

Review of the Prohibition of Incitement to Hatred Act 1989

Public Consultation

October 2019

Introduction

This consultation forms a crucial part of the review of the Prohibition of Incitement to Hatred Act 1989 by the Department of Justice and Equality.

Improvements in our hate-speech legislation are one element in a wider suite of measures across all areas of Government which are designed to address hatred and intolerance. These measures will span across policies, operational areas, law enforcement and educational measures designed to support a safe, fair and inclusive society, where expressions of hatred and prejudice are not tolerated, and are dealt with swiftly and effectively where they occur.

Thank you for sharing your views with us. We rely on your feedback to help ensure that Ireland's legislation on hate speech is fit for purpose and is effective in meeting the real needs of communities and individuals who are living with the impacts of hate speech.

Hate crime

The Department is also developing new legislation to deal with hate crime, which is separate from but closely related to hate speech. While hate speech is a crime in itself under the Prohibition of Incitement to Hatred Act 1989, a hate crime occurs where an offence is committed that is already itself a crime (for example assault or criminal damage), but where the victim is selected because of their association with a particular identity characteristic, perhaps their sexual orientation or ethnicity for example.

Ireland does not currently have separate legislation dealing with hate crime, although a hate motive is an aggravating factor that judges can take into account at sentencing for any criminal offence.

The Department of Justice and Equality is conducting research on the effectiveness of approaches to hate-crime legislation in other countries. This research will conclude in November 2019 and the

results will inform the development of new legislation to deal with hate crime in this jurisdiction. As part of the development of that legislation, a specific, separate consultation will be held, and experts and members of the public will be invited to submit their views. However, the Department recognises that although hate speech and hate crime are legally distinct, the real-world experiences of hate crime and hate speech are often very closely linked. Therefore, if you wish to include material relating to hate crime in your submission on this consultation, please feel free to do so.

The Prohibition of Incitement to Hatred Act 1989

The legislation enacted in 1989 made incitement to hatred (hate speech) a crime in Ireland. This reflects our society's rejection of displays of prejudice, bias or hostility, especially those based on fundamental aspects of a person's identity which cannot or should not be changed or concealed. The impact of hate speech is especially serious as it has a ripple effect which spreads far beyond the individual victim and can, if not dealt with, lead to a more divided society where entire communities feel unsafe. Hate speech therefore impacts on the cohesion and fabric of our shared community.

Hate speech facilitates, and can lead to, hate crime. In itself it can cause great distress or injury. It validates prejudice and can be used by individuals or groups to organise and campaign for their cause or raise funds to perpetuate and escalate the hateful climate they wish to promote.

**This public consultation deals in particular with incitement to hatred and
how our legislation on hate speech can be improved.**

Tackling hate speech and hate crime are both essential to ensure that all people living in Ireland can feel safe, valued and equally respected and protected under law. This tolerance and respect for the equal dignity for all human beings is fundamental to Ireland's identity as a democratic, pluralistic society.

It is important in considering changes to the 1989 Act to bear in mind the fundamental right, enshrined in our Constitution and in the European Convention on Human Rights, to freedom of expression. Though fundamental, this right is not absolute and can be limited or restricted by law for compelling reasons, including protecting other fundamental human rights. Any limitation on freedom of expression must be provided for in law, and must respect the essence of the right to

freedom of expression. We must ensure that the limitations we, as a society, choose to place on freedom of expression by prohibiting incitement to hatred are needed in order to protect the rights and freedoms of others, and are effective in doing so.

The law on incitement to hatred sits within a wide body of international and Irish law designed to protect against racism, harassment, discrimination, defamation and many other related matters. Not all measures to combat prejudice or hostility require a criminal offence – takedown orders in respect of online content, civil remedies and other measures¹ may have considerable effect where they are available.

What is illegal under the 1989 Act at the moment?

The 1989 Act prohibits certain forms of threatening, abusive or insulting conduct that are intended or likely to stir up hatred against a group of persons on account of certain characteristics. These characteristics are race, colour, nationality, religion, ethnic or national origins, membership of the travelling community and sexual orientation. The threatening, abusive or insulting conduct can take the form of

- Actions likely to stir up hatred (section 2) – this covers the publication or distribution of written material; the use of words, behaviour or display of written material outside of a private residence; and the distribution, showing or playing of a recording of sounds or visual images;
- Broadcasts likely to stir up hatred (section 3) – this covers broadcasts to the general public of images or sounds; and
- Preparation and possession of material likely to stir up hatred (section 4) – this covers the preparation or possession, or the making or possession, of written material or recordings of sounds or visual images.

¹ Examples include equality legislation which provides for persons who feel that they have been discriminated against in the workplace or in the provision of goods or services to take civil action, education and awareness-raising measures against prejudice and intolerance which can be very valuable, supports for civil society organisations to tackle racism and voluntary codes of conduct for internet service providers at national and EU level to deal with illegal content online.

The Act contains some exceptions and defences. However, the conduct or material concerned, whether it involves words, written material, images or sounds, must be

- threatening, abusive or insulting; **and**
- intended or likely to stir up hatred against a group of persons (not an individual) on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.

Important issues

Four preliminary issues for discussion have been identified:

- 1) the list of protected characteristics covered by the Act and whether these should be changed
- 2) the use of the term 'hatred' in the Act and whether this should be changed
- 3) whether the wording of the 1989 Act is adequate to deal with online communications
- 4) the need to prove the intent or likelihood of stirring up hatred and whether this should be changed

Issue 1: Protected characteristics covered by the 1989 Act

The Act deals with incitement on the grounds of race, colour, nationality, religion, ethnic or national origins, membership of the travelling community and sexual orientation. The Department is examining whether this list should be amended. The list of identity characteristics should take account of current social issues, but also their social or historical context. Historic or emerging fissures or divisions in society can be helpful in identifying groups that may be the target of hate speech. Care is needed not to include characteristics which are in any way unclear, or which are not easily identifiable – in prosecuting offences under this Act it will be necessary to prove to a court of

law that the accused person knew or perceived that the victim was a member of or associated with a protected group.

Question

1. Are there other groups in society with shared identity characteristics, for example disability, gender identity, or others, who are vulnerable to having hatred stirred up against them and should be included in the list of protected characteristics?

Issue 2: Use of the term “hatred” in the Act

Under the 1989 Act, in order to be an offence, the words or material must be intended or likely to stir up “hatred” against one of the protected list of groups. This is a high threshold. It is important to remember that the Act is designed to deal with hateful behaviour that is sufficiently severe to reach the threshold for criminal prosecution. The term “hatred” is not defined and has its ordinary meaning. Given that prosecutions under the Act have been relatively rare, the Department is considering whether the requirement to stir up hatred should be replaced by another term (hostility or prejudice, for example).

Question

2. Do you think the term “hatred” is the correct term to use in the Act? If not what should it be replaced with? Would there be implications for freedom of expression?

Issue 3: Application of the Act to online speech

The wording of the 1989 Act is broad enough to cover incitement via modern technologies and online behaviour. The definitions of “broadcast”, “publish”, “recording” and “distribute” in the Act are wide enough to cover online broadcasting, publication and social media discourse. However, the Department is considering whether a more explicit wording mentioning these forms of

communication might result in more successful prosecutions under the legislation. The 1989 Act refers to distributing written material to the public or a section of the public. The Department is considering whether this is sufficient to capture modern day communications where posts on social media sites can be general posts or theoretically limited to followers or 'friends' and could therefore be argued not to be public.

Question

3. Bearing in mind that the Act is designed only to deal with hate speech which is sufficiently serious to be dealt with as a criminal matter (rather than by other measures), do you think the wording of the Act should be changed to make prosecutions under for incitement to hatred online more effective? What, in your view, should those changes be?

Issue 4: Proving intent or likelihood

A critical element of all of the offences in the 1989 Act is the requirement to prove that the action was intended or likely to stir up hatred. In some cases prosecutions may not succeed as this intent or likelihood cannot be proven, regardless of the actual effect of the action. The Department is considering whether the need to prove intent or likelihood within the Act should be changed, for example to include circumstances where the person was reckless as to whether their action would stir up hatred.

Questions

4. In your view, does the requirement that an offence must be intended or likely to stir up hatred make the legislation less effective?
5. If so, what changes would you suggest to this element of the 1989 Act (without broadening the scope of the Act beyond incitement)?

Making a submission

We welcome submissions from all members of the public, experts and groups. While general commentary can be useful, submissions which go on to make concrete proposals and suggestions for alternative approaches or other changes are especially helpful.

We welcome your answers to any or all of the above questions. We would also welcome broader suggestions for changes to the 1989 Act and, as mentioned above, any comments you wish to include on the related issue of hate crime.

Deadline for submissions: 13 December 2019

**Please send all submissions via email to HateSpeechConsultation@justice.ie or by post to
Department of Justice and Equality, 51 St. Stephen's Green, Dublin 2.**