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# Hate speech, report 3

The boundary between freedom  
of speech and criminal law  
protection against hate speech

Jon Wessel-Aas, Audun Fladmoe and Marjan Nadim

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# Preface

The Institute for Social Research (ISF) has been commissioned by the Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) to prepare three reports on hate speech. ISF has cooperated with KUN<sup>1</sup> and lawyer Jon Wessel-Aas in the preparation of these reports. The background for the project is the strategy to prevent hate speech presented by the Norwegian Government in November 2016. The reports are included as part of the knowledge base for this strategy.

Marjan Nadim from ISF has been Project Manager. The members of the project team have worked together in one group, but divided the work on the reports among themselves. For Report 1, Marjan Nadim and Audun Fladmoe, also from ISF, have reviewed relevant statistics and research on the nature and extent of online hate speech. For Report 2, Helga Eggebø and Elisabeth Stubberud (KUN) have reviewed research that sheds light on the relationship between hate speech and discrimination, bullying and violence. For Report 3, Jon Wessel-Aas has investigated the legal boundary between freedom of speech and protection against hate speech, while Audun Fladmoe and Marjan Nadim have described ongoing discussions about where such boundaries should be drawn.

Simultaneously with this project, ISF and Jon Wessel-Aas have also been working on a project for the Ministry of Justice and Public Security relating to the prevention of online hate speech and hate crime. The projects have several common factors, particularly in relation to parts of the literature review and legal investigations. This has allowed the project group to gain in-depth knowledge of the research literature, but also implies that there is somewhat of an overlap between the reports prepared for the Norwegian Directorate for Children, Youth and Family Affairs and for the Ministry of Justice and Public Security respectively.

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<sup>1</sup> KUN is a private foundation located in Steigen in Nordland County, Norway that works with gender equality, diversity and integration. For more detailed information, go to [www.kun.no](http://www.kun.no).

Our sincere thanks to Joseph Vasquez, Karen Sofie Pettersen and Cecilie Håkonsen Sandness at the Norwegian Directorate for Children, Youth and Family Affairs and Kari Steen-Johnsen, Arnfinn H. Midtbøen, Marte Winsvold and Bernard Enjolras at the Institute for Social Research for their helpful input on previous drafts of the reports. Jon Haakon Hustad at the library at ISF has provided invaluable help with the literature search.

Oslo and Steigen, 30 September

Marjan Nadim (Project Manager)

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# Summary

<b>Authors</b>	Jon Wessel-Aas, Audun Fladmoe and Marjan Nadim
<b>Title</b>	Hate speech, report 3: The boundary between freedom of speech and criminal law protection against hate speech
<b>Summary</b>	<p>In Norwegian law we have civil anti-discrimination legislation that prohibits discrimination and harassment based on ethnicity, religion, beliefs, disability, gender, sexual orientation, gender identity or gender expression. However, with the exception of the Ethnicity Anti-Discrimination Act, none of these anti-discrimination laws contain a legal basis for penalties for contravention.</p> <p>Our most important penal provision pertaining to hate speech is Section 185 of the Norwegian General Civil Penal Code. Of the above-mentioned grounds for discrimination, the penal provision only includes ethnicity/skin colour/nationality, religion/beliefs, homosexual orientation and disability.</p> <p>Neither sexual orientation in general nor gender and gender identity/ expression receive direct criminal law protection against hate speech. However, these categories are still given indirect protection in more general provisions in criminal law.</p> <p>For instance Section 266 of the Norwegian General Civil Penal Code, relating to offensive behaviour, may include hate speech that is based on gender and gender expression/identity, at least when such statements are made to the person they apply to. In addition, Section 77 of the Norwegian General Civil Penal Code contains a provision that entails that it may constitute aggravating circumstances if a criminal offence is motivated by "factors that offend groups with a special need for protection". This allows for the inclusion of grounds for discrimination other than those that are protected under Section 185 of the Norwegian General Civil Penal Code. For example, there may be sanctions for violation of Section 183 of the Norwegian General Civil Penal Code relating to incitement to commit a criminal act. If someone incites others to commit criminal acts against someone because of their gender or gender expression/identity, this may constitute aggravating circumstances pursuant to Section 77. Section 265 of the Norwegian General Civil Penal Code, which applies to threats in general, will also apply to threats that are motivated by different grounds for discrimination to those covered by Section 185. The fact that one of the grounds for discrimination is not covered by Section 185 does not therefore mean that it is completely without criminal law protection from hate speech. On the contrary, it can be claimed that much that lies at the heart of Section 185, as this is interpreted, is also covered by the Norwegian General Civil Penal Code's general prohibition against incitement to commit criminal acts, and against threats and offensive behaviour.</p>



In terms of legal sources, the situation is complex. The interpretation and application of the provisions in the Norwegian General Civil Penal Code must take place in a manner that is compatible with freedom of speech as this is protected in both the Constitution and in international conventions that Norway is bound by, and which have been implemented into Norwegian law through the Human Rights Act, including Article 10 of the European Convention on Human Rights (ECHR). At the same time, Section 98 of the Constitution contains a general equality and non-discrimination principle and Norway also has obligations pursuant to international conventions to combat and, in part, criminalise, certain forms of hate speech. The only explicit obligation to criminalise is found in Article 4 of CERD (UN Committee on the Elimination of Racial Discrimination). This entails that Norway's legislative room to manoeuvre is most restricted when concerning hate speech based on someone's ethnicity, skin colour and nationality. However, with regard to the other grounds for discrimination, Norway has more flexibility in terms of whether and to what extent hate speech should be criminalised.

Based on a review of the European Court of Human Rights' (ECtHR) jurisprudence on cases concerning hate speech versus freedom of speech, there is nothing at a general level that indicates that current Norwegian law goes too far in restricting freedom of speech in terms how this is enforced by the ECtHR.

**Index terms** Hate speech, freedom of speech, legal framework, jurisprudence

# 1 Introduction

This report will primarily contain a legal assessment which has the objective of explaining the criminal law protection against hate speech based on applicable law. The review will also highlight which groups that are provided such protection.

The legal assessment will include both the most important relevant provisions in the Norwegian General Civil Penal Code (Penal Code) and references to case law from Norwegian courts and supranational courts such as the European Court of Human Rights (ECtHR). In terms of legal sources the field is complex. The interpretation and application of the provisions in the Penal Code must take place in a manner that is compatible with freedom of speech as this is protected in both the Constitution and in international conventions that Norway is bound by and which have been implemented into Norwegian law through the Human Rights Act. At the same time, Norway has obligations under international conventions to combat and, in part, criminalise certain types of hate speech. This is therefore a field of law that contains inherent tensions. This characterises both the legal policy debate and enforcement by the courts of the provisions we have.

In ordering this report, the client has emphasised that hate speech must be understood as statements that express hate based on gender, ethnicity, religion, beliefs, disability, sexual orientation, gender identity or gender expression. This includes more categories than those directly protected under Norwegian criminal law. Neither sexual orientation in general nor gender and gender identity/expression receive direct criminal law protection against hate speech. This issue will therefore be addressed separately such that the report identifies which of the categories that do not receive direct criminal law protection. However, we will also explain how these categories are given indirect protection in more general provisions in criminal law.

This report is part of a series of three reports about hate speech.

**Hate speech, report 1. Research on the nature and extent of hate speech**

(Nadim and Fladmoe 2016) reviews research that highlights:

- the extent of online hate speech
- which groups in society are particularly subjected to online hate speech
- who produces hate speech, and what motivates them

**Hate speech, report 2. Research on hate and discrimination** (Eggebø & Stubberud

2016) reviews research that highlights:

- the correlation between hate speech and discrimination, bullying and violence
- research on the consequences for groups exposed to the above, and for society.

## 1.1 The definition of hate speech in brief

There is no uniform definition of hate speech in Norwegian society. The term is often used in everyday speech and the press to describe a wide range of statements that express and/or are motivated by hate towards other people or groups of people.

For example, the Equality and Anti-Discrimination Ombud (LDO) operates with a broad, social scientific definition of hate speech: “Hate speech is degrading, threatening, harassing or stigmatising speech which affects an individual or a group’s dignity, reputation and status in society by means of linguistic and visual effects that promote negative feelings, attitudes and perceptions based on characteristics such as ethnicity, religion, gender, disability, sexual orientation, gender expression, gender identity and age.”

As mentioned above, and as we will elaborate on later in this report, the understanding of the concept of “hate speech” in Norwegian criminal law is considerably more restricted. It applies, first and foremost, to the groups/interests that are protected by the relevant penal provisions, but also when concerning the specific classification of the degree of offence caused by the speech. In addition, the strong principle of legality in criminal law – which necessitates it to be clearly stated in the law as to what is punishable – entails that one cannot necessarily interpret terms such as, for example, “beliefs” in Section 185 of the Penal Code regarding hate speech as broadly as the same term can be understood in other contexts.<sup>2</sup>

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<sup>2</sup> For example, in 2015, LDO found (in case 14/1531) that veganism is to be considered a belief pursuant to the Ethnicity Anti-Discrimination Act. It is not immediately certain that the same understanding of the term can be used as a basis when concerning enforcement of Section 185 of the Penal Code relating to hate speech.

## 1.2 Broader discussions about the relationship between freedom of speech and protection against hate speech<sup>3</sup>

A prohibition against hate speech is an infringement on freedom of speech. The question of where the boundary between freedom of speech and hate speech that cannot be tolerated should be drawn and whether hate speech should even be a criminal offence, constitute the basis for an ongoing debate. In the following, we will review some of the arguments in the legal and social scientific debate.<sup>4</sup>

A fundamental argument for freedom of speech to be regulated to the least possible extent can already be found with John Stuart Mill and his idea of “the cleansing function of public debate” and the public being a “marketplace of ideas”.<sup>5</sup> Mill’s starting point was that the public could form the “truest” opinions and that if certain speech was censored, the risk would be that the truth would not emerge. In the report from the Freedom of Speech Commission at the end of the 1990s, it was precisely Mill’s “truth principle” that was emphasised as a vital reason for freedom of speech as such.<sup>6</sup> Based on this, the Commission argued for far-reaching acceptance of hateful and other undesirable speech, because such speech can be combated with counter arguments. The Commission found that

...the freedom to express oneself in the public sphere leads to ventilation, cleansing and decency of opinions through discourse and criticism. For the public to function in this manner, the discriminatory attitudes need to be expressed, for it is only after they have been expressed that they can be fought through public criticism. Therefore, in principle, freedom of expression is intended as protection against discrimination.

There is therefore an assumption that the “cleansing function of public debate” may in itself be the best protection against hate speech. The Commission stated that “there could be situations in which it is legitimate to prohibit or restrict freedom of speech out of consideration to public safety and peace and order”,<sup>7</sup> but in the discussion of hate speech concluded that Norway should not have stricter regulations on such speech than necessary in accordance with signed international conventions. In practice, this entails that the Commission proposed

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3 This section was written in collaboration with Audun Fladmoe and Marjan Nadim.

4 See also Enjolras, B., Rasmussen, T. & Steen-Johnsen, K. (ed.). 2014. Status for yttringsfriheten i Norge. Hovedrapport fra prosjektet. Oslo: Fritt Ord, ISF, IMK, FAFO; Midtbøen, A. H. & Steen-Johnsen, K. 2016.

5 Mill, J. S. [1859] 1989: Chapter 2. *On Liberty and other writings*. Cambridge: Cambridge University Press.

6 NOU, 1999: 27. *Ytringsfrihed bør finde Sted – Forslag til ny Grunnlov § 100*. Oslo: Ministry of Justice and the Police.

7 Ibid.: 199.

to remove parts of the legislative text in Section 135a (now Section 185) and specify in the preparatory works "...that the section should be interpreted restrictively".<sup>8</sup>

A related argument against special hate crime laws has been that these types of laws can, in practice, limit freedom of thought.<sup>9</sup> If two otherwise equal offences are punished differently on the grounds of the offender's motivation, then some motives are, in practice, defined as being worse than others. The argument is that it is the act, not the thought behind it, that should be punished. Without directly addressing Section 185 of the Penal Code, a similar argument has been put forward in the Norwegian debate by Jon Wessel-Aas and Helge Rønning:

It is a paradox that while freedom of thought is absolute, the restrictions on free speech that BV [Sindre Bangstad and Arne Johan Vetlesen] argue for and which the examples above are logical manifestations of, in reality are an indirect restriction on freedom of thought by people being directly or indirectly subjected to threats of sanctions for expressing their thoughts – even if the comments in themselves do not directly cause harm to any individual.<sup>10</sup>

Arguments against regulating hate speech in the statutory framework are often linked to the concept of "chilling effect". This describes instances in which the introduction of new laws contributes to deterring behaviour that is, in principle, protected under the Constitution.<sup>11</sup> Freedom of speech is a constitutional right and if the right to express oneself is restricted through another statutory prohibition, the threat of sanction could cause people who would otherwise have had something important to say to refrain from expressing themselves in the public sphere.<sup>12</sup> In the worst case, this could entail that hate speech laws and other restrictions on freedom of speech contribute to frightening off important voices from public debate.

However, it could also be the case that hate speech has a "chilling effect" on its recipients. A much used argument in defence of legislation against hate speech has been precisely that such speech can silence important voices in public

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8 Ibid.: 202–207.

9 Jacobs & Potter, 1998, quoted in Hall, 2005: 134–138. *Hate Crime*. Cullompton: Willan Publishing.

10 Rønning, H. & Wessel-Aas, J. 2012. Meninger, ytringer, handlinger. *Nytt Norsk Tidsskrift*, 29(01).

11 "Chilling effect" is described in Webster's New World Law Dictionary (2010) as follows: "In constitutional Law, the inhibition or discouragement of the legitimate exercise of a constitutional right, especially one protected by the First Amendment to the United States Constitution, by the potential or threatened prosecution under, or application of, a law or sanction."

12 See for example Gelber, K. & McNamara, L. 2015. The Effects of Civil Hate Speech Laws: Lessons from Australia. *Law & Society Review*, 49(3), 631–664; Parekh, B. 2006. Hate Speech. *Public Policy Research*, 12(4), 213–223.

debate and particularly minority voices that would otherwise be unknown to mainstream society.<sup>13</sup> It is precisely the damage hate speech can cause to certain groups and society as a whole that has been an important factor in the reasoning behind limiting freedom of speech in certain instances.<sup>14</sup> Such a position is based on the premise that a liberal democracy must balance many different values (“balance of harms”) and that freedom of speech is not necessarily a more important value than, for example, protection of minorities. For example, Jeremy Waldron has defended statutory regulation of hate speech by arguing that such speech can undermine an individual’s dignity and hinder social integration which he believes are equally important values in a modern society.<sup>15</sup> Through empirical studies of anti-racism laws in selected Western countries, Erik Bleich has demonstrated how all of the countries have always struggled, and continue to struggle, to find precisely the right balance between freedom of speech and other values.<sup>16</sup>

In Norway, Sindre Bangstad and Arne Johan Vetlesen have argued for a “balance of harms” approach by noting that the Declaration of Human Rights of 1948 and subsequent conventions have emphasised that “...freedom of speech is not absolute and unrestricted, and must be balanced in relation to other fundamental human rights and that there is a right that also entails responsibility.”<sup>17</sup>

Bangstad and Vetlesen were also of the view that by arguing that freedom of speech in itself will be protection against discrimination (see above), the Freedom of Speech Commission based its position on an overtly rational approach to freedom of speech. Empirically, it is unclear whether the public exchange of views has such a “protective” effect.<sup>18</sup> Among other things, this is associated with the fact that hate speech does not often occur in a symmetrical power relationship. On the contrary, by attacking minority groups, hate speech can be viewed as an example of “kicking downwards”.<sup>19</sup> Hate speech does not

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13 See for example the blog post from Anine Kierulf: <https://mrbloggen.com/2016/05/16/ja-vi-elsker-ytringsfrihet-og-nyanser/>

14 Bangstad, S. & Vetlesen, A.J. 2011. Ytringsfrihet og ytringsansvar. *Nytt Norsk Tidsskrift*, 28(04); Bleich, E. 2011. *The Freedom to Be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism*. Oxford: Oxford University Press; Waldron, J. 2012. *The Harm in Hate Speech*. Cambridge, MA: Harvard University Press.

15 Waldron, 2012: 4–5. Waldron’s arguments are controversial among certain American legal scholars, see: <http://justitia-int.org/en/the-harm-in-hate-speech/> and [http://www.nytimes.com/2012/06/24/books/review/the-harm-in-hate-speech-by-jeremy-waldron.html?\\_r=0](http://www.nytimes.com/2012/06/24/books/review/the-harm-in-hate-speech-by-jeremy-waldron.html?_r=0).

16 Bleich, 2011.

17 Bangstad & Vetlesen, 2011: 341.

18 Ibid.: 341–342.

19 See also Maussen, M. & Grillo, R. 2014. Regulation of Speech in Multicultural Societies: Introduction. *Journal of Ethnic and Migration Studies*, 40(2), 174–193.

just impact on the individual who is subjected to it, but is aimed at and can create fear among all individuals who belong to the same group.<sup>20</sup>

Another type of argument for allowing hate crime to be regulated through law is related to the symbolic importance of this.<sup>21</sup> By expanding the legal protection of minorities and marginalised groups this makes it clear that it is not acceptable to attack certain groups. In this way, legislation can contribute to social integration between different groups in the greater community. The authorities recognise hate as being a threat to society and emphasise the importance of combating this.<sup>22</sup> However, some have questioned this premise and have argued that the symbolic impact can have the opposite effect. By introducing special protection for specific groups who have historically been subjected to discrimination, there is a risk that differences between groups are cemented in people's consciousness and that social integration between groups is prevented.<sup>23</sup> Jacobs and Potter, who have been among the foremost critics of hate crime legislation in the USA, have noted that the vast majority of crime in the USA occurs internally in groups – not between groups. Their conclusion is that the hate crime legislation in the USA has resulted in the false idea that hate crime is increasing, while the statistics show that these types of crimes were much more common before.<sup>24</sup>

The debate on the relationship between freedom of speech and protection against hate speech is largely theoretical and philosophical and not so much empirical. This could be partly due to it being a challenge to study the possible “effects” of legal protection against hate speech. One approach is to ask the population about attitudes towards and experiences with freedom of speech and hate speech. Data from the project *Status of Freedom of Speech in Norway* has shown that the Norwegian population set rather clear limits for what they consider to be “acceptable” or “unacceptable” speech. For example, the majority agree that statements that criticise religion should be permitted, while far fewer believe that statements that mock religion should be permitted. There is also a low level of acceptance for racist comments, but much greater acceptance of public criticism of ethnic minority groups.<sup>25</sup> At the same time, the dominant attitude is that there should be a high threshold for what is to be punishable.

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20 Hall, N., Corb, A., Giannasi, P. & Grieve, J. (2014). *The Routledge international handbook on hate crime*. New York: Routledge.

21 Hall, 2005: 132–134.

22 Ibid.

23 Jacobs & Potter, 1998, quoted in Hall, 2005: 134–138.

24 Ibid.

25 Steen-Johnsen, K., Fladmoe, A. & Midtbøen, A.H. 2016: 26. *Ytringsfrihetens grenser. Sosiale normer og politisk toleranse*. Oslo: Fritt Ord, ISF.

Very few believe that disparaging and insulting speech directed at the grounds that are covered by Section 185 of the Penal Code should result in strict legal sanctions.<sup>26</sup> A large proportion would like different forms of non-judicial, but formal, sanctions (such as being censured by the Norwegian Press Complaints Commission or banned from social media). However, the majority made reference to different forms of social reactions in public debate. Such reactions can be interpreted in line with the principle of the cleansing function of public debate: Undesirable speech can be met with counter arguments and social resistance.

As shown above, the “Balance of Harms” approach is based on the consequences hate speech can have for individuals and society. Research on the harmful effects of hate speech has found several possible harmful effects at individual, group and society level (see Report 2 [Eggebø and Stubberud 2016] for a more detailed discussion about the research into consequences of hate speech). At an individual level, hate speech can result in fear and other emotional symptoms, lower self-confidence, the feeling of lost dignity, withdrawal from the public and limitations on freedom of movement.<sup>27</sup> Hate speech can have consequences at group level because in a vulnerable group there is not necessarily a clear difference between the consequences of having directly experienced hate speech and knowledge of the experiences other members of the group have had with hate speech. Because hate speech impacts on the group identity or group affiliation, it can spread fear among the entire group.<sup>28</sup> At society level, a consequence of hate speech circulating can be that radical or extreme attitudes will gradually be sanitised and appear legitimate. In addition, studies show that experiences with “unpleasant and condescending comments” can result in withdrawal from the public domain and this also more often applies for people with immigrant backgrounds than for the majority population. This may be an indication that, regardless of whether it is “cleansed” in the public debate, hate speech can result in less actual freedom of speech for certain groups.

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26 Ibid.: 33–35.

27 Boeckmann, R.J. & Liew, J. 2002. Hate speech: Asian American students' justice judgments and psychological responses. *Journal of Social Issues*, 58(2), 363–381; Boeckmann, R.J. & Turpin-Petrosino, C. 2002. Understanding the Harm of Hate Crime. *Journal of Social Issues*, 58(2), 207–225; Eggebø, H., Sloan, L. & Aarbakke, M.H. 2016. *Erfaringer med digitale krenkelser i Norge*. KUN Report 2016: 1; Gelber, K. & McNamara, L. 2016. Evidencing the harms of hate speech. *Social Identities*, 22(3), 324–341; Herek, G.M., Cogan, J.C. & Gillis, J.R. 2002. Victim Experiences in Hate Crimes Based on Sexual Orientation. *Journal of Social Issues*, 58(2), 319–339; Leets, L. 2002. Experiencing hate speech: Perceptions and responses to anti-semitism and antigay speech. *Journal of Social Issues*, 58(2), 341–361.

28 Bell, J.G. & Perry, B. 2015. Outside Looking In: The Community Impacts of Anti-Lesbian, Gay, and Bisexual Hate Crime. *Journal of Homosexuality*, 62(1), 98–120; Gelber & McNamara, 2016: 327; Perry, B. & Alvi, p. 2012. ‘We are all vulnerable’ The in terrem effects of hate crimes. *International Review of Victimology*, 18, 57–71.



Another empirical approach is to study consequences of the legislation. In a relatively recent study of the possible effects of the legislation in Australian states which started to criminalise hate speech in 1989, Katharine Gelber and Luke McNamara found, among other things, that these laws have had an educational effect on the public debate. An indication of this is that newspaper editors receive fewer reader submissions with hateful content than they did previously. The study also found no support for a “chilling effect” in the Australian debate. Controversial issues are discussed just as much as before.<sup>29</sup> At the same time, Erik Bleich notes in the above-mentioned comparative study of racism legislation in selected countries that it is difficult to say anything certain about such effects.<sup>30</sup> Racist speech has declined over an extended period in the countries he has studied, including the USA, where there are no laws against hate speech. The USA differs from European countries due to them making a greater distinction between speech and actions. While actions motivated by racism have been increasingly criminalised, the right to make racist comments has not been. The fact that there has still also been a decline in racist speech, including in the USA, indicates that other changes in society such as increased tolerance must be taken into consideration when assessing the extent of hate speech.

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29 Gelber & McNamara, 2015.

30 Bleich, 2011.

## 2 Legal overview

The issue regarding the legal boundaries between lawful speech and speech that comes under the prohibition against hate speech, is regulated by different regulatory frameworks that must be viewed in context.

At an overarching level, we have the Constitution and international conventions that Norway is bound by under international law. In addition, we have specific provisions in the Penal Code, as well as some in anti-discrimination laws.

Section 100 of the Constitution protects freedom of speech by setting constraints on what intervention that can legally be made against freedom of speech. The same also applies to, among other things, Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

At the same time, Section 98 of the Constitution contains a general equality and non-discrimination principle and Norway also has an obligation, through the ECHR, ICCPR and several other international conventions, to use different methods to protect certain groups from hate, persecution and discrimination.

For example, Article 17 of the ECHR stipulates that none of the convention rights, including that of freedom of speech, must be able to be used to permit any state, group or person “to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” This has been used by the ECtHR to justify that certain types of hate speech are not protected under Article 10. Article 14 of the ECHR also prohibits discrimination in general in the implementation of the ECHR’s other rights.

Correspondingly, Article 20 of the ICCPR contains a provision that requires statutory protection against advocacy of “national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Articles 26 and 27 of the ICCPR also contain respective requirements for more general protection from discrimination and protection of the right of ethnic minorities to enjoy and preserve their cultures.

In terms of other important conventions that commit Norway to protect individuals or groups of people against hate/discrimination, the following are mentioned:

- The International Convention on the Elimination of All Forms of Racial Discrimination/Racial Discrimination Convention (ICERD). The Committee on the Elimination of Racial Discrimination (CERD) monitors compliance with the Convention. It has been implemented into Norwegian law through Section 5 of the Ethnicity Anti-discrimination Act and otherwise implemented through, among other things, Section 185 of the Penal Code. ICERD is the only convention that explicitly requires criminalisation of hate speech.
- The UN Convention on the Rights of Persons with Disabilities. The Committee on the Rights of Persons with Disabilities (CRPD) monitors compliance with the convention. This is implemented into Norwegian law through the Anti-discrimination and Accessibility Act.
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This is implemented into Norwegian law through the Human Rights Act.

In formal terms, there is a certain significance that the ECHR, ICCPR and CEDAW have been implemented into (incorporated into) Norwegian law through the Human Rights Act, while the ICERD has been implemented into Norwegian law through the Ethnicity Anti-discrimination Act and the CRPD has been implemented (transformed) into Norwegian law through the Anti-discrimination and Accessibility Act. If there is conflict between what is stipulated in conventions that have been implemented into Norwegian law through the Human Rights Act and what is stipulated in other Norwegian statutory provisions, Section 3 of the Human Rights Act states that the relevant convention obligation shall take precedence. The conventions that are implemented through other laws are not given this type of preference. With regard to the topic of this report, this principal difference is probably of less importance in practice since the courts will still, irrespectively and in principal, have to find a balance between the consideration of freedom of speech on the one hand and the consideration of protection of vulnerable groups from hatred and discrimination on the other.

For example, in the so-called Tvedt case in 2007, the Supreme Court summarised the starting points for the relationship between legal protection of freedom of speech on the one hand and, on the other hand, criminal law protection of individuals or groups of people against hateful/discriminatory speech based on ethnicity etc., as follows:

The provision must be read in connection with the principle of freedom of speech that is enshrined in Section 100 of the Constitution and conventions Norway is bound by and which are incorporated into Norwegian law, cf. Article 10 of the European Convention on Human Rights (ECHR) and Article 19, no. 2 of the UN's Covenant on Civil and Political Rights, cf. Section 2 and 3 of the Human Rights Act. At the same time, by ratifying the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Norway has assumed a clear obligation to, among other things, through criminal law, protect individuals and groups of people from hate/discrimination based on race etc. which is also the historical background to the adoption of Section 135a of the Penal Code. Norway is also obligated under Article 20, no. 2 of the ICCPR to prohibit advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence. The scope of Section 135a will therefore have to be determined based on a trade-off between the consideration of protection against discrimination based on race etc. and the consideration of freedom of speech.

As can be seen here, the Supreme Court does not make an issue out of the ICERD not being assigned precedence ahead of other Norwegian law. The Supreme Court was content to refer to the fact that by ratifying the ICERD Norway had assumed a "clear obligation" to protect individuals and groups of people from discrimination based on ethnicity etc., through penal provisions such as the Penal Code's prohibition against hate speech (then Section 135a, now Section 185).

In its case law relating to Article 10 of the ECHR regarding freedom of speech, the ECtHR has consistently highlighted the fundamental function of freedom of speech in a democratic society and that, in principle, freedom of speech also includes speech that offends, shocks or disturbs the State or any sector of the population. This was expressed as follows in one of the fundamental decisions (Handyside case):

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.<sup>31</sup>

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31 Handyside versus the United Kingdom (case no. 5493/72).

At the same time, the ECtHR has emphasised that tolerance and respect for the equal dignity of all human beings also constitute another foundation of a democratic, pluralistic society, such that it may be necessary to restrict freedom of speech when it is used to spread, encourage or legitimise hate based on intolerance. The ECtHR expressed this in the following manner in the *Erbakan* case:

[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, 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 [...], provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.<sup>32</sup>

In cases in which these starting points are at odds with one another, the ECtHR regularly makes reference to international conventions, for example ICERD, to substantiate that the combating of hate that originates from intolerance is an acknowledged, universal obligation in international law.

However, with regard to the ECtHR’s enforcement of the ECHR in cases in which freedom of speech is in conflict with protection against hate speech, the ECtHR has in many instances completely exempted many statements that are deemed “hate speech” from protection by Article 10, with reference to the statements being covered by Article 17 of the ECHR pertaining to prohibition against abuse of rights. Article 17 states the following:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

A review of ECtHR case law shows that the ECtHR is inclined to use this provision in many instances. (For an updated review and analysis, see Weber, Anne: *Manual on Hate Speech*, Council of Europe Publishing: 2009.) Some examples can be mentioned: A case in which a person who was a member of the British Nationalist Party (BNP) had put up a poster on his window depicting the Twin Towers in New York on fire and accompanied by the text “Islam out of Britain – protect the British People”.<sup>33</sup> Equivalent decisions are also found when concerning, among other things, manifestly anti-Semitic speech, including holocaust denial. Here the ECtHR differentiates between general academic discussion of historical events and denial of obvious historical facts that is done

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32 *Erbakan versus Turkey* (case no. 59405/00).

33 *Norwood versus the United Kingdom* (case no. 23131/03).

in a manner that presents the Jews as a group who have conspired to spread a lie and which therefore incites hate against them as a group.<sup>34</sup> This has even resulted in the ECtHR having applied Article 17 against something that, in its form, should appear as being comedy/satire, but the ECtHR determined that attempts to camouflage gross, political anti-Semitism as satire could not be accepted.<sup>35</sup>

When the ECtHR did not dismiss the case with reference to Article 17, but considered whether the sanctioning of speech can be accepted as necessary in a democratic society pursuant to Article 10 (2), in principle the trade-off occurs in the same way as was cited above with regard to the Supreme Court (which itself enforces the EHRC in Norwegian law). For a detailed and updated review and analysis, see Weber: 2015.

Despite the fact that, like the Supreme Court, the ECtHR closely monitors interference with what has to be protected, such as political opinions, if the objective is to contribute to the public debate, it also accepts interference with political statements that contain manifestly hateful elements directed at vulnerable groups.<sup>36</sup> Speech that, first and foremost, has hateful and malicious objectives does not receive much protection. Furthermore, ECtHR case law also shows that the severity of the penalty for the speech in question is an important element in the necessity assessment. Speech for which an acceptable response could have been, for example, civil liability for damages to the aggrieved party, would not necessarily be considered as proportionate and compatible with Article 10 if the response is a criminal sanctions. In connection with this, in the field of hate speech the ECtHR has also placed emphasis on whether the respective member state had an obligation under international law to criminalise the type of speech in question, such as Article 4 of the ICERD when concerning racially discriminating hate speech.

At a general level there is nothing that indicates that applicable Norwegian law, cf. the review below, goes too far in restricting freedom of speech as this has been enforced by the ECtHR. On the contrary, it could be assumed that Section 100 of the Constitution, as this has been practiced thus far, constitutes a greater counterweight in this field than Article 10 of the ECHR. At the same time, it is important to emphasise that the ECtHR assesses each case specifically, such that it is the specific enforcement of the national statutory provisions in each individual case that has to be compatible with the requirements set out in Article 10 of the EHRC.

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34 See for example *Garaudy versus France* (case no. 65831/01).

35 *M'bala M'bala versus France* (case no. 25239/13).

36 See for example *Le Pen versus France* (case no. 18788/09).

# 3 Regulation of hate speech in Norwegian law

## 3.1 Introduction

In Norwegian law, the prohibition against hate speech is principally regulated in Section 185 of the Penal Code (which replaced the previous Section 135a of the Penal Code when the present Penal Code entered into force from and including October 2015).

Section 185 of the Penal Code directly concerns hate speech and is our only penal provision that does so. The only exception is the special provision in Section 26 of the Ethnicity Anti-Discrimination Act pertaining to organised, gross violation of the same Act's prohibition against discrimination and harassment which is presented in more detail below. Both provisions relate to the implementation of Norway's obligations under Article 4 of the ICERD. As the most important provision, Section 185 of the Penal Code will be assigned particular attention below.

However, there are also other penal provisions that can apply to hate speech without the provisions having been specially formulated with hate speech in mind. Examples of this are the Penal Code's penal provisions against threats (Section 265), incitement to commit criminal acts (Section 183), offensive behaviour (Section 266) etc. In some instances, such provisions can be relevant in addition to Section 185, while other times they can apply to speech that does not satisfy the sentencing requirements pursuant to Section 185. The most relevant of these provisions will also be presented.

The civil anti-discrimination legislation also contains prohibitions against discriminatory acts that have wider consequences, but also include hate speech. However, with the exception of the Ethnicity Anti-Discrimination Act, none of these laws contain a legal basis for penalties for such speech. For the sake of completeness, the individual anti-discrimination laws will still be presented because these are also part of the overall protection against discrimination.

### 3.1 Section 185 of the Penal Code – Hate speech

Section 185 of the Penal Code applies to discriminatory and hateful speech. In addition to verbal and written statements, the term speech also includes the use of symbols.

The provision states the following:

Any person who wilfully or through gross negligence publicly conveys discriminatory or hateful speech shall be liable to fines or imprisonment for up to 3 years. Speech also includes the use of symbols. The person who, in the presence of others, wilfully or through gross negligence conveys such speech towards someone who is affected by this, cf. paragraph two, shall be liable to fines or imprisonment for up to 1 year.

By discriminatory or hateful speech is meant threatening or insulting anyone or inciting hate, persecution or contempt for anyone based on their

- a) skin colour or national or ethnic origin,
- b) religion or beliefs,
- c) homosexual orientation, or
- d) disability.

The provision lists three fundamental conditions that must be satisfied for speech to come under this prohibition. These are reviewed individually in sections 3.2.1, 3.2.2 and 3.2.3 below.

#### 3.2.1 In public or in the presence of others

Firstly, the speech must be conveyed “in public” or “in the presence of others [...] towards someone who is affected by the [speech].”

The definition of public place and public act/speech appears in Section 10 of the Penal Code which states:

Public place means any place intended for public use or frequented by the public.

An act is considered to be committed in public when it is committed in the presence of a large number of people or under such circumstances that it could easily have been observed from a public place. If the act involves conveying speech, the act was also committed in public when the speech was conveyed in such a manner that it is likely to reach a larger number of people.



The definition of public place is today technology neutral. Internet and social media are therefore considered the same as the physical world when assessing whether a place is to be deemed as public. With regard to speech, it will regardless be decisive if the speech is conveyed in a manner that makes it likely to reach a large number of people. According to the preparatory works for the provision, this means “more than 20–30” people.<sup>37</sup> Note that the question is not whether 20–30 people have actually heard the speech, but whether it was conveyed in such a way that it was likely to reach so many. A hateful message that is sent to a person will therefore not be included if it is unlikely that the recipient will spread this further. However, comments on open websites will be covered. Closed internet forums, Facebook groups and Facebook pages of private individuals will also be included if there are enough members or “friends” who have access to these sites.

If the speech is conveyed in public, the punishment is a fine or imprisonment for up to three years.

The alternative “in the presence of others” is new in the Penal Code of 2015, and previously hate speech was only punishable if it was conveyed in public. The term “in the presence of others” also includes semi-public and private surroundings.<sup>38</sup> Speech conveyed in the presence of others is subject to a milder punishment because there is less potential for harm<sup>39</sup>. According to the preparatory works, the reason for inserting this alternative was to include parts of the criminal law protection that ceased when the previous Section 246 of the Penal Code relating to defamation was not continued.<sup>40 41</sup>

### 3.2.2 The speech must discriminate based on the following criteria:<sup>42</sup>

Secondly, the speech must discriminate based on the following criteria: a) skin colour or national or ethnic origin, b) religion or beliefs, c) homosexual orientation or d) disability.

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37 See Proposition no. 90 to the Odelsting (2003–2004), page 164.

38 See Section 16 of Proposition no. 22 to the Odelsting (2008–2009).

39 Ibid.

40 Ibid.

41 Defamation was decriminalised when the current Penal Code entered into force and is presently only assigned civil law protection in Section 3-6a of the Damages Act. The part of the previous Section 246 of the Penal Code regarding defamation of another person that could have included hate speech conveyed directly to the person it was intended for will now be able to come under this part of Section 185 if the other conditions in the provision are satisfied.

42 This discussion is partly based on Oslo politidistrikt. 2015. *Hatkrim: Rettslige og praktiske spørsmål*. Oslo: Strategisk stab, Oslo politidistrikt.

Therefore, it is not sufficient to be covered by this provision to convey speech that, based on a natural linguistic understanding, will be hateful. The criteria in the Act constitute a restricted, exhaustive list that requires that the hateful or discriminatory content of speech also includes one of the groups that are listed in the provision.

Brief remarks about the individual criteria are provided below.

(a) skin colour or national or ethnic origin, provides somewhat more nuanced wording after earlier statutory amendments, when this was amended from the term “race” – the group that received the earliest protection. This section implements the requirements in the ICERD regarding criminalisation of speech that expresses ideas of racial superiority and racial hatred.

b) homosexual orientation includes the sexual orientation in itself and any expression of this (often referred to as lifestyle). Being bisexual will most likely be included because it also includes homosexuality. However, other sexual orientations, gender identities or gender expressions (that are otherwise protected from discrimination through the Anti-Discrimination Act, among others) fall outside of this. With reference to the issue of expanding the penal provision to include a person’s sexual orientation more generally, the Ministry stated the following:

The Ministry agrees that the time is right for allowing “orientation” to fully replace the more old-fashioned terms such as “inclination” and “lifestyle”, while maintaining that the objective of this sentencing alternative should also be to provide special protection to vulnerable minorities. Protection for everyone quickly becomes protection for no one. The expression “sexual orientation” would also include heterosexuals, who do not require such protection. The Ministry has decided to word this alternative in such a way that it protects people of a homosexual orientation.<sup>43</sup>

(c) religion and beliefs include all religions and beliefs, including secular beliefs. For something to be referred to as a religion or a belief, there is most likely a requirement for a certain prevalence and holistic view of life. A limited conviction is hardly enough. Believing that you can speak to the dead, for example, is unlikely to have any special criminal law protection on its own.

Associations that primarily carry out work of a humanitarian, self-development, health-oriented, cultural or political nature will fall outside this term. The term

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<sup>43</sup> See Section 10.7.4.3 of Proposition no. 8 to the Odelsting (2007–2008).

can be challenging with regard to new age religious movements and organisations that are religious in nature or have religious ambitions, but which do not necessarily conform to traditional views of religious communities.

(d) disability was first included in connection with the adoption of Section 185 (and new Penal Code), but was also included in Section 135a of the previous Penal Code pending the new Penal Code entering into force. According to the preparatory works, the expression includes physical, mental and cognitive functions. Reduced physical functions may include movement, sight or hearing functions. Reduced mental functions include diseases and conditions that are considered mental disorders. Reduced cognitive functions include the reduced ability to use mental processes, for example, memory and speech.

### 3.2.3 Discriminatory or hateful speech

Thirdly, the speech must be discriminatory or hateful which, according to Section 185, paragraph two of the Penal Code, means that it must involve “threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone”.

The specific content of each of the terms that are listed is not defined in much more detail in preparatory works or in case law. However, it is clear that the essence of the provision applies to speech that can be interpreted as threats of or incitement to commit illegal acts against individuals or groups due to them belonging to one of the protected groups. It still also includes speech that is “only” intended to convey hate towards or grossly denigrate the human dignity of the same people/groups of people.

However, a high threshold for the type of speech that can be punishable in Norway has been set to avoid conflict with freedom of speech – it must be aggravated or manifestly offensive.<sup>44</sup>

However, this threshold has been lowered somewhat since the start of the 2000s in connection with statutory amendments in 2003 and 2005 and the adoption of the Anti-Discrimination Act.<sup>45</sup> In addition, Section 100 of the Constitution was amended in 2004 with the pre-condition from the Norwegian Parliament (Storting) that the threshold would be reduced somewhat compared to what was suggested in previous case law. Emphasis was placed on this in the so-called

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44 See for example Rt. 2012 p. 536 (paragraph 28) cf. Rt. 1997 p. 1821 (p. 1826).

45 Chapter 17 of Proposition no. 33 to the Odelsting (2004–2005). See Section 10.7.4.2 of Proposition no. 8 to the Odelsting (2007–2008).

Doorman case in the Supreme Court in 2012.<sup>46</sup> Norway was criticised by CERD in a statement of 15 August 2005 for not having complied with the ICERD's requirements for criminalisation of hate/discrimination based on race etc. after a complaint was filed about the so-called Boot Boys case in 2005.<sup>47</sup>

To determine whether speech is discriminatory or hateful, the opinions expressed in the speech must be interpreted. The starting point is how the average reader or listener would understand the statement. A person can only be held liable for what he or she has actually stated. In the preparatory works emphasis is placed on "nobody should risk criminal liability due to a statement being assigned a meaning that is not explicitly expressed, if this cannot be derived from the context with a reasonably high level of certainty."<sup>48</sup>

The starting point is that it must be the average reader or listener's understanding of the statement that is used as a basis. This means that the context of a discriminatory statement can have an effect on how it is interpreted, and it can be of significance if the statement was made in a debate or as a slogan in a demonstration.<sup>49</sup> If there are multiple statements, these must be interpreted in connection with one another.

A number of elements are specified through the preparatory works and case law that must be included in the assessment of whether speech is punishable pursuant to Section 185 or protected by freedom of speech. Some of the most important elements are listed below:<sup>50</sup>

- the vulgarity of the speech<sup>51</sup>
- whether the speech involves (gross) denigration of the human value of a group.<sup>52</sup>
- whether it is a political expression of opinion or harassment. Harassment has weaker protection than political expression of opinion<sup>53</sup>
- if the person the statement is directed towards is in a vulnerable position<sup>54</sup>
- whether there is incitement to violence/violation of integrity<sup>55</sup>

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46 Rt-2012-536, paragraph 44. The judgment is referred to in more detail later in the report.

47 See the Director General of Public Prosecution's Circular G-11/2005 of 9 December 2005, issued in the wake of the statement from the UN Committee on the Elimination of Racial Discrimination. The entire statement from the committee was included in the circular.

48 Section 17.1.6.8 of Proposition no. 33 to the Odelsting (2004–2005).

49 Ibid.

50 See Oslo politidistrikt. 2015: 34.

51 Vigrid case (Rt. 2007 p. 1807) and Boot Boys case (Rt. 2002 p. 1618).

52 Doorman case (Rt. 2012-536) paragraph (29), Tvedt case (Rt 2007-1807) paragraph (33) and Boot Boys case (Rt 2002-1618).

53 Rt 2012-536 (Doorman case) paragraph 38.

54 Rt 2012-536 (Doorman case) paragraph (38–39).

55 Rt 2007-1807 (Vigrid case) paragraph (41), Rt 2002-1618 (Boot Boys case).

- how specific the speech is. The more specific it is the easier it will have an impact<sup>56</sup>

Reference is otherwise made to section 3.2.6 below for a more detailed review of Norwegian case law relating to the provision.

### 3.2.4 Requirement for guilt

The requirement for guilt in the provision is intent or gross negligence. These forms of guilt are defined in Section 22 and 23, paragraph two of the Penal Code.

In brief, this entails that the person who makes the statement must either have had the intention of conveying hate speech, or understood or expected it to be highly probable that he/she did so or can be strongly criticised for it having occurred. It is therefore not a requirement for criminality that the person responsible had a hateful motive, it is sufficient that the speech, as it is interpreted in its context, satisfies the other requirements in the provision and that the person responsible can be strongly criticised for not having understood that the speech would be understood in this manner.

The question of whether the requirement for guilt pursuant to Section 185 has been satisfied can be complicated, but is made somewhat easier by gross negligence being sufficient. This modification of the requirement for guilt was introduced upon the amendment to the previous Section 135a of the Penal Code in 2005. In the preparatory works, the Ministry stated the following:

Such an amendment will contribute to strengthening the protection which the provision intends to provide, first and foremost by the simplification of the evidence situation. While a requirement for intent entails that the court has to address matters relating to the accused's thought process at the time the offence was committed, the assessment of whether the accused has demonstrated gross negligence can be linked to a greater degree to the actual act.<sup>57</sup>

A more recent judgment in Borgarting Court of Appeal regarding remarks on a Facebook comments thread, in which it was not considered to have been proven that the accused understood the context of what he had commented about, is illustrative of how the requirement for guilt plays a part, including with regard

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56 Rt 2007-1807 (Vigrid case) paragraph 41, 44 and 45, Rt-2002-1618 (Boot Boys case).

57 Section 17.1.6.5 of Proposition no. 33 to the Odelsting (2004–2005).

to how speech must be interpreted and in which context it has to be interpreted.<sup>58</sup> The judgment is referred to in more detail in the review of Norwegian case law.

### 3.2.5 Aiding and abetting hate speech

Aiding and abetting hate speech is a criminal offence. This is stipulated in Section 15 of the Penal Code.

If, for example, a person forwards on hate speech from another person, depending on the circumstances, he/she could be punished either as a separate principal offender or for aiding and abetting this.

Complicity may also include allowing hate speech posted by third parties to remain on one's Facebook profile after having been made aware of the existence of such postings. Another example could be allowing hate speech to remain in the comments field of online newspapers or other websites that allow the public to make comments/discuss issues. The question of how long hate speech can remain in a comments field without the news/discussion portal being liable was addressed in the so-called Delfi Case before the ECtHR (Grand Chamber) in 2015.<sup>59</sup>

Disseminating hate speech from another person will not be deemed as either a principal offence or as aiding and abetting an offence if the person who disseminates hate speech does this in a context in which it is clear that the person in question clearly does not support the hateful content and the dissemination of this in itself has an honourable purpose, for example, as a contribution to public debate about hate speech.<sup>60</sup>

### 3.2.6 Attempted hate speech

Attempted hate speech is a criminal offence. This is stipulated in Section 16 of the Penal Code. For an attempt to be punishable, there must be intent to commit a violation of Section 185 and the person in question must have taken actions that lead directly to execution. Envisaging instances in which attempted hate speech is punishable will largely be a theoretical exercise, for example, envisaging that someone attempts to publish hate speech on the internet, but loses the internet connection just as he/she is about to press the "publish" button.

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58 LB-2014-174730.

59 Delfi versus Estonia (case no. 64569/09)

60 Jersild versus Denmark (case no. 15890/89)

### 3.2.7 Case law

Below is a brief review of the most important decisions (that were continually referred to above), principally from the Supreme Court, relating to hate speech.<sup>61</sup> All of the decisions are from before the current Penal Code entered into force, and the sections referred to are therefore the provisions in the previous Penal Code.

#### **From the Supreme Court:**

##### *Rt 2012-536 (Doorman case)*

While intoxicated, the convicted person said, among other things, “jævla neger (damn negro)”, “jævla svarting (damn n\*\*\*er)” and “why are negroes allowed to work in Norway” to a dark-skinned doorman at a nightclub. There were dozens of people who witnessed this.

He was convicted for violation of Section 135a of the Penal Code (and Section 390a) and received a suspended 18 day prison sentence and a fine of NOK 15,000.

Despite the comments not being particularly specific, they were interpreted as meaning that the doorman was not capable of doing his job because of his skin colour.

Emphasis was placed on the fact that: “*the comments were made in a context in which the practitioner is dependent on respect from guests and the public*” and “[...] *made as harassment without any purpose other than to denigrate the victim due to the colour of his skin.*”

The comments were deemed to constitute gross denigration of the human value of a group and were not protected by Section 100 of the Constitution.

##### *Rt 2007-1807 (Vigrid case)*

Tore Tvedt, founder of the organisation Vigrid stated the following in an interview with the newspaper VG:

[...] the Jews are the main enemy, they have killed our people, they are evil murderers. They are not humans, they are parasites who must be purged [...]

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61 The review of decisions from the Supreme Court are based on Oslo politidistrikt. 2015: 37-39.

He also gave the impression that Vigrid was at war with the Jews and that the members of Vigrid were given weapons and combat training.

The Supreme Court concluded that the statements were a breach of Section 135a of the Penal Code and placed particular emphasis on the fact that they included both incitement to violate integrity and gross denigration of the human value of a group.

Tvedt was given a 45 day suspended prison sentence.

*Rt 2002-1618 (Boot Boys case)*

The leader of a neo-Nazi group known as the Boot Boys held a brief appeal during a demonstration. Among other things, he said the following:

Each day immigrants rob, rape and kill Norwegians. Each day our people and country are plundered and destroyed by Jews who suck our country dry of wealth and replace it with immoral and un-Norwegian thoughts.

He also praised Rudolf Hess and Adolf Hitler and concluded with repeated “sieg heil” salutes. The participants wore masks and used racist symbols.

He was charged with breach of Section 135a of the Penal Code but was acquitted by the Supreme Court in plenary session.

The Supreme Court found that the statements could not be interpreted as “support for the persecution of Jews and thereby approval of the mass extermination of Jews during the war”, but more as general support of the National Socialist ideology.

The Supreme Court further stated that:

In general, support of the Nazi ideology cannot simply be assumed to include acceptance of mass extermination or other systematic and serious acts of violence against Jews or other groups. This must apply even if the ideology also includes praise of the Nazi leaders.” The Court also stated that: “...when concerning general knowledge about the behaviour of Neo-Nazis, for example, violence and convictions for other criminal acts, care must otherwise be exhibited when including these in a criminal case regarding speech.

As previously mentioned, CERD criticised the result of the judgment as being contrary to the ICERD and the previous Section 135a of the Penal Code was amended as a consequence of this. The judgment is therefore no longer deemed to be an expression of applicable law.



*Rt 1997-1821 (Kjuus ruling)*

The leader of the party “Hvit valgallianse” (White Electoral Alliance) distributed a party programme which, among other things, stated the following: *“We will permit adopted children to continue to live in Norway on condition that they allow themselves to be sterilised.”*

The Supreme Court upheld the District Court’s judgment of a 60 day suspended prison sentence and fine of NOK 20,000– on the following grounds: *“The statements in the case relate to extreme violation of integrity and involve gross denigration of the human value of a group.”*

The ECtHR dismissed the appeal of the conviction because there was nothing that indicated that the provisions in the Convention pertaining to freedom of speech had been violated.

*Rt 1994-768 (Ku Klux Klan)*

A man made and set fire to a wooden cross. A short time later he smashed the door of a store that was owned by a person from Pakistan and wrote “KKK” and “pakkis (Paki)” on the wall.

He received a 60 day suspended prison sentence for breach of°, among other things, Section 135a of the Penal Code.

The Supreme Court stated that actions such as this come under the provision, particularly when they occur in combination with written words.

The combination of vandalism and the wording of the graffiti made this a racially motivated threat in the core area of Section 135a, including if one disregards the burning cross.

*Rt 1984-1359 (Bratterud case)*

Pastor Bratterud stated the following on local Christian radio:

So we would like to encourage all Christians – those who really believe in God – to break this devilish power that homosexuality represents in this country. We would also ask that everyone who represents this school of thought to be removed from leading positions in our country [...].

He was charged with breach of Section 135a of the Penal Code and acquitted by the District Court. The Supreme Court stated that Section 135a also includes

religious preaching, but that care must be exhibited due to the special considerations that assert themselves in this area.

The Supreme Court stated that direct quotes from the Bible fall outside Section 135a and that, “...*in my opinion, the same must apply for the approximate quoting and interpretation of scriptures*”.

With doubt and dissenting opinion, the Supreme Court found that the statements that homosexuals had to be removed from leading positions was a breach of Section 135a.

*Rt 1981-1305 (Flyer case)*

As a representative of “Organisasjonen mot skadelig innvandring i Norge (Organisation against harmful immigration in Norway)”, A distributed 16,000 flyers in which Islam and Muslims were referred to in strongly negative terms. Among other things, the flyers stated:

Islam is called a religion, system of laws and culture, but is actually a term for terrorism, chauvinistic religion and the subjugation of women, ruthless overpopulation and enormous suffering.

The Supreme Court found that the statements came under Section 135a because, “...*they contain such a massive and one-sided prejudiced attack on Islamic immigrants in Norway that they cannot be accepted.*”

*Rt 1978-1072 (Reader letter judgment)*

A was charged, but acquitted with dissenting opinion, for having written a reader letter that was extremely critical of immigration. The grounds for acquittal were summarised as follows:

After an overall assessment, I find that A’s reader letter is likely to evoke or strengthen prejudice or negative attitudes among certain readers against Pakistani migrant workers in particular, but that these effects cannot be assumed to be so strong or apply to so many that the boundary for what constitutes a criminal act has been overstepped.

*Rt 1977-114 (Lecturer case)*

A received a 120 day suspended prison sentence for offensive statements about Jews in newspaper interviews.

Among other things, the statements included support for the extermination of Jews and a desire for Jews to be interned.



**From lower instances:**

As the above review demonstrates, there is nothing from the cases that were before the Supreme Court that concerns any of the protected groups other than those in (a) ethnicity and/or (b) religion and beliefs. The only exception was the Bratterud case (concerning homosexuals). However, there is an interesting decision from Borgarting Court of Appeal that also applies to (c) homosexual orientation, and which also illustrates how decisive the requirement for subjective guilt can be and how this is of importance for both the interpretation of the speech and the context in which it must be interpreted.<sup>62</sup> This is therefore commented on here:

The case concerned a number of counts in an indictment that was issued due to various actions committed/statements made as representatives for the Islamic group “Profetens Umma” on Facebook.

Among these was the question of whether the accused (A) had made a discriminatory or hateful statement in public, cf. Section 135a of the previous Penal Code.

The statement was made on a discussion thread on Facebook. The starting point for the relevant Facebook thread was in fact a reference (via a hyperlink) to a news item about an incident of violence in Norway when a lesbian Norwegian-Somali woman was subjected to a violent attack from two Muslims (due to, among other things, having openly criticised the attitudes of many Muslims towards homosexuality).

A fair way down the discussion thread, the accused had posted the following comment (to someone who had condemned the attack).

I completely agree. They should absolutely not hit her. They should have stoned her to death, because practicing homosexuality must be punished by death. May Allah SWT look after our mothers who fight for Haq and wake us brothers who sleep!!!

The Court of Appeal was divided into a majority of four and a minority of three. Both the majority and minority of the court agreed that the comment on a Facebook was made “in public” and that it had remained there for 20–30 minutes before it was deleted by the accused himself.

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62 LB-2014-174730

The majority was of the view that the comment had to be interpreted such that A advocated that the offenders should have gone further in their use of violence against the Norwegian-Somalian because she was gay. The majority placed emphasis on the consideration of freedom of speech in Section 100 of the Constitution being a vital interpretation factor which, in many instances, can suggest a restrictive interpretation of Section 135a of the Penal Code, but that speech that encourages or supports violations of integrity may come under Section 135a of the Penal Code because these are of a “manifestly offensive character”. The majority were therefore of the view that the accused should be sentenced pursuant to Section 135a.

However, the minority were of the opinion that the accused had to be acquitted for this item in the indictment because there was reasonable doubt about whether A understood that this instance of violence had occurred in Norway. A himself had testified that he thought this was an incident from a country where Islamic law was in force and that he therefore had only expressed what applied in Islamic law. The minority were therefore of the view that the comment had to be interpreted based on this and stated the following:

The minority is of the opinion that A’s Facebook comment [...] cannot be considered gross denigration or manifest offence of Lesbians or homosexuals as a group. The comment supported the denigration of homosexuals and lesbians as a group, but only as a consequence of what, in A’s view, is stipulated about this in Islamic law. As mentioned, the comment can be interpreted as expounding and supporting Islamic law. In the view of the minority, this falls within the limits of freedom of speech as this is protected by, among other things, Section 100 of the Constitution and Article 10 of the EHRC. In light of this, Section 135 of the Penal Code must be interpreted restrictively.

The deciding minority was therefore of the view that A had to be acquitted and that was therefore the result.

Among other things, the judgment illustrates the difficulty of distinguishing between what has to be deemed protection of political/religious expression and punishable hate speech, and whether the context, and not least the understanding of the context by the person responsible, cf. the requirement of guilt, can decide how speech must be interpreted.

### 3.2 Section 186 of the Penal Code – Discrimination

This penal provision prohibits – outside the private domain – refusing a person goods or services on the same anti-discrimination grounds that we are familiar with from Section 185.

The provision states the following:

A person shall be liable to fines or imprisonment for up to 6 months if he/she, in any commercial or similar activity, refuses any person goods or services due to that person's

- a) skin colour or national or ethnic origin,
- b) religion and beliefs,
- c) homosexual orientation, or
- d) disability, as long as such refusal is not due to lack of physical adaptations.

The same punishment is also imposed on any person who, on the same grounds, refuses a person access to a public performance, exhibition or other gathering on the conditions that apply for others.

This provision is built up in much the same way as the provision relating to hate speech. The difference is that the provision only applies to discriminatory actions when one actively does something to refuse someone something based on them belonging to a specific group. Even though refusal will often be communicated through a statement, it is not the statement as such that the prohibition applies to. If refusal is communicated through or accompanied by hate speech, this may have to be assessed as a separate criminal offence pursuant to Section 185 of the Penal Code. We will therefore not examine this provision in any more detail, despite the fact that it is part of the penal provisions in the broader protection against discrimination.

### 3.3 Section 264 of the Penal Code – Serious threats

Hateful motivation can entail that a threat is deemed to be serious. For general threats pursuant to Section 265, the sentencing framework is fines or imprisonment for up to one year and applies to any person who *“by word or deed, threatens to commit a criminal act, under such circumstances that the threat is likely to cause serious fear.”*

Section 264 concerns serious threats that are punishable by imprisonment for up to 3 years. To determine whether the threat is serious, particular emphasis must be placed on, among other things, whether it *“is motivated by the victim’s skin colour, national or ethnic origin, religion, beliefs, homosexual orientation or disability.”*

The protected groups/interests are therefore the same as in the provision relating to hate speech in Section 185. Aiding and abetting and attempted offences will also be punishable, cf. Section 15 and 16 of the Penal Code.

### 3.4 Section 77 of the Penal Code (i) – Aggravating circumstances

Another innovation in the 2005 Penal Code, which largely codifies applicable law, and was developed through case law is the provision regarding aggravating circumstances in Section 77. Section 77 (i) stipulates that when determining a stricter sentence, particular consideration must be made to whether the legal offence *“was based on another person’s religion or beliefs, skin colour, national or ethnic origin, homosexual orientation, disability or other factors that offend groups with a special need for protection.”*

This provision demonstrates that hateful motivation for criminal acts must be taken into consideration when determining the sentence for any offence. We see here that a hateful motive is a requirement for this alternative to be applied. The groups/interests that are protected are somewhat expanded in relation to the other provisions in the Penal Code since the additional text *“groups with a special need for protection”* has been inserted. The list is therefore not exhaustive. This entails that actions that are motivated by hate based on other grounds for discrimination can also justify a stricter punishment.

The preparatory works to the provision state that *“the provision is aimed at instances in which the motive of the crime can be fully or partly attributed to these circumstances.”*<sup>63</sup>

The same preparatory works further state that *“on a general basis, the Ministry is of the view that criminal acts that are motivated by such considerations should be subject to stricter punishments than are currently imposed.”*<sup>64</sup>

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63 Section 12.1 of Proposition no. 8 to the Odelsting (2007–2008).

64 Ibid.

### 3.5 Section 183 of the Penal Code – Incitement to commit a criminal act

Section 183 of the Penal Code states the following:

Any person who incites someone to commit a criminal act is punished by fines or prison for up to 3 years.

The provision is general, but it will therefore also include incitement to commit criminal acts against members of specific groups or against individuals due to them being members of specific groups. Since the provision is general, it will also include incitement based on other grounds for discrimination than those that are protected by Section 185, for example, gender, gender expression/identity and sexual orientation in general. If such incitement is intended to impact on individuals or a group of people based on the grounds for discrimination covered by Section 77 (i), this will also constitute aggravating circumstances.

### 3.6 Section 266 – Offensive behaviour

Section 266 applies to any person who *“by frightening or bothersome behaviour or other offensive behaviour violates another person’s right to be left in peace”*. The punishment is fines or imprisonment for up to 2 years.

This provision can apply to a range of actions, including statements, when such occur in a manifestly frightening or bothersome manner. The provision can include speech that, in isolation, is not covered by other restrictions on speech, but which, due to the scope, context or other factors, mean that the activity *“clearly goes beyond the type of unpleasantness that normal human relations may regularly involve.”*<sup>65</sup>

Examples can be:

- stalking
- nightly phone calls
- harassment and abuse.
- sending messages with abusive content
- vague threats

With regard to the topic of this report, the provision is very practical.

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65 Rt-2014-669.



For instance, it can include hateful and malicious speech that is neither conveyed in public or with others in attendance and that therefore cannot come under Section 185. The provision is also, and typically, applicable in situations in which the statements are addressed directly to and only to the victim.

It may also include speech that is hateful based on different grounds for discrimination to those that are covered by Section 185, for example, gender, gender identity/expression and sexual orientation. In addition, it may also include statements that, individually, do not qualify as hateful pursuant to Section 185 (or, for example, as threats pursuant to Section 265), if the scope, context or other factors mean that the activity as a whole goes beyond the unpleasantness the victim must be able to accept.

If the activity constitutes the type of harassment that is prohibited pursuant to civil anti-discrimination law (see more detailed information about this below), this will suggest that the norm in Section 266 of the Penal Code has also been violated, because the anti-discrimination legislation on this point precisely expresses the type of unpleasantness individuals must not have to accept. Section 77 of the Penal Code concerning aggravating circumstances will also be relevant if violation of Section 266 is fully or partly motivated by such grounds for discrimination.

### 3.7 Civil anti-discrimination legislation

The different civil anti-discrimination laws will be briefly presented below. The most important part of this report is criminal law protection against hate speech, and it will therefore also be the relevant provisions in this legislation in this context that will be the focus of the review.<sup>66</sup>

From that perspective, the individual laws are reasonably similar since they all contain general prohibitions against both discrimination and harassment based on the respective grounds for discrimination. It is first and foremost the prohibitions against harassment that will apply to speech as such.

Other than the grounds for discrimination being different, the anti-harassment provisions are largely identical in terms of their wording. Therefore, we will present the content of the anti-harassment provision in the Ethnicity

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<sup>66</sup> There is also protection against discrimination in housing laws, cf. Section 3a of the Property Unit Ownership Act, Section 1-8 of the Tenancy Act and Section 1-5 of the Housing Cooperatives Act. These will not be reviewed in any more detail here since these do not typically concern speech and because, unlike the general anti-discrimination laws, do not contain prohibitions against harassment.

Anti-Discrimination Act in more detail, while in the presentation of the other anti-discrimination laws we will only make note of where the equivalent anti-harassment provision can be found.

As will be shown, violations of the prohibitions in anti-discrimination laws generally only result in civil law liability for damages, not in criminal liability (with the exception of the Ethnicity Anti-Discrimination Act, which has a penal provision for aggravated, organised violations). It is also for this reason that the review of these laws will be limited. At the same time, we make note of what was stated above about Section 266 relating to offensive behaviour, which could be applied as a criminal law basis for violations of the norm in the prohibition against harassment in the anti-discrimination laws. This entails that violations of the anti-harassment prohibitions can still result in criminal liability, if not indirectly.

The purpose of the **Ethnicity Anti-Discrimination Act** is to promote equality, irrespective of ethnicity, religion and beliefs.

Section 5 of the Act contains a general prohibition against discrimination.

Section 6 of the Act also contains the following prohibitions against harassment:

Harassment on the basis of ethnicity, religion or belief shall be prohibited.  
“Harassment” shall mean acts, omissions or statements that have the effect or purpose of being offensive, frightening, hostile, degrading or humiliating.

As stated in the wording, this prohibition will also apply to harassing statements. Even though the provision includes hate speech, a statement does not need to be hateful to be deemed harassment. As the wording shows, the threshold is much lower. It is sufficient that it appears or has the intention of appearing “*offensive, frightening, hostile, degrading or humiliating*”. This is subjective and according to the preparatory works, the starting point must be the aggrieved party’s own opinion of the behaviour in question. Each instance of harassment must be specifically assessed, and different people will have different thresholds for what they consider to be harassment. However, the subjective assessment is not decisive, as was elaborated on by Ministry:

However, the subjective assessment must be supplemented with a more objective assessment of whether the act etc. satisfies the mentioned criteria. Behaviour that is annoying and irritating, but not of a certain degree of severity, does not qualify as harassment. The description of the consequences entails that the harasser’s behaviour must be of a negative

character. Whether or not the person who is committing the harassing behaviour him/herself realises that the act etc. could be offensive, frightening, hostile, degrading or humiliating is also of importance. Other elements in this assessment are the seriousness of the offence, the circumstances under which the act etc. took place, whether the victim has given notice that the behaviour is considered offensive, and the victim's reaction. However, it must still be emphasised that there is no general requirement that the victim must have clearly given the impression that the act etc. was undesirable. It will also be of significance if the harassment has occurred over a long period of time. Even if each individual act, omission or statement does not alone satisfy the criteria, they could possibly be said to have the above-mentioned effects if they are viewed in context. Persistent or repeated distressing behaviour may in itself result in the situation becoming untenable such that the harassment provision will apply. The list of the different elements is not exhaustive and must be supplemented through case law.<sup>67</sup>

However, unlike Section 185 of the Penal Code, this prohibition against harassment does not include public statements about a group as a whole. The prohibition against harassment presupposes that the statement must be directed at one or more specific people.<sup>68</sup> Therefore, on this point the scope is more restricted than for Section 185 of the Penal Code.

Furthermore, as a starting point, breach of the provision only entitles the aggrieved party to compensation and aggravated damages. However, also unlike the other anti-discrimination laws (cf. immediately below), this Act has a penal provision:

Section 26. Penalties for gross breach of the prohibition against discrimination committed jointly by several persons.

A person who intentionally commits a gross breach or aids and abets in the gross breach of Sections 6 to 12 jointly with at least two other persons shall be punished by fines or imprisonment for up to three years. A person who has previously been subjected to a penalty for breach of this provision may be punished even if the breach is not gross.

In the assessment of whether a breach is gross, particular weight shall be given to the degree of demonstrated guilt, whether the breach was racially motivated, whether it constitutes harassment, whether it involves bodily harm or a serious violation of an individual's mental integrity, whether it is likely to create fear and whether it has been committed against a person under the age of 18.

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67 Section 10.5.7 of Proposition no. 33 to the Odelsting (2004–2005).

68 Ibid.

A great deal is required for this penal provision to be applied because it requires that the act has been committed jointly by at least three people and that there was a gross violation (or a recurrence). There are no published judgments pertaining to breach of this provision.

The provision was adopted after criticism from the UN Committee on the Elimination of Racial Discrimination (CERD) concerning Norway not having an adequate prohibition against racist organisations. However, no prohibition against these types of organisations was adopted as such. It was considered sufficient to have the above-mentioned prohibition against organised activities that are in violation of the prohibition against discrimination and harassment.

The purpose of the **Gender Equality Act** is to promote equality between the sexes. Section 5 of the Act includes a general prohibition against discrimination based on gender, while Section 8 prohibits harassment (including sexual harassment) on the same grounds.

Breach of the Act can give the right to compensation and aggravated damages. The Act has no penal provisions.

The purpose of the **Anti-Discrimination and Accessibility Act** is to promote equality irrespective of disability. Section 5 of the Act contains a general prohibition against discrimination. Section 8 contains a prohibition against harassment.

Breach of the Act can entitle the aggrieved party to compensation and aggravated damages. The Act has no penal provisions.

The purpose of the **Sexual Orientation Anti-Discrimination Act** is to promote equality irrespective of sexual orientation, gender identity and gender expression. The Act prohibits discrimination based on sexual orientation, gender identity or gender expression, cf. Section 5.

The Act also includes a prohibition against harassment in Section 8.

Note that the Act provides special protection that goes further than Section 185 of the Penal Code. As we have seen, under the Penal Code only homosexual inclination, lifestyle or orientation are protected, while the Sexual Harassment Anti-Discrimination Act protects any sexual orientation, any gender identity and any gender expression.

Breach of the Act can give the right to compensation and aggravated damages. The Act has no penal provisions.

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