and societal leaders. Politicians and public officials, due to their positive, and negative, influence over others arising from their position play an outsized role in shaping and contributing to public discourse and policymaking. In particular, elected officials and parliamentarians are crucial in endorsing and promoting legislative measures to combat and prevent hate crime in all its forms and manifestations. All such public officials should promote a culture of inclusiveness and human rights, and actively condemn hate crime as far as possible. In the event of a breach of their duties in this regard, independent complaints mechanisms should be available.

Educational systems

On paragraphs 62 and 63

143. Educational systems should be seen by Member States as a key means of recognising and addressing the particularly insidious impacts of hate crime on young people. In this regard, Chapters II and III of the ECRI GPR No. 10 on combating racism and racial discrimination in and through school education contain a set of relevant recommendations which should be adopted and adapted to apply also to other protected characteristics. In this context, ECRI provided an example of a good practice in Cyprus' "Shield against Homophobia" organised under the auspices of the Ministry of Education and Culture, the Commissioner for Administration and Human Rights and the Commissioner for Children's Rights, to train educators of different levels on the topic of homophobia in schools. Cases of hate crime may be part of a broader problem of bullying in school settings, especially where there are hate elements present. Although general bullying may focus on a wide range of characteristics of the victims, and all forms of bullying should be stopped and addressed properly by school staff, bullying due to the victims' identity as an ethnic, religious, sexual orientation, gender expression, disability

or other protected minorities should be taken particularly seriously by the school staff and leadership. The importance of early intervention in this regard cannot be overemphasised. Any case involving criminal activity should of course be referred to the police by school authorities.

144. A research-informed and quality assured approach should be taken to teacher education and the development of educational resources for use in education and classrooms as part of primary and post-primary education. Human rights education, education for democratic citizenship and media, and information literacy, all of which should address offline and online hate speech, should be embedded in the general education curriculum at all stages. Diversity and inclusion should be embedded in educational policy, from teacher education, ongoing training and curriculum development, and through classroom resources. Such resources, training, and policies should be cyclically reviewed. Expanding awareness on trauma and its effects is also a key skill that will assist educators to understand the experience of all victims of hate crime.

145. Third level institutions should equally be cognisant of responsibilities with respect to promoting diversity and inclusion. Compulsory modules should be made available for all students, seeking to embed and promote diversity and inclusion on campus and in society.

146. As well as seeing educational systems as a key means by which hate can be prevented and addressed, educational systems can also be a means by which hate can be fomented and reproduced. Accordingly, measures to prevent this from occurring should be considered at national, regional and institutional levels. Where possible, teachers and educators should be trained on managing and addressing hate crime in a trauma-informed manner. Additionally, the Recommendation suggests that specialist liaison officers could be considered to provide support across educational districts and to ensure consistency in areas such as reporting of hate crime in educational institutions.

147. Victimisation surveys should be considered for use in third level campuses to understand the prevalence of hate crime with research-informed policies being developed across and within institutions to combat prejudice and promote diversity and inclusion.

Civil society organisations

On paragraphs 64-67

148. A fully funded and resourced civil society is vital to the promotion and protection of the rights of individuals and groups exposed to hate crime. As noted above in paragraph [135] civil society can also play a critical role in preventing hate crime by supporting targeted communities to build resilience and implement proactive measures to reduce the risk of hate crimes occurring. States should engage with civil society in all aspects of state policy-making regarding hate crime, and see civil society as an invaluable partner in combating hate. As far as possible, civil society organisations working in the area of hate crime should have a formal role in the development of local and state policies with respect

to combating hate. As noted in Principle 8 of the Key Guiding Principles on Cooperation between Law Enforcement Authorities and Civil Society Organisations (EU Commission, 2021), one specific step that could be taken is setting up national multi-stakeholder working groups, under the auspices of broader strategic frameworks that include national equality bodies, as relevant, and civil society organisations that work with individuals at risk of hate victimisation.

149. The vital function of civil society often needs to be safeguarded and protected in order to fully meet its potential. This is particularly important in a context where civil society organisations may face threats, harassment or recrimination as a result of their work on hate crime, as they may face hostility by supporting minority groups or by advocating for the rights of groups subject to discrimination and hate.

150. Where provided with the appropriate resources, civil society organisations working in the area of hate crime may also support the States in fulfilling their obligations by providing support to victims of hate crime (paragraph [64]), in contributing to the training of police officers on hate crime (as highlighted as promising practice by ECRI in its 6th cycle monitoring report on Bulgaria) as well as engage in third party monitoring (paragraph [120]) and third party reporting (paragraph [119]).

151. Organisations representing a range of population groups threatened by hate crime will often have common interests in sharing experiences and promoting their needs and complaints towards the police and other authorities. It is well-documented that lack of trust in the police is a main cause why many hate crime attacks are not reported to the police. Establishing, as recommended in paragraph 18 of ECRI GPR No. 11, umbrella forums where these organisations and groups can meet policymakers, police and other criminal justice professionals to discuss their concerns are a constructive approach to improve relations and exchange of views. Such feedback may help the police and other authorities to improve the ways they handle hate crime cases and victims.

152. The Recommendation also highlights the potential for both domestic and cross-border cooperation between civil society organisations working in the area of hate crime. This is particularly important for supporting efforts to improve civil society activities in relation to victim support services (paragraph [64]), data collection, third-party reporting (paragraph [120]) and the development of state action plans and strategies (paragraph [32]).

Internet intermediaries including internet service providers

On paragraphs 68-69

153. Extensive guidance and recommendations are made in CM/Rec(2022)16 regarding the role of internet intermediaries, including internet service providers, in combating hate. The present Recommendation and Explanatory Memorandum understands hate as a continuum, and so recognises that the recommendations at §§ 30 – 37 applying to combating hate speech broadly apply to hate crime (cf. the Convention on Cybercrime and the Additional Protocol to the Convention on Cybercrime, concerning the

criminalisation of acts of a racist and xenophobic nature committed through computer systems).

154. Internet intermediaries, including internet service providers, should develop means by which they can identify hate crime committed on or disseminated through their systems and act on them in line with Recommendation CM/Rec(2016)3 on human rights and business and Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries. Where appropriate and with due regard for Article 8 and Article 10 of the Convention, internet intermediaries, including internet service providers, should also cooperate with police and law enforcement in combating hate crime, in line with Article 18 of the Convention on Cybercrime.

Media and journalists

On paragraph 70

155. Journalists and media services can play an important role in diffusing information on hate crime to a variety of audiences. The Recommendation recalls this function while also highlighting the need to ensure that relevant principles of media freedom are observed, building on previous Council of Europe instruments such as Recommendation CM/Rec(2022)16 as well as Recommendation CM/Rec(97)21 on the media and the promotion of a culture of a inclusion and the celebration of diversity. Furthermore, the Recommendation calls on member States to provide reasonable access on the part of the press to relevant information on hate crime held by state authorities, according to national law, particularly when such information is deemed to be in the public interest, while also permitting certain restrictions where needed.

National cooperation and coordination

On paragraphs 71-72

156. National strategies to combat hate crime where in place, or broader strategies to combat hate, should identify all key actors and stakeholders involved in addressing hate crime at all levels of society. An effective whole-of-society strategy to combating hate crime prioritises inclusive stakeholder engagement, dialogue and civil society coordination, harnessing the particular specialisations and institutional competencies in a constructive manner. Fragmentation in policy and practice results in differential supports and responses to victims, as well as the prevention of hate more generally. In order to avoid such discrepancies, strategies should be developed at a national level and then adopted and implemented at a regional and local level. Many European countries have developed structures for multiagency collaboration with the purpose of preventing and handling violent radicalisation or (youth) crime in general. These structures may also be applied for handling hate crime or may serve as models for developing parallel structures for handling hate crime. A parallel structure devoted to handling hate crime may be in a better position to involve representatives and insights from groups affected by hate crimes. A regular working group could also be established to enable dialogue and cooperation. Involving civil society actors in operational collaboration structures is

important and necessitates to solve challenges such as information sharing and confidentiality, diverse mandates and roles, and in particular, (lack of) trust.

157. While national or regional strategies may be necessary to improve the overall framework in which relevant institutions work together, the Recommendation also highlights the role of cooperation agreements and memorandums of understanding as a potential tool to improve understanding and promote cooperation between specific agencies and institutions. These instruments, whether convened multilaterally or bilaterally, should be considered in order to promote cross-sectoral approaches and procedures, as well as to harmonise identified deficiencies in addressing hate crime, such as incompatible approaches to data collection and reporting. Furthermore, these cooperation agreements can facilitate collective oversight and mutual supervision of the implementation of hate crime policies and practices, for instance when concluded between government bodies and national human rights institutions.

International cooperation and coordination

On paragraphs 73-75

158. The Recommendation recognises that international cooperation and coordination between member States is an essential component of contemporary efforts to combat hate crime, as hate crime can be committed or have effects across borders, and as all States can play a role in mutually reinforcing efforts to prevent and suppress this phenomenon.

159. Hate crime is an issue that affects all member States to some degree. Hate and extremism knows no borders, and the jurisdiction-less nature of the internet has enabled narratives and ideologies of hate to circulate throughout member States. Online groups and networks have become the primary means by which certain violent extremist movements engage with other, recruit new members and inspire further attacks. While there exists an increasingly sophisticated international architecture to address crimes such as violent extremism conducive to terrorism, there are less robust systems in place to facilitate cooperation and coordination on hate crime falling below this threshold. As such, the Recommendation calls for increased cooperation and information-sharing aimed at building dissuasive and deterrent measures at the international level. Exchanging and learning from good practices in this area implemented by other member States, such as the counter-extremism strategies identified above in paragraph [40], can help develop common, effective approaches to address the factors and drivers leading to hate crime, while also taking into account local specificities and concerns.

160. The Recommendation also emphasises that there is a robust European architecture available for cooperation in criminal matters, such sharing of evidence and information through mutual legal assistance can be essential in order to fully gather evidence necessary to investigate and prosecute hate crime offences. As criminal trials increasingly rely on digital evidence and data held by private companies or servers in foreign jurisdictions, also instruments such as the Budapest Convention's Second Additional Protocol on enhanced co-operation and disclosure of electronic evidence

(CETS No. 224) are valuable means of supporting criminal proceedings related to hate crime. Mutual legal assistance can also be vital to supporting cross-border victims of hate crime, including, for instance, providing access to necessary information on victim support services available in the jurisdiction in which the incident occurred as well as the home jurisdiction, and compensation, among other matters.

161. Finally, the Recommendation emphasises the role of international cooperation and joint initiatives to combat hate crime across borders. The Recommendation particularly highlights the need to improve the compatibility and interoperability of data and information collected on hate crime. While it may be the case that full harmonisation of certain data may not be possible due to specific legislative provisions or institutional competences in certain member States, the lack of harmonised data collection has long been recognised as one of the main obstacles to fully understanding the prevalence and scope of hate crime in Europe and further efforts to harmonise these approaches is both urgent and necessary.