

ARTICLE 19

# Responding to Hate Speech against LGBTI people

October 2013

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Policy Brief

# Executive Summary

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**In this policy paper, ARTICLE 19 proposes the response to “hate speech” targeting people on account of their sexual orientation or gender identity. The proposal is based on the review of international standards and domestic trends countering the advocacy of hatred that constitutes incitement to hostility, discrimination or violence (“incitement”) specifically, and “hate speech” more generally, on these bases.**

With this paper, ARTICLE 19 aims to respond to growing demands from human rights advocates, policy makers and the general public, to define “hate speech” targeting lesbian, gay, bisexual, transgender and intersex (LGBTI) people and recommend responses within a framework that protects and promotes the right to freedom of expression for all. The paper is guided by the principle that coordinated and focused action to promote the rights to freedom of expression and equality is essential for fostering a tolerant, pluralistic and diverse democratic society in which all human rights can be realised, including those of LGBTI people.

ARTICLE 19 believes that all domestic prohibitions of incitement should include sexual orientation and gender identity as protected characteristics. However, such prohibitions should conform to international standards on limiting the right to freedom of expression and information. Prohibitions that unnecessarily censor contentious viewpoints are often counter-productive to the aim of promoting equality for LGBTI people and fail to address the underlying social roots of the kinds of prejudice that homophobia and transphobia are symptomatic of. In most instances equality is better promoted through positive measures to increase understanding and tolerance, rather than through censorship of views perceived as injurious to LGBTI people or any other community.

Under certain limited circumstances, the state is *obliged* by international human rights law to prohibit the advocacy of hatred against LGBTI people that constitutes incitement to discrimination, hostility, or violence. These prohibitions should primarily be through civil and administrative laws, and only in the most serious cases should criminal sanctions be imposed. The criminal law should not be the default response to instances of incitement if less severe sanctions or measures could achieve the same effect. ARTICLE 19 also recommends numerous measures for States to adopt to ensure uniform and consistent implementation of their obligations, as well as measures that should be offered to victims of incitement.

ARTICLE 19 hopes that by establishing clear boundaries between permissible and impermissible expression, and by providing robust criteria to assist in this determination, this paper will serve the purpose not only of a legal and policy review but also of contributing to ensuring that all people are able to enjoy both the right to freedom of expression and the right to equality.



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# Foreword

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In the past years, we have witnessed some positive developments in the legal and political environment to combat verbal and physical violence motivated by sexual orientation and gender identity in Europe. In its Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers of the Council of Europe stated that homophobic and transphobic hate speech “should be prohibited and publicly disavowed whenever it occurs”. However, the Committee added “all measures should respect the fundamental freedom of expression in accordance with Article 10 of the Convention and the case law of the Court.”

ILGA-Europe supported the realisation of the present research by ARTICLE 19, as we believe that it is necessary to explore the very sensitive articulation between the protection of freedom of speech and the necessity to tackle “hate speech”.<sup>1</sup> A number of problems have to be analysed carefully. In fact, tackling hate speech cannot be done without clearly defining which types of speech should be prohibited because they really incite hostility, discrimination or violence. It must be emphasised that while legislative measures can be justified in certain cases, many other actions can have a positive impact: awareness raising, training for public officers at all levels of responsibility, media codes of conduct or deontology, positive campaigns promoting tolerance, respect and mutual engagement between communities are some example.

ARTICLE 19’s work is enlightening in many respects, and will provide useful tools to achieve the right balance between different policy tools. Firstly, it delivers an in-depth analysis of the international and European legal framework for the interpretation and the regulation of “hate speech” and incitement to hostility, discrimination or violence in the case of sexual orientation and gender identity, compared to comparable forms of expression spreading other types of hatred. Secondly, it clarifies concepts by providing a typology of the different forms of “hate speech” regulated by different legal systems, on the double basis of the intention of the authors and of the actual impact of such forms of expression. Thirdly, the research provides a comparative analysis of different national and international legal systems, which includes the most recent case law developments, including the ground-breaking *Vejdeland and others v. Sweden* decision of the European Court of Human Rights.

Last but not least, it is important to keep in mind that tackling hate speech is only one of the key issues at stake in the articulation of freedom of speech and the human rights of LGBTI people. The other one obviously is the need to ensure that all LGBTI persons fully enjoy this fundamental freedom. This is a condition for their self-development as individuals and for the formation of their collective identities when relevant. Unfortunately, the protection of sexual orientation and gender identity in all forms of expression and association remains a difficult challenge in many European countries. During the development of this report, the Russian Federation adopted a federal ban on the propaganda of “non-traditional” sexual relationships, with a similar law adopted in Moldova. Similar measures are being considered in Ukraine.

Such provisions simply aim at prohibiting all statements concerning homosexuality in public, including for purposes such as cultural festivals, media reports or public health messages. More than ever, the right to be free from violence and discrimination is a priority for LGBTI people. Public authorities have a duty to protect them, as all other citizens, from escalation processes in which hate speech plays a major role.

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<sup>1</sup> While ILGA-Europe supported this publication, it does not necessarily reflect ILGA-Europe’s position or opinion.

# Introduction

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Human rights violations against lesbian, gay, bisexual, trans and intersex (LGBTI) people constitute a global concern. Impunity for acts of violence against LGBTI people and discriminatory legislation and State practice contribute to an environment in which LGBTI people are too frequently marginalised and silenced, in some cases through imprisonment and even execution.<sup>2</sup> Often at the heart of this prejudicial environment is the denial of LGBTI people’s rights to freely express their identities and broader opinions, which secondarily deprives all people of important and diverse information. In turn, LGBTI people are deprived of their ability to assert other fundamental human rights, in particular the right to freedom of peaceful assembly and of association and democratic participation. Even where discrimination on the basis of sexual orientation and gender identity is prohibited by national law, prejudices and stereotypes related to LGBTI people significantly impede their implementation.

Discriminatory and prejudicial policies and practices against LGBTI people often reinforce contempt for sexual minorities in society and as a consequence LGBTI people are frequently targeted by “hate speech”. This occurs in various contexts, including in the media, in political debates or counter-demonstrations at public LGBTI events such as pride parades. Too often, in these statements, LGBTI persons are depicted negatively, for example as “unnatural, diseased, deviant, linked to crime, immoral or socially destabilising.”<sup>3</sup>

The extent to which States permit, prohibit, or sanction “hate speech” varies greatly. National laws contain vague and overbroad prohibitions, implemented inconsistently and often with counter-productive consequences. In this debate, it is important to understand the circumstances under which the International Covenant on Civil and Political Rights (the ICCPR) and other regional standards *permit* States to limit the right to freedom of expression; and to be mindful that States are only *obliged* to prohibit expression that amounts to the “advocacy of hatred” that constitutes “incitement” to discrimination, hostility or violence (Article 20(2) of the ICCPR), and to understand what this obligation entails.

At the same time, recognition by States of sexual orientation and gender identity as protected characteristics varies significantly and guidance at the international and regional levels in this regard is limited. International human rights institutions have been slow to recognise that sexual orientation and gender identity should be included among the defining characteristics of groups protected from discrimination. However, recent developments at the international and regional levels support an increasing trend among States to recognise homophobic and transphobic speech as being as serious as racial, xenophobic or anti-Semitic speech.<sup>4</sup>

Against this setting, there has been a growing demand from human rights activists as well as from policy makers and the general public to define, identify and respond to “hate speech” targeting LGBTI people in a framework conducive to the protection and promotion of the right to freedom of expression for all people. This policy paper attempts to respond to this demand. It also builds on the recent work undertaken by ARTICLE 19 on this subject; including the 2012 policy paper *Prohibiting incitement to discrimination, hostility or violence*<sup>5</sup> and the 2009 *Camden Principles on Equality and Freedom of Expression*” (the Camden Principles).<sup>6</sup>

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<sup>2</sup> “Homosexual acts” remain illegal in 76 countries around the world, and individuals can be executed on the basis of their sexual orientation in 7; State Sponsored Homophobia: a world survey of laws criminalising same-sex sexual acts between consenting adults, ILGA, May 2011.

<sup>3</sup> European Union Fundamental Rights Agency, Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part II – The Social Situation, 31 March 2009, at p. 11.

<sup>4</sup> See, for example the decision of the European Court of Human Rights in *Vejdeland and Others v. Sweden*, Application No. 1813/07, 9 February 2012. See, also the UN Human Rights Council of Resolution 17/19 and the Committee of Ministers for the Council of Europe of Recommendation CM/Rec (2010) 5.

<sup>5</sup> ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence, 2012; available at <http://www.article19.org/data/files/medialibrary/3572/12-12-01-PO-incitement-WEB.pdf>.

<sup>6</sup> ARTICLE 19, the Camden Principles on Freedom of Expression and Equality, London, 2009; available at:

The structure of this paper is as follows. First, it provides a brief assessment of key terminology frequently confused in debates surrounding the issue of “hate speech”. This is followed by an overview of international and regional human rights standards related to safeguarding the right to freedom of expression and the rights to equality and non-discrimination. Third, in light of international standards, ARTICLE 19 recommends a two-pronged response to “hate speech” against LGBTI people, which combines:

- Comprehensive positive policy measures to tackle the root causes of prejudice and intolerance against LGBTI people; and
- A coherent legal framework for prohibiting the advocacy of hatred against LGBTI people that constitutes incitement to discrimination, hostility, or violence. Since ARTICLE 19 has developed a separate policy paper on incitement generally, this section summarises the key recommendations of that paper, including the six-part test for incitement.

Annexed to this policy paper is a survey of legal responses at the national level to “hate speech”, focusing on countries where sexual orientation or gender identity have been recognised as protected characteristics.

The ultimate aim of this policy paper is to help establish clear boundaries between permissible and impermissible expression, as well as robust criteria that can be used in determining this boundary. Our objective in doing so is to help ensure that all people enjoy the rights to both freedom of expression and equality.

# Key terminology

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“Hate speech” and “hate crimes” are terms that are often conflated and used interchangeably. While both are symptomatic of intolerance and prejudice towards groups of individuals defined by a protected characteristic, the two concepts do not raise the same concerns for the right to freedom of expression. For this reason, it is important that the terms are employed accurately in order to properly denote the state’s obligation under international human rights law.

## Defining “hate speech”

There is no universally accepted definition of the term “hate speech” in international law. The term is usually used to refer to expression that is abusive, insulting, intimidating or harassing and/or which incites to violence, hatred or discrimination against groups identified by a specific set of characteristics. For example, the Council of Europe Committee of Ministers has indicated that the term “hate speech” includes:

[A]ll forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin.<sup>7</sup>

The lack of a uniform definition of “hate speech” is also reflected in domestic legislation. In many States, prohibitions are often formulated in impermissibly broad terms. However, as this policy paper illustrates, it is only in very narrow circumstances that States are *required* by international human rights law to prohibit the most severe forms of “hate speech” – the advocacy of hatred that constitutes incitement to hostility, discrimination or violence. Any restrictions on “hate speech”, including incitement, must respect the right to freedom of expression.

## Distinguishing “hate crime”

The term “hate crime” refers to the commission of a criminal offence where the perpetrator targeted the victim in whole or in part out of a bias motivation.

Labelling a criminal offence as a “hate crime” serves as a vehicle for acknowledging the broader prejudicial context in which a person was victimised. This acknowledgment symbolises a rejection by society of “hate crimes”, inspires confidence among marginalised individuals in the criminal justice system, and allows the victim to feel that their full experience of the crime has been recognised. In many jurisdictions, sexual orientation and gender identity are considered as protected characteristics in “hate crimes”.

Although the term “hate crime” has gained international currency, the use of the emotive term “hate” may cause confusion. For example, the term can lead people to believe that any manifestation of hatred is a criminal offence. This is not the case. As the Organisation for Security and Cooperation in Europe (the OSCE) has indicated, “hate crimes” are characterised by the existence of two conjoined elements:

- A “base” criminal offence; and
- The crime being committed out of a “bias motivation”, which means the perpetrator chose the target of the crime based on the victim’s “protected” characteristic.<sup>8</sup>

The term “bias motivated crime” therefore more accurately conveys that criminal liability is contingent on the proving of a criminal offence, and not on proving hatred. For the most part, prejudicial expression will

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<sup>7</sup> Committee of Ministers Recommendation, 30 October 1997. See also, the European Court of Human Rights, *Gündüz v. Turkey*, No. 35071/97 (2004), paras. 22 and 43.

<sup>8</sup> Hate Crime Laws: a practical guide, the OSCE, 2009.

not be an element of the base criminal offence. Rather, prejudicial expression uttered immediately prior to, during, or after the commission of a criminal offence may be an *indicator of a bias motivation* and be introduced as evidence. It will not be available to the accused to raise a defence based on their right to freedom of expression.

Within this typology it is important to recognise a category where the “base criminal offence” of a bias motivated crime will be characterised by expressive conduct. For example:

- Threats of violence or threats of other criminal acts;
- Assault, where expressive conduct causes a person to fear for their immediate safety;
- Harassment, characterised by sustained verbal or non-verbal attacks or intimidation;
- Inchoate (incomplete) offences, including incitement and conspiracy to commit a future criminal offence.

In these examples, both the “base criminal offence” and the “bias motivation” will be proven by reliance on the same expressive conduct. Take the following hypothetical example:

Person A is walking in the street and is confronted by Person B, who acts in an intimidating manner and employs homophobic abuse that causes Person A to fear for their immediate safety.

In many jurisdictions, this incident would properly be investigated and prosecuted as a bias motivated crime. The offence of assault is the basis for criminal liability and is characterised by the intimidating conduct that causes person A to fear for their immediate safety. The homophobic nature of the abuse would be introduced as evidence of a bias motivation, to prove that Person B targeted Person A on account of their sexual orientation.

# International and regional standards on freedom of expression and human rights

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This section provides an overview of applicable international and regional human rights standards and also details the positive obligation on states to prohibit the advocacy of hatred that constitutes incitement to discrimination, hostility or violence.

## International standards

### *Universal Declaration on Human Rights*

The Universal Declaration of Human Rights (UDHR)<sup>9</sup> sets forth in its first Article that “all human beings are born free and equal in dignity and rights.” The right to freedom of expression is guaranteed in Article 19.<sup>10</sup> The right to equality is reiterated in Article 2, which provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind” based on a non-exhaustive list of characteristics. This list may be interpreted as inclusive of protections on the basis of sexual orientation and gender identity.

The UDHR does not *require* states to prohibit any forms of expression. However, the scope of Article 19 is limited by the necessity to secure “due recognition and respect for the rights and freedoms of others” and the “duties everyone holds to the community” (Article 29) and other principles set forth in the UDHR (Article 30).<sup>11</sup> Furthermore, states are required to protect individuals from discrimination, including incitement to discrimination (Article 7).

### *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (the ICCPR), adopted by the UN General Assembly in 1976, gives legal force to many of the rights contained in the UDHR. All 167 states party to the ICCPR are required to respect its provisions and implement its framework at the national level.<sup>12</sup>

### *The right to freedom of expression and information*

The ICCPR guarantees the right to freedom of expression in Article 19 in similar terms as the UDHR.<sup>13</sup> In General Comment No. 34, the UN Human Rights Committee (the HR Committee), the treaty monitoring body for the ICCPR reiterated that the scope of Article 19(2) of the ICCPR “embraces even expression that

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<sup>9</sup> As a UN General Assembly Resolution, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> circuit).

<sup>10</sup> Article 19 stipulates that “everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.”

<sup>11</sup> Article 30 of the UDHR stipulates that “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

<sup>12</sup> Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)

<sup>13</sup> Article 19 of the ICCPR reads as follows: “(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (i) For respect of the rights or reputations of others; (ii) For the protection of national security or of public order, or of public health or morals.

may be regarded as deeply offensive.”<sup>14</sup> There is no right under the ICCPR not to be offended, even where expression is prejudicial towards a person based on a protected characteristic.

Any limitation on the right to freedom of expression must meet the following criteria:

- All limitations must be justified according to Article 19(3) of the ICCPR: Determining whether a limitation is justified is often articulated as a three-part test. The limitation must be provided by law,<sup>15</sup> pursue a legitimate aim,<sup>16</sup> and be necessary and proportionate.<sup>17</sup> Thus, any prohibition on “hate speech” must be justified according to this three-part test.
- The obligation to prohibit the advocacy of hatred that constitutes incitement: Article 20(2) of the ICCPR sets additional limitations on the right to freedom of expression and information, obliging States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

The term “prohibit by law” does not mean prohibitions in criminal law; indeed, based on the HR Committee interpretation, it only requires States to “provide appropriate sanctions” in cases of violations.<sup>18</sup> However, the HR Committee has had few opportunities to interpret Article 20(2) of the ICCPR. The three decisions it has issued relate to two communications against Canada and one against France, each of which concerned prohibitions on anti-Semitic speech. In each the HR Committee took a different approach to Article 20(2), placing a varying degree of reliance on Article 19(3) of the ICCPR.

- The relationship between Article 20(2) and Article 19(3) of the ICCPR: There is a strong coherence between Articles 20(2) and Article 19(3) of the ICCPR, as the HR Committee has highlighted.<sup>19</sup> In General Comment No. 34 the HR Committee stressed that it is only in respect of the speech indicated in Article 20(2) that States are *required* to prohibit expression. This is distinct from Article 19(3), which narrowly prescribes the circumstances under which states are *permitted* to restrict the right to freedom of expression.<sup>20</sup>

The HR Committee emphasised in *Ross v. Canada* that any restriction placed on expression pursuant to Article 20(2) of the ICCPR must also comply with the three-part test under Article 19(3) of the ICCPR.<sup>21</sup> In this respect Article 20(2) constitutes the *lex specialis*, providing an *additional* rather than a *substitutive* obligation on states by prescribing the specific response required to certain forms of expression.

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<sup>14</sup> General Comment No. 34, HR Committee, CCPR/C/GC/34, 12 September 2011, para. 11.

<sup>15</sup> To satisfy this requirement, a law or regulation must be formulated precisely and enacted to enable an individual to regulate his/her conduct accordingly, see *Leonardus J.M. de Groot v. the Netherlands*, No. 578/1994, (1995)

<sup>16</sup> Safeguarding “public order” or “the rights of others” are most frequently cited as the legitimate aims of legislation restricting “hate speech”, including the protection of the right to life and the right to equality or non-discrimination. The term “others” in this context has been held by the HR Committee to relate to other persons individually or as members of a community (*Ross v. Canada*, CCPR/C/70/D/736/1997, 26 October 2000).

<sup>17</sup> The State must demonstrate in a “specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat” (*Shin v. Republic of Korea*, No. 926/2000). “Necessity” requires that there must be a pressing social need for the restriction. “Proportionality” requires that a restriction on expression is not overly broad and that it is appropriate for achieving its protective function.

<sup>18</sup> “For Article 20 to become fully effective, there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy”, HRC, General Comment 11, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para. 2.

<sup>19</sup> HR Committee, General Comment No. 11, *op.cit.*

<sup>20</sup> HR Committee, General Comment No. 34, 21 June 2011, CCPR/C/GC/34, para. 52.

<sup>21</sup> *Ross v. Canada*, No. 736/1997, para. 10.6: “[R]estrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”

While the Article 20(2) obligation is narrow, members of the HR Committee have recognised the legitimacy of restrictions on the right to freedom of expression that serve the same purpose as the Article 20(2) prohibition but are necessarily framed in broader terms to reflect the complexity of the ways in which prejudice manifest in society.<sup>22</sup>

- Article 20(2) as inclusive of sexual orientation or gender identity: The HR Committee has not stated whether or not the protected grounds under Article 20(2) should be interpreted expansively to include sexual orientation or gender identity. The selectivity of the text may be attributed to the political context of the negotiations and the specific historical events they were responding to. However, interpreting Article 20(2) in light of developments in the HR Committee and states' understanding of non-discrimination provisions favours inclusion of these characteristics. This interpretation is supported by the HR Committee's concluding observations in respect of a number of countries.<sup>23</sup>

### *The right to equality and non-discrimination*

Additionally, non-discrimination is guaranteed by Article 2(1)<sup>24</sup> and in Article 26<sup>25</sup> of the ICCPR. The HR Committee has affirmed the expansive scope of the term “discrimination” as implying “any distinction, exclusion, restriction or preference which is based on any ground such as [...] sex [...] or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>26</sup>

In *Toonen v. Australia* (1994) the HR Committee decided that Article 2(1) of the ICCPR protects people from discrimination on the basis of sexual orientation.<sup>27</sup> The HR Committee has since recommended in numerous concluding observations that States party to the ICCPR should “guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation”<sup>28</sup> and welcomed legislation that includes sexual orientation among prohibited grounds of discrimination.<sup>29</sup>

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<sup>22</sup> See *Faurisson v. France*, Concurring Opinion of Evatt, Kretzmer and Klein: “There may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where [...] statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.” Communication No. 550/1993 (1996).

<sup>23</sup> For example, in its concluding observations on Poland, the HR recommended the criminalisation of “hate speech” targeting individuals on account of their sexual orientation, and called for awareness raising activities aimed at the police force and wider public to be intensified; see HR Committee, concluding observations on Poland, CCPR/C/POL/CO/6, 17 July 2009, para. 8. Also, in its concluding observations on Russia, the Committee recommended “effective protection against violence and discrimination” on the basis of sexual orientation including through “the prohibition of discrimination on grounds of sexual orientation” but stopped short of calling for criminalisation; Concluding observations on Russia, CCPR/C/RUS/CO/6, 24 November 2009, para. 27. Both recommendations were premised on Article 2(1) and Article 26 of the ICCPR respectively.

<sup>24</sup> Article 2 of the ICCPR reads: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as [...] sex [...] or other status.”

<sup>25</sup> Article 26 of the ICCPR reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] sex [...] or other status.”

<sup>26</sup> HR Committee, ICCPR General Comment No. 18: Non-discrimination, 10 November 1989, para. 7.

<sup>27</sup> *Toonen v. Australia*, Communication No. 488/199, CCPR/C/50/D/488/1992 (1994). Toonen's communication explained that Australia's laws prohibiting sexual contact between consenting adult men “created the conditions for discrimination in employment, constant stigmatisation, vilification, threats of physical violence and the violation of basic democratic rights” and contributed to a “campaign of official and unofficial hatred” against LGBT people. *Ibid.*, para. 2.4 and 2.6. See also: *Young v Australia*, communication No. 941/2000; *X v. Columbia*, communication No. 1361/2005.

<sup>28</sup> See concluding observations on Chile (CCPR/C/CHL/CO/5), para. 16; San Marino (CCPR/C/SMR/CO/2), para. 7; and Austria (CCPR/C/AUT/CO/4), para. 8.

<sup>29</sup> See concluding observations on El Salvador (CCPR/C/SLV/CO/6), para. 3 (c); Greece (CCPR/CO/83/GRC), para. 5; Finland (CCPR/CO/82/FIN), para. 3 (a); and Slovakia (CCPR/CO/78/SVK), para. 4. See also *Fedotova v. Russian Federation*, CCPR/C/106/D/1932/2010, 19 November 2012.

## Other international standards

### *International Convention on the Elimination of all Forms of Racial Discrimination*

From a comparative perspective, the International Convention on the Elimination of all Forms of Racial Discrimination (the ICERD) – in Article 4 - contains much broader positive obligations on Member States to prohibit incitement to discrimination than those provided in Article 20(2) of the ICCPR.<sup>30</sup> However, the Committee on the Elimination of Racial Discrimination recently adopted General Recommendation No. 35 on “combating racist hate speech”, which clarifies the scope of these provisions vis-à-vis the protection of the right to freedom of expression.<sup>31</sup>

There is no equivalent international treaty protecting individuals on account of their sexual orientation or gender identity.

### *Convention Against Torture*

Article 16 of the Convention Against Torture (the CAT) requires States to undertake to *prevent* all acts of cruel, inhuman or degrading treatment or punishment, including those that do not amount to torture. General Comment No. 2 of the Committee Against Torture specifies measures to be taken for the protection of individuals and groups made vulnerable to torture by discrimination or marginalisation, including individuals characterised by their sexual orientation or “transgender identity” or “any other status or adverse distinction”.<sup>32</sup>

The Committee Against Torture has recognised that “hate speech” is symptomatic of an environment of hostility in which torture and other acts of cruel, inhuman or degrading treatment or punishment are more likely to manifest. The Committee has recommended to individual States to sanction hate crimes as acts of intolerance and incitement to hatred and violence based on sexual orientation” as part of the obligation under Article 16 of the CAT.<sup>33</sup> However, the Committee has not defined “hate crimes”, “intolerance”, “incitement to hatred” or “hate speech”, or offered guidance on the appropriate balance between the right to non-discrimination and the right to freedom of expression, leaving the nature of the legal obligation ambiguous.

### *Soft laws*

Inter-governmental organisations have produced numerous reports, and issued resolutions and recommendations related to combating “hate speech”, including speech that targets people on account of their sexual orientation or gender identity. While not legally binding, these political statements are forms of “soft law” and may be considered persuasive by courts, therefore playing an important role in contributing to the development of international human rights law. For example:

- The 2011 [Resolution 17/19](#) of the UN Human Rights Council “on human rights, sexual orientation and gender identity” (the first resolution of its kind), expressed “grave concern” at acts of violence and discrimination on the basis of sexual orientation and gender identity.

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<sup>30</sup> Article 4 of the ICERD requires states to “condemn all propaganda and all organisations which are based on ideas of theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in [the UDHR] and the rights expressly set forth in Article 5 of [the ICERD].”

<sup>31</sup> Committee on the Elimination of Racial Discrimination, CERD/C/GC/35, 9 September 2013.

<sup>32</sup> Committee against Torture, General Comment No.2, CAT/C/GC/2, 24 January 2008, Part V

<sup>33</sup> Concluding observations on Moldova, CAT/C/MDA/CO/2, para. 27; Concluding observations on Poland, CAT/C/POL/CO/4, para. 20; and Concluding observations on Mongolia, CAT/C/MNG/CO/1, para. 25.

- Following Resolution 17/19, the UN High Commissioner for Human Rights released a study to document discriminatory laws and practices against individuals based on their sexual orientation and gender identity (17 November 2011).<sup>34</sup> While the report does not directly address “hate speech”, it recommends that states take positive measures to combat discrimination and prejudice against LGBTI people in society, including public information campaigns and education campaigns in schools. The report also recommended that States ensure the freedom of expression, association and peaceful assembly rights of LGBT people.
- The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression in their 2006 Joint Declaration stated the “very important role” of freedom of expression and a free and diverse media in “promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences.”<sup>35</sup> The Special Mechanisms warned that “hate speech” legislation is often “abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues” and that the “resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.”
- The Camden Principles on Freedom of Expression and Equality (the Camden Principles), a progressive interpretation of international law and standards prepared by ARTICLE 19 in consultation with high-level inter-governmental officials, civil society representatives and academic experts, elaborate on set of measures that states should adopt to jointly protect the right to freedom of expression and protection from discrimination. Recommendations in the next section of this policy document are largely based on the Camden Principles.
- The 2007 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) set out in clear terms the rights of LGBT people to equality and non-discrimination (Principle 2), and to freedom of expression (Principle 19).<sup>36</sup> They do not directly address the issue of “hate speech”, however they call on states to take all necessary policing and other measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity; to take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on the sexual orientation or gender identity of any person or group of persons, in all spheres of life, including the family; and to undertake campaigns of awareness-raising, directed to the general public as well as to actual and potential perpetrators of violence, in order to combat the prejudices that underlie violence related to sexual orientation and gender identity.

## Regional standards

At the regional level, there are numerous human rights instruments that protect the right to freedom of expression and equality and that are instructive on the appropriate balance to be struck between these rights. It is noteworthy that only the American Convention on Human Rights contains a provision similar to Article 20(2) of the ICCPR. However, it is the European Court of Human Rights that has developed the most extensive jurisprudence related to “hate speech” and has explicitly recognised the legitimacy of restrictions on the right to freedom of expression to protect LGBTI people from such speech.

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<sup>34</sup> Report of the UN High Commissioner for Human Rights, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity, A/HRC/19/41.

<sup>35</sup> International Mechanisms for Freedom of Expression, Joint Declaration of 20 December 2006.

<sup>36</sup> The Yogyakarta Principles were developed by a group of experts under the auspices of the International Committee of Jurists. The Yogyakarta Principles have been endorsed by a number of countries that also use them to guide their own policy responses to incidents of violence and discrimination.

### ***African Charter on Human and Peoples' Rights***

The African Charter on Human and Peoples' Rights<sup>37</sup> (the African Charter) guarantees the right to freedom of expression and information under Article 9. There is no provision within the African Charter equivalent to Article 20(2) of the ICCPR requiring States to prohibit incitement.

Article 2 of the African Charter provides for non-discrimination in the enjoyment of rights on the basis of a non-exhaustive list of protected characteristics. Article 19 of the African Charter provides that “all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.” There have been no decisions by the African Commission to interpret this guarantee as protecting individuals on account of their sexual orientation or gender identity, although it would be open to such an interpretation. The case law of the African Commission on incitement to hatred and on “hate speech” more broadly is also limited.<sup>38</sup>

### ***American Convention on Human Rights***

The right to freedom of expression is guaranteed in Article 13 of the American Convention on Human Rights (the ACHR).<sup>39</sup> Article 13(5) places a positive obligation on States to make “offences punishable by law” for “the advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin.” The right to equality and protection from discrimination are guaranteed in Articles 1(1) and Article 24 of the ACHR respectively.

The Inter-American Court of Human Rights has not had the opportunity to interpret Article 13(5) of the ACHR. It has therefore not been determined whether the protected characteristics would be interpreted as inclusive of “sexual orientation” or “gender identity.” However, in the landmark case of *Caso Atala Riffo y Niñas vs. Chile*, the Inter-American Court of Human Rights ruled categorically that discrimination on the basis of sexual orientation and gender identity violates the right to equality and non-discrimination as contained in the ACHR.<sup>40</sup>

It should also be noted that the Permanent Council of the Organisation of American States has since 2000 been considering the need to elaborate an Inter-American convention to prevent, penalise and eradicate racism and all forms of discrimination and intolerance. The “Working Group to Prepare a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance” has developed a draft instrument that is still in development, although limited in scope to “racial discrimination” based on race, color, descent, or national or ethnic origin.

### ***European Convention on Human Rights***

The European Convention on Human Rights (the ECHR)<sup>41</sup> guarantees the right to freedom of expression in Article 10.<sup>42</sup> Protection from discrimination is prohibited in Article 14 and in Protocol No. 12. In its case

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<sup>37</sup> The African (Banjul) Charter on Human and Peoples Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>38</sup> The only decision is Communication No. 249/02, Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea (2004) AHRLR 57 (ACHPR 2004).

<sup>39</sup> American Convention on Human Rights, Pact of San Jose, Costa Rica (B-32), adopted 22 November 1969, entered into force 18 July 1978.

<sup>40</sup> *Caso Atala Riffo y Niñas vs. Chile*, Inter-American Court of Human Rights, 24 February 2012. The Court held that “sexual orientation” and “gender identity” both fall within the specified “other social condition” under Article 1.1. The remedies awarded included requiring that Chile provide educational programmes on sexual orientation and gender identity to civil servants and judges.

<sup>41</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950

<sup>42</sup> Article 10 (1): Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises; Article 10 (2), The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions,

law, the European Court of Human Rights (the European Court) has recognised that the prohibition of discrimination in Article 14 includes “sexual orientation”<sup>43</sup> and “transsexuality”<sup>44</sup> among its protected characteristics.

Compared to Article 20(2) of the ICCPR, the ECHR does not place a positive obligation upon States to prohibit any expression that amounts to the advocacy of hatred that constitutes incitement to hostility, discrimination or violence. However, the European Court has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the Convention as a whole.<sup>45</sup> The Court has also exercised particularly strict supervision in cases where criminal sanctions have been imposed by the State and in many instances it has found that the imposition of a criminal conviction violated the proportionality principle.<sup>46</sup> Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression if less severe sanctions would achieve the same effect.

While the European Court has not concretely defined “hate speech”, the term has been employed decisively to preclude reliance on Article 10.<sup>47</sup> In its case-by-case approach, the European Court of Human Rights has used alternate methodologies for determining whether restrictions on certain speech are compatible with the ECHR. However, the Court’s jurisprudence is inconsistent in this respect.

- Application of Article 17 of the ECHR: Article 17 of the ECHR may be invoked to preclude applicants from relying on the Article 10 protection for freedom of expression to defend speech “aimed at the destruction of any of the rights and freedoms set forth [in the ECHR] or at their limitation to a greater extent than is provided for in the Convention.” The European Court of Human Rights has suggested that for Article 17 to be invoked, “the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence to undermine the nation’s democratic and pluralistic political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.”<sup>48</sup> It has been applied in cases concerning racist and xenophobic forms of expression,<sup>49</sup> or instances of Holocaust denial amounting to anti-Semitism.<sup>50</sup>
- Application of Article 10(2) of the ECHR: In a parallel series of cases, the European Court has accepted that much harmful expression falls within the scope of the protection of Article 10(1), but may be limited according to the framework provided in Article 10(2). An assessment of the jurisprudence across these cases demonstrates that attention is paid to a variety of factors, such as the purpose pursued by the speaker,<sup>51</sup> the content of the expression,<sup>52</sup> its context<sup>53</sup> or form of dissemination, and the potential impact of the expression.<sup>54</sup>

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restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

<sup>43</sup> *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96 (1999); *Dudgeon v. United Kingdom*, Application No. 7525/76 (1981); or *Smith and Grady v. the United Kingdom*, Application Nos. 33985/96 and 33986/96 (1996).

<sup>44</sup> *P.V. v. Spain*, Application No. 35159/09, 30 November 2010, para. 30; *Goodwin v. United Kingdom*, Application No. 28957/95 (2002).

<sup>45</sup> In *Erbakan v. Turkey*, the European Court stated: “As a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued” (emphasis added); Application No. 59405/00 (2006), para. 56. See also *Gündüz v. Turkey*, op.cit., para. 22.

<sup>46</sup> *Jersild v. Denmark*, App No 15890/89 (1992), para. 35.

<sup>47</sup> *Gündüz v. Turkey*, op.cit., para. 41.

<sup>48</sup> *Lehideux and Isorni v. France*, Application No. 24662/94, 23 September 1998, concurring opinion of Judge Jambrek, para 2.

<sup>49</sup> *Norwood v. the United Kingdom*, Application No. 23131/03, (2004); *Jersild v. Denmark*, op.cit., [references to Article 17 concerned the expression of the originators of the expression in issue, and these individuals were not party to the complaint]; *Glimmerveen and Hagenback v. the Netherlands*, Application Nos. 8348/78 and 8406/78, (1979).

<sup>50</sup> *Garaudy v. France*, Application No. 65831/01 (2003); *Honsik v. Austria*, Application No. 25062/94 (1995); *Marais v. France*, Application No. 31159/96 (1996).

<sup>51</sup> *Erbakan*, op. cit., para. 55; *Gündüz v. Turkey*, op. cit., para. 37; or *Pedersen and Baadsgaard v. Denmark*, No. 49017/99

- **Homophobic and transphobic speech:** In the 2012 landmark case of *Vejdeland and Others v. Sweden*, the European Court extended its jurisprudence on “hate speech” to expression targeting individuals on account of their sexual orientation.<sup>55</sup> The applicants distributed approximately 100 leaflets in an upper-secondary school (without permission to be on premises) that called homosexuality a “deviant sexual proclivity” with “a morally destructive effect on the substance of society”, alleged homosexuality was “responsible” for HIV and AIDs, and connected “the homosexual lobby” to paedophilia. The four applicants were convicted under the Swedish Penal Code for “agitation against a group” defined by their sexual orientation; three received suspended prison sentences and fines between EUR 200 and EUR 2,000, one received probation. They claimed a violation of their rights under Article 10.

The judges were unanimous in finding that there had been no violation of Article 10 of the Convention and were unequivocal that “discrimination based on sexual orientation is as serious as discrimination based on ‘race, origin, or colour.’”<sup>56</sup> The European Court agreed that Swedish court had correctly considered the content of the expression (that it was “unnecessarily offensive” and “serious and prejudicial”) and the context of the expression (the leaflets were distributed by persons without permission to be on the premises to the school lockers of young people at an “impressionable and sensitive age” who were denied the opportunity to reject them). The Court also noted that the applicants had only been fined and had not been sentenced to serve prison terms. The Court’s judgment was accompanied by three concurring opinions, each differing in the approach taken to finding no violation of the ECHR, revealing a lack of coherence in the European Court’s approach to “hate speech.”

The concurrence of Judge Yudkivska, joined by Judge Villiger, lamented that the majority had “missed an opportunity to consolidate an approach to hate speech against homosexuals.” They found the expression to fall within definition of “hate speech”, and concluded that reliance on Article 10 was precluded by the application of Article 17.

Judge Spielmann and Judge Nussberger, in a joined concurrence, argued that labelling the content of the leaflets as “serious and prejudicial” was “insufficient” without a closer analysis of the aim of the expression. They found contradiction in the Court’s acceptance that the expression was intended to contribute to a public interest debate (the objectivity of education in Swedish public schools) but was at the same time “unnecessarily offensive”; this undermined the principle that the right to freedom of expression encompasses information or ideas “that offend, shock or disturb the State or any sector of the population.” They argued that a more “robust justification” should have been sought to connect the infringement of the right to freedom of expression with the legitimate aim of protecting the rights of others.

In the same vein, Judge Zupancic warned against “over-estimating the importance of what is being said” and instead argued that the focus should have been entirely on the context of the expression. He argued that if the same words contained in the leaflets distributed at the school in this case were instead contained in a public newspaper, then they would “probably not be a matter for criminal prosecution and condemnation.” Judges Spielmann and Nussberger agreed that the context in which the leaflets were distributed should have been accorded decisive weight and noted that the “real

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(2006), para. 76.

<sup>52</sup> *Incal v. Turkey*, No. 22678/93 (1998), para. 51; *Féret v. Belgium*, Application No. 36109/02 (2009), para. 73.

<sup>53</sup> *Erbakan, op. cit.*, para. 64; *Jersild, op. cit.*, para. 31; *Sirek v. Turkey*, No. 26682/95 (1999), para. 63; or *Seurot v. France*, No. 57383/00 (2004).

<sup>54</sup> In relation to broadcast media, see *Jersild, op. cit.*, paras 31 and 34 or *Gündüz, op. cit.*, para 49. In relation to artistic expression, see *Karatas v. Turkey*, Application No. 23168/94 (1999) para. 29; or *Vereinigung Bildender Künstler v. Austria*, Application No. 68354/01 (2007), para. 33.

<sup>55</sup> *Vejdeland and Others v. Sweden*, Application No. 1813/07 (2012).

<sup>56</sup> *Ibid.*, para. 55.

problem of homophobic and transphobic bullying and discrimination in educational settings” “may justify a restriction of freedom of expression.”

### *Other European regional standards*

#### **The Council of Europe**

The Parliamentary Assembly of the Council of Europe has called upon its member states to take “positive measures to combat homophobic attitudes, particularly in schools, the medical profession, the armed forces, the police, the judiciary and the Bar, as well as in sport, by means of basic and further education and training.”<sup>57</sup> It has also recommended members states to include sexual orientation among the prohibited grounds of discrimination in their domestic legislation.<sup>58</sup>

Other specific standards of the Council of Europe include:

- Recommendation No. R (97) on “hate speech” set out seven key principles to guide Member States in combating “hate speech” through a “comprehensive approach.”<sup>59</sup> The explanatory memorandum to the Recommendation explains that “legal measures alone will not be sufficient to combat this evil [‘hate speech’]” and broader “policy measures” are needed.<sup>60</sup> In addition to positive policy measures, the Recommendation calls for States to adopt a legal framework consisting of administrative, civil and criminal law measures, enabling administrative and judicial authorities to “reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others.”<sup>61</sup> At the same time, the explanatory memorandum warned of the “real danger” that criminal prosecutions for “hate speech” may be counter-productive to promoting tolerance and respect for the rights of others; proponents of “hate speech” may exploit their prosecutions to present themselves as “martyrs” or “victims”, or frame unsuccessful prosecutions as a vindication of their prejudicial views. In this regard, it is worth noting the adoption by the Committee of Ministers of the Charter on Education for Democratic Citizenship, which emphasises the role of education in combating violence, discrimination and intolerance.<sup>62</sup>

Importantly, the Recommendation also places significant emphasis on the importance of protecting and promoting the right to freedom of expression.<sup>63</sup> The Recommendation requires member states, public authorities, and public institutions and their officials to refrain from a broader category of “hate speech” than that which is prohibited generally. This includes expression that “may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance.” Furthermore, such statements should be prohibited and publicly disavowed whenever they occur.<sup>64</sup> The Recommendation also emphasises the positive role for the media in tackling discrimination and intolerance.<sup>65</sup>

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<sup>57</sup> Parliamentary Assembly Recommendation 1474 (2000) on the Situation of lesbians and gays in Council of Europe Member States

<sup>58</sup> See e.g. Parliamentary Assembly Recommendation 924 on discrimination against homosexuals, 1 October 1981; Parliamentary Assembly Recommendation 1117 on the condition of transsexuals, 29 September 1989.

<sup>59</sup> Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to Member States on “Hate Speech,” 30 October 1997.

<sup>60</sup> Explanatory Memorandum to Recommendation No. R (97) (20), at Para. 16.

<sup>61</sup> Recommendation No. R (97) 20, *Ibid.*, Principle 2.

<sup>62</sup> Recommendation CM/Rec(2010)7 adopted by the Committee of Ministers of the Council of Europe on 11 May 2010.

<sup>63</sup> Recommendation No. R (97) 20, *Ibid.* Principle 3 recommends that any interference with the right must be narrowly circumscribed and applied “in a lawful and non-arbitrary manner on the basis of objective criteria.” Moreover, any limitation of, or interference with, freedom of expression must be subject to independent judicial control, particularly where the right must be reconciled with respect for human dignity and the protection of the reputation or the rights of others.

<sup>64</sup> *Ibid.*, Principle 1.

<sup>65</sup> *Ibid.*, Principle 6. See also, Recommendation No. R (97) 21 of the Committee of Ministers on the Media and the Promotion of a Culture of Tolerance.

- Recommendation CM/Rec(2010) 5<sup>66</sup> extended the principles of Recommendation No. R (97) 20 to “hate speech” against LGBT people” and outlines state obligations in this respect.<sup>67</sup> Its definition of “hate speech” is broader than the definition adopted in the previous Recommendation and includes expression that “may be reasonably understood as likely to” produce (rather than actually produce) the proscribed outcomes. The Recommendation also emphasises that alternate responses, including the “promotion of tolerance” in the public sphere, should be considered in addition to any prohibitive measures.
- The Additional Protocol to the Convention on Cybercrime relates to the prosecution of acts of racist and xenophobic nature through computer systems.<sup>68</sup> The Additional Protocol only commits states parties to criminalise the distribution of racist and xenophobic material, insults and the denial, minimisation or justification of genocide or crimes against humanity. However, It only applies to the promotion or inciting of hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. It does not include sexual orientation or gender identity as protected characteristics.

### European Union

The European Parliament has called upon Member States “to ensure that LGBT people are protected from homophobic hate speech and violence”, including by: firmly condemning homophobic “hate speech” or incitement to hatred and violence; through educational measures, such as campaigns against homophobia in schools, in universities and in the media; as well as through administrative, judicial and legislative means.<sup>69</sup> Moreover, the European Parliament has specifically criticised Poland, singling out public homophobic statements by the ‘Party of the League of Polish Families’, the Deputy Prime Minister, and the Minister for Education. The European Parliament called upon the Polish authorities to take measures against declarations of “hate speech” against LGBT people by public leaders, and warns that failure to do so may be perceived as a violation of Article 6 of the Treaty establishing the European Union.<sup>70</sup>

The EU has issued no binding legal instrument aimed at countering the expression of “hate speech” against LGBTI people. However, from a comparative perspective, the Council framework decision “on combating certain forms and expressions of racism and xenophobia by means of criminal law” (2008/913/JHA) requires states to sanction racism and xenophobia through effective, proportionate and dissuasive criminal penalties. It establishes four categories of incitement to violence or hatred offences that States must criminalise, as well as obligations to criminalise the instigation, aiding and abetting of those offences with penalties of up to 3 years imprisonment. States are afforded the discretion of choosing to punish only conduct which is carried out in “a manner likely to disturb public order” or “which is threatening, abusive, or insulting.” The framework decision therefore foresees states criminalising expression beneath this threshold, which would seemingly be at odds with the European Court’s jurisprudence outlined above. The obligation to criminalise expression under the framework decision is much broader than the obligation to prohibit certain forms of expression under Article 20(2) of the ICCPR, since the proscribed outcome of the framework decision is “hatred”, rather than “discrimination, hostility or violence”. ARTICLE 19 finds that

<sup>66</sup> Recommendation CM/Rec (2010) 5 “on measures to combat discrimination on the grounds of sexual orientation or gender identity”.

<sup>67</sup> It recommends, that “(6). Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such “hate speech” should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court. (7). Member states should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination. (8). Public officials and other state representatives should be encouraged to promote tolerance and respect for the human rights of lesbian, gay, bisexual and transgender persons whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities.

<sup>68</sup> Adopted on 28 January 2003 and entered into force on 1 March 2006.

<sup>69</sup> European Parliament resolution on homophobia in Europe, 18 January 2006, P6\_TA(2006)0018.

<sup>70</sup> European Parliament resolution on homophobia in Europe, 26 April 2007, P6\_TA(2007)0167.

the limitations on the right to freedom of expression required by the framework decision, in particular the provision of custodial penalties, do not comply with Article 19(3) of the ICCPR.

# Recommended responses

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ARTICLE 19 believes that States are obliged to introduce a variety of measures to tackle “hate speech” against LGBTI people and to challenge the prejudice and intolerance that such expression is symptomatic of. In this section, ARTICLE 19 outlines what would be the most appropriate response to concerns for tackling prejudice and intolerance while also complying with international human rights standards on the right to freedom of expression and information.

ARTICLE 19 proposes that this response be premised on a combination of two measures:

- Comprehensive **positive policy measures** to tackle the root causes of prejudice and intolerance against LGBTI people.<sup>71</sup>
- A coherent legal framework for **prohibiting** the advocacy of hatred against LGBTI people that constitutes **incitement to discrimination, hostility, or violence** that meets international standards in this area.

Underpinning these recommendations is the belief that the resolution of tensions and intolerance in a society on issues related to sexual orientation and gender identity cannot be achieved by suppressing the expression of differences but rather by debating them openly.

## Positive policy measures

ARTICLE 19 recommends that states should primarily employ a range of positive measures –including in the fields of media regulation, education, social security, health care, access to goods and services, immigration, crime, sport and culture - for tackling prejudice and discrimination without recourse to punitive sanctions. The recommendations in this section are not intended to be exhaustive or representative of all positive practices in the field, but instead indicate some possibilities that States should consider.

It must be noted that all such measures must be based on a firm commitment by public officials to respect the principles of equality, tolerance and diversity related to sexual orientation and gender identity. The promotion of dialogue and the fostering of political participation from all quarters of society in the development and implementation of any public policy is also key to ensuring its effectiveness.

### *Building institutional knowledge*

ARTICLE 19 recommends that states create **independent equality institutions**, with proper financial support, with mandates to develop data collection mechanisms and to promote empirical and other **research on discrimination** on various grounds, including sexual orientation and gender identity. Any comprehensive policy for tackling inequality, discrimination and other forms of prejudice against LGBTI people should be evidence-based. Information collected by equality institutions is important for identifying policy priorities, identifying key actors as well as obstacles, and for monitoring and evaluating the effectiveness of policy.

Civil society organisations can and should be encouraged to play an active role in relation to monitoring incidents of intolerance and prejudice and providing data to equality bodies.

### *Public education and information campaigns*

Public information and education campaigns are essential to combating negative stereotypes of, and

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<sup>71</sup>These recommendations are largely derived from those contained in *The Camden Principles, op.cit.*

discrimination against, LGBTI people and fostering safe environments for LGBTI people in the society. Equipped with information, people may identify and confidently challenge manifestations of intolerance in their day-to-day interactions.

In particular, public information and education campaigns should be integrated into primary, secondary and tertiary **education**, and complemented with concrete **anti-bullying policies**, including the provision of support services for victims of bullying, including peer-led initiatives.

Civil society organisations can and should be encouraged to play a central role in leading or collaborating with States on public information campaigns. Positive examples of such campaigns include the “safe schools coalition” in Australia; the “belong to” campaign in Ireland; and the Stonewall “education for all” campaign in the United Kingdom.<sup>72</sup> These campaigns target youth both in schools and outside of schools, in particular through use of Internet-based tools.

In relation to the arena of **sport**, the “You Can Play” project in Canada is dedicated to providing positive messages from athletes, coaches and fans to counteract the prevalence of discrimination and slurs against LGBT people in this field.<sup>73</sup> The United Kingdom based “Stand Up Foundation”, led by former rugby union international Ben Cohen, is committed to raise awareness of the long-term, damaging effects of bullying against LGBT youth.<sup>74</sup>

A number of recent initiatives aimed at challenging manifestations of intolerance and prejudice against LGBTI people **on-line** are noteworthy. The “no homophobes” “social mirror” project is an innovative tool, pioneered by the Institute for Sexual Minority Studies and Services and the University of Alberta, to highlight the prevalence of derogatory language against LGBTI people on Twitter and to call on individuals to challenge so-called casual homophobia.<sup>75</sup> The Council of Europe youth sector project, “young people combating hate speech online”, has also produced a mapping study of civil society organisations working to tackle hate speech online generally.<sup>76</sup>

### ***Equality training***

States should provide trainings for **public officials** and other public figures on the right of LGBTI people to equality and non-discrimination, particularly where discrimination is institutionalised and has a history of going unchallenged. Areas of priority in this respect should include schools and other educational settings, the medical profession, the armed forces, the police, the judiciary, legal services, political associations or religious institutions.

Further, **politicians** and other influential people in society should be instructed on the importance of avoiding statements that might promote discrimination or undermine equality, and should take advantage of their positions to promote understanding, including by contesting, where appropriate, discriminatory statements or behaviour. Ethical codes and “no discrimination” policies adopted by political parties should also be considered.

### ***Mobilisation of influential actors and institutional alliances***

Enhancing public understanding around issues of sexual orientation and gender identity and tackling intolerance and prejudice towards LGBTI people requires the fostering of dialogue and engagement between government, civil society, and society at large. Key actors should attempt to forge **alliances to**

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<sup>72</sup> The Safe Schools Coalition, see: <http://safeschoolscoalitionvictoria.org.au/>; The Belong To campaign, see: <http://www.belongto.org/>; the Stonewall “education for all” campaign, see: [http://www.stonewall.org.uk/at\\_school/](http://www.stonewall.org.uk/at_school/).

<sup>73</sup> The “You Can Play Project”, see: <http://youcanplayproject.org/>;

<sup>74</sup> The “Stand Up Foundation”, see: <http://www.standupfoundation.com/>

<sup>75</sup> “No Homophobes Dot Com”, see: [www.nohomophobes.com](http://www.nohomophobes.com)

<sup>76</sup> Starting points for combating hate speech online: three studies about online hate speech and ways to address it, Council of Europe Youth Department, 2012; see: <http://act4hre.coe.int/eng/News-Archive/Starting-points-for-Combating-Hate-Speech-Online>

**collaborate** on tackling manifestations of intolerance and prejudice in society – in particular seeking the support of non-government organisations, equality bodies, religious institutions, police, policymakers and international organisations to collaborate on tackling manifestations of intolerance and prejudice in society.

A positive example includes the “Living History Forum” in Sweden, which initiated alliances between employer associations, trade unions, LGBT organisations, and municipalities, as well as the creation of ombudsman against sexual orientation discrimination.<sup>77</sup>

### ***Role of an independent, pluralistic, and self-regulated media***

Any policy measures directed at the media should respect the fundamental principle that any form of media regulation should be undertaken by bodies independent of political influence, which are publicly accountable and operate transparently. Editorial independence and media plurality should not be compromised, as these are essential to the functioning of a democratic society.

In respect of broadcast media, any regulatory framework should promote the right of LGBTI people to freely access and use media and information and communications technologies for the production and circulation of their own content and for the reception of content produced by others.

All forms of mass media should recognise that they have a **moral and social responsibility** to promote equality and non-discrimination, including based on sexual orientation and gender identity. In respect of their own constitutions, mass media entities should take steps to:

- Ensure that their workforces are diverse and representative of society as a whole;
- Address as far as possible issues of concern to all groups in society, including LGBTI people;
- Seek a multiplicity of sources and voices within the LGBTI community, rather than representing LGBTI people as a monolithic bloc;
- Adhere to high standards of information provision that meet recognised professional and ethical standards;
- Professional codes of conduct for the media and journalists should reflect equality principles and effective steps should be taken to promulgate and implement such codes.

In relation to the combating of discrimination, media entities should consider:<sup>78</sup>

- Taking care to report in context and in a factual and sensitive manner, while ensuring that acts of discrimination are brought to the attention of the public;
- Being alert to the danger of discrimination or negative stereotypes of LGBTI people being furthered by the media;
- Avoiding unnecessary references to sexual orientation or gender identity that may promote intolerance;
- Raising awareness of the harm caused by discrimination and negative stereotyping of LGBTI people;
- Reporting on different groups or communities and giving their members an opportunity to speak and to be heard in a way that promotes a better understanding of them, while at the same time reflecting the perspectives of those groups or communities.

### ***Strengthened anti-discrimination legislation and implementation***

Many states have taken positive efforts to strengthen the **implementation of anti-discrimination legislation** through both the civil and administrative laws, but also through non-legal mechanisms such as

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<sup>77</sup> See, for example, “the many faces of intolerance” report, the Living History Forum, 2010; available at: <http://www.levandehistoria.se/node/4667>

<sup>78</sup> From a comparative perspective, the ARTICLE 19 publication “Getting the facts right: reporting ethnicity and religion” analyses the role of the media in responsibly reporting on ethnicity and religion; available at: <http://www.article19.org/data/files/medialibrary/3093/7d0676b-793d318.pdf>

mediation and alternative dispute resolution provided through equality institutions. As with any public action, these initiatives must be properly framed according to international human rights law.

ARTICLE 19 notes that it is often in the absence of robust anti-discrimination frameworks that recourse is made to the criminal law, even though criminal measures are not the most effective forum for resolving incidents of discrimination.

The UK Equality Act 2010 is an example of a legislative measure that was taken to strengthen and harmonise existing equality legislation, previously spread across numerous statutes and statutory instruments, into a single comprehensive piece of legislation. The Equality Act 2010 includes protected characteristics such as “gender reassignment”, “sex”, and “sexual orientation” and the innovation of a broad public sector duty to promote equality on the basis of these characteristics (sections 49 – 157).

## Prohibition of incitement to hostility, discrimination or violence

Article 20(2) of the ICCPR obliges States to prohibit the advocacy of hatred that constitutes incitement to discrimination, hostility, or violence (the prohibition of incitement), which should be understood as a distinguishably severe form of “hate speech”. Interpretation of these obligations is a complex issue that has recently been the subject of extensive examination by international fora.<sup>79</sup> To contribute to this process, ARTICLE 19 developed a specific policy on the prohibition of incitement that elaborates on the interpretation of Article 20(2) of the ICCPR in much greater detail.<sup>80</sup> This section summarises the key recommendations in this respect and how these should be applied in the context of incitement based on sexual orientation and gender identity.

### Definition of key terms

ARTICLE 19 recommends that States should adopt uniform and clear definitions of key terms of Article 20(2) of the ICCPR, specifically: “hatred”; “discrimination;” “violence”, and “hostility” and to ensure that interpretation given to these terms by domestic courts is consistent with international standards.

Previously, ARTICLE 19 recommended that the definition of these terms should be as follows:<sup>81</sup>

- Hatred is a state of mind characterised as “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”
- Discrimination shall be understood as “any distinction, exclusion, restriction or preference based on race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status, colour which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”
- Violence shall be understood as “the intentional use of physical force or power against another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development, or deprivation.”
- Hostility shall be understood as “a manifested action of an extreme state of mind.” Although the term implies a state of mind, an action is required. Hence, hostility can be defined as the manifestation of

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<sup>79</sup> In 2011-2012, the Office of the UN High Commissioner for Human Rights organised several workshops on the prohibition of incitement to national, racial and religious hatred organised in various regions of the world. See <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>. The process culminated in the 2012 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence that recommends the adoption of comprehensive anti-discrimination national legislations with preventive and punitive action to effectively combat incitement to hatred, as well as the empowerment of minorities and vulnerable groups. The Rabat Plan of Action; available at [http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf).

<sup>80</sup> Prohibiting incitement to discrimination, hostility or violence, *op.cit.*

<sup>81</sup> Prohibiting incitement to discrimination, hostility or violence, *op.cit.*

hatred – that is the manifestation of “intense and irrational emotions of opprobrium enmity and detestation towards the target group.”

### ***Protected characteristics should include sexual orientation and gender identity***

Article 20(2) of the ICCPR only lists three characteristics which states are required to protect from incitement – nationality, race, and religion. The HR Committee has not yet addressed the question of whether this list should be interpreted as non-exhaustive.

However, ARTICLE 19 recommends that this list should be read in light of Article 2(1) and Article 26 of the ICCPR and therefore should be interpreted to require States to prohibit incitement on the basis of “sexual orientation” and “gender identity.” This interpretation would comply with the evolution of developments in human rights protections since the adoption of the ICCPR in 1977.<sup>82</sup> ARTICLE 19 has also pointed out that the ICCPR was adopted before equality movements around the world made significant progress in promoting and securing human rights for all. However, it has since come to be interpreted and understood as supporting the principle of equality on a larger scale, applying to other grounds not expressly included in the treaty text, including sexual orientation and gender identity. It would also be in line with the object and purpose of international human rights law that must be interpreted “in the light of present-day conditions”, rather than being viewed as contracts with concrete terms defined by the norms that were prevailing at the moment of their drafting or ratification.<sup>83</sup> ARTICLE 19 has also argued that the realisation of human rights should not be constrained by an overly formalistic commitment to the original wording of any instrument, or even to the intent of the drafters, if that interpretation would unnecessarily narrow the enjoyment of rights and freedoms.

Hence, ARTICLE 19 strongly supports an interpretation of Article 20(2) of the ICCPR that provides a framework for the prohibition of incitement on all the protected grounds recognised under international human rights law, including sexual orientation or gender identity.

### ***Incitement requires intent***

The intent of the speaker to incite others to commit acts of discrimination, hostility or violence should be considered a crucial and distinguishing element of incitement as prohibited by Article 20(2) of the ICCPR. Importantly, the element of intent distinguishes incitement from other forms of expression that may offend, shock or disturb but are nevertheless protected under Article 19(2) of the ICCPR.

ARTICLE 19 recommends that domestic legislation should always explicitly state that the crime of incitement is an *intentional* crime<sup>84</sup> and not a crime that can be committed with recklessness or negligence.<sup>85</sup> With no uniform definition of intent in international law or across domestic laws,<sup>86</sup> ARTICLE 19 proposes that any definition of intent should include the following aspects:

- The volition (purposely striving) to engage in advocacy to hatred;
- The volition (purposely striving) to target a protected group on the basis of prohibitive grounds;
- Having knowledge of the likely consequences of his or her action in the ordinary course of events.

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<sup>82</sup> The ICCPR was adopted before equality movements around the world made significant progress in promoting and securing human rights for all. However, it has since come to be interpreted and understood as supporting the principle of equality on a larger scale, applying to other grounds not expressly included in the treaty text, including sexual orientation, gender identity, and disability.

<sup>83</sup> In the context of the ICCPR, see: Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 2<sup>nd</sup> revised edition, at page 628. In the context of the ECHR, see: *Tyrer v. the United Kingdom*, A 26 (1978).

<sup>84</sup> In some jurisdictions, also acting “wilfully” or “purposefully.”

<sup>85</sup> ARTICLE 19 notes that the legislation of many States already recognises intent or intention as one of the defining elements of incitement, for example, the UK, Ireland, Canada, Cyprus, Ireland, Malta, and Portugal.

<sup>86</sup> No international treaty body or mechanism has adopted a definition of “intent” for the purpose of prohibition on incitement. A common approach within international criminal law and domestic criminal law is to ensure liability for offences where the speaker acted with knowledge and with the intention of causing the objective elements of a crime.

***The prohibition of incitement should not be limited to criminal sanctions***

Since Article 20(2) of the ICCPR requires States to *prohibit* incitement but not to *criminalise* it, ARTICLE 19 recommends that States apply a variety of legal means to respond to it, including civil, administrative and other measures. The criminal law penalties should be limited to the most severe forms of incitement and “as a last resort measures to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest.”<sup>87</sup>

States should also provide a range of remedies to victims, such as civil tort claims, the right of correction and the right to reply that are often better suited as a response to incitement.<sup>88</sup> Importantly, they also presuppose the involvement and participation of victims and make provision for specific redress to them.

***Specific recommendations for domestic legislation***

In order to comply with requirements of Article 20(2), ARTICLE 19 recommends that:

- Domestic legislation should include specific and clear reference to “incitement to discrimination, hostility or violence” with references to Article 20(2) of the ICCPR and avoid broader or less specific language.
- The prohibition of incitement should conform to the three-part test of legality, proportionality and necessity under Article 19(3). This means that any prohibitions are provided for by law; pursue a legitimate aim; and be necessary in a democratic society, i.e. they must meet a pressing social need and meet the requirement of proportionality.

***All incitement cases should be strictly assessed under a six-part test***

ARTICLE 19 recommends that all incitement cases – including those on the grounds of sexual orientation and gender identity - should be assessed under a “six part” incitement test, taking into consideration the following criteria:

- **Context of the expression:** the analysis would put the expression within the social and political context prevalent at the time it was made and/or disseminated.<sup>89</sup> Such analysis would consider issues such as the existence of conflicts in society, the existence and history of institutionalised discrimination, the legal framework, and the media landscape. For example, in cases of incitement on the grounds of sexual orientation and gender identity, this analysis could take into consideration outbreaks of violence against LGBTI people, regular and frequently negative media reports and the lack of access to alternative sources of information, structural inequalities and discrimination against LGBTI people, the lack of anti-discrimination legislation, or the lack of broad condemnation against hateful statements. An important aspect of the context would be the degree to which opposing or alternative ideas are present and available.

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<sup>87</sup> Venice Commission, Report on the Relationship Between Freedom of Expression and Freedom of Religion, 17-18 October 2008; available at [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026-e.pdf](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf).

<sup>88</sup> For example, it has been documented that in Brazil, criminal law has not been efficient due to institutional bias among law enforcement agencies, while sanctions have been levied in civil proceedings. See, Tanya Hernandez, Hate Speech and the Language of Racism in Latin America, 32 U. Pa. J. Int'l L. 805 2010-2011.

<sup>89</sup> As noted by Toby Mendel, “it is extremely difficult to draw any general conclusions from the case law about what sorts of contexts are more likely to promote the proscribed result, although common sense may supply some useful conclusions. Indeed, it sometimes seems as though international courts rely on a sample of contextual factors to support their decisions rather than applying a form of objective reasoning to deduce their decisions from the context. Perhaps the impossibly broad set of factors that constitute context make this inevitable”. Toby Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred* (2006).

- **The speaker:** the analysis should examine the position of the speaker and his or her authority or influence over the audience. Special considerations should be made when the speaker was a politician or a prominent member of a political party and public officials or persons of similar status (e.g. teachers or religious leaders) due to the stronger attention and influence they exert over the others. This analysis should also examine the relationship of the audience to the speaker, and issues such as the degree of vulnerability and fear of the various communities, including those targeted by the speaker, or whether the audience is characterised by excessive respect for authority.<sup>90</sup>
- **Intent:** as noted above, ARTICLE 19 recommends that any prohibition of incitement should require the intent of the speaker to incite others to hostility, discrimination or violence. Determining the intent in actual circumstances, in the absence of a guilty plea, is a complex matter and the international and comparative jurisprudence indicates that intent is usually derived from an assessment of the case and its circumstances as a whole.<sup>91</sup> Intent can be determined from aspects such as the language used by the speaker, the scale and repetition of the particular communication or objectives pursued by the speaker (e.g. incitement may not apply to cases where a person seeks to inform the public about a matter of general interest for reasons such as the dissemination of news, historical research or attempts to expose the wrongdoings of government in the interests of public accountability).
- **Content of the expression:** the analysis of the content will typically include examination of what was said, the form and the style of the expression, whether the expression contained direct calls for discrimination or violence, the nature of the arguments deployed or the balance struck between the arguments. This analysis should also look at the targeted audience (those that the speech was intending to incite), how the targeted group are described, and the form of the expression. It should also be noted that under international standards, it has been recognised that certain forms of expression provide “little scope for restrictions of freedom of expression;”<sup>92</sup> in particular artistic expression, public interest discourse, academic discourse and research and statements of facts and value judgements.
- **Extent and magnitude of the expression:** the analysis should examine the public nature of the expression,<sup>93</sup> the means of the expression and the intensity or magnitude of the expression in terms of its frequency or volume (e.g. one leaflet as opposed to broadcasting in the mainstream media, or singular dissemination as opposed to repeated dissemination). If the expression was disseminated through media, consideration should be given to media freedom, in compliance with international standards.<sup>94</sup>
- **Likelihood of harm occurring, including its imminence:** in order to qualify as incitement, it must be established that there was a probability of harm occurring as a result of the expression. It should be noted that a number of domestic laws (as also demonstrated by the overview in the Appendix) have established the occurrence of violence as an aggravating circumstance in criminal cases. However, ARTICLE 19 notes that incitement, by definition, is an inchoate crime and the action advocated in the expression need not occur. However, courts should determine whether there was a reasonable probability that the speech would succeed in inciting the audience into committing the

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<sup>90</sup> See: Susan Benesh, *Dangerous Speech: A Proposal To Tackle Violence*, 2011.

<sup>91</sup> See, e.g. *Jersild, op. cit.*, para. 31.

<sup>92</sup> *Erbakan, op. cit.*, para. 68.

<sup>93</sup> ARTICLE 19 suggest that this should include looking at issues such as whether the statement or communication was circulated in a restricted environment or whether it was widely accessible to the general public; whether it was made in a closed place accessible by ticket or in an exposed and public area; whether the communication was directed at a non-specific audience (the general public); or whether the speech was directed to a number of individuals in a public place, and whether the speech was directed to members of the general public.

<sup>94</sup> As the European Court noted, “while the press must not overstep the boundaries set, *inter alia*, for the protection of the vital interests of the State, [...] it is nevertheless incumbent on it to impart information and ideas on political issues, including divisive ones. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. The freedom to receive information or ideas provides the public with one of the best means of discovering and forming an opinion on the ideas and attitudes of their leaders.” See *Halis Doğan v. Turkey*. no. 71984/01 (2006).

harm advocated.<sup>95</sup> The considerations must be also given to “whether the ordinary, reasonable viewer would understand from the public act that he or she is being incited to hatred.”<sup>96</sup> ARTICLE 19 also argues that the possibility of such harm should be imminent: it should be made sure that the length of time that has passed between the speech and the time when the intended acts could take place is not be so long that the speaker could not reasonably be held responsible for the eventual result.

### ***Sanctions for incitement should not be limited to criminal law penalties***

ARTICLE 19 believes that the sanctions for incitement should principally be contained within civil and administrative law and criminal penalties should be imposed only in the most serious cases.

- **Civil law sanctions**<sup>97</sup> should be a part of a comprehensive anti-discrimination framework that should include: protection against discrimination on grounds of sexual orientation and gender identity, including in employment and training, education, social protection, membership of organisations and access to goods and services; definitions of direct and indirect discrimination and harassment; requirements for positive action to ensure full equality in practice; the right to complain through a judicial or administrative procedure, with appropriate penalties for those who discriminate; limited exceptions to the principle of equal treatment (where a difference in treatment on the respective ground is a genuine occupational requirement), and a shared burden of proof in civil and administrative cases. In regard to the burden of proof, victims must provide evidence of alleged discrimination and defendants must prove that there has been no breach of the principle of equal treatment. The remedies for victims should include compensation in the form of pecuniary and non-pecuniary damages,<sup>98</sup> and the right of correction and reply.<sup>99</sup> States should also allow NGOs to bring civil claims in relevant cases and should provide for the possibility of bringing class actions in discrimination cases. This is especially important in cases concerning vulnerable groups, including LGBTI people, where individual victims are often reluctant to initiate cases for fear of reprisals or further victimisation.
- **Administrative sanctions** should also be considered, in particular to enforce rules established by communication, media and press councils, consumer protection authorities, or any other regulatory bodies. Consideration should also be given to establishing formal codes of conduct and employment rules for certain actors, including for politicians, public officials, and civil servants (such as teachers). These measures should support the principle that public officials at all levels should, as far as possible, avoid making statements that promote discrimination or undermine equality and intercultural understanding. Sanctions may be in the form of an order to: issue a public apology (although this should not automatically preclude culpability or other sanctions); issue a correction; provide a right of reply; allocate broadcasting time to advertise the outcome of an administrative decision, or the imposition of fines.

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<sup>95</sup> ARTICLE 19 suggest that this examination should look at issues such as whether the speech is understood by its audience to be a call to acts of discrimination, violence or hostility; whether the speaker is able to influence the audience; whether the audience had the means to resort to the advocated action, and commit acts of discrimination, violence or hostility, or whether the targeted victim group suffered or recently been the target of discrimination, violence or hostility. C.f. Susan Benesh, *op.cit.*

<sup>96</sup> *Ekeremawi v Network Ten Pty Ltd*, [2008] NSWADT 334, 18 November 2008, 16 December 2008.

<sup>97</sup> The proposal is based on requirements set by the Racial Equality Directive (2000/43/EC) against discrimination on grounds of race and ethnic origin; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>.

<sup>98</sup> Council of Europe Committee of Ministers Recommendation No. R 97 (20) on ‘hate speech’, Principle 2. The awards of damages should be proportional and carefully and strictly justified and motivated so that they do not have a collateral chilling effect on the freedom of expression.

<sup>99</sup> *Ibid.*, Principle 2. Also, Camden Principles, *op.cit.*, Principle 7. The right of reply gives any person the right to have a mass media outlet disseminate his or her response where the publication or broadcast by that media outlet of incorrect or misleading facts has infringed a recognised right of that person, and where a correction cannot reasonably be expected to redress the wrong. This remedy also has the result of encouraging further dialogue, rather than restricting it.

- Recourse to the **criminal law** should be avoided if less severe sanctions would achieve the intended effect. Moreover, the experience of many jurisdictions demonstrates that civil and administrative sanctions are better suited as a response to the harm caused by incitement.<sup>100</sup> It is also important that courts, law enforcement authorities and public bodies should consider the perspective of victims in criminal law proceedings to strengthen the pursuit of justice in respective cases. They should also attempt to involve them in the proceedings through other channels, for example, by inviting third party interventions in the form of amicus briefs by representatives of groups concerned by the case.

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<sup>100</sup> For example, in Brazil, it has been documented that, criminal law has not been efficient due to institutional bias among law enforcement agencies, while sanctions have been levied effectively in civil proceedings. See, Tanya Hernandez, *Hate Speech and the Language of Racism in Latin America*, 32 U. Pa. J. Int'l L. 805 2010-2011.

# Conclusion

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ARTICLE 19 hopes that this policy paper clarifies the international standards pertaining to “hate speech” that targets LGBTI people on account of their sexual orientation or gender identity. We also hope that the recommendations contained in this section will help both activists and policy makers in understanding key considerations when determining prohibitions against such expression.

In particular, the six-part test for determining incitement should give States the means of avoiding vague and overly broad prohibitions on incitement when legislating, and to avoid inconsistent and restricted interpretations frequently given to those laws by the judiciary and law enforcement authorities. We believe that this test will help States review cases and determine whether particular speech reaches the threshold of incitement to hostility, discrimination or violence.

Where a coherent legal framework for prohibiting incitement, including appropriate civil and administrative sanctions, is accompanied with the development of a variety of positive policy measures, States are able to ensure that all people everywhere are able to enjoy both the right to freedom of expression and the right to equality, including LGBTI people.

## Annex: Domestic prohibitions of “hate speech”

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This section identifies jurisdictions that prohibit incitement to hostility, discrimination and violence as well as broader prohibitions of “hate speech,” with emphasis given to those jurisdictions that recognise sexual orientation or gender identity as protected characteristics in these laws. This survey is intended to be illustrative rather than comprehensive; preference is given to criminal provisions that require proof of incitement, although the majority of these prohibitions are drawn in broader terms than Article 20(2) of the ICCPR and do not necessarily comply with Article 19(3) of the ICCPR. Examples of civil and administrative measures are also included.

The survey demonstrates the significant divergence between States in the extent to which they permit, prohibit, or criminalise certain expression and the protected characteristics that they recognise. This highlights the differences in constitutional and philosophical approaches that each country has taken to protecting and promoting the right to freedom of expression and the right to equality, and provides some indication as to the difficulty of achieving international consensus on best practices in this area.

### *Australia*

There are no federal criminal prohibitions on “hate speech” against LGBTI people in Australia.

At the State level, New South Wales, Queensland, the Australian Capital Territory and Tasmania prohibit “vilification” and include sexual orientation or gender identity as protected characteristics. For example, the Anti-Discrimination Act (1977) of New South Wales makes “vilification” a criminal offence on the grounds of one’s homosexuality,<sup>101</sup> HIV or AIDS status,<sup>102</sup> or transgendered status.<sup>103</sup> “Vilification” is defined as any public act that could incite or encourage hatred, serious contempt, or severe ridicule towards people who are either of a protected status or perceived to be of that protected status. Aggravated offences exist under each provision for threatening physical harm or for inciting others to commit physical harm towards persons or property.

Exemptions from criminal liability exist for: fair reporting by the media of someone else’s act of vilification unless they add extra vilifying material or commentary; acts that are done “reasonably and in good faith,” for academic, artistic, scientific, research or other purposes in the “public interest”; and for privileged material such as statements made in parliament.

The Australian Commercial TV Industry Code of Practice (2010) provides that, in broadcasting news and current affairs programs, licensees “must not portray any person or group of persons in a negative light by placing gratuitous emphasis on [...] gender [...] or sexual preference.”

### *Austria*

Section 283(1) of the Criminal Code, as amended, prohibits a person to solicit or excite “in a manner suited to jeopardise public order” “violence against a church or religious denomination or any other group of persons defined according to criteria of race, colour of skin, language, religion or ideology, nationality, descent or national or ethnic origin, sex, a disability, age or sexual orientation, or against any person belonging to such a group, explicitly on account of his/her belonging to such a group.” Custodial sentences of up to two years are available.

Moreover, under Section 283(2), “agitation” against a group as defined in Section 283(1) is punishable if it is in a manner perceivable to the general public, as is verbal harassment that “infringes human dignity” and “tries to disparage them.”

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<sup>101</sup> Anti-Discrimination Act 1977, at Part 4A, Division 5, 49ZS, 49ZT, and 49ZTA.

<sup>102</sup> *Ibid.*, At Part 4F, 49ZXA, 49ZXB, 49ZXC.

<sup>103</sup> *Ibid.*, At Part 3A, Division 5, 38R, 38S, 38T.

Section 1330 of the Civil Code contains the action of “insult” for expression that violates human dignity by verbal abuse, hurt or mockery. ARTICLE 19 is not aware of any cases where this provision has been used to protect individuals from insult on account of their sexual orientation or gender identity.

In relation to the media, s10(2) of the Austrian Broadcasting Corporation (ORF) Act stipulates under the heading of “Programme Principles” that broadcasts must not incite to hatred based on race, sex, age, disability, religion or nationality. A similar provision is contained in s30(2) of the Audiovisual Media Act. Neither act has been updated to include sexual orientation or gender identity as protected characteristics.

### ***Belgium***

Article 22(1) and (2) of the Anti-Discrimination Act (2007) criminalises “incitement to hatred, discrimination and violence” against an individual on grounds of sexual orientation. Article 22 (3) and (4) criminalise public “incitement to hatred, discrimination, violence and segregation” against a group, a community or its members. Sentences of imprisonment of one month to one year and a fine of €50 to €1000 are available. Article 150 of the Belgian Constitution provides heightened protection to written and published materials, requiring press crimes to be tried by jury. An exception exists for press crimes “motivated by racism or xenophobia” but not for homophobia or transphobia.

The Constitutional Court ruled in 2004 in case no. 157/2004 that “incitement” presupposes actively “urging”, “stimulating” or “instigating” third parties to undertake certain actions or to adopt a particular conduct (of hatred). This must be accompanied by “special intent”, so the proponent of the expression must consciously intend that their words incite or provoke hatred, discrimination, violence or segregation.

On 11 April 1991, the Correctional Court of Brussels enumerated the following list of factors for considering when the threshold of incitement is reached: “a conscious and deliberate desire” to incite hatred, violence or discrimination; a provocative tone; the absence of nuances or distinctions in a statement containing an amalgam of ideas; the intent to show contempt; a wounding or offensive statement of a nature “to provoke a passionate reaction of aggression” against the persons targeted by the statement; conduct that “stimulates or promotes the resort to acts of violence”; organised acts; and “manifest absence of regret or reform.”

On 4 June 2008, the Criminal Court (Indictment Division) at Nivelles acquitted Raadkamer Nijve of incitement. Nijve was Archbishop at the time, and allegedly stated in an interview with a magazine that homosexuals were “abnormal”. The Court accepted that the words used were offensive, but did not amount to incitement to hatred or discrimination.

In January 2010, the Court of First Instance of Arlon found that insults against a same-sex couple in the street amounted to incitement to hatred. The defendant was convicted and ordered to pay a fine and compensation.<sup>104</sup>

### ***Brazil***

Article 20(2) of Law 7.716/1989 prohibits the “practice, inducement or incitement to discrimination committed through media vehicles” based on numerous protected characteristics but does not expressly include sexual orientation or gender identity. Imprisonment of up to five years is available as a penalty. Attempts to add sexual orientation to this provision (Bill of Law PLC 122/2006) have faced strong opposition from members of Congress.

### ***Bulgaria***

The Bulgarian Criminal Code makes it an offence to incite hatred on the grounds of nationality, race, and religion or to incite discrimination on the basis of race. Article 162 of the Criminal Code provides up to three years of imprisonment and a public reprimand for a person “who propagates or incites racial animosity or hatred or racial discrimination.” Article 164 provides similar punishment in addition to compulsory work for a person who propagates religious hatred. ARTICLE 19 is not aware that these

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<sup>104</sup> Belgium/Tribunal de première instance d’Arlon – criminal court, decision of 11 January 2010

provisions have been interpreted to protect individuals on the basis of their sexual orientation or gender identity.

Under the civil law, Article 5 of the Prevention Against Discrimination Act prohibits harassment, explicitly including sexual orientation as a prohibited ground. Harassment is defined as “unwanted conduct [on grounds of sexual orientation] expressed physically, verbally or in any other manner, having the purpose or effect of violating the dignity of a person and of creating a hostile, offensive or intimidating environment”. Incitement is also explicitly recognised as a form of discrimination, defined as the “direct and deliberate encouragement, instruction, exertion of pressure or persuasion of someone to commit discrimination”, where the inciting party is in a position to influence the incited one.

### ***Canada***

Article 319(1) of the Criminal Code makes it an offence to incite hatred in a public place against an “identifiable group” where such hatred is likely to lead to a breach of the peace. Article 319(2) makes it an offence to wilfully promote hatred against an “identifiable group”, irrespective of whether that expression was in public or was likely to lead to a breach of the peace. An “identifiable group” includes groups defined by their sexual orientation but not by their gender identity.

Section 319 of the Criminal Code provides exemptions to criminal liability for: (a) true statements; (b) good faith statements expressed or attempted to establish by argument an opinion on a religious subject; (c) statements relevant to any subject of public interest, the discussion of which was for the public benefit and reasonably believed as true; (d) for pointing out in good faith for the purpose of removal matters producing or tending to produce feelings of hatred towards an identifiable group.

### ***Colombia***

The Anti-discrimination Law (Law 1482/2011), inserted to the Penal Code the offence of promoting or inciting “acts, conduct or behavior constituting harassment, aimed at physical or moral harm to a person, group of persons, community or people, because of their [...] sex or sexual orientation”. Custodial sentences of between twelve and thirty-six months are available, in addition to fines of between ten and fifteen times the monthly minimum wage. Where the offence is committed through the mass media, aggravated penalties are available.

### ***Czech Republic***

The Criminal Code (2010) provides for the following offences: “hatred against a group of people or to restrict their rights and freedoms” (Article 356); “apartheid and discrimination against a group of people” (Article 402); foundation, propagation and support of a movement aimed at oppressing of rights and freedoms of a person (Article 403); and declaration of support of a movement aimed at oppression of rights and freedoms of a person (Article 404). The Criminal Code also prohibits “public defamation of the nation, race, ethnic or other group” (Article 355) and aggravated penalties are provided in case this is done through “print, film, radio, television, the Internet or other similarly effective means.” ARTICLE 19 is not aware that these provisions have been interpreted to protect individuals and groups characterised by their sexual orientation or gender identity.

### ***Denmark***

Section 266(b)(1) of the Criminal Code makes it a criminal offence to “publicly or with the intention of wider dissemination, make a statement or impart other information by which a group of people are threatened, scorned or degraded on account of their race, colour, national or ethnic origin, religion, or sexual orientation.” Custodial sentences of up to two years and fines are available as penalties.

### ***Estonia***

Article 12 of the Constitution provides that “the incitement of national, racial, religious or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable.” Section 151 of the Penal Code, within a division on “offences against equality”, criminalises “activities which publicly incite to hatred, violence or discrimination on the basis of [...] sexual orientation [...] if this results in danger to the life, health or property of a person.”

### **France**

Law no. 2001-1066 amended Articles 225-1 and 225-2 of the Penal Code on “punishable discrimination” to include sexual orientation as a prohibited ground of discrimination.

Article 225-1 defines types of discrimination against natural persons and Article 225-2 specifies the conditions in which discrimination constitutes a criminal offence. Law no. 2004 – 1486 (at Title III, Article 20) adds discriminatory statements of a homophobic nature to the list of prohibited provocations to discrimination. Article 21 of Title III also prohibits homophobic slander and libel. Prison sentences of up to three years and a fine up to €45,000 are available under the law for criminal discrimination.

The 2004 reforms also amended Article 222-18-1 of the Penal Code on “threats” to include real or perceived sexual orientation as a protected characteristic. Threats may be punished with between two and seven years imprisonment and fines of between €30,000 and €100,000 according to the category of threat.

In July 2012, the Parliament adopted a law on combating sexual harassment, in which an amendment was introduced to add “sexual identity” to the protected discrimination grounds and to the bias motivations recognised as aggravating circumstances in the French criminal code, including in the above-mentioned articles. The government clarified in an instruction that “sexual identity” included all “transsexual and transgender people”.

On 12 November 2008, the Cour de Cassation, in Case No. 07-83398, overturned the conviction of a French politician for homophobic statements made to newspaper *La Voix du Nord* on the basis that the restriction on freedom of expression violated his rights under Article 10 of the ECHR. His statements included the assertion that “homosexuality was inferior to heterosexuality, and could be dangerous for humanity.” He had been ordered to pay €11500 in fines, damages to associations constituted as civil parties, and costs for publishing the court’s verdict in numerous publications.

In relation to incitement to discrimination more generally, the Criminal Division of the Court of Cassation has held that the following incidents met the threshold of incitement:

- 7 January 1995: the publication of an article which included a drawing that showed young blacks and North Africans brandishing knives and clubs, with the caption: “Insecurity is often caused by ethnic gangs (of blacks and North Africans).”
- 21 May 1996: the publication of an article entitled “plural society”, which, citing the President of the Republic as having said that “the French nation has a profound sense of the value of having immigrants among us, where they work and work well”, related various incidents involving persons from Africa or the gypsy community having committed criminal offences, without making further comment. It was held that the article would like “encourage reactions of rejection” in the reader.
- 24 June 1997: an election pamphlet making a commitment to fight immigration fiercely, called for the “invaders” to be driven out immediately, denouncing French officials as accomplices or collaborators with the “occupants of our land”, and demanding the expulsion of foreign pupils who were disrespectful and “harmful to the education of French youth.”

In October 2012, the government adopted an *Action Programme against Violence and Discrimination Based on Sexual Orientation and Gender Identity*. The Programme includes four main priorities: combating homophobic and transphobic violence, the development of inclusive dedicated programmes and curricula in the education system, initiatives to tackle discrimination, and governmental action at European and international level to promote the rights of LGBT people.

### **Finland**

Chapter 11, Section 10 of the Penal Code makes “incitement against a population group” an offence. Any individual who “spreads statements or other information among the public where a certain race, a national, ethnic or religious group or comparable group is threatened, defamed or insulted” may be sentenced to a

fine or to imprisonment for up to two years. In June 2011, sexual orientation was added to the list of protected characteristics.

Within the civil law, the Equal Treatment Act, restricted to the fields of education and employment, prohibits “harassment” as a form of discrimination at Section 6 and provides civil remedies. Harassment defined as the “deliberate or de facto infringement of the dignity and integrity of a person or group of people by the creation of an intimidating, hostile, degrading, humiliating or offensive environment.”

### ***Germany***

Article 130 of the Criminal Code defines the offence of “incitement” against “part of the population.” This has been interpreted as including a part of the population defined by a common sexual orientation. Under paragraph (1), the acts of “incitement to hatred”, “appeals to violent or wanton measures against parts of the population”, and “attacks on the human dignity of others through abusive language, malicious contempt or vilification” are criminalised to the extent that they threaten a disturbance of the “public peace”. Custodial sentences of between three months and five years are available as penalties. Under paragraph (2) the same penalties are available for expression contained in print, publication or picture.

### ***Greece***

Law 927/1979 (FEK A 139, 28/06/1979) provides imprisonment up to two years in addition to or instead of fines for “hate speech” based on racial origin or nationality. A 1984 reform added religion to the list of protected grounds. Neither sexual orientation nor gender identity is expressly protected by the provision.

### ***Hungary***

Article 296 of the Criminal Code provides that it is an offence for “a person who in front of a wider public, stirs up hatred against [...] the Hungarian nation or a national, ethnic, racial, religious group or certain groups of the society.” Sanctions of up to three years imprisonment are available under the provision. “Stirring up hatred” is understood as having a particularly high threshold, being that it must prompt “direct and immediate violent action.” ARTICLE 19 is not aware that Article 296 has been interpreted to include protections for groups defined by their sexual orientation or gender identity.

Under the civil law, the Equal Treatment Act (2003) makes “harassment” a cause of action where premised on sex, ethnic origin, or sexual orientation. Harassment includes conducts of sexual or another nature related to protected grounds with the purpose or effect of violating human dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment.

In December 2009, during a TV programme panel on “LGBT persons” comments were made that such people were “decaying and destroying society” and that they could not “coexist with the civilisation of white Christians.” The Hungarian Radio and Television Commission found that this was capable of stirring up hatred against LGBT people and violating their human rights. The TV station was ordered to broadcast the Commission’s main findings in a thirty-minute slot.<sup>105</sup>

### ***Iceland***

Section 223a of the Criminal Code makes it an offence for any person, by mockery, slander, insult, threat, or other means, to publicly attack a person or a group of persons on the grounds of their sexual orientation.

### ***Ireland***

The Prohibition of Incitement to Hatred Act 1989, at Section 2, prohibits words, behaviour or written material in a place other than a private residence which are “threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred” against “a group of persons in the State or elsewhere on account of their [...] sexual orientation.” Section 3 makes it an offence to broadcast an item involving “threatening, abuse or insulting visual images or sounds”. Section 4 makes the preparation and possession of material likely to stir up hatred an offence.

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<sup>105</sup> Hungary/Országos Radio és Televízió Testület (ORTT)/No. 2005/2009 (XII.16), 16 December 2009.

Summary convictions are available under the Prohibition of Incitement to Hatred Act 1989 with fines up to €1,270 or a term of imprisonment up to six months. A conviction following an indictment allows fines up to €12,700 and custodial sentences of up to 2 years.

More generally, Section 10 of the Non-Fatal Offences Against the Person Act 1997 makes harassment an offence if the harassing behaviour is persistent in nature. Section 6 of the Criminal Justice (Public Order) Act 1994 makes threatening abusive or insulting behaviour in a public place an offence, but a breach of the peace must either be intended or the individual must be reckless to a breach of the peace occurring.

The Equal Status Act 2000 and the Employment Equality Act 1998, provide civil remedies for harassment on the basis of sexual orientation.

The Press Council of Ireland state in their Code of Practice for Newspapers and Periodicals that “newspapers and periodicals shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their [...] gender, sexual orientation.”

### ***Italy***

Article 3 of the Legge 654/1975 (as amended by Decreto legge 122/1993), which implements the ICERD, penalises: a) those who propagandise ideas founded on racial or ethnic superiority or hate, or solicit someone to commit, or themselves commit, acts of discrimination for reasons of race, ethnicity, nationality or religion; b) those who, in every way, solicit someone to commit, or themselves commit, violence or acts which induce to violence for reasons of race, ethnicity, nationality or religion; c) those who take part or support organisations, associations, movements or groups which aim to solicit discrimination or violence for reasons of race, ethnicity, nationality or religion. Sexual orientation and gender identity are not expressly included as protected grounds.

On 28 October 1994 the Supreme Court upheld the conviction of a teacher for the crime of “vituperation” after the teacher had used a number of terms to humiliate a student, including the word “gay” used with a derogatory intent.<sup>106</sup>

### ***Latvia***

The Criminal Code was amended on the 21 June 2007 with Article 78, previously the “violation of national or racial equality and restriction of human rights” renamed “incitement to national, ethnic and racial hatred”. Article 150, previously “violation of equality rights of persons on the basis of their attitudes towards religion” was renamed “raising religious hatred”. A supplementary provision was added in Article 149, named “violation of prohibition of discrimination” which criminalises discrimination on the grounds of race or ethnic affiliation. ARTICLE 19 is not aware that these provisions have been interpreted to protect individuals on the grounds of sexual orientation or gender identity.

### ***Lithuania***

Section 170(3) of the Criminal Code provides “any person who by public statements orally, in writing or through mass media mocks, expresses contempt, incites hatred or discrimination against a group of people or an individual belonging to such group on account of their [...] sexual orientation [...] shall be punished by fine or restriction of freedom, or arrest, or imprisonment up to 3 years.”

### ***Luxembourg***

The Criminal Code provides custodial sentences of between 9 days and 2 years and or a fine of €251 to €25,000 for the verbal, written or graphic communication or materials that are made available in public places or meetings which incite discrimination, hate or violence against a natural or legal person or a group or community of persons. Sexual orientation is considered a protected characteristic.

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<sup>106</sup> Italy/Corte di Cassazione sez. V pen., 28.10.1994.

### **Malta**

Section 82A of the Criminal Code, as amended in 2012, prohibits the use of threatening, abusive or insulting words or behaviour or displays written or printed material or conduct to the same effect “with intent to stir up violence or hatred” or “whereby such violence or racial hatred is likely, having regard to all the circumstances” on account of listed grounds including sexual orientation and gender identity. Sentences of six to eighteen months imprisonment are available.

Section 6 of the Press Act similarly prohibits individuals to “threaten, insult, or expose to hatred, persecution or contempt, a person or group of persons because of their race, creed, colour, nationality, sex, disability as defined in Article 2 of the Equal Opportunities (Persons with Disability) Act, or national or ethnic origin.” Imprisonment of up to three months and fines are available as sanctions. Sexual orientation or gender identity are not expressly included as protected characteristics.

### **Mexico**

The Federal Law to Prevent and Eliminate Discrimination (11 June 2003) defines discrimination at Article 4 as “any distinction, exclusion or restriction, based on [...] sex [...] sexual orientation [...] or any other” which “has the effect of impairing or nullifying the recognition or exercise of the rights and real equality of opportunity for people”.

Article 9 prohibits any discriminatory practice that serves to prevent or reverse the recognition or exercise of rights and equality of opportunities on the basis of protected characteristics. At paragraph 27 of that provision prohibits incitement to hatred, violence, rejection, ridicule, defamation, slander, persecution or exclusion.

Article 185 of the Criminal Code prohibits “insult”, but only encompasses expression directed at an individual rather than at characteristics attributable to a group.

### **Netherlands**

Article 137(c) of the Penal Code criminalises any public expression about a group of people that is insulting towards people on the basis of protected characteristics, including “heterosexual or homosexual orientation.” Sentences include imprisonment of up to one year and fines up to €7600. Sentences may be aggravated if the conduct is in pursuance of an individual’s profession, is a habitual practice, or has been committed by two or more people.

Article 137(d) of the Penal Code makes the public incitement of hatred, discrimination or violence against persons on grounds of their heterosexual or homosexual orientation punishable with sanctions similar to Article 137(c). Article 137(e) makes it a criminal offence to insult a group through published statements that the person knew or ought to have known or may reasonably have suspected to incite hatred of or discrimination against people or violence against their person or property on grounds of their sexual orientation; sanctions include imprisonment up to 6 months and fines up to €7600. Aggravated sentences are provided for in similar terms to Article 137(c).

Article 226 makes it a criminal offence to insult a person, whether or not that insult is discriminatory. There is a public interest exception.

In 2002, the Court of Appeal upheld the acquittal of Imam el-Moumni for inciting hatred or discrimination against a group of people because of their sexual orientation under Article 137 of the Criminal Code. He had denounced homosexuality on the Dutch television channel *Nova* as “harmful to Dutch society” and as a “contagious disease”. The Court of Appeal found that in the context of the interview as a whole his statements were permitted as a manifestation of his religious freedom of expression as an Imam.

On 17 November 2006, the Amsterdam Court of Appeal upheld a conviction and sentence of a €500 fine and one-week suspended custodial sentence for a person who maintained a self-defined satirical website in

which he made statements that the death penalty was a “mild penalty” for homosexuals. The expression was termed “unnecessarily offensive”.<sup>107</sup>

On 6 January 2004, an individual was fined €50 for calling a police officer a “homosexual” during an arrest for public urination. The Court paid particular attention to the context of the expression in finding that the defendant intended to injure the police officer’s reputation.<sup>108</sup>

### ***New Zealand***

Section 61 of the Human Rights Act 1993 implements Article 20(2) of the ICCPR. It prohibits expression that is “threatening, abusive, or insulting” and considered “likely to excite hostility against or bring into contempt a person or group of persons on the ground of their colour, race or ethnic or national origins.” Section 131 establishes a criminal offence similar to Section 61 but adds the additional words “with intent to excite hostility or ill will against, or bring into contempt or ridicule.” Sexual orientation and gender identity are not included as protected characteristics.

The Race Relations Act (1971) makes “incitement to racial disharmony” a criminal offence. No equivalent provision exists for sexual orientation or gender identity.

Section 3 of the Films, Videos and Publications Classification Act (1993) (“the FVPCA”) prohibits the publication of material that “represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in Section 21(1) of the Human Rights Act 1993.” This includes the ground of sexual orientation.

- In *Living Word Distributors Ltd v. Human Rights Action Group Inc (Wellington)* (2000) film distributors challenged the decision of the Film and Literature Board of Review to classify two US-produced religious videos as “objectionable” under the FVPCA based on the prohibition on sexual orientation discrimination in Article 21(1) of the Human Rights Act 1993. While the High Court endorsed the decision of the Board of Review, the Court of Appeal overturned that decision on the basis of an error of law. The Court of Appeal ruled that the analysis must focus on whether the infringement on the right to freedom of expression (both to impart and receive) is justified in order to protect the state interest in protecting individuals from harm caused by the speech. It is this state interest, rather than the right of individuals to non-discrimination, that is the appropriate counter-balancing consideration when restricting freedom of expression.

The Broadcasting Act 1989 relates to discrimination and denigration, establishing that “[B]roadcasters should not encourage discrimination against, or denigration of, any section of the community on account of sex, sexual orientation, race, age, disability, occupational status, or as a consequence of legitimate expression of religion, culture or political belief”.

### ***Norway***

Section 135a of the Criminal Code provides for up to two years imprisonment for publicly threatening, insulting or subject to hatred, persecution or contempt any person or group of persons because of their “homosexual bent, life-style, or inclination.”

### ***Poland***

Article 256 of the Penal Code (1997) makes “offences against honour and personal inviolability” on the basis of national, ethnic, racial, or religious differences or for the absence of a religious belief a criminal offence. Article 257 of the Criminal Code makes it an offence to “publicly insult” a group within the population or a particular person, or “breach the personal inviolability of another individual” on the same protected grounds. Prison penalties of up to three years are available. ARTICLE 19 is not aware that the

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<sup>107</sup> Netherlands/Gerechtshof Amsterdam/No.23-000547-06.

<sup>108</sup> Hoge Raad [Supreme Court], no. 01019/03, LJN: AN8498.

protected grounds under either of these provisions has been interpreted as protecting people on account of their sexual orientation or gender identity.

### ***Portugal***

The Penal Code (2007) prohibits “racial, religious and sexual discrimination” in Article 240. Paragraph (1) criminalises the creation of an organisation or the provision of organised activities that incite discrimination, hatred or violence against individuals or groups of individuals because of their sex or sexual orientation or takes part in those activities, including by financial assistance. In paragraph (2) stipulates that it is considered an offence for anyone in a public gathering, who by printed or electronic means:

- Causes acts of violence against individuals or groups of individuals based on their ... sex or sexual orientation;
- Defames or insults individuals or groups of individuals because of their ... sex or sexual orientation, for example, by denying war crimes or crimes against peace and humanity; or
- Threatens individuals or groups of individuals because of their ... sex or sexual orientation with the intention of inciting ... discrimination.

The “Television Law” (Law 27/2077, altered by Law no. 8/2011) provides that “television and on demand services cannot, through their programming elements, incite racial, religious or political hate, [...] based on [...] sexual orientation.”

### ***Romania***

Article 369 of the Criminal Code 2009 makes incitement of the public, by any means, to hatred or discrimination against a category of persons, an offence. ARTICLE 19 is not aware whether this provision has been interpreted to protect a “category of persons” defined by their sexual orientation or gender identity.

### ***Russian Federation***

Article 282 of the Federal Criminal Code criminalises incitement to “hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group, if these acts have been committed in public or with the use of mass media.” These acts are punishable by fines, prohibitions on holding certain offices or engaging in certain activities, community service and imprisonment of up to two years. ARTICLE 19 is not aware that this provision has been applied to protect individuals on the basis of sexual orientation or gender identity.

### ***Slovenia***

Article 63 of the Constitution prohibits “any incitement to national, racial, religious or other discrimination and the inflaming of national, racial, religious or other hatred and intolerance.”

Article 297(1) of the Penal Code (2008) criminalises conduct that “publicly provokes or stirs up [...] hatred, strife or intolerance, or provokes any other inequality on the basis of [...] sexual orientation.” Custodial sentences of up to two years are provided. Subparagraph (3) provides an exemption for live media broadcasts where the expression was not preventable. Aggravated punishment is available for public officials under subparagraph (5). Subparagraph (6) allows for the confiscation of materials.

Article 131 of the Penal Code, more generally, prohibits “violation of the right to equality” and specifies gender and sexual orientation as protected grounds.

Article 8 of the Media Act prohibits “the dissemination of programming that encourages [...] sexual or any other inequality, or violence and war, or incites [...] sexual or any other hatred and intolerance”. Article 47 of the Media Act prohibits advertising that would, “incite racial, sexual or ethnic discrimination, religious or political intolerance”. Penalties equivalent to €10,000 are available as sanctions under both provisions.

### ***Spain***

Article 510(1) of the Criminal Code (1996) prohibits “incitement” as “[t]hose who provoke discrimination, hatred or violence against groups or associations for racist, anti-Semitic or other reasons regarding [...] gender, sexual orientation.” Custodial sentences up to three years and a fine equivalent to six to twelve months income are available. Article 510 (2) provides that “those who, knowing it to be false or in reckless disregard of the truth, spread injurious information on groups or associations in relation to their [...] gender, sexual orientation [...] will be punished with the same penalties.”

Article 515(5) of the Criminal Code prohibits associations “that promote or prompt discrimination, hatred or violence against people, groups or associations on grounds of their [...] gender, sexual orientation”. Article 517 establishes penalties for this offence: founders, directors and presidents of associations may be sentenced to prison for two – four years, a fine of twelve to twenty-four months wages, and disqualification from public employment or position for a period of six to twelve years. Active members may be punished with a prison term of one to three years and a fine of twelve to twenty-four months.

Article 173 of the Criminal Code prohibits “degrading treatment and seriously undermining their moral integrity” which may be employed in instances of “hate speech”.

The Statutes of Autonomy of Andalusia (Organic Law 2/2007 19 March) and Catalonia (Organic Law 6/2006 19 July 2006) both speak of the “fight against [...] homophobia” and the promotion of “equality of all individuals regardless of their [...] gender [...] or sexual orientation” respectively. The former cites teaching “about values and providing education which promotes equality, tolerance, freedom and solidarity” as a leading principle for public policy.

Article 27(2) of the Spanish Constitution provides: “Education shall aim at the full development of human personality with due respect for the democratic principles of coexistence and for basic rights and freedoms.” The law on Education and Culture of Peace (27/2005) provides that:

1. Ensuring that on all levels of the educational system, the subjects are given in accordance with the values of a culture of peace, and the creation of specialised subjects in questions concerning education for peace and democratic values.
2. To drive, from the side of peace, the incorporation of the values of non-violence, tolerance, democracy, solidarity and justice in the contents of textbooks, didactic and educational materials, and the audio visual programs intended for pupils.

Article 4.1 of the Law establishes the government obligation, “to promote all necessary action to develop the contents of the international agreement on eliminating all kinds of racial discrimination, discrimination against women and discrimination derived from sexual orientation”.

### ***Sweden***

Chapter 16, Article 8 of the Penal Code (SFS 1962:700) provides that a person is guilty of “agitation against a group” when making a statement or otherwise spreading a message that threatens or expresses contempt for an ethnic group or any other group of people, including groups defined by their sexual orientation. The ground of sexual orientation was added to the provision by an amendment adopted on 1 January 2003. Available sanctions include fines and custodial sentences of up to two years’ imprisonment. Aggravating circumstances allow for sentences of between six months and four years.

In 2005 the Supreme Court quashed the conviction of pastor Åke Green who had been sentenced to one month in prison in 2004 for inciting hatred on grounds of sexual orientation. Pastor Green had delivered a sermon, titled “is homosexuality congenital or the powers of evil meddling with people?” to approximately fifty persons in July 2003. During the sermon, he associated homosexuality with: (i) the origin and spread of AIDS; (ii) bestiality; (iii) paedophilia; and (iv) the corruption of pure thought. These statements were qualified with assurances that not all homosexuals were paedophiles nor did they all have AIDS. The Supreme Court ultimately held that while Green’s conviction was not in violation of the Swedish Constitution, it was a disproportionate restriction of his right to freedom of religion under Article 9 of the ECHR and his freedom of expression under Article 10 of the ECHR. The Court viewed that Pastor Green was acting out of his conviction to “improve the situation of his fellow man” and “what he considered his duty as pastor.” The Court rejected Pastor Green’s argument that his contention was with homosexual

conduct and not homosexuals as a group. The Court laid great emphasis on the context of the speech, and that there had been no incitement to violence. The Court concluded that Green's statements could not be said to encourage or justify hatred of homosexuals and that to convict him in these circumstances would therefore violate the ECHR. The ruling essentially requires Swedish courts to interpret the offence of "agitation against a group" narrowly.

On 6 July 2006, the Supreme Court reversed a 2005 ruling by the Court of Appeal and upheld the first instance conviction of four men for "agitation against a group" defined by their sexual orientation. The facts of the case in *Vejedland and Others* are outlined above. The Supreme Court gave particular attention to the fact that the leaflets had been distributed in a school in the lockers of students who did not have the opportunity to accept or reject them. While the leaflets intended to provoke debate on a matter of public interest, the manner in which the questions were phrased was offensive and disparaging to homosexuals as a group. The Supreme Court identified a duty under Article 10 to "as far possible" "avoid statements that are unwarrantedly offensive to others thus constituting an assault on their rights". Åke Green's case was distinguished on the basis that the statement made to his congregation was premised on quotations from the Bible and to a closed group of individuals in a Church. The European Court of Human Rights ultimately endorsed this reasoning in *Vejedland and others*.

### **Turkey**

Article 312 of the Penal Code provides for up to three years' imprisonment for anybody who "incites hatred based on class, race, religion, religious sect, or incites hatred between different religions." This provision does not include sexual orientation or gender identity as protected grounds. However, the provisions of the Penal Code concerning insult have been interpreted to protect individuals from offensive language on the basis of sexual orientation or gender identity.

In 2012 the Court of Cassation overturned the acquittal of a journalist who had been tried for "insult" following an article in which he criticised a politician for supporting an NGO event held to tackle homophobia. It is not clear from reports which provision of the Penal Code he had been charged under. However, the use of the terms "sexual deviant" and "faggot" were deemed to fall outside of the scope of acceptable speech and were not protected expressions. The Court of Cassation stated in their judgment that "the freedom of the press does not encompass the freedom to insult the personal freedoms of individuals." The newspaper was ordered to pay 4,000 Turkish Liras while the journalist was ordered to pay 2,000 liras in damages.<sup>109</sup>

### **United Kingdom**

Section 74 and Schedule 16 to the Criminal Justice and Immigration Act (CJIA) 2008 creates in England and Wales the offence of using "threatening words or behaviour" or to "display any written material which is threatening" if it is intended to "stir up hatred on grounds of sexual orientation". Hatred "on the grounds of sexual orientation" is defined in circular terms as "Hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex, or both."

Schedule 16 to the CJIA, at paragraph 14, provides the following defence to protect the right to freedom of expression in respect of prosecutions under section 74: "For the avoidance of doubt, the discussion or criticism of sexual conduct or practices or urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred."

Two cases under Section 74 of the CJIA should be noted:

- In January 2012 a jury at Derby Crown Court convicted three men for "stirring up hatred". One man was sentenced to two years in prison and two others to fifteen months in prison. The three men had delivered leaflets through letterboxes before a gay pride event depicting a mannequin hanging by the neck from a noose with the caption "God Abhors You" and "Turn or Burn". One of the defendants argued that he saw it as his duty as a Muslim to spread what God says about homosexuality. A prosecution witness had stated in Court that the leaflet had made him fear for his safety.

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<sup>109</sup> See: <http://www.kaosgl.org/page.php?id=10512>

- In June 2010, Paul Shaw, a Christian street preacher standing as an independent candidate in the general election was arrested for distributing leaflets calling for gay and lesbian people to be “locked up”. He was arrested for “stirring up hatred” under section 74 of the CJIA. The Crown Prosecution Service later dropped the prosecution citing lack of evidence to proceed.

Section 5 of the Public Order Act 1986 (“the Public Order Act”) makes it a criminal offence in England, Scotland and Wales to use “threatening, abusive or insulting words or behaviour, or disorderly behaviour, or display any writing, sign or other visible representation which is threatening, abusive or insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby”. The mental element of the offence, contained in Section 6 of the Public Order Act, states that a person must either intend or be aware that his conduct is or may be threatening, abusive or insulting or he intends or is aware that it may be disorderly. Section 4A of the Public Order Act makes it a criminal offence to intentionally cause harassment, alarm or distress to a specific person.

A number of cases under the Public Order Act should be noted:

- In 2002, street preacher Harry Hammond was arrested pursuant to Section 5 of the Public Order Act for preaching in the street while holding a sign bearing the words “Stop Immorality”, “Stop Homosexuality”, “Stop Lesbianism”, and “Jesus is Lord”. His sermon attracted a crowd of onlookers, culminating in a confrontation during which Hammond was assaulted. However, it was Hammond who was convicted and ordered to pay a fine of £300, costs of £395 and an order for the confiscation of his sign issued. He unsuccessfully appealed the decision, claiming a breach of his rights under Article 9 and Article 10 of the ECHR.
- In June 2005, student Sam Brown was held in police custody for one night after refusing to pay an £80 for asking a mounted police officer if he knew that his horse was a homosexual. The police claimed the slur was uttered “within the hearing or sight of a person likely to be caused harassment, alarm or distress”. However, in a statement to a student newspaper, a spokesperson for Thames Valley Police said that the incident was also “offensive to the policeman and his horse.” The Crown Prosecution Service eventually discontinued the prosecution.
- In December 2010, West Midlands Police were ordered by Birmingham Crown Court to pay £4000 in damages to Anthony Rollins, who had been arrested and held in police custody for four hours for quoting passages from the Bible, informing passers-by that homosexuals were “abominable” and “shall have their part in the lake which burneth with fire and brimstone.” Following this ruling, West Midlands Police settled a civil case brought by Dale McAlpine for £7000. Mr McAlpine alleged that he had been wrongfully arrested, unlawfully imprisoned and that his human rights had been breached after he had been arrested in April 2010 for telling a community support officer that homosexuality was a sin.

The Crime and Courts Act 2013 removed the term “insulting” from Section 5 of the Public Order Act 1986, but ARTICLE 19 remains concerned with this provision of the legislation.<sup>110</sup>

In the United Kingdom, the Home Office and the Association of Chief Police Officers require police forces to record “hate incidents” which are defined as “any non-crime incident *which is perceived by the victim or any other person*, as being motivated by hostility or prejudice based on a person’s sexual orientation.”<sup>111</sup> However, it appears that a number of police forces have taken these directions as requiring them to respond to “hate incidents”. For example, campaigner Lynette Burrows was telephoned by the police after she advocated in a BBC radio debate that gay couples should not be allowed to adopt children. The head of the

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<sup>110</sup> ARTICLE 19: “Insult to be decriminalised but greater protection for freedom of expression is still needed”, 15 January 2013; available at: <http://www.article19.org/resources.php/resource/3584/en/uk:-'insult'-to-be-decriminalised,-but-greater-protection-for-freedom-of-expression-is-still-needed>

<sup>111</sup> Association of Chief Police Officers and Home Office Standards Unit, *Hate Crime: Delivering a Quality Service* (London: Home Office, 2005), para. 2.2.1.

Muslim Council of Britain was also investigated after he told the Today programme on BBC Radio 4 that homosexuality was “not acceptable” and should be viewed as a medical problem.

### ***The United States of America***

The First amendment to the Constitution of the United States of America provides for protection of freedom of speech. It has been interpreted to severely restrict the power of the government to regulate expression. Any prohibition on expression that is premised on the *content* of that expression will be unconstitutional unless there is a compelling government interest that justifies it. However, certain forms of expression have been held to fall outside of the scope of the First Amendment protections, including obscene forms of expression and pornography; defamation; and ‘fighting words’ “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” The prohibition of incitement is therefore only permitted to prevent the advocacy of likely and imminent lawless action. These forms of speech must also address a person personally and trigger an immediate reaction.

The US has entered reservations in respect of Article 20 of the ICCPR and of Article 4 of the ICERD which specify that the provisions will only be complied with to the extent that they are compatible with the guarantees for the right to freedom of expression as contained in the United States Constitution.

### ***Ukraine***

Article 161 of the Criminal Code provides that “wilful actions inciting national, racial or religious enmity and hatred, humiliation of national honour and dignity, or the insult of citizens' feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, colour of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, shall be punishable by a fine of 200 to 500 tax-free minimum incomes, or restraint of liberty for a term up to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.” This provision may be interpreted to protect individuals on the basis of sexual orientation or gender identity.

### ***Uruguay***

Article 149 of the Criminal Code (1989) provides that, “whoever publicly or by any means suitable for public dissemination, incites to hatred or any form of moral or physical violence against a person or persons on account of their [...] sexual orientation or gender identity, is punishable by three to eighteen months in prison”. Law 17.677/2003 inserted the protected characteristics of sexual orientation and gender identity to the Criminal Code.