Prejudice against Groups, Prejudice-Motivated Crime, & Freedom of Expression

Submission from Atheist Ireland
to Department of Justice Consultation
on Hate Crime and Hate Speech

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1. Introduction to Atheist Ireland

Atheist Ireland is an Irish advocacy group. We promote atheism and reason over superstition and supernaturalism, and we promote an ethical, secular society where the State does not support or finance or give special treatment to any religion.

Since being formed in late 2008, we have campaigned for a secular Irish Constitution, parliament, laws, government, and education and healthcare systems. We are part of the dialogue process between the Government and religious and nonreligious philosophical bodies.

We base our policies on human rights standards. We have made submissions to and attended meetings of the United Nations Human Rights Committees and Council, the OSCE, the Council of Europe, and various Government Departments and consultation processes.

As atheists, we empathise with members of other groups who face prejudice and discrimination in Ireland, because we have first-hand experience of it. We also recognise that members of other groups face more frightening hostility in Ireland, including overt harassment, intimidation and violence. We should all stand together to challenge prejudice and hostility against any and all of us, and to protect the values of Western liberal democracy that enable us to do so.

This submission relates both to the review of the Prohibition of Incitement to Hatred Act 1989 and to any new legislation that may be developed on what is often described as hate crime. We would welcome the opportunity to take part in any face-to-face meetings to discuss this further.

2. The Law Should Say ‘Prejudice-Motivated Crime’ Not ‘Hate Crime’

Laws should be accurate, understandable, and enforceable. Their words and definitions should be coherent, universal and inclusive, with clear and justified boundaries, and free from ideological assumptions. A person should be able to know whether or not they are breaking it.

Laws based on ambiguous or emotive words cannot do this. ‘Hate crime’ laws are not about hate. They are fundamentally about prejudice and bias on the basis of being a member of a group with common characteristics. Here are several examples of this concern being raised by experts:

> “Reflecting academic suggestions that hate crimes commonly involve bias or prejudice (rather than hate), ODIHR uses the term ‘bias’ in defining the hate crime motivation, rather than the more extreme emotion of ‘hate’. Similarly, Sweden's National Council for Crime Prevention includes ‘fear, hostility or hate’ in its definition of motivations behind hate crimes, while in the UK the College of Policing’s hate crime guidance, which applies to all 43 police forces in England and Wales, similarly does not use ‘hate’ as its definition but rather the lesser emotions of ‘hostility or prejudice against an identifiable group of people’.”
> *— Defining Hate Crime Internationally, Jon Garland and Corinne Funnell, Globalisation of Hate, Oxford University Press, p22*

> “According to Hannah Arendt, ‘words can be relied on only if their function is to reveal and not to conceal’ (1996:66). In that case, the pairing of the two words ‘hate’ and ‘crime’ is notoriously unreliable. There are crimes motivated by genuine hatreds that would never be prosecuted as hate crimes, and the term ‘hate crime’ can cover forms of bias that would never qualify as hatred on any conventional use of the term. However, the ambiguity of ‘hate’ is only one of several forms of confusion about the meaning of ‘hate crime’. Describing it has been described as ‘notoriously difficult’ (Hall 2013:1) and like entering a ‘conceptual swamp’ (Berk, Boyd, and Hammer 2003:51). Definitions abound and consensus seems both improbable and to some degree undesirable.”
> *— Conceptualising Hatred Globally, Thomas Brudholm, Globalisation of Hate, Oxford University Press, p33*

> “And what does ‘hate’ signify in this context? Is it an emotion, an attitude, a disposition, or something other? There are some reasons to prefer the terms ‘bias’ and ‘prejudice’ to ‘hate’—they conceptually imply that the attitude is at fault, and they are attitudes connected to groups, not individuals.”
> *— Hate Crime Concepts and their Moral Foundations, David Brax, Globalisation of Hate, Oxford University Press, p54*

> “Hate speech constitutes a growing phenomenon around the globe. In order to better address problems linked to hate speech, such as discrimination and the commission of physical hate crimes, policy and lawmakers have tried, unsuccessfully, to define it.”
> *— How Should We Legislate Against Hate Speech? Viera Pejchal and Kimberley Brayson, Globalisation of Hate, Oxford University Press, p247*

Such laws often add to this confusion, by including definitions of ‘hate’ that are clearly not definitions of hate. As two practical examples, the Leicester Hate Crime Project 2014 (Britain’s biggest study of hate crime victimisation), and the ODIHR (which guides OSCE States) use the following definitions:

> “A hate crime refers to acts of violence, hostility and intimidation directed towards people because of their identity or perceived ‘difference’.”
> *https://le.ac.uk/hate-studies/research/the-leicester-hate-crime-project*

> “The ODIHR definition has two facets. First, a hate crime must constitute a criminal offence, and second, the victim of the offence must have been deliberately targeted because of their ethnicity, race, religion, or other status.”

— Defining Hate Crime Internationally, Jon Garland and Corinne Funnell, Globalisation of Hate, Oxford University Press, p22

It is instantly clear how much more precise, accurate, and enforceable the following would be:

"*A prejudice-motivated crime* refers to acts of violence, hostility and intimidation directed towards people because of their identity or perceived 'difference'."

"First, *a prejudice-motivated crime* must constitute a criminal offence, and second, the victim of the offence must have been deliberately targeted because of their ethnicity, race, religion, or other status."

3. The Law Must Not Become a Blasphemy Law by Another Name

Because religion is one of the characteristics that is protected under the law, there is a danger that this might evolve into becoming a blasphemy law by another name. The law should take into account the same principles that led to the law against blasphemy being removed from the Constitution, and soon to be repealed from our statute law.

Those principles are that the law should protect people from harm, but that the law should not protect ideas or beliefs from criticism, including harsh or unreasonable criticism, or even ridicule. These principles also apply to ideas or beliefs related to other characteristics protected by the law. This balance can best be reached by basing the law on human rights standards.

Religion is different in essence to most other protected characteristics such as sex, sexual orientation, age, disability and race. These other characteristics are fixed, and do not depend on the internal beliefs of the person involved.

Religion, however, is based on beliefs that can be chosen or rejected. In many cases it can be difficult to change religious beliefs because of early childhood immersion, and it can be even harder to manifest a change of belief because of community pressure.

But it remains the case that unlike, say, race, religion involves beliefs that can be changed, and it is important that the law does not criminalise expressions of criticism of those beliefs,

"regardless of the critical nature of the opinion, idea, doctrine or belief or whether that expression shocks, offends or disturbs others, so long as it does not cross the threshold of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence."
— Ahmed Shaheed, UN Special rapporteur on Freedom of Religion and Belief (this statement is expanded on in Section 6 of this submission)
https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24257&LangID=E

Heiner Bielefeld, the former United Nations Special Rapporteur on Freedom of Religion and Belief, wrote in the Oxford Journal of Law and Religion that:
https://academic.oup.com/ojlr/article/1/1/15/1547673

"A source of much confusion is the term 'identity' that plays a major role in many current debates on human rights, minority issues and anti-discrimination policies. It is one of those keys terms one can in fact hardly avoid using. However, the problem may arise that an unspecified invocation of 'identity' in the context of freedom of religion or belief can obscure the component of 'change' or 'choice' that forms an integral and indispensable part of this human right.

Given the right to also change one's religion or to have and adopt a religion or belief of one's own choice, the notion of identity in the area of religion or belief conceptually differs from, say, identity in the area of ethnicity. When using the somewhat fashionable identity

language, at least one has to insist that religious or belief-based identity is always an identity ‘in the making’, ie in the sense that it can change in most different ways and can also legitimately be exposed to missionary activities, including non-violent forms of provocation.

Saying this does not imply denying the possibility of serious changes also in other areas, like ethnicity. But still there remains a conceptual difference that in my opinion receives too little attention. To give just one example to illustrate the significance of that difference: While negative comments on some particular ethnic characteristics—an extreme case would be skin colour—for good reasons are generally condemned as unacceptable, negative remarks on religious ideas like, for instance, monotheism, divine revelation or re-incarnation, although possibly deemed offensive by the recipient groups, in my view clearly deserves a different assessment.

I would insist, at any rate, that there is a wider scope of legitimate intellectual provocation in the field of religion or belief than in the field of ethnicity—which has to do with the explicit recognition of the rights to change and to make choices in the field of religion or belief. Hence, if we simply lump together religion, belief, ethnicity, ‘race’ and other elements of a person's or a group's identity, with the purpose of protecting such identities, we run a serious risk of losing out of sight some crucial elements of freedom of religion or belief, including the freedom to search, choose, change, reach out, communicate, convert and peacefully provoke in the field of religious or belief.”

4. Tackle Prejudice with Education, Tackle Crime with the Law

There are two aspects to prejudice-motivated crimes.

- Prejudice is the internal motivation. It can range from bias to hatred, filtered through tribal paranoia, a desire to bully, or a desire for revenge for some real or imagined injustice.

- Hostility is the outward behaviour. It can range from discrimination to harassment, intimidation and violence, and ultimately to oppression and persecution by States or terrorists.

What these types of prejudice and hostility have in common is that the victims are targeted because of their membership of a group, rather than because of anything that they have done personally. Typically, the group will be one of those that the laws of western democracies protect from discrimination, such as sex, sexual orientation, gender identity, age, disability, religion, race, membership of the Traveller community, civil status or family status.

However, these types of prejudice and hostility have different outcomes.

- At its least bad, prejudice against groups leads to disharmony, discrimination, segregation, inequality and alienation among diverse individuals who could otherwise live together more happily. Even what may seem to be minimal incidents of prejudice can have a serious psychological impact on the people who are targeted if it happens on a regular basis.

- At its worst, prejudice-motivated hostility can be similar to terrorism, which both harms innocent people, and also sends a threatening message to other people who are members of that group. It leaves the victims, and others in their community, afraid to go about their day-to-day business without fearing that another attack might come any time now.

These differences mean that we must challenge them in different ways.

- On the one hand, we can only change prejudice, bias and hatred by education, political and community leadership, and social pressure. We cannot change how people think and feel by making it illegal. However, we can use education-related measures to help people to understand and empathise with people who have different personal characteristics.

- On the other hand, we can challenge hostility, discrimination and violence by making it illegal. And we can make prejudice an aggravating factor when it is a motive for an existing crime.

- While doing both of the above, we should not criminalise people merely because of what they say or publish, no matter how repugnant their views, unless what they say or publish is defamatory, or a direct incitement to violence or another crime.

Again, this balance can best be reached by basing the law on human rights standards.

Even where a relevant crime has been committed, responding to that crime through the law should be accompanied with responding to the underlying prejudice through education. The Leicester Hate Crime Project said the following in its Victims' Manifesto:
https://le.ac.uk/hate-studies/research/the-leicester-hate-crime-project/our-reports

> "10. There is often an assumption that members of the public – and particularly victims of crime – demand punitive responses to offending behaviour. Within the context of this study however, participants showed an overwhelming preference for the use of educational interventions and restorative approaches to justice, as opposed to extended prison sentences or harsher regimes. Moreover, this preference was shared by victims of different types of violent and non-violent hate crime and from different communities, ages and backgrounds.
>
> Many participants spoke of wanting the offender to understand the impact that their behaviour had had on them, their family and in some cases their wider community, and believed that this could be achieved through the use of facilitated mediation. More broadly, participants called for schools, youth workers and community groups to use educational programmes as a platform to inform young people about positive aspects of diversity, to connect divided and segregated communities, and to raise awareness of the harms of hate. Overall, participants felt that the use of smarter punishment – and not harsher punishment – offered a more effective route to challenging underlying prejudices, and therefore to preventing future offending."

5. Tackling Prejudice against Groups through Education and Leadership

The best way to tackle prejudice against groups is by bringing together people with different or overlapping characteristics, and working together on common goals. Atheist Ireland regularly works together with other groups facing prejudice in Ireland.

In particular, we have formed a unique alliance between Atheist Ireland, the Evangelical Alliance of Ireland, and the Ahmadiyya Muslim community in Ireland, as three groups with very different world-views who are all discriminated against by the lack of secular schools.

We also assist immigrants and refugees to Ireland who face prejudice because of their membership of a group, in particular ex-Muslims, and we work internationally with other atheist and secular groups who face similar problems in countries that are not democratic.

As well as the police dealing with crimes, there should also be a wide variety of people and organisations in society who are trained in helping people who face prejudice against groups, or at least who can direct victims to somebody who can help them more effectively.

The Leicester Hate Crime Project found that victims sometimes report their experiences to people or organisations such as: Teachers; Victim Support; Local Councils; Social Care Workers; Doctors or Nurses; Housing Associations; Disability Networks or Organisations; LGBT Organisations; Community Leaders; Race Equality Networks or Organisations; Faith Networks or Organisations; Local Libraries; Transgender Networks or Organisations; True Vision.

However, the Leicester Hate Crime Project found that, while responses from Victim Support in particular were positive, some other people and groups were unable to respond knowledgeably.

The Leicester Hate Crime Project has also published a Victims' Manifesto which embodies the needs and expectations of those whose lives have been directly affected by hate crime. Their recommendations are:
https://le.ac.uk/hate-studies/research/the-leicester-hate-crime-project/our-reports

- Frontline practitioners should treat victims with empathy, humanity and kindness.
- Organisations should consider early interventions before incidents escalate into violence.
- Hate crime awareness campaigns should be publicised in more appropriate community locations.
- Public transport should be made safer for all.
- The public should be encouraged to take appropriate action when witnessing hate crimes.
- Third party reporting mechanisms should be located, staffed and publicised appropriately.
- Organisations should simplify reporting procedures and make them more victim-friendly.
- Organisations should engage more extensively with different groups and communities.
- Voluntary and tailored community services should be supported and properly resourced.
- Non-punitive responses to hate offending should be pursued to challenge underlying prejudices.

6. The Law Should be Based on Human Rights Principles

The following human rights principles are based on the balance between the rights to freedom of expression and freedom of religion or belief. These principles also apply to ideas or beliefs related to other characteristics protected by the law.

In March 2019, the UN Rapporteur on Freedom of Religion and Belief, Ahmed Shaheed, stated in the recommendations section of his report to the 40th session of the Human Rights Council:
https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24257&LangID=E

> "55 International law compels States to pursue a restrained approach in addressing tensions between freedom of expression and freedom of religion or belief. Such an approach must rely on criteria for limitations which recognise the rights of all persons to the freedoms of expression and manifestation of religion or belief, regardless of the critical nature of the opinion, idea, doctrine or belief or whether that expression shocks, offends or disturbs others, so long as it does not cross the threshold of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence."
>
> "57 Increasingly, limitations on freedom of expression related to religion or belief take the form of anti-"hate speech" laws. Article 20 (2) of the International Covenant on Civil and Political Rights provides that States must prohibit by law any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. At the same time, general comment No. 34 (2011) stresses that prohibitions under article 20 (2) must comply with the regime for limitations under article 19 (3). Moreover, advocacy of hatred requires a nuanced response that includes criminal sanctions as well civil, administrative and policy measures. States must ensure that criminal sanctions are imposed only in the most serious cases and be, based on a number of contextual factors, including intent."
>
> "62 countries must assess existing laws and measures for any vagueness of formulation… and review and redress laws and measures which do not stress the importance of *mens rea* (the reasonably evident presence of intent) as a necessary element in assessing guilt and punishment. The absence of the element of intent in formulating the definition of an offence, whether in the case of blasphemy or incitement to violence, has often resulted in erroneous convictions."

In 2008, the Venice Commission (European Commission for Democracy through law) published a report on the relationship between Freedom of Expression and Freedom of Religion.
https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)026-e

> "43. Freedom of expression, guaranteed by Article 10 ECHR, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its

progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb.

"44. A democracy should not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion through open public debate, as opposed to ban or repression, is the most democratic means of preserving fundamental values."

"68. It is true that the boundaries between insult to religious feelings (and even blasphemy) and hate speech are easily blurred, so that the dividing line, in an insulting speech, between the expression of ideas and the incitement to hatred is often difficult to identify. This problem however should be solved through an appropriate interpretation of the notion of incitement to hatred rather than through the sanctioning of insult to religious feelings."

"84. As important as the role of the courts may be in deciding whether a statement amounted to incitement to hatred or whether damages are incurred, the Commission is of the opinion that the relationship between freedom of expression and freedom of religion should not per se be regulated through court rulings, but, first and foremost, through rational consultation between people, believers and non-believers."

7. The Rabat Plan of Action

In 2013, the United Nations High Commissioner for Human Rights, in a report to the 22nd session of the Human Rights Council, addressed the question of the prohibition of incitement to national, racial or religious hatred. In particular, the report provided details on the wrap-up expert meeting organised in Rabat in October 2012, which brought together conclusions and recommendations from expert workshops and resulted in the adoption by the experts of the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

The Rabat Plan of Action states that:

"Pursuant to principle 12, national legal systems should make it clear, either explicitly or through authoritative interpretation, that the terms "hatred" and "hostility" refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term "advocacy" is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups. (footnote 5)"

"14. Under international human rights standards, which are intended to guide legislation at the national level, expression labelled as "hate speech" can be restricted under articles 18 and 19 of the International Covenant on Civil and Political Rights on different grounds, including respect for the rights of others, public order or sometimes national security. States are also obliged to "prohibit" expression that amounts to "incitement" to discrimination, hostility or violence (art. 20, para. 2, of the Covenant and, under some different conditions, art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination)."

"20. In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others."

“22. States should ensure that the three-part test – legality, proportionality and necessity – for restrictions to freedom of expression also applies to cases of incitement to hatred.”

“29. It was suggested that a high threshold be sought for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 of the International Covenant on Civil and Political Rights. In order to establish severity as the underlying consideration of the thresholds, incitement to hatred must refer to the most severe and deeply felt form of opprobrium. To assess the severity of the hatred, possible elements may include the cruelty or intent of the statement or harm advocated, the frequency, quantity and extent of the communication. In this regard, a six-part threshold test was proposed for expressions considered as criminal offences:

> (a) Context: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;
>
> (b) Speaker: The speaker’s position or status in the society should be considered, specifically the individual’s or organisation’s standing in the context of the audience to whom the speech is directed;
>
> (c) Intent: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.
>
> (d) Content and form: The content of the speech constitutes one of the key foci of the court’s deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;
>
> (e) Extent of the speech act: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;
>
> (f) Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.”

“35. While a legal response is important, legislation is only part of a larger toolbox to respond to the challenges of hate speech. Any related legislation should be complemented by initiatives from various sectors of society geared towards a plurality of policies, practices and measures nurturing social consciousness, tolerance and understanding change and public discussion. This is with a view to creating and strengthening a culture of peace, tolerance and mutual respect among individuals, public officials and members of the judiciary, as well as rendering media organisations and religious/community leaders more ethically aware and socially responsible. States, media and society have a collective

responsibility to ensure that acts of incitement to hatred are spoken out against and acted upon with the appropriate measures, in accordance with international human rights law."

8(a) Application of Human Rights Law to 'Hate Speech'

In October 2019, David Kaye, the United Nations Special Rapporteur on the promotion and protection of the freedom of opinion and expression, published a report to the United Nations General Assembly on the human rights law that applies to freedom of expression, with particular regard to online 'hate speech'.
https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

The Special Rapporteur began, in the same manner as we have highlighted throughout this document, by describing the problems associated with using the phrase 'hate speech'.

> "1 'Hate speech', a short-hand phrase that conventional international law does not define, has a double-edged ambiguity. Its vagueness, and the lack of consensus around its meaning, can be abused to enable infringements on a wide range of lawful expression. Many governments use 'hate speech,' like 'fake news,' to attack political enemies, non-believers, dissenters and critics. Yet the phrase's weakness ('it's just speech') also seems to inhibit governments and companies from addressing genuine harms such as the kind that incites violence or discrimination against the vulnerable or the silencing of the marginalised. The situation frustrates a public that often perceives rampant online abuse."

He then addressed 'hate speech' regulation in international human rights law.

> "6. Since the freedom of expression is fundamental to the enjoyment of all human rights, restrictions on it must be exceptional, subject to narrow conditions and strict oversight. The Human Rights Committee has underlined that restrictions, even when warranted, "may not put in jeopardy the right itself". The exceptional nature of limitations is described in article 19 (3) of the Covenant, recognising that States may restrict expression under article 19 (2) only where provided by law and necessary to respect the rights or reputations of others or protect national security, public order, public health or morals.
>
> These are narrowly defined exceptions (see, in particular, A/67/357, para. 41, and A/HRC/29/32, paras. 32–35), and the burden falls on the authority restricting speech to justify the restriction, not on the speakers to demonstrate that they have the right to such speech.8 Any limitations must meet three conditions:
>
> (a) *Legality*. The restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion, and appropriate notice must be given to those whose speech is being regulated. Rules should be subject to public comment and regular legislative or administrative processes. Procedural safeguards, especially those guaranteed by independent courts or tribunals, should protect rights;
>
> (b) *Legitimacy*. The restriction should be justified to protect one or more of the interests specified in article 19 (3) of the Covenant, that is, to respect the rights or reputations of others or to protect national security, public order, public health or morals;
>
> (c) *Necessity and proportionality*. The restriction must be demonstrated by the State as necessary to protect a legitimate interest and to be the least restrictive means to achieve the purported aim. The Human Rights Committee has referred to these conditions as "strict tests", according to which restrictions "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".
>
> "8. Under article 20 (2) of the Covenant, States parties are obligated to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination,

hostility or violence". States are not obligated to criminalise such kinds of expression. The previous Special Rapporteur explained that article 20 (2) relates to (a) advocacy of hatred, (b) advocacy which constitutes incitement, and (c) incitement likely to result in discrimination, hostility or violence (A/67/357, para. 43)."

"10. A critical point is that the individual whose expression is to be prohibited under article 20 (2) of the Covenant is the advocate whose advocacy constitutes incitement. A person who is not advocating hatred that constitutes incitement to discrimination, hostility or violence, for example, a person advocating a minority or even offensive interpretation of a religious tenet or historical event, or a person sharing examples of hatred and incitement to report on or raise awareness of the issue, is not to be silenced under article 20 (or any other provision of human rights law). Such expression is to be protected by the State, even if the State disagrees with or is offended by the expression. There is no "heckler's veto" in international human rights law."

"24. It is important to emphasise that expression that may be offensive or characterised by prejudice and that may raise serious concerns of intolerance may often not meet a threshold of severity to merit any kind of restriction. There is a range of expression of hatred, ugly as it is, that does not involve incitement or direct threat, such as declarations of prejudice against protected groups. Such sentiments would not be subject to prohibition under the International Covenant on Civil and Political Rights or the International Convention on the Elimination of All Forms of Racial Discrimination, and other restrictions or adverse actions would require an analysis of the conditions provided under article 19 (3) of the Covenant. The six factors identified in the Rabat Plan of Action for criminalising incitement also provide a valuable rubric for considering how to evaluate public authorities' reactions to such speech. Indeed, the absence of restriction does not mean the absence of action; States may (and should, consistent with Human Rights Council resolution 16/18) take robust steps, such as government condemnation of prejudice, education, training, public service announcements and community projects, to counter such intolerance and ensure that public authorities protect individuals against discrimination rooted in these kinds of assertions of hate."

8(b) Application of Human Rights Law to Online 'Hate Speech'

The Special Rapporteur went on to address the human rights law that applies to freedom of expression, with particular regard to online 'hate speech'. He began by addressing State obligations and the regulation of online hate speech, including by stating that:

"29. Strict adherence to international human rights law standards protects against governmental excesses. As a first principle, States should not use Internet companies as tools to limit expression that they themselves would be precluded from limiting under international human rights law. What they demand of companies, whether through regulation or threats of regulation, must be justified under and in compliance with international law. Certain kinds of action against content are clearly inconsistent with article 19 (3) of the International Covenant on Civil and Political Rights, such as Internet shutdowns and the criminalisation of online political dissent or government criticism (see A/HRC/35/22). Penalties on individuals for engaging in unlawful hate speech should not be enhanced merely because the speech occurred online.

"31. Article 19 (3) of the Covenant requires that, when imposing liability for the hosting of hate speech, the phrase itself and the factors involved in identifying the instances of hate speech must be defined. In a proposal to impose liability for a failure to remove "incitement", the content of such incitement must be defined consistent with article 20 (2) of the Covenant and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, including by defining the key terms in the Rabat Plan of Action noted above."

"32. Several States have adopted or are considering adopting rules that require Internet companies to remove "manifestly unlawful" speech within a particular period, typically

within 24 hours or even as brief as 1 hour, or otherwise to remove unlawful content within a lengthier period. The most well-known of these laws is the Network Enforcement Act of Germany… While the Network Enforcement Act should be understood as a good-faith effort to deal with widespread concern over online hate and its offline consequences, the failure to define these key terms undermines the claim that its requirements are consistent with international human rights law."

"35. The push for upload filters for hate speech (and other kinds of content) is ill-advised, as it drives the platforms towards the regulation and removal of lawful content. They enhance the power of the companies with very little, if any, oversight or opportunity for redress. States should instead be pursuing laws and policies that push companies to protect free expression and counter lawfully restricted forms of hate speech through a combination of features: transparency requirements that allow public oversight; the enforcement of national law by independent judicial authorities; and other social and educational efforts along the lines proposed in the Rabat Plan of Action and Human Rights Council resolution 16/18."

He then addressed Company content moderation and hate speech, including by stating that:

"40. It is on the platforms of Internet companies where hateful content spreads online, seemingly spurred on by a business model that values attention and virality. The largest companies deploy "classifiers", using artificial intelligence software to identify proscribed content, with perhaps only intermittent success, on the basis of specific words and analysis."

"41. Internet companies shape their platforms' rules and public presentation (or brand). They have an enormous impact on human rights, particularly but not only in places where they are the predominant form of public and private expression, where a limitation of speech can amount to public silencing or a failure to deal with incitement can facilitate offline violence and discrimination (A/HRC/42/50, paras. 70–75)."

"42. In previous reports, it has been argued that all companies in the ICT sector should apply the Guiding Principles on Business and Human Rights of the United Nations and integrate human rights into their products by design and by default. However, companies manage hate speech on their platforms almost entirely without reference to the human rights implications of their products… The Special Rapporteur reiterates the call for companies to implement human rights policies that involve mechanisms to:

(a) Conduct periodic reviews of the impact of the company products on human rights;

(b) Avoid adverse human rights impacts and prevent or mitigate those that arise;

(c) Implement due diligence processes to "identify, prevent, mitigate and account for how they address their impacts on human rights" and have a process for remediating harm."

"45. The lack of transparency is a major flaw in all the companies' content moderation processes. There is a significant barrier to external review (academic, legal and other) of hate speech policies as required under principle 21: while the rules are public, the details of their implementation, at the aggregate and granular levels, are nearly non-existent…"

"47. The companies should review their policies, or adopt new ones, with the legality test in mind. A human rights-compliant framework on online hate speech would draw from the definitional guidance mentioned above and provide answers to the following:

(a) What are protected persons or groups?
(b) What kind of hate speech constitutes a violation of company rules?
(c) Is there specific hate speech content that the companies restrict?
(d) Are there categories of users to whom the hate speech rules do not apply?

"52. Evelyn Aswad identifies three steps that a company should take under the necessity framework: evaluate the tools it has available to protect a legitimate objective without interfering with the speech itself; identify the tool that least intrudes on speech; and assess whether and demonstrate that the measure it selects actually achieves its goals."

8(c) Recommendations for States Regarding Online 'Hate Speech'

The Special Rapporteur made the following recommendations for States:

"57. State approaches to online hate speech should begin with two premises. First, human rights protections in an offline context must also apply to online speech. There should be no special category of online hate speech for which the penalties are higher than for offline hate speech. Second, Governments should not demand – through legal or extralegal threats – that intermediaries take action that international human rights law would bar States from taking directly. In keeping with these foundations, and with reference to the rules outlined above, States should at a minimum do the following in addressing online hate speech:

(a) Strictly define the terms in their laws that constitute prohibited content under article 20 (2) of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and resist criminalising such speech except in the gravest situations, such as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and adopt the interpretations of human rights law contained in the Rabat Plan of Action;

(b) Review existing laws or develop legislation on hate speech to meet the requirements of legality, necessity and proportionality, and legitimacy, and subject such rule-making to robust public participation;

(c) Actively consider and deploy good governance measures, including those recommended in Human Rights Council resolution 16/18 and the Rabat Plan of Action, to tackle hate speech with the aim of reducing the perceived need for bans on expression;

(d) Adopt or review intermediary liability rules to adhere strictly to human rights standards and do not demand that companies restrict expression that the States would be unable to do directly, through legislation;

(e) Establish or strengthen independent judicial mechanisms to ensure that individuals may have access to justice and remedies when suffering cognizable harms relating to article 20 (2) of the Covenant or article 4 of the Convention;

(f) Adopt laws that require companies to describe in detail and in public how they define hate speech and enforce their rules against it, and to create databases of actions taken against hate speech by the companies, and to otherwise encourage companies to respect human rights standards in their own rules;

(g) Actively engage in international processes designed as learning forums for addressing hate speech."

8(d) Recommendations for Companies Regarding Online 'Hate Speech'

The Special Rapporteur also made the following recommendations for online companies:

"58. Companies have for too long avoided human rights law as a guide to their rules and rule-making, notwithstanding the extensive impacts they have on the human rights of their users and the public. In addition to the principles adopted in earlier reports and in keeping with the Guiding Principles on Business and Human Rights, all companies in the ICT sector should:

(a) Evaluate how their products and services affect the human rights of their users and the public, through periodic and publicly available human rights impact assessments;

(b) Adopt content policies that tie their hate speech rules directly to international human rights law, indicating that the rules will be enforced according to the standards of international human rights law, including the relevant United Nations treaties and interpretations of the treaty bodies and special procedure mandate holders and other experts, including the Rabat Plan of Action;

(c) Define the category of content that they consider to be hate speech with reasoned explanations for users and the public and approaches that are consistent across jurisdictions;

(d) Ensure that any enforcement of hate speech rules involves an evaluation of context and the harm that the content imposes on users and the public, including by ensuring that any use of automation or artificial intelligence tools involve human-in-the-loop;

(e) Ensure that contextual analysis involves communities most affected by content identified as hate speech and that communities are involved in identifying the most effective tools to address harms caused on the platforms;

(f) As part of an overall effort to address hate speech, develop tools that promote individual autonomy, security and free expression, and involve de-amplification, de-monetisation, education, counter-speech, reporting and training as alternatives, when appropriate, to the banning of accounts and the removal of content."

9. Police Operational Guidelines in the United Kingdom

Our law should ensure that the Police Operational Guidelines on this issue in the United Kingdom cannot be replicated here, particularly with regard to the concept of 'non-crime hate incidents.' http://library.college.police.uk/docs/appref/C204I1019_Hate%20Crime%20Operational%20Guidance.pdf

These Guidelines have resulted in police officers calling to the houses and workplaces of people, who the police know have not committed any crime, to warn that person about content that they have lawfully published online, because somebody else has complained that they were motivated by hatred, without the complainant being required to justify their belief with any evidence.

Even though the person has committed no crime, the police then record and store the person's details under the heading 'non-crime hate incident'. Potential employers can then access this information under Disclosure and Barring Service checks.

This practice is currently the subject of a Judicial Review in the United Kingdom High Court, with the judgement due either before Christmas or early next year.

Because religion is one of the characteristics that is protected under the law, there is a danger that such Guidelines might evolve into becoming a blasphemy law by another name, as we have outlined in Section 3 of this document.

The Police Operational Guidelines in the United Kingdom include the following potential or actual breaches of human rights:

Responding to Hate

"1.4 Chief officers should ensure that hate crimes and non-crime hate incidents are recorded and included as part of the force intelligence and demand assessments."

Perception-based Recording

> “1.10 The perception of the victim, or any other person, determines whether an incident should be flagged as a hate crime (where circumstances meet crime recording standards), or non-crime hate incident.”

> “1.11 The victim does not have to justify or provide evidence of their belief, and police officers or staff should not directly challenge this perception. Evidence of the hostility is not required for an incident to be recorded as a hate crime or non-crime hate incident.”

> “1.12 If the facts do not identify a recordable crime but the victim perceived it to be a hate crime, it should be recorded as a non-crime hate incident.”

Malicious Complaints

> “1.22 If a report of a malicious complaint identifies that a crime has been committed, this should be recorded as such… If no crime has taken place, but the victim or any other person still perceives that the incident was motivated wholly or partly by hostility, it should be recorded as a non-crime hate incident.”

Non-Monitored Hate Crime

> “1.25 Forces, agencies and partnerships can extend their local policy response to hate crime and non-crime hate incidents to include additional types of hostilities they believe are prevalent in their area or that are causing the greatest concern to their community.”

Responding to Non-Crime Hate Incidents

> “5.2 Where it is established that a criminal offence has not taken place, but the victim or any other person perceives that the incident was motivated wholly or partly by hostility, it should be recorded as a non-crime hate incident.”

Recording Non-Crime Hate Incidents

> “5.28 Police officers may also identify a non-crime hate incident, even where the victim or others do not.”

> “5.29 The recording system for local recording of non-crime hate incidents varies according to local force policy.”

Disclosure and Barring Service Checks

> “5.33 A current or prospective employer may request a Disclosure and Barring Service (DBS) check as part of their employment and/or recruitment processes.”

> “5.34 For the majority of roles, a standard DBS check will be required and this will disclose conviction information, including cautions. An enhanced DBS check will show the same data as a standard check, plus any other information held by the police that the chief officer considers to be relevant to the role. This may include records relating to non-crime hate incidents.”

> “5.35 Chief officers must take into account the circumstances of the non-crime hate incident and whether it is relevant to the DBS check taking into account the role for which the person is applying, proportionality and human rights.”

Responding to Online Hate Crimes

> "9.8 If an allegation does not include a crime, the incident should be recorded as a non-crime hate incident, and the victim can be encouraged to contact the internet host themselves to ask them to consider removing the material. If they report it to True Vision, it would be recorded centrally as a non-crime hate incident."

10. Prohibition of Incitement to Hatred Act 1989

With specific regard to the review of the Prohibition of Incitement to Hatred Act 1989, we recommend the following:

That the title should be changed to:

> "Prohibition of Incitement to Prejudice-Motivated Crime Act.

That the definition of Prejudice-Motivated Crime should be:

> "Discrimination, hostility or violence against a person or persons based on their membership or perceived membership of a group with characteristics that are protected by law."

That the notion of 'stirring up' 'hatred' should be dropped, as it is not sufficiently accurate, precise, understandable, or coherent to form part of a law.

That the crime should require either intention to incite a prejudice-motivated crime, or that incitement to such a crime should be a reasonably foreseeable consequence based on the available evidence.

That the core of the offence should be something like:

> "To publish or distribute written material, words, (…etc.) which are intended to incite a prejudice-motivated crime, or, having regard to all the circumstances including the available evidence, incitement to a prejudice-motivated crime is a reasonably foreseeable consequence…"

That it should be made explicit that is not an offence under this Act to criticise beliefs, ideas, ideologies, or historic or current behaviours, associated with groups whose members are protected as individuals from prejudice-motivated crime.

That the remainder of the Act should be amended, where relevant, to reflect these changes.

11. Conclusion

These are our recommendations on how the State should

- Tackle prejudice against groups through education,
- and tackle prejudice-motivated crime through the law,
- while protecting the right to freedom of expression,
- based on human rights principles and standards,

with regard both to the review of the Prohibition of Incitement to Hatred Act 1989 and to any new legislation that may be developed to deal with what is often described as hate crime.

We would welcome the opportunity to take part in any face-to-face meetings to discuss this submission further.

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