

Hate Crimes

Version of the 2th of June 2022

1. Overview and Checklist

Criminal offenses based on the victim's race, skin colour, national or ethnic origin or beliefs or disability or because of the sexual orientation, gender identity, gender expression or gender characteristics of the group in question may be a violation of:

- Section 266 b of the Criminal Code (see [paras 2.1.](#), [4.1.](#) and [4.2.](#)).
- Act on prohibiting of differential treatment on the grounds of race, etc. (see [paras 2.2.](#) and [4.5.](#))

It may also be relevant to apply:

- Section 81 (vi) of the Criminal Code on the increase of the penalties in criminal offences where the offence is wholly or partly on other people's ethnic origin, religion, disabilities, sexual orientation, gender identities, gender expressions, gender characteristics or the like. (see [paras 2.3.](#), [3.2.](#) and [4.6.](#)).

1.1.Cases concerning Section 266 b of the Criminal Code

The police should mainly pay attention to the following aspects:

- Establish the contents of the statement/communication. See [para 2.1.1.](#)
 - The purpose is to determine whether the statement is of such gravity that it falls within the scope of section 266 b. See [para 4.1.4.](#)
- Establish where, how (for instance orally in the street or in a blog on the Internet) and to whom the statement/communication was addressed. See [para 2.1.1.](#)
 - The purpose is to determine whether the statement was made publicly or with the intention of wider dissemination. See [para 4.1.1.](#)
- Establish the grounds for the statement/communication. See [para 2.1.1.](#)
 - The purpose is to determine whether the offender had the intention to threaten, humiliate or degrade a group of people on account of their race, colour, national or ethnic origin, beliefs, disabilities or on account of the sexual orientation, gender identity, gender expression or gender characteristics of the group in question. See [para 4.1.3.](#)

The prosecutor mainly should pay attention to the following aspects:

- Ensure that the grounds for the statement/communication have been adequately elucidated.
- Assess whether the case can be closed with a fixed-penalty notice or whether it needs to be brought before a court of law – maybe a court sitting with lay judges, see section 686 (2) of the Danish Administration of Justice Act. See [para 3.1.1.](#)
- Rules on submission. See [para 3.1.1.](#) and [para 3.1.2.](#)

1.2. Cases concerning the Act on Prohibition of Differential Treatment Based on Race, etc.

The police mainly should pay attention to the following aspects:

- Establish what was said/expressed to the person in connection with the refusal of service or entry.
 - o The purpose is to determine the grounds for refusal given to the person concerned (e.g. dress code, non-membership or young age).
- Examine relevant conditions relating to the other patrons present in the discotheque, the restaurant, etc. at the time when the person was refused service or entry. See [para 2.2.](#)
 - o The purpose is to determine, if the grounds for refusal given, are real or a manifestation of discrimination based on race, colour, national or ethnic origin, religions, sexual orientation, gender identities, gender expressions or sexual characteristics.

The prosecutor mainly should pay attention to the following aspects:

- Ensure that the grounds for refusing service or entry have been adequately elucidated.
- Institute prosecution against both the person engaging in the differential treatment and the owner, manager or similar person, including a company, who may have ordered an employee to engage in the differential treatment.
- Rules on submission, see [para 3.1.3.](#) and [para 3.1.4.](#)

1.3. Cases where Section 81 (vi) of the Criminal Code must be invoked

The police mainly should pay attention to the following aspects:

- Whether there are indications of a hate motive. This applies, in particular, to cases of threats, violence or criminal damage. See [para 4.6.1.](#)
- If yes, initiate an investigation capable of elucidating any hate motive. See [para 2.3.1.](#)

The prosecutor should mainly pay attention to the following aspects:

- Cite Section 81 (vi) in the indictment/motion for a court hearing. See [para 3.2.1.](#)
- Consider whether a need exists for producing special evidence in court in relation to elucidating the motive, e.g. producing a witness from an interest group/association or special documentation in addition.
- Invite the court to take expressly position (in the ratio decidendi) on the issue of application of Section 81 (vi) of the Criminal Code. See [para 3.2.2.](#)
- Submit judgments to the Knowledge Database of the Danish Prosecution Service. See [para 6.3.](#)
- Ensure correct registration of decisions in POLSAS. See [para 2.1.2.](#)

2. Police Investigation and Proceedings

2.1. Cases concerning Section 266 b of the Criminal Code

2.1.1. Should an investigation be Initiated?

Where the Police receive a report of an alleged violation of section 266 b of the Criminal Code, the Police are generally required to initiate an investigation. The overriding principle should therefore be that the person issuing the statement etc. should be interviewed in order to identify the purpose of and grounds for the statement etc., and the victim in the case (the person lodging the report of the alleged offence/complainant) should also be interviewed.

The requirement for questioning also applies, even if the detailed content of the statement must be considered to be fixed, e.g. in the case of a post on Facebook. For more information see para 4.4.

An interview may be omitted only if it is obvious, in view of the contents and nature of the statement etc., that Section 266 b of the Criminal Code has not been violated.

What must the police elucidate when interviewing the person provisionally charged and the complainant/victim?

- Form and contents of the statement/communication.
- Where was the statement/communication issued?
 - Who – and in certain cases how many people – have overheard/seen/read the statement/communication?
 - Especially relevant if the incident occurred where other persons are not naturally present, e.g. in a street at night.
- The grounds for the statement/communication. See para 4.1.3.
 - Have there – prior to the issuing of the statement/communication – been disagreements between the parties?
 - If yes, elucidate the precise nature of such disagreements.

Further investigative measures:

- Has the statement/communication been issued in the media (newspapers, television, radio, etc.) or via the Internet (websites, blogs, etc.)?
 - Procure a copy/a printout of the relevant article, video or the like.
- Has the statement been issued in a social media on the Internet, e.g. on Facebook?
 - Procure a copy/a printout of the relevant insert etc.
 - Elucidate the profile setup (is it open or closed?).
 - If the statement/communication has been issued in a closed forum on the Internet, the report material must show the number of persons who, at the time of the offence, had access to the statement/communication.
 - Elucidate the use of the profile by the person provisionally charged, including how long the person has had the profile.
- If the statement/communication has been issued directly to one or more persons, e.g. in the street, the report material must show:
 - The (approximate) number of persons who have – or could have – overheard/seen the statement/communication.
 - In such case, any relevant (third-party) witnesses must be interviewed.

2.1.2. Update in POLSAS on Hate Crimes

All hate crimes must be updated with a search key in POLSAS in order to ensure that the National Commission of the Danish Police is capable of monitoring the hate crime area.

The scheme is described in the national guidelines on registration of hate crimes provided by the National Commission of the Danish Police, from which, i.a., the following appears:

- The purpose of the monitoring scheme.
- A description of the individual search keys.

The guidelines from the Danish National Police are available at Polnet under ”Politifagligt” (Police Professionally) ” -> ”Forebyggelse” (Prevention) -> “Hate Crimes” -> “National Commission of the Danish Police - National Guidelines on Registration of Hate Crimes”.

2.2. Cases concerning the Act on Prohibition of Differential Treatment based on Race, etc.

In cases concerning the Act on Prohibition of Differential Treatment based on Race, Colour, National or

Ethnic Origin, Religion or Sexual Orientation, Gender Identities, Gender Expressions, or Sexual Characteristics, the Police must conduct its investigation for the main purpose of determining:

- What was said/expressed in connection with the refusal of service or entry to the discotheque, to the restaurant or the like?
 - The purpose is to determine the grounds given for the differential treatment concerned (e.g. dress code, membership or age).
- How were conditions in the discotheque, the restaurant, etc. at the time when the person was refused service or entry? Do conditions in the establishment (e.g. other patrons’ clothing or age) correspond to the grounds for refusing the person?
 - The purpose is to investigate whether the differential treatment may be a manifestation of discrimination based on Race, Colour, Religion, Sexual Orientation, Gender Identities, Gender Expressions, or Sexual Characteristics.
- If the grounds for refusing service or entry to a person are the person's non-observance of the establishment's dress code, the police must, in the police report,
 - specify if other patrons present were wearing the same type of clothing as the refused person and
 - provide documentation of the establishment's dress code, if applicable.
- If a person is refused service or entry because the person does not have the required membership, the police must
 - investigate whether other patrons present are members and
 - provide documentation of the establishment's requirement of membership, if applicable.
- If a person is refused service or entry because the person does not have the required age, the police must
 - check other patrons’ age and
 - provide documentation of the establishment's age requirement, if applicable.

2.3. Cases where it may be relevant to increase the sentence under Section 81 (vi) of the Criminal Code

2.3.1. Investigation of the Hate Motive

When alleged offences are reported to and investigated by the police, the police officers should pay attention to whether the specific case (typically a case of violence, assault or the like, but may also be other types of criminal offence) involves any circumstances indicating that the offence may have been committed in full or in part on grounds of other persons' ethnic origin, religion, sexual orientation, gender identities, gender expressions, or sexual characteristics, or the like – in other words, whether the offender has what is known as a hate motive, see Section 81 (vi) of the Criminal Act.

Indications suggesting the existence of a hate motive include e.g.:

- Verbal declarations concerning the victim's ethnic origin, religion, disabilities, sexual orientation, gender identities, gender expressions, or sexual characteristics, or the like See [para 4.6.](#)
- The suspect is affiliated or has sympathies with an organisation, association, etc. which is a proponent of, e.g., highly racist or homophobic views. See [para 4.6.](#)
- At the time of the offence, the victim participated in activities related to the victim's ethnic origin, religion, disabilities or sexual orientation, gender identities, gender expressions, or sexual characteristics or the like See [para 4.6.](#)
- Information about the scene of the offence (a site considered commonly known as a meeting place for persons of a particular ethnic origin, religion, disabilities or sexual orientation, gender identities, gender expressions, or sexual characteristics or the like). See [para 4.6.](#)

For more information about indicators of a hate motive, see [para 4.6.](#)

Investigative Measures

If one or more of these indicators exists or if other circumstances of the case point towards a hate motive, the Police must attempt to elucidate the motive during the investigation. This may – depending on the nature and specific circumstances of the case – be effected through the following investigative measures:

- Interviewing the victim, the suspect/person provisionally charged and any witnesses of the incident.
- Interviewing the suspect's family and acquaintances to discover a potential affiliation or sympathies with organisations or associations which are proponents of highly racist or homophobic views.
- Searching the suspect's residence, including his or her computer.
- Procuring special local knowledge or contacts with interest groups to discover, e.g., whether a particular site is known as a local meeting place of homosexuals or persons of particular ethnic groups.

Significance of prior conflict

A prior conflict between the suspect/person provisionally charged and the victim does not preclude the concurrent existence of a hate motive. It is therefore also an aggravating circumstance if the offence is only partly based on other persons' ethnic origin, religion, disabilities or sexual orientation, gender identities, gender expressions, or sexual characteristics or the like. See the travaux préparatoires for Act No. 218 of the 31st of March 2004 ([Bill No. L 99 of 26 November 2003, the special remarks to Section 81](#)), and [Report to Act No. 2591 of 28 December 2021](#), where "in full or in part" was inserted in the Criminal Code, Section 81, No. (vi). The Act entered into force on 1 January 2022.

With the insertion of ‘in full or in part’ in Section 81, (vi) of the Criminal Code, no change in the present state of the Law is intended, as it is already clear from the travaux préparatoires for Act no. 218 of 31 March 2004, that the provision is aimed at cases where the motive of the crime can be attributed in whole or in part to the circumstances listed in the provision.

With the insertion of ‘in full or in part’ in Section 81, (vi), the legal position as of 1 January 2022 is expressly stated in the legislative text.

Offensive Statements Without a Hate Motive

It will always depend on a concrete assessment whether there is a hate motive behind an offence. There may be cases where offensive statements were made in connection with the offence but where such statements are not sufficient per se to constitute a hate motive for the offence. In case law, this has occurred particularly when the conflict arose while the victim was performing his or her duties (e.g. during the performance of police business or in connection with ticket checks) and when it was assumed due to the circumstances of the case that the cause of the conflict was solely the victim’s performance of his or her duties. Reference to report on case law, see [para 4.6.1.](#)

Examples from Case Law of Offensive Statements Without a Hate Motive:

- U 2008.65Ø, where the defendant used violence against a bus driver pursuant to Section 119 (1) of the Criminal Code, and at the same time called him, i.a., a ‘Paki’ and ‘Paki Pig’ and also, i.a. came up with the remark ‘Why do you all come to this country?’ . The High Court found that – regardless of the concurrent offensive statements – the assault could not be considered with the requisite certainty to have been committed on grounds of the bus driver’s ethnic origin, but was solely due to irritation because the bus driver had not stopped and allowed the defendant to board the bus. Section 81 (vi) of the Criminal Code thus did not apply.
- U 2009.83Ø, where the defendant had used violence against a ticket inspector pursuant to Section 119, (1) of the Criminal Code, and at the same time called the victim a ‘Paki’. The defendant had stated, i.a., that he was ‘pissed as a newt’ and that he had called the victim a ‘Paki’ as a common term that he applied to all foreigners without attaching any importance to the expression. The High Court - regardless of the defendant's statements during the assault - found no basis for increasing the sentence pursuant to Section 81 (vi) of the Criminal Code, as it was not found proven that the assault had a background in the ticket inspector's ethnic origin.

Update in POLSAS on Hate Crimes

For more information, see [para 2.1.2.](#)

3. Pre-trial Stage

3.1. Submission to the higher-level Public Prosecutor

The Commissioner of Police must submit the following cases to the Regional Public Prosecutors and/or the Director of Public Prosecutions:

- Cases of violation of section 266 b of the Criminal Code.
- Cases of violation of the Act on Prohibition of Differential Treatment based on Race, etc.

The rules governing submission to the higher-level public prosecutor are described in greater detail under [paras 3.1.1. - 3.1.4.](#)

3.1.1. Section 266 b of the Criminal Code where a charge has been preferred

Submission to the Director of Public Prosecutions

In cases of violation of section 266 b of the Criminal Code in which a charge has been preferred, the Commissioner of Police must submit the case to the Director of Public Prosecutions together with a recommendation on the question of prosecution. The case must be submitted through the Regional Public Prosecutor, cf. the Guidelines of the Director of Public Prosecutions, the section on [Submission and Reporting, etc., para 3.3.4.](#)

Institution of Prosecution

If prosecution is recommended, a draft indictment must also be prepared.

If the Director of Public Prosecutions endorses the recommendation, the case will be sent to the Police District, which brings the case to court.

Where persons falling within the scope of the Media Responsibility Act (medieansvarsloven) are prosecuted, the power of prosecution of the Director of Public Prosecutions also follows from Section 28 of that Act. In these cases, the Director of Public Prosecutions draws up a resolution on prosecution, which replaces an indictment. The police district redirects the resolution on prosecution to the court. Reference is also made to the section of the Public Prosecutor's Guidelines on [Submission and Reporting, etc., para 3.3.6.](#)

It should be noted that for the trial of court cases in which the imposition of a fine is claimed, the court needs to sit with lay judges if the case must be considered to have a particularly profound impact on the defendant or to be of particular public interest, see Section 686(2) of the Administration of Justice Act. The Supreme Court in U1999.1731H, has said that cases of violation of, i.a., Section 266 b of the Criminal Code, must be considered to have a particularly profound impact on the defendant or to be of particular public interest. Against this background, in each individual case of violation of Section 266 b of the Criminal Code, it has to be specifically assessed whether the case should be conducted before a court of law sitting with lay judges.

Withdrawal of charges

If the Director of Public Prosecutions decides to withdraw the charges, the Director of Public Prosecutions issues a decision on the withdrawal of charges and notifies the person charged and others presumed to have a reasonable interest in the case of the withdrawal of charges, see Section 724(1), first and second sentences, of the Administration of Justice Act.

Altered Subsumption

If the Director of Public Prosecutions decides to refer the offence to a penalty provision other than section 266 b of the Criminal Code, the Director of Public Prosecutions in general issues a withdrawal of charges.

The parties involved in the case have to be notified in the same manner as described immediately above. The parties involved in the case should be notified as described immediately above. It must also appear from the withdrawal of charges, however, that the case has not been closed and that it will be returned to the police for investigation and processing under a different penalty provision. In these circumstances, the case will be returned to the Commissioner of Police with a note specifying that the case can be processed to completion in accordance with the altered subsumption.

3.1.2. Section 266 b of the Criminal Code where no charge has been preferred

Submission to the Regional Public Prosecutor

Cases where the Commissioner of Police finds that a report of an alleged violation of section 266 b of the Criminal Code should be dismissed under section 749(1) of the Administration of Justice Act, or where, pursuant to section 749(2), first sentence, no basis is found for continuing the investigation, must be submitted to the Regional Public Prosecutor together with a recommendation stating why the report should be dismissed or the investigation discontinued.

The Regional Public Prosecutor Notifies the Parties

If the Regional Public Prosecutor endorses the recommendation, the Regional Public Prosecutor in general issues a decision on the dismissal of the report or the discontinuation of the investigation and notifies the victim and others presumed to have reasonable interest in the case of the decision, see Section 749(3) of the Administration of Justice Act. In that connection, it must appear that the decision can be appealed to the Director of Public Prosecutions.

Notification of the Director of Public Prosecutions

The Director of Public Prosecutions must be notified of all cases in which the report is dismissed pursuant to section 749(1) or the investigation is discontinued pursuant to section 749(2), first sentence, of the Administration of Justice Act. The notification must be made by forwarding a copy of the decision, the report and other relevant documents, including a copy of the statements or communications concerned.

3.1.3. Act on Prohibition of Differential Treatment based on Race, etc. where a charge has been preferred

Submission to the Regional Public Prosecutor

In all cases of violation of the Act on Prohibition of Differential Treatment based on Race, etc., in which a charge has been preferred, the Commissioner of Police must submit the case to the Regional Public Prosecutor together with a recommendation on the question of prosecution.

Institution of Prosecution

If prosecution is recommended, a draft indictment must also be prepared.

In the cases where it is recommended that an indictment be filed and the Regional Public Prosecutor can endorse the recommendation, the case will be sent to the Police District, that must bring the case before the court.

It should be noted that it follows from Section 3 of the Act that companies may be liable to a fine in case of violation of Section 1. Prosecution should be instituted against both the person applying the differential treatment and the owner, manager or similar person, including a company, who may have ordered an employee to apply the differential treatment.

Reference can be made to the High Court judgment U 2004.641, where two doormen were found guilty of violating the Law on Prohibition of Discrimination on the Grounds of Race, etc. by having denied some persons access to a restaurant because of their ethnic origin. The fines were set at DKK 1,000. The manager was found guilty of violating the same law by having instructed the doormen to discourage groupings of people who had ethnic origins other than Danish in the restaurant and he was fined DKK 5,000. A limited liability company was also found guilty of violating the same law by having issued guidelines as a licensee for the restaurant that no groupings of guests with a different ethnic origin than the Danish one should arise in the restaurant, and the company was fined DKK 10,000.

Reference is also made to the section of the Public Prosecutor's Guidelines on Criminal liability of Legal People, paras 3.1.1. and 3.1.6.

Withdrawal of charges

If the Regional Public Prosecutor decides to withdraw the charges, the Regional Public Prosecutor issues a decision on the withdrawal of charges and notifies the person charged and others presumed to have a reasonable interest in the case of the decision, see section 724(1), first and second sentences, of the Administration of Justice Act.

Altered subsumption

If the Regional Public Prosecutor decides to refer the offence to a penalty provision other than the provisions of the Act on Prohibition of Differential Treatment based on Race, etc., the Regional Public Prosecutor in general issues a withdrawal of charges. The parties involved in the case should be notified as described immediately above. It must also appear from the withdrawal of charges, however, that the case has not been closed and that it will be returned to the police for investigation and processing under a different penalty provision. In these circumstances, the case will be returned to the Commissioner of Police with a note specifying that the case can be processed to completion in accordance with the altered subsumption.

Reference is also made to the Section of the Public Prosecutor's Guidelines on Submission and Reporting, etc., para 3.3.5.

3.1.4. Act on Prohibition of Differential Treatment based on Race, etc. where no Charge has been Preferred

Submission to the Regional Public Prosecutor

Cases where the Commissioner of Police finds that a report alleging a violation of the Act on Prohibition against Differential Treatment based on Race, etc., should be dismissed under section 749(1) of the Administration of Justice Act, or where, pursuant to section 749(2), first sentence, no basis is found for continuing the investigation, must be submitted to the Regional Public Prosecutor together with a recommendation stating why the report should be dismissed or the investigation discontinued.

The Regional Public Prosecutor notifies the parties

If the Regional Public Prosecutor endorses the recommendation, the Regional Public Prosecutor issues a decision on the dismissal of the report or the discontinuation of the investigation and notifies the victim and others presumed to have reasonable interest in the case of the decision, see Section 749(3) of the Administration of Justice Act. In that connection, it must appear that the decision can be appealed to the Director of Public Prosecutions.

Reference is also made to the section of the Public Prosecutor's Guidelines on Submission and Reporting, etc., para 3.3.5.

3.2. Cases where it may be relevant to Increase the Sentence under Section 81 (vi) of the Criminal Code

3.2.1. The Indictment

Before instituting proceedings, the prosecutor should pay attention to whether, in the specific case, there are any circumstances indicating that the offence may have been committed in full or in part on grounds of other persons' ethnic origin, religion, disability, sexual orientation, gender identities, gender expressions, and sexual characteristics or the like, see para 2.3.

If this is the case, the prosecutor must ensure that an attempt has been made to elucidate this motive adequately during the investigation. If no attempt has been made to determine any hate motive adequately, the prosecutor must return the case to the police for further investigation of the motive.

If the prosecutor finds the motive to be adequately elucidated and the conditions for applying section 81 (vi) of the Criminal Code must be considered to be met, section 81 (vi) of the Criminal Code must generally be cited in the indictment/motion for a court hearing. Moreover, when and as appropriate, witnesses must be called and other evidence produced in general to elucidate this aspect of the case.

3.2.2. Main Proceedings

During the main proceedings, the prosecutor should pay attention to the following aspects:

- During the production of evidence, the prosecutor must elucidate any hate motive, if applicable, e.g. by interviewing witnesses and producing evidence with relevant information on that point.
- The prosecutor should object to any claim raised by the defendant for permission to prove the correctness of any allegation of a serious offence. Reference can be made in this respect to the judgment U2000.2234H, in which the Supreme Court declared that there had been no basis for allowing the evidence requested by the defendant for the purpose of substantiating that the defendant's statements were based on scientific research.
- The prosecutor must emphasise, during his or her closing argument, any hate motive as an aggravating circumstance in relation to sentencing. This also applies in cases where section 81 (vi) of the Criminal Code is not cited in the indictment, but where the conditions for applying the provision must nevertheless be considered to be met.
- The court must be invited to take an express position in its judgment on the issue of application of section 81 (vi) of the Criminal Code to raise awareness of the application of the provision through case law.

4. The Legal Framework

4.1. Conditions for Applying Section 266 b(1) of the Criminal Code

The conditions for applying section 266 b(1) of the Criminal Code are described under [paras 4.1.1.-4.1.5.](#), where the individual elements of the provision are reviewed, e.g. by including references to relevant case law.

Unprinted judgments from 2000 onwards are listed using the numbers allocated to the judgments in the overview of case law prepared by the Director of Public Prosecutions on [Hate Crime \(Section 266 b of the Criminal Code\) – the Overview of Case Law](#).

4.1.1. 'Publicly or with the intention of wider dissemination'

To apply section 266 b of the Criminal Code, it is a condition that the statement or communication was issued publicly or with the intention of wider dissemination.

The table below provides a list of different incidents together with supporting information as to whether a statement etc. must be considered to be covered by the condition of being issued publicly etc.

Where was the statement/communication issued?	Covered by the condition?	Examples from case law

At public meetings, in newspapers, on radio or television and in electronic versions of such media.	Covered.	Judgment 1.1.81> Conviction (statements made in a reader's letter published in the paper edition of a newspaper and on the newspaper's website)
In public discussion fora on websites and blogs as well as postings on Facebook and similar social media.	Generally covered. If the statement was made in a forum not available to the general public, e.g. on a closed Facebook profile, the statement must have been made with the intention of wider dissemination. That necessitates, i.a., a <u>requirement</u> of documentation to prove how many persons have access to the profile or forum and how the profile has been set up with a view to assessing whether there is an intention of wider dissemination.	Judgment No. 1.2.9. > Conviction (statements on the defendant's blog). U 2014.73V > Conviction (reproduction on the defendant's blog of another person's statements). U 2003.2259V > Conviction (song uploaded to the defendant's website). Judgment No. 1.4.9. > Acquittal (statement made as a comment on a posting on another person's Facebook profile. The High Court found that there was no intention of wider dissemination. There was no information available in the case to show the profile settings and the number of persons who had access to the profile). Judgment No. 1.2.17 > Conviction (video recording posted on Facebook profile).

Where was the statement/communication issued?	Covered by the condition?	Examples from case law
To journalists in connection with interviews etc.	Generally covered (however, there may be instances where the statement was not made with the intention of wider dissemination).	Judgment No. 1.4.1. > Acquittal (Statements made to a third party in the presence of a journalist. The High Court found that the journalist had not asked for an interview or otherwise made it clear to the defendant that his statements would be literally reproduced in the newspaper. Therefore, it had not appeared highly probable to the defendant that his statements would be widely disseminated). Judgment No. 1.2.14. > Conviction (T (who was an Imam) had to a journalist at a local newspaper, for the purpose of an article, stated: <i>"Homosexuality is unnatural. It's like having sex with animals. It is similarly abnormal,"</i> as T to a journalist at a nationwide newspaper for a purpose of another article stated, <i>"It is unacceptable and just as abnormal as eating one's own shit. Or eating dogs. For us, it's like being a pedophile. I get nauseous when I hear about homosexuality "</i>).
To an individual in nonpublic places, e.g. an examination room at a hospital, a holding cell at a police station, a private home, a taxi or a private garden).	Generally not covered.	Judgment No. 1.4.6. > Acquittal (statements made in the parents' private dwelling at a nursing home, which statements were overheard by a person inside the dwelling and by a person who happened to be in a public corridor of the nursing home without the defendant being aware of that).
Where was the statement/communication issued?	Covered by the condition?	Examples from case law

Where was the statement/communication issued?	Covered by the condition?	Examples from case law
To an individual in a public place (such as a street, a means of public transport, a shop, a restaurant and a railway station).	Depending on the circumstances, covered (according to case law, it is normally required in such situations that the relevant statement was overheard by several accidental bystanders and that the person making the statement must have been aware that this would be the case - or that s/he otherwise acted intentionally).	Judgment No. 1.2.6. > Conviction (statements at a bus stop in the presence of about 10 innocent bystanders). Judgment No. 1.1.12. > Conviction (yelling on a public bus in the presence of several innocent bystanders). Judgment No. 1.2.8. > Conviction (yelling in a shawarma bar in the presence of several persons). Judgment No. 1.1.31. > Conviction (statements made countless times at a railway station in front of several persons and over a long period of time). Judgment No. 1.1.32. > Conviction (yelling at a security guard in front of an embassy and several persons) Judgment No. 1.1.101. > Conviction (statements made in the Danish Immigration Service's Citizen Service in the presence of several people)
To a closed group of people, e.g. on the board or committee of an association, club or the like.	Generally not covered.	Judgment No. 1.4.2. > Acquittal (statements made after a football match on a bus where the players from the rival team were present. The court found that statements made in circumstances that made them only audible by a limited group of people were not publicly made).
Use of symbols against individuals.	May be covered.	See examples para 4.1.2. ('Issues a statement or other communication').

4.1.2. 'Issues a Statement or other communication'

The expression 'issues a statement or other communication' comprises both written and oral expressions. The words 'other communication' extend the provision to cover means of expression that cannot be characterised as statements, e.g. images or cartoons.

Acts implying the use of generally known racist symbols may constitute a violation of section 266 b.

Examples from case law could include:

- U 1994.993/1Ø, according to which a burning cross erected on the road outside a house occupied by a Turkish family was considered as the issuing of ‘other communication’ within the meaning of Section 266 b of the Criminal Code.
- Judgment No. 1.1.14, by which the reproduction of three swastikas on the brickwork of a grill bar owned by a man of Turkish origin was considered to be a violation of Section 266 b of the Criminal Code.

4.1.3. ‘Group of people’

Pursuant to section 266 b(1) of the Criminal Code, the statement must be one by which ‘a group of people’ are threatened, humiliated or degraded.

Not any grouping of people is covered by the concept of ‘a group of people’. The group of people humiliated etc. may therefore become so large/diverse that the statement will not be considered a violation of section 266 b. A group of people within the meaning of section 266 b must share a common feature/characteristic and, in that fashion, constitute a ‘certain’ group to be covered by the provision.

From case law, reference can be made to the following decision, by which ‘persons who are not Danes’ did not constitute a ‘group of people’ within the meaning of section 266 b:

- (TfK 2013.967V, where the mounting on a window in an Indian restaurant of two stickers with the image of a swastika and the text ‘Denmark for Danes’ and the possession of corresponding stickers, including stickers reading ‘Racial mixing is genocide’ were not considered to be a violation of section 266 b(1) of the Criminal Code. The High Court thus attached importance to the fact that the statements did not contain any degradation or humiliation of a group of people on account of their race, colour, national origin or ethnic origin and that persons who are not Danes do not constitute ‘a certain group of people’ within the meaning of section 266 b of the Criminal Code. The High Court found that the circumstance that the stickers were marked with swastikas and that they had been mounted in an ‘ethnic’ restaurant was not capable of making the statements constitute a violation of section 266 b of the Criminal Code.

Furthermore, reference can be made to the following [Supreme Court judgment of 20 January 2021](#), which states that ‘non-Western migrants’ and ‘asylum seekers’ are not a group of persons covered by section 266 b of the Criminal Code.

- T1, T2 and T3 had handed out spray cans on the street with the word “Asylum spray” and texts about migrants and asylum seekers, as well as flyers with text on the same subject. For the Supreme Court, the question was whether the defendants in these statements had violated Section 266 b of the Criminal Code. The decisive factor was then whether the group of persons in question had been ridiculed or degraded because of their race, skin colour, national or ethnic origin, religion or sexual orientation. The majority of the Supreme Court found that the group of persons nonWestern migrants’ and ‘asylum seekers’ were not delimited by a particular race, colour, national or ethnic origin, religion or sexual orientation, and that the statements were not directed at those concerned because of the relationship. The statements were therefore not punishable under Section 266 b of the Criminal Code, and the defendants were acquitted.

It is the Director of the Public Prosecution's opinion that the person group 'refugees' in the light of the Supreme Court judgment of 20 January 2021 is not covered by Section 266 b of the Criminal Code. It is noted, however, that the conditions in Section 266 b of the Criminal Code talk about statements about 'refugees'. It can e.g. This may be the case if statements are made about 'Syrian refugees', as the group of people in that situation is characterized by national origin.

Referring to the judgment of the Supreme Court of 20 January 2021, the Prosecution sought acquittal in the following cases:

Judgment 1.1.57 compared with judgment 1.4.29 (animated video containing threat to refugees)

Judgment 1.4.26 (comment on Facebook aimed at refugees)

Statements aimed at an individual that cannot be considered an expression of humiliation etc. of the group to whom the individual belongs must be adjudicated under the general rules of the Criminal Code on offences against privacy and defamation. For more information, see the travaux préparatoires for Section 266 b (FT 1970-71, Annex A, columns 1187-88, and Ministerial Report No. 553/1969, p. 34).

Whether a statement aimed at an individual must also be considered to be an expression of threat, humiliation or degradation of a group of people is based on an overall assessment of the contents of the statement, the particular situation in which the statement was made and the grounds for the statement.

Cases Concerning Individuals

Below follows a list of different types of incidents together with supporting information as to whether statements or communications issued to individuals must be considered to be covered by the condition of being issued to degrade, humiliate, etc. a group of people.

- Statements/communications issued to individuals who the offender has no reason to contact and no prior relations with will often be covered.
 - Judgment 1.1.5. Conviction (in the open street, the defendant yelled at a random woman of Iraqi origin: 'Go home to where you come from. Go home to Khomeini. Young immigrants rape and rape again. Free Europe').
 - Judgment 1.1.12. Conviction (on a public bus, the defendant yelled in front of a group of Somali girls, who were passengers on the bus: 'Paki pigs', 'black sow', 'black pigs' and 'make off to the country you came from').
 - Judgment 1.2.6. Conviction (at a bus stop, in the presence of about 10 innocent bystanders, the defendant said to a woman without any provocation or prior contact: 'Tell your Paki offspring to stop gawking').
 - Judgment 1.1.86. Conviction (in a café to two people of foreign origin, who the accused had no reason to address, having shouted: 'I hate all Muslims, you are a shit people who only want to exploit Denmark, you should all be thrown out of the country, Muslims are responsible for all crime in Denmark and Sweden', 'I'll kill all Muslims, I'll kill you, Muslims should be exterminated', 'You are terrorists' and 'You bomb and kill and will take over the whole world', etc.).
- Statements/communications issued during an argument, a conflict or the like between two (or more) persons where the reason for the argument was not the victim's affiliation with a particular group of people falling within Section 266 b of the Criminal Code are usually not covered, if such statements generally must be considered to be pejoratives intended to insult the victim personally. In such a situation, statements are usually not made intentionally to threaten, humiliate or degrade the group of people to whom the victim belongs.

- This might be the case where the matter at issue is a long-term neighbourhood feud or conflicts caused by traffic disagreements. In such circumstances, the statements may instead fall within the general provisions of the Criminal Code on offences against privacy and defamation.
- Statements / communications made to certain persons acting in the public service or function, and who by virtue of their duties are particularly exposed to statements which may be of a threatening, derogatory or degrading nature, are not normally covered if say e.g. on police officers, train drivers, bus drivers, prison officers, etc., and in the light of the circumstances of the case, it must be assumed that the statements were made due to these persons performing their service or duties and not e.g. because of the race, skin colour, national or ethnic origin or religion or disability of these persons or because of the sexual orientation, gender identity, gender expression or gender characteristics of the group concerned.
 - E.g. during the performance of a police business or in connection with ticket checks. In that case the statements must be considered to be pejoratives etc., aimed at this particular public employee due to dissatisfaction with his or her way of performing his or her work and not a statement aimed at, e.g., the ethnic group to whom the victim belongs. It might instead – depending on the nature of the statements – be relevant to prosecute for violation of Section 119(1), or Section 121, of the Criminal Code. If, on the other hand, it is a question of the statements e.g. is made because of the race, skin colour, national or ethnic origin or religion or disability of these persons or because of the sexual orientation, gender identity, gender expression or gender characteristics of the group concerned, the opinions usually will be covered.
 - See judgment 1.1.82. Conviction (refused to provide information to an S-train inspector and shouted repeatedly in this connection: "Paki" and "I do not want to be served by a Paki").
- Statements/communications issued to privately employed security staff, doormen and store detectives, etc., who are particularly exposed to such statements due to the nature of their jobs, are normally not covered if, based on the circumstances of the incident, it must be considered a fact that the statements were issued because of the relevant persons' performance of their occupational duties and not, e.g., because of the race, skin colour, national or ethnic origin or religion or disability of these persons or because of the sexual orientation, gender identity, gender expression or gender characteristics of the group concerned.

Whether these are statements that have the character of terms of abuse or e.g. are made on the basis of a person's pursuit of his profession, or statements made on the basis of a person's race, colour, national or ethnic origin, religion or sexual orientation will, however, always depend on a specific assessment.

4.1.4. 'Threatened, humiliated or degraded' (gravity criterion)

The statement or communication must have the character of a threat, humiliation or degradation (gravity criterion). This means that certain statements etc. fall outside the scope of criminal offences.

Against the background of the travaux préparatoires for the provision, the following general restrictions in the scope of criminal offences can be established:

- Less grave offences.
- Scientific theories on racial, national or ethnic differences.
- Statements not made in a strictly scientific context, but otherwise in the context of a professional discussion.

For more information, see the travaux préparatoires for Section 266 b of the Criminal Code (FT 1970-71, Annex A, columns 1187-88, and Ministerial Report No. 553/1969, p. 34).

These restrictions in the scope of application are intended to ensure that due consideration is given to the freedom of expression in the application of section 266 b of the Criminal Code. Consideration of the freedom of expression was further emphasised by the fact that the phrase of ‘made the subject of degrading mention’ in the originally proposed wording of section 266 b was amended to ‘degrading’ during a parliamentary reading of the Bill (FT 1970-71, Annex B, column 3001).

Criminal liability is based on a general assessment of whether the relevant statements in the specific context can be considered suited to arouse fear (threats) or seem humiliating and/or degrading. Criminal liability does not depend on whether the group in question actually felt threatened, humiliated or degraded.

Expressions implying that the group in general have no value as human beings

It follows from case law that statements implying that a certain group of people in general have no value as human beings will usually meet the gravity criterion of section 266 b of the Criminal Code. This applies, e.g., in case of negatively phrased comparisons with animals.

Examples of decisions concerning comparisons with animals that were deemed to meet the gravity criterion are:

- Judgment No. 1.1.6. (‘breed like rats’)
- Judgment No. 1.1.11. (‘reproduce like rats’)
- Judgment No. 1.1.12. (‘Paki pigs, black sow, black pigs’)
- Judgment No. 1.1.16. (‘the only difference between Mohammedans and rats is that rats do not receive social benefits’)
- Judgment No. 1.1.24. (‘you look like a monkey’, ‘it is much worse that you come from Morocco - you are a bunch of monkeys’, etc.)
- Judgment No. 1.1.31. (‘all Blacks should leave the country’, ‘black pig’, ‘monkey’, ‘go down and eat bananas in the palm trees’, etc.)

Moreover, a range of sentences have been imposed for comparisons with diseases. The following decisions provide examples of this:

- U 1999.296V (‘Blacks are spreading all over; it’s just like cancer!’)
- U 1995.887H (Jews characterised as a plague)

Generalised allegations of serious offences

According to case law, generalised allegations of serious offences are generally sufficient for considering the gravity criterion to have been met.

The following decisions are examples of convictions for allegations of serious offences:

- Judgment No. 1.1.5. (‘young immigrants rape and rape again’)
- Judgment No. 1.1.7. (‘stop more Mohammedan rapes’)
- Judgment No. 1.1.9. (‘mass rapes, serious violence, gang crime’)

- Judgment No. 1.2.1. ('only here to ingratiate themselves until they are strong enough to execute us')
- Judgment No. 1.2.7. ('particularly the Muslims, who commit violence, crime and rapes')

An example of acquittal:

- U 1980.465Ø ('immigrant workers take advantage of our social system')

Other Incidents

Other examples of cases in which the gravity criterion was considered to have been met are provided by the following decisions:

- Judgment No. 1.1.2. (where a spectator at a football match repeatedly shouted, 'Those who hate niggers, clap your hands', and clapped)
- Judgment No. 1.2.6. (according to which the court considered it a punishable offence to state to a woman in the presence of her children: 'Tell your Paki offspring to stop gawking')
- Judgment No. 1.2.14. (TfK 2018.901V) (where the accused (who was an Imam) to two journalists had stated: 'Homosexuality is unnatural. It's like having sex with animals. It is similarly abnormal,' and, 'It is unacceptable and just as abnormal as eating one's own shit. Or eating dogs. For us, it's like being a pedophile. I get nauseous when I hear about homosexuality').

4.1.5. 'On account of their race, colour, national or ethnic origin, or religion or their disabilities or on account of sexual orientation, gender identity, gender expression or gender characteristics of the group in question '

To apply Section 266 b of the Criminal Code, it is a condition that the humiliation etc. is based on race, colour, national or ethnic origin, or religion or their disabilities or on account of sexual orientation, gender identity, gender expression or gender characteristics of the group in question. Against the background of the travaux préparatoires, an explanation follows below to provide a more thorough understanding of these concepts.

Race

According to the travaux préparatoires, 'race' refers to the racial classification in anthropology based on hereditary characteristics.

Ethnic origin

Contrary to 'race', 'ethnic origin' refers to a classification according to cultural features.

National origin

National origin' probably means an individual's affiliation with a nation or origin in the people of such nation, and most likely emphasis should not merely be on nationality in this connection.

Religion

The concept of 'religion' is not defined in detail in the travaux préparatoires. It must be natural to assume that the forms of religion professed by all recognised religious communities in Denmark are considered to be covered by the concept. It is also conceivable that other forms of faith that are not recognized in Denmark, and which originate from e.g. nature or witchcraft-based belief systems, may be covered by the term. It does not appear that a position has been taken on this in case law.

Disability

'Disability' was inserted in Section 266b of the Criminal Code by Act No. 2591 of the 28th of December, 2021, which came into force on the 1st of January, 2022. It is apparent from the travaux préparatoires ([L 18 of 6 October 2021, the Special Remarks on Section 4, \(ii\)](#)) that the concept of disability is to be understood in accordance with the definition in the UN Convention on the Rights of Persons with Disabilities, which entered into force for Denmark on the 23rd of August 2009. It follows from Article 1 of the Convention that persons with disabilities include persons who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with other people.

The change entails that a statement or other form of notification, according to which a group of persons is threatened, insulted or degraded due to their disability, from the 1st of January 2022 will be covered by Section 266 b of the Criminal Code.

Sexual orientation

The term "sexual orientation" is to be understood, according to the travaux préparatoires of Law No. 357 of the 3rd of June 1987 ([1986/1 LSF 196, the General Remarks](#)), to mean the lawful sexual behaviour and attitude of a person.

Gender Identity, Gender Expression or Gender Characteristics

'Gender identity, gender expression or gender characteristics' was inserted in Section 266 b of the Criminal Code by Act no. 2591 of the 28th of December 2021, which entered into force on the 1st of January 2022. It appears from the travaux préparatoires ([L 18 of 6 October 2021, the Special Remarks to Section 4, \(ii\)](#)) that the concept of gender identity covers a person's inner and individual experience of his or her gender. The concept of gender expression covers the way in which one expresses one's gender, e.g. choice of clothes, hairstyle, makeup, behaviour, movements and speech. The concept of gender characteristics covers the bodily characteristics that characterize and differentiate gender, e.g. the number of X and Y chromosomes, the type of internal and external genitalia, endocrine conditions, beard growth and breast development.

Furthermore, it is clear from the travaux préparatoires for Act no. 2591 of the 28th of December 2021 ([L 18 of 6 October 2021, the General Comments para 3.2.2.](#)) that the insertion of 'gender identity,

gender expression or gender characteristics’ in Section 266 b (1) of the Criminal Code creates a clearer legal situation, which will ultimately strengthen both the victim's and the perpetrator's due process.

It should be noted that it is assumed that the Criminal Code Section 266 b, (1), even before the change in the law included threats, insult or degradation due to gender identity or gender expression, even though this was not explicitly stated in the wording or remarks of the provision. However, it was unclear whether gender characteristics were also covered by the scope of the provisions (L 18 of 6 October 2021, the General Remarks, para 3.2.1.1.). However, it appears from the answer to question 16 to L 18 of 6 October 2021, that the Ministry of Justice assesses that “gender characteristics” would probably be considered to be covered.

Ideology

In U 2016.3158Ø, the High Court has held that statements directed at a group of persons because of their ideology are not covered by Section 266b of the Criminal Code. Ideologi

4.2. Conditions for applying Section 266 b(2) of the Criminal Code (Act of Propaganda)

Section 266 b(2), which provides that an act of propaganda must be considered a particularly aggravating circumstance when determining the penalty, was inserted into the Criminal Code by Act No. 309 of 17 May 1995 to amend the Criminal Code.

The concept of ‘propaganda’ must be understood to mean the performance of some kind of systematic, intensive or continuous activity to influence public opinion.

The following acts may be prosecuted under Subsection (2):

- If the offence under section 266 b was committed jointly by several persons. This is particularly relevant if such persons have acted jointly in more than just one isolated situation, including if they belong to the same association, club or organisation, and the statements of this nature must be considered to have been made in connection with the activities of that association, club or organisation.
- Wider dissemination of statements. In that connection, it must be particularly emphasised whether the statements were made in a medium that implies wider dissemination, such as printed matter, radio, television, the Internet or any other electronic medium.

The Gravity Criterion pursuant to Subsection (1)

The provision was not intended to expand the scope of criminal offences compared to that of Subsection

(1), including the condition that the statement must have been of a somewhat grave nature.

When an offence is in the nature of an act of propaganda, however, it is necessary to make an overall assessment. Hence, the consequence of the systematic use of highly negatively phrased statements and claims relating to particular groups of people protected by the provision may be, depending on the circumstances, that the requirement of gravity is considered to have been met, even if the individual statements etc. do not independently satisfy this requirement in full.

For more information, see the travaux préparatoires for section 266 b, ([L 46 of 9 November 1994, the Special Explanatory notes to Section 1](#)).

4.2.1. Case law relating to propaganda

Case law concerning section 266 b (2) of the Criminal Code has emphasised, i.a., whether the statements

- were originally made by members of a political organisation,
- were made to contribute to the dissemination of the political views of such organisation,
- whether they were made during a prolonged period, and
- whether they were intended to influence public opinion.

In this connection, reference is made to the Director of Public Prosecution's overview of case law regarding violation of Section 266 b of the Criminal Code. Unprinted sentences from 2000 onwards are indicated with the numbers that the judgments have in the Director of Public Prosecution's overview. [The overview can be found here.](#)

Examples of cases in which the defendants were sentenced for violation of section 266 b(2) of the Criminal Code are:

- Judgment 2.2.1 about an article uploaded to the Internet website of a political list of candidates.
- U 2003.1428Ø (judgment 2.2.3) where an association had disseminated statements falling within section 266 b on the Internet and in flyers.
- U 2003.1947Ø (judgment 2.2.4.) where members of a political organisation had produced an advertisement and posters.
- U 2004.734H (judgment 2.2.5.) where such statements had been made in connection with an election campaign and on the relevant politician's website.
- Judgments Nos. 2.2.6 and 2.2.7 where statements made at a debate meeting, in a television programme and in radio broadcasts related to a subject that the person in question had commented on for years, the purpose being to influence public opinion.
- Judgment 2.2.10., Where a film had been posted on a political party's YouTube channel, to which there was public access.
- Judgment 2.2.11., Where statements were posted on Twitter as well as on a political party's YouTube channel and Facebook page.

Examples of cases in which the defendants were acquitted for violation of section 266 b(2) of Criminal Code are:

- Judgment 1.1.8. where it was not proved to the satisfaction of the court that the statements made as a contribution to a debate on the website of a political party were in the nature of an act of propaganda.
- Judgment 1.1.13. where the court emphasised that it was a private website and that the defendant had not made any arrangements intended to make a large number of people visit the site or become aware of it.

4.3. Freedom of Expression in Cases Concerning Section 266 b of the Criminal Code

4.3.1. The Importance of Article 10 of the EMRK

Section 266 b of the Criminal Code must be interpreted in the light of Article 10 of the European Convention on Human Rights (EMRK), which protects the freedom of expression. This protection is not absolute as the freedom of expression may be interfered with if the conditions of Article 10 (2) have been met, that is, if interference with the freedom of expression is necessary in a democratic society for specified purposes.

According to the case law of the European Court of Human Rights relating to Article 10, the freedom of expression of politicians is emphasised as highly important. Accordingly, the Court has said that, although the freedom of expression is essential to everyone, it is particularly essential to politicians elected by the people as they represent the electorate, draw attention to the interests of the voters and defend their interests. Any interference with the freedom of expression of an elected politician would therefore be very intensively reviewed by the Court to assess whether such interference is necessary in a democratic society.

The specific interests must be balanced in each individual case to determine whether an interference with the freedom of expression is deemed necessary in a democratic society. Interference may, e.g., be based on consideration for the need to protect a group of people against racist statements. In such cases, consideration of the freedom of expression must be balanced against the consideration for the need to protect groups of people against such racist statements, etc.

Consideration of the freedom of expression does not imply that persons like politicians cannot be punished for issuing statements in violation of Section 266 b of the Criminal Code. Danish case law thus includes several decisions from, i.a., the Supreme Court, punishing Danish politicians for violation of section 266 b of the Criminal Code. See [para 4.3.2.](#)

4.3.2. Case Law Relating to Freedom of Expression

It appears from case law that a specific assessment must be made as to whether the relevant statement falls within section 266 b of the Criminal Code, as interpreted in the light of Article 10 of the European Convention on Human Rights (EMRK).

Statements by Politicians

Examples of cases in which Danish politicians were sentenced for violation of section 266 b of the Criminal Code are:

- U 2000.2234H (founder of a political party and a Member of Parliament for several election periods)
- U 2003.1947Ø (four members of a political organisation)
- U 2003.2435V (statements made at an annual national conference of a political party)
- U 2004.734H (the front-runner of a political party)
- Judgment No. 1.1.7. (deputy leader of a political party)
- Judgment No. 1.2.7. (candidate for a political party)

Journalists conveying statements made by others

Consideration of the freedom of expression may also have to be taken into account in cases regarding journalists conveying statements made by others. One example of this:

- The decision of the European Court of Human Rights in the case *Jersild v. Denmark* (judgment of 23 September 1994), according to which a journalist of the television news magazine 'Søndagsavisen' interviewed some 'Greenjackets' who made a number of statements prohibited by Section 266 b of the Criminal Code. The Court found that consideration of the freedom of expression in the case at hand had to carry more weight than consideration of the protection of the members of the groups of people who were targeted by the 'highly offensive' statements. The Court said in this respect, i. a., that a crucial circumstance in this case was the fact that the journalist did not make the offensive statements himself.

Statements as provocations, happenings or art

- U 2014.73V where the defendant had violated Section 266 b(1) of the Criminal Code by having, in the context of a debate on politics and religion in the Middle East in a blog, reproduced another person's criminal statements, which the defendant in that connection adopted as his own.

4.4. The Requirement of effective investigation under the United Nations International Convention on the Elimination of All Forms of Racial Discrimination

Against the background of the conclusions of the two communications considered by the UN Committee on the Elimination of Racial Discrimination, it should be emphasised that in cases of violation of section 266 b of the Criminal Code, regardless of whether the detailed contents of the statement must be deemed not to be disputed, the overriding principle should be that the persons involved in the matter should be interviewed.

The Committee said in connection with its consideration of the two specific communications – *Gelle v.*

Denmark, decided in March 2006 (communication No. 34/2004), and *Adan v. Denmark*, decided in August 2010 (communication No. 43/2008) – that it is contrary to the United Nations International Convention on the Elimination of All Forms of Racial Discrimination not to carry out an effective investigation to determine whether or not an act of racial discrimination had taken place.

Both cases concerned statements made by politicians because of the consultation of the Danish-Somali Association in connection with the Bill prohibiting female mutilation. The first communication concerned a letter to the editor of a newspaper from a politician who argued against the consultation of the Association; the second communication related to a radio debate in which another politician supported this argument. As the first statement was made in a letter to the editor and the second in a radio broadcast, the contents of the statements were not disputed. In the first case, it was decided not to initiate a full criminal investigation of the alleged offence following a legal assessment. The second communication was filed because the investigation had been discontinued pursuant to section 749(2) of the Administration of Justice Act on the grounds that 'the statements did not exceed the particularly extensive freedom of expression enjoyed by politicians about controversial social issues'. None of the two politicians was interviewed by the police before the cases were decided.

The Documentation and Advisory Centre on Racial Discrimination (DRC) complained of the decisions to the Committee, and the Committee found that Denmark had violated Article 2, (1) paragraph (d), and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination by failing to carry out an effective investigation to determine whether or not an act of racial discrimination had taken place.

4.5. Conditions for applying the Act on Prohibition of Differential Treatment Based on Race, etc.

The Act on Prohibition of Differential Treatment based on Race, etc. entered into force in 1971 to make it possible for Denmark to ratify the International Convention on the Elimination of All Forms of Racial Discrimination. The Act was amended in 1987 when the discrimination ground of 'sexual orientation' was inserted. By Law No. 2591 of 28 December 2021, which entered into force on the 1st of January 2022, "gender identity, gender expression and sex characteristics" were inserted.

Pursuant to Section 1 of the Act, the prohibition of discrimination applies to any service made available to the general public for commercial or social purposes.

The provision covers, e.g.,

- services from sales, repair and service organisations of any kind regardless of their nature of shop, workshop, clinic or the like,
- access to medical and dental treatment,
- assistance from lawyers and architects,
- access to transportation of any kind by transport means offered to the general public,
- access to service in restaurants, hotels, boarding houses, etc., and
- the commercial sale and letting – including subletting – of real estate, flats, apartments or parts thereof and letting by social housing associations.

The activity need not be the owner's principal occupation, and it is of no significance whether it yields and/or is intended to yield a profit. The provision covers any person who applies or orders the application of differential treatment, whether or not s/he is the person responsible for the activity or is merely an employee.

Both express refusal of a request made and omission to provide service without any refusal proper constitute refusal of service.

Any requirement of a higher price from or otherwise more unfavourable conditions for persons of specific races or the like fall within the provision, as appears from the phrase 'on the same conditions as others'. The Act does not cover negligent acts or omissions, see Section 2.

It follows from section 3 that companies may become liable to a fine in case of violation of Section 1. For information on institution of prosecution against companies, see under [para 3.1.3.](#)

See the travaux préparatoires for Act No. 289 of the 9th of June 1971 – now Act No. 626 of the 29th of September 1987 (FT 1970-71, Annex A, columns 1167-68, and Ministerial Report No. 553/1969, p. 35-37)

Furthermore, it is clear from the travaux préparatoires for Act no. 2591 of the 28th of December 2021 ([L 18 of 6 October 2021, the Special Comments to Section 5](#)) as regards the insertion of 'gender identity, gender expression, gender characteristics', that the concept of gender identity covers a

person's inner and individual experience of his or her gender. The concept of gender expression covers the way in which one expresses one's gender, e.g. choice of clothes, hairstyle, makeup, behaviour, movements and speech. The concept of gender characteristics covers the bodily characteristics that characterize and differentiate gender, e.g. the number of X- and Y- chromosomes, the type of internal and external genitalia, endocrine conditions, beard growth and breast development.

4.6. Conditions for Applying Section 81 (vi) of the Criminal Code

It appears from Section 81, (iv) of the Criminal Code that there at the determination of the sentence must generally be included as an aggravating circumstance that the act has a background in full or in part in the ethnic origin, the religion, disability, sexual orientation, gender identity, gender expression, and gender characteristics or the like, of others.

Disability

‘Disability’ was inserted in Section 81(vi) of the Criminal Code by Act No. 709 of the 26th of April 2021, which entered into force on the 1st of May 2021.

It is apparent from the travaux préparatoires for the Act ([L 154 of 3 February 2021, the Special explanatory notes on Section 1, \(i\)](#)) that the provision after the entry into force of the Act applies in relation to any type of crime based on the victim's disability.

Moreover, the insertion of ‘disability’ is not intended to change when a crime is based on the victim's defenceless position and will thus be covered by Section 81, (xi) of the Criminal Code.

On the understanding of the concept of ‘disability’, it is clear from the travaux préparatoires for the Act (L 154 of 3 February 2021, the Special Remarks on Section 1, no. (i) that the concept of disability is to be understood in accordance with the definition in the UN Convention on the Rights of Persons with Disabilities, which entered into force for Denmark on 23 August 2009. It follows from Article 1 of the Convention that persons with disabilities include persons who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with other people.

Full or Partial Hate Motive

By Act no. 2591 of the 28th of December 2021, which entered into force on the 1st of January 2022, it was also inserted, into Section 81, no. (vi), that the deed in full or partly is based on the ethnic origin, religion, disabilities, sexual orientation, gender identity, gender expression, and gender characteristics or the like, of others.

With the insertion of ‘in full or in part’ into Section 81, (vi) of the Criminal Code, no change in the present state of the Law is intended, as it is already clear from the travaux préparatoires for Act no. 218 of 31 March 2004, (L 99 of 26 November 2003, the Special explanatory notes to Section 81) that the provision is aimed at cases where the motive of the crime can be attributed in full or in part to the circumstances listed in the provision.

With the insertion of ‘in full or in part’ into Section 81, no. (vi), the legal position as of 1 January 2022 is expressly stated in the legislative text.

See also [Report to Act no. 2591 of 28 December 2021](#).

Gender Identity, Gender Expression or Gender Characteristics

It appears from the travaux préparatoires No. 2591 of 28 December 2021 ([L 18 of 6 October 2021, the Special explanatory notes to Section 4, \(ii\)](#)) that the concept of gender identity covers a person's inner and individual experience of his or her gender. The concept of gender expression covers the way in which one expresses one's gender, e.g. choice of clothes, hairstyle, makeup, behaviour, movements and speech. The concept of gender characteristics covers the bodily characteristics that characterize and differentiate gender, e.g. the number of X- and Y- chromosomes, the type of internal and external genitalia, endocrine conditions, beard growth and breast development.

Furthermore, it is clear from the travaux préparatoires for Act no. 2591 of the 28th of December 2021 ([L 18 of 6 October 2021, the General Remarks para 3.2.2.](#)) that the insertion of 'gender identity, gender expression or gender characteristics' in Section 81, (vi) of the Criminal Code creates a clearer legal situation, which will ultimately strengthen both the victim's and the perpetrator's due process.

It should be noted that it is assumed that the Criminal Code Section 81, (vi), even before the change in the law included threats, insult or degradation due to gender identity or gender expression, even though this was not explicitly stated in the wording or remarks of the provision. However, it was unclear whether gender characteristics were also covered by the scope of the provisions ([L 18 of 6 October 2021, the General Remarks, para 3.2.1.1.](#)). However, it appears from [the answer to question 16 to L 18 of 6 October 2021](#), that the Ministry of Justice assesses that "gender characteristics" would probably be considered to be covered.

The provision is not restricted to specific types of offences or to situations where the offender's motive was to threaten, humiliate or degrade a person or a group of people. Depending on the circumstances, the provision can also be applied to, e.g., economic crime committed for the purpose of supporting a racist organisation of which the offender is a member.

The interpretation of the words 'ethnic origin, religion, sexual orientation or the like' must be based on Section 266 (b) of the Criminal Code. In addition, 'disability' and 'gender identity, gender expression, gender characteristics' are also included into Section 266 b of the Criminal Code, and there is thus parallelism between Section 266 b and Section 81(vi) of the Criminal Code. For more details, see [para 4.1.5.](#)

The provision applies to the imposition of both fines and custodial sentences.

See the travaux préparatoires for Act No. 218 of the 31st of March 2004 ([Bill No. 99 of 26 November 2003, the Special Explanatory Notes to Section 1, \(ii\) /Section 81 \(vi\)](#))

In April 2008, the Director of Public Prosecutions issued [a memorandum on the application of Section 81 \(vi\) and \(vii\) of the Criminal Code and on cases of violation of the Act on Prohibition of Differential Treatment based on Race, etc.](#) The memorandum reviews in detail the application in case law of, i.a., Section 81 (vi) of the Criminal Code.

4.6.1. Indications of a Hate Motive

Based on case law, various indications suggesting the existence of a hate motive, can be identified.

Unreported judgments are listed using the numbers allocated to the judgments in the [memorandum on the application of section 81\(vi\) and \(vii\) of the Criminal Code and on cases of violation of the Act on](#)

[Prohibition of Differential Treatment based on Race, etc.](#), issued by the Director of Public Prosecutions.

Oral declarations

Information showing that the suspect had made (negative) statements concerning the victim's ethnic origin, religion, sexual orientation or the like immediately before, during or in continuation of the offence.

Examples from case law:

- Judgment No. 3 where a discussion arose as to whether the victim was a homosexual. The defendant invited the victim to kiss him, after which he headbutted the victim. It had been proved to the satisfaction of the court that the violence had been committed at least in part because of the victim's sexual orientation.
- Judgment No. 6, where the defendant asked the victim immediately before the assault whether he was a homosexual, which the victim confirmed, and the court found on those grounds that aggravating circumstances existed, see Section 81 (vi).

Posters, graffiti, etc.

Information showing that the suspect had posted bills, made graffiti or the like at the scene of the offence or elsewhere referring to an organisation or an association which is a proponent of, e.g., highly racist or homophobic views.

The suspect's affiliation/sympathies

Information showing that the suspect is affiliated or has sympathies with an organisation, association, etc. which is a proponent of, e.g., highly racist or homophobic views.

Examples from case law:

- (U2007.1679Ø), where the defendant, in a case among other things of assault pursuant to Section 244 of the Criminal Code against a person of an ethnic origin other than Danish, the defendant was wearing a T-shirt bearing the inscription 'Dansk Front' (Danish Front). The sentence was increased with reference to Section 81 (vi) of the Criminal Code.
- Reference is also made to judgment No. 1 concerning attempted assault pursuant to Section 245, see Section 21, of the Criminal Code against a person of an ethnic origin other than Danish. In this case, the defendant wore a T-shirt bearing the inscription 'Patriot' and was a member of the Danish Front association. Also in this case, the sentence was increased with reference to Section 81 (vi) of the Criminal Code.

The Victim's circumstances etc. attire, appearance or the scene of the offence

Information showing that

- the victim participated in an activity related to the victim's ethnic origin, religion, disability or sexual orientation (e.g. prayers, a meeting or a demonstration) at the time of the offence,

- the victim had been subjected to harassment prior to the incident, e.g., in the form of negative emails, phone calls or verbal attacks, because of his or her ethnic origin, religion, disability or sexual orientation,
- the aggrieved party was dressed/looked a certain way
 - Reference may be made to [AM2013.10.24B2](#) , where T was sentenced to 1 year and 3 months of unconditional imprisonment for having committed serious violence against a man because he was made up and dressed as a woman. In the aggravating direction of the sentence, the court attached importance to the fact that the violence was based on the sexual orientation of the aggrieved. On this basis, the man was convicted of violation of, among other things, Section 245 (1) of the Criminal Code on serious violence, cf. Section 81, no. 6, on hate crimes.
- the offence was aimed at or occurred at a site considered commonly known as a meeting place for persons of a particular ethnic origin, religion, disability or sexual orientation (e.g. a church, mosque or synagogue, cultural centres, pubs or specific parks), or that
- similar incidents had previously occurred at or been aimed at the same site.

5. Punishment and other legal consequences

5.1. Sentence claimed in cases concerning Section 266 b of the Criminal Code

The sentence claimed for violation of section 266 b(1) of the Criminal Code for first-time offences must generally be a fine. Depending on the circumstances, the cases can be closed if the defendant accepts an extrajudicial fine. See [para 3.1.1.](#) on the trial of cases before a court sitting with lay judges.

In case of violation of section 266 b(2), see Subsection (1), relating to propaganda, the prosecutor must normally claim imprisonment.

Moreover, reference is made to the overview of case law relating to violations of section 266 b of the Criminal Code. [Hate Crime \(Section 266 b of the Criminal Code\) – the Overview of Case Law.](#)

5.2. Sentence claimed in cases concerning the Act on Prohibition of Differential Treatment based on Race, etc.

As a point of departure, the sentence claimed for violation of the prohibition of differential treatment based on race, etc. must be a fine.

If there is a basis for prosecuting both the person who applied differential treatment and an owner/manager, including a legal person, a claim should be made for the imposition of an increased fine on the owner/manager.

Examples from case law could include:

- In (U1999.1286Ø), a bouncer was sentenced to a fine of DKK 1,000 for having refused to admit a person to a discotheque based on the person's ethnic origin.
- In (U2003.2438V), a pizzeria owner was sentenced to a fine of DKK 5,000 for violation of section 1(1), having refused to sell pizzas to Germans and Frenchmen.
- In (U2004.641V), two bouncers were sentenced to a fine of DKK 1,000 each for violation of section 1(2), having refused to admit one or more persons to a restaurant. Additionally, the

manager was sentenced to a fine of DKK 5,000 and the licence holder (a public limited company) to a fine of DKK 10,000, the former for having ordered the bouncers to comply with guidelines requiring them to prevent groupings of persons of an ethnic origin other than Danish from being formed in the restaurant, and the latter for having issued such guidelines.

- By a judgment pronounced by Hillerød District Court on 10 December 2008, a caretaker was sentenced to a fine of DKK 500, having refused to let a community hall to a family on account of the family's ethnic origin.
- In (U2009.2068Ø), a bouncer was sentenced to a fine of DKK 1,000 for having refused to admit five persons of Brazilian origin to a restaurant on account of their ethnic origin.
- At a default judgment pronounced by the Copenhagen City Court on 24 August 2010, by which a discotheque was sentenced to a fine of DKK 10,000 for having been responsible, as the licence holder, for the refusal by doormen employed by the discotheque to admit several persons to the discotheque on account of their ethnic origin.

5.3. Sentence claimed where Section 81 (vi) of the Criminal Code is invoked

In cases where section 81 (vi) of the Criminal Code is invoked, the prosecutor must generally claim a penalty that is higher than the usual penalty level applying to criminal offences of the relevant nature.

In that connection, it should be noted that there may be mitigating circumstances capable of influencing the sentence claimed in an opposite direction. Furthermore, the influence the motive should have on determining the penalty in the specific cases depends on a specific assessment.

Det bemærkes i den forbindelse, at der kan foreligge formildende omstændigheder, som kan påvirke strafpåstanden i den modsatte retning. Det beror i øvrigt på en konkret vurdering, hvilken indflydelse motivet bør have på strafudmålingen i de konkrete sager.

As far as case law is concerned, reference can be made to the memorandum on the application of section 81 (vi) and (vii) of the Criminal Code and on cases of violation of the Act on Prohibition of Differential Treatment based on Race, etc., issued by the Director of Public Prosecutions.

6. After judgment

6.1. Section 266 b of the Criminal Code

Judgments concerning violation of section 266 b of the Criminal Code must be forwarded for information to the Director of Public Prosecutions and to the Regional Public Prosecutor through whom the case has been submitted.

The Director of Public Prosecutions must be involved in considerations regarding appeals of judgments. The matter may be submitted to the Legal Division over the phone.

6.2. Act on Prohibition of Differential Treatment based on Race, etc.

Judgments concerning violation of the Act on Prohibition of Differential Treatment based on Race, etc. must be forwarded for information to the Regional Public Prosecutor.

The Regional Public Prosecutor must be involved in considerations regarding appeals of judgments. The matter may be submitted to the Regional Public Prosecutor over the phone.

6.3. The Public Prosecutor's registration of the application of Section 81, (vi) of the Criminal Code

In all cases where section 81, (vi) of the Criminal Code has been applied by the Courts, the Public Prosecutor must register this in POLSAS. The Public Prosecutor must use the field 'remark' (the remark field) in the decision picture in POLSAS, where 'Section 81, (vi)' must be stated in the field.

It is important that the registration is done specifically as stated. It is also important that the provision is registered every time the provision is applied by the Courts, and that it is also ensured that an update is made in the field if the judgment of the District Court is changed in a higher instance. Thus, it must be the result of the final decision marked in the field.

6.4. Judgments to the Knowledge Database

6.4.1. Judgments where section 81(vi) of the Criminal Code was invoked

It should be considered whether the judgment is suitable for inclusion in the Knowledge Database of the Danish Prosecution Service.

A judgment may be suitable for inclusion in the Knowledge Database if it elucidates the penalty level or practice for deprivation of rights within a specific area, or if the judgment elucidates issues of general/fundamental importance to the present state of the law. Moreover, a judgment may be suitable for inclusion if it relates to an area not already covered by the Knowledge Database. Judgments in which section 81(vi) has been applied will normally be suitable for inclusion in the Knowledge Database.

Only final judgments may be submitted to the Knowledge Database.

Forms for submission of judgments to the Knowledge Database are available from the Knowledge Database at AnklagerNet.

7. Statutes and travaux préparatoires

Section 266 b of the Criminal Code

- Ministerial Report No. 553/1969 on Prohibition of Racial Discrimination
- The United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965
- Act No. 288 of 9 of June 1971
- FT 1970/71, Annex A, columns 1183 et seq.
- FT 1970/71, Annex B, columns 3001 et seq.
- Act No. 357 of 3 June 1987
 - L 196 of 12 February 1987
- Act No. 309 of 17 May 1995

- L 46 of 9 November 1994
- Act. No. 2591 of 28 December 2021
 - L 18 of 6 October 2021

Act on Prohibition of Differential Treatment based on Race, etc.

- Act No. 289 of 9 June 1971
- Official Report of Danish Parliamentary Proceedings 1970/71, Annex A, columns 1167 and 1183
- Act No. 626 of 29 September 1987
 - Bill No. L 196 of 12 February 1987
- Act No. 2591 of 28 December 2021
 - L 18 of 6 October 2021

Section 81, (vi) of the Criminal Code

- Act No. 218 of 31 March 2004
 - L 99 of 26 November 2003
- Act No. 709 of 26 April 2021
 - L 154 of 3 February 2021
- Act. No. 2591 of 28 December 2021
 - L 18 of 6 October 2021