

LAW SOCIETY SUBMISSION



**SUBMISSION ON THE REVIEW OF THE PROHIBITION OF INCITEMENT
TO HATRED ACT 1989**

DEPARTMENT OF JUSTICE AND EQUALITY

January 2020

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1. The Law Society of Ireland ('the Law Society') welcomes the opportunity to contribute to the public consultation on the review of the Prohibition of Incitement to Hatred Act 1989 being undertaken by the Department of Justice and Equality ('the Department'). The Society is mindful in its observations that the appropriate balance needs to be struck between the right to freedom of expression on the one hand and the right to be free from violence and hate on the other, and in the range of policy and regulatory responses to ensure that balance.
- 1.2. The Law Society is the educational, representative and regulatory body of the solicitors' profession in Ireland. This submission is based on the views of members of the Law Society's Human Rights and Equality Committee and Criminal Law Committee. The Committees are comprised of solicitors who have extensive experience and expertise in national and international human rights, and criminal law.
- 1.3. The Society is aware that the Committee on the Elimination of Racial Discrimination ("CERD") published its Concluding Observations on the combined fifth to ninth reports of Ireland in December 2019. In those, it called on Ireland to "[s]trengthen its legislation on racist hate speech...[and to i]ntensify its efforts to tackle the prevalence of racist hate on the Internet and social media". In this regard, the Society commends the Department for its approach in consulting with relevant stakeholders to inform their review. Members of the relevant Society Committees are available to meet with Department representatives, should that be of further assistance.
- 1.4. The Society also notes that the European Commission Against Racism and Intolerance ("ECRI") in their *General Policy Recommendation No. 15 on Combating Hate Speech*, in addition to legislative change, propose that support should be given to those targeted by hate speech. This includes the availability of appropriately trained counsellors as well as ensuring victims are aware of their rights to redress and that they are able to access complaints mechanisms, with those dealing with such complaints receiving appropriate training.

2. Executive Summary

- 2.1 The protected characteristics covered by the 1989 Act should be broadened to include those based on gender, disability, civil status, family status and age, whether actual or perceived. The definition should also be expanded to include perceived or actual membership of specific marginalised groups.
- 2.2 The key term of 'hatred' should be clearly defined in line with that employed by ECRI and the UN Special Rapporteur. Other key terms should also have clear definitions. New legislation should be applicable to an individual on the basis of their protected characteristics and the intention to 'stir up' should be capable of being established without need of actual proof that a third party responded or was incited by the impugned behaviour.
- 2.3 Any review or reform of the legal framework of hate speech must also address the issue of online incidents of hate speech. Where it reaches sufficiently serious levels, there should be criminal measures in place to deal with such offences. Further dissemination of material through re-tweeting and sharing should be treated as equally culpable as original dissemination. Civil measures as well as criminal are required to provide protection from online hate speech.
- 2.4 The mental element in the current legislation of intention to stir up is too high a threshold. The requirement to prove the offence of incitement to hatred should be lowered to recklessness.

3. Protected Characteristics covered by 1989 Act

- 3.1 The Society welcomes the Department's commitment to reforming Ireland's legal framework on issues of hate crime and speech. The Prohibition of Incitement to Hatred Act 1989 currently prohibits incitement to hatred against groups of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.
- 3.2 The Society considers that the current list of protected characteristics no longer sufficiently meets the needs of Ireland's diverse society and is under-inclusive and insufficiently defined.
- 3.3 In that context, the Society notes that protections from incitement to hatred do not include those based on gender, disability, civil status, family status and age. This is not in line with protections conferred on such groups under equality legislation and should be included in any new definition.
- 3.4 To ensure effective protection against incitement to hatred based on gender, the Society suggests that gender should be separately and specifically defined to cover acts targeted at individuals based on actual or perceived sex, having multiple protected characteristics, gender identity and gender expression.
- 3.5 The aim of this recommendation is to ensure that explicit protection against incitement to hatred could be made available to intersex persons, persons identifying as gender non-binary, transgender people and people discriminated against on the basis of how their gender identity is perceived by others. The Society would further suggest that 'disability' be defined broadly to include those with actual or perceived physical and/or intellectual disabilities.
- 3.6 The Society is also mindful that the lack of protection from incitement to hatred on the ground of socio-economic status might also exclude highly vulnerable groups not captured within other grounds and would suggest that the Department consider this aspect in more detail.
- 3.7 Finally, the Society notes that the Act does not address incitement to hatred against other marginalised communities where hate speech is often directed and the inclusion of specific marginalised groups such as asylum seekers and refugees should be considered in any new definition. This again should include perceived or actual membership of such groups to ensure the broadest protection possible.

Law Society Recommendation: The protected characteristics covered by the 1989 Act should be broadened to include those based on gender, disability, civil status, family status and age, whether actual or perceived. The definition should also be expanded to include perceived or actual membership of specific marginalised groups.

4. Use of the term “hatred” in the 1989 Act

- 4.1 The Society accepts that there is no universally accepted definition of hate speech and the notion itself, including its popularisation has only developed as a concept relatively recently. Nevertheless, the Society is of the view that the 1989 Act does not provide an adequate definition of ‘hatred’. It is further of the view that the lack of definition of other key terms used in the Act such as ‘threatening’, ‘abusive’, ‘insulting’ and the phrase ‘stir up’ causes a great deal of uncertainty as to what can actually be classified as ‘hate speech’ as opposed to what should be just defined as ‘commentary’.
- 4.2 In its 2018 Submission on Ireland’s Combined 5th, 6th and 7th Periodic Report to the UN Committee on the Elimination of Racial Discrimination, the Society noted the low prosecution rate under the 1989 Act. Figures from the Courts Service of Ireland show that since 2000, there have been only five convictions under the 1989 Act and of those, only two resulted in imprisonment. As the Irish Human Rights and Equality Commission (“IHREC”) have noted in its submission on the Review of the Prohibition of Incitement to Hatred Act 1989, this low rate has been attributed to a number of factors including definitional difficulties.
- 4.3 While the IHREC does not recommend any particular definition, it makes reference to useful definitions offered by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and ECRI. Both suggest the following definition of hatred, which may be useful to the Department in clarifying this key term.
- “Hatred” is a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group”.
- 4.4 The ECRI in its General Policy Recommendation No. 15 on Combating Hate Speech recommends that States “ensure that the offences are clearly defined and take due account of the need for a criminal sanction to be applied” where hate speech is intended or reasonably could be expected to incite violence, intimidation, hostility or discrimination. The Society also notes the importance of clear definitions of key terms being included in a reformed legal framework prohibiting incitement to hatred and it suggests that the 1989 Act be amended to provide for the offences of incitement to “hostility” and incitement to “violence” in addition to incitement to hatred.
- 4.5 The Society proposes that the legislation should also be amended to counteract any definitional difficulties found in the interpretation of the target of incitement to hatred, e.g. a group of persons in the State. It suggests that new legislation must ensure that the offence of incitement to hatred can be committed where it is directed to an individual when based on that individual having protected characteristics.
- 4.6 The Society also suggests that the Department consider introducing a specific element in the definition of “hate” under the 1989 Act which explicitly excludes “legitimate public comment or legitimate political speech”. Such definitions would need to be sufficiently

clear to safeguard free public debate whilst ensuring adequate protection against hate speech.

- 4.7 Finally, the current legislation appears to be perceived as necessitating the intention to 'stir up' hatred, before any such acts become capable of prosecution under the 1989 Act. Any new legislation should ensure to clarify that there is no need to prove that any third party was actually incited to hatred, hostility or violence, so long as the intention to incite such a response or behaviour was present. The standard for proving intention is addressed at section 6 of this submission. This is in line with the recommendations of the ECRI in its [2019 Report on Ireland](#).

Law Society Recommendation: Key term of 'hatred' should be clearly defined in line with that utilised by ECRI and the UN Special Rapporteur. Other key terms should also have clear definitions. New legislation should be applicable to an individual on the basis of their protected characteristics and the intention to 'stir up' should be capable of being established without need of actual proof that a third party responded or was incited by the impugned behaviour.

5. Application of the 1989 Act to online hate speech

- 5.1 The Department raises the prospect of amending the wording of the Act to make prosecutions for incitement to hatred online more effective and the Society notes that such a prospect has already been considered by the Law Reform Commission in its 2016 Report on Harmful Communications and Digital Safety Law. The Law Reform Commission recommended that “reform of online hate speech laws needs to be undertaken as part of an overarching reform of hate crime, as the problems with Ireland’s hate crime laws extend beyond the potential difficulty with applying them in the online setting”, and recommended that online hate speech “should be addressed as part of the general reform of hate crime law”.
- 5.2 In light of increasing technological developments, the Society submits that any review or reform of the legal framework of hate speech must also address the issue of online incidents of hate speech. In this regard, it is also mindful of the State’s obligations under European law, calling for legal protection against incitement to hatred online. Article 9(2) of Council Framework Decision 2008/913/JHA on combatting certain forms and expressions of racism and xenophobia by means of criminal law, requires that (a) Member States take effective measures to ensure that laws prohibiting incitement to hatred extend to cases where the conduct is committed through an information system and the offender is within the territory of the Member State, even if the content hosted is not, and (b) to cases where the material is hosted within the territory of the Member State whether or not the offender commits the conduct when physically present in its territory.
- 5.3 The Society is of the view that, as online hate speech can be quickly viewed by many people and it remains accessible long after it occurs, it will in certain circumstances be sufficiently serious to be dealt with as a criminal matter. Further, as outlined in the Society’s submission in September of this year on Online Harassment, Harmful Communications and Related Offences: Possible Issues to Address, the Society expressed its concern “that online providers are not properly placed to self-regulate due to the fact that such platforms are economically dependent upon sharing of images and content for profit. Thus, it is not in their self-interest to self-censor. Levels of self-regulation vary widely in relation to online safety with some providers such as Facebook taking considerable but not always adequate efforts, with others such as online dating sites taking almost none.”
- 5.4 A further issue relevant on social media is that of re-tweeting or sharing of material. In the Society’s view, any further dissemination of hate speech to the public or within a public domain should be treated as equally culpable as the original material due to its equal potential to incite hatred.
- 5.5 The Society has already noted in its September submission that the Law Reform Commission has recommended the introduction of an online Digital Safety Commissioner and the Government has already committed to establishing this office.

The Society reiterates its support for such an initiative and is hopeful that this will be brought to fruition as soon as possible.

Law Society Recommendation: Any review or reform of the legal framework of hate speech must also address the issue of online incidents of hate speech. Where it reaches sufficiently serious levels, there should be criminal measures in place to deal with such offences. Further dissemination of material through re-tweeting and sharing should be treated as equally culpable as original dissemination. Civil measures as well as criminal are required to provide protection from online hate speech.

6. Proof of intent or likelihood to stir up hatred

- 6.1 Under the current legislation the mental element required to prove an offence is intention or likelihood. Prosecutors are required to demonstrate that an individual intended to stir up hatred or it was likely, having regard to all the circumstances that the expressed opinion would stir up hatred. The Society believes that this has caused difficulties with the enforcement of the 1989 Act given that proving intention is an extremely high threshold that is not required for similar offences such as that of harassment under the Public Order Acts.
- 6.2 The Society agrees with the Department's suggestion that the standard should be lowered to recklessness, which would align the 1989 Act with other legislation and with similar charges currently prosecuted before the Courts. It would also ensure that hate speech can be more effectively prosecuted.
- 6.3 Further, it is of note that the ECRI in its *General Policy Recommendation No.15* (referenced above), states that where incitement to hatred "can reasonably be expected from a particular use of hate speech, it would thus be reckless for it to be used." The ECRI observes that such an approach is in keeping with judgments of the European Court of Human Rights involving the right to freedom of expression under Article 10 of the European Convention on Human Rights.

Law Society Recommendation: The mental element in the current legislation of intention to stir up is too high a threshold. The requirement to prove the offence of incitement to hatred should be lowered to recklessness.

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