

Supporting Lesbian, Gay, Bisexual &
Trans Young People in Ireland



Submission to the Public Consultation on the Review of the Prohibition of Incitement to Hatred Act, 1989

BeLonG To Youth Services

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Introduction

BeLonG To Youth Services is the national organisation supporting lesbian, gay, bisexual, transgender, and intersex (LGBTI+) young people in Ireland. Since 2003, we have worked with LGBTI+ young people, aged between 14 and 23 years, to create a world where they are equal, safe, and valued in the diversity of their identities and experiences. We also advocate and campaign on behalf of young LGBTI+ people and offer a specialised LGBTI+ youth service with a focus on mental and sexual health, alongside drug and alcohol support. We respond to the needs of LGBTI+ young people in Ireland and we help them thrive.

In the context of our youth work, our advocacy and our research we have witnessed in the last year a rise in anti-LGBTI+ speech and behaviour online and offline, both physical and verbal. Often those who are the most vulnerable, for example those who do not 'pass' as non-LGBTI+, being the most likely to be victimised. Being a member of a marginalised group with a historically stigmatised identity often propels stereotypes, violence, isolation, discrimination and prejudice among other members of society who do not understand our lives. Historically LGBTI+ people have been criminalised¹ and denied access to equal rights afforded by their cisgender heterosexual counterparts in Irish society. This historical criminalised identity and a lack of access to citizen rights such as marriage, employment protections etc. has reinforced within Irish socio-cultural history and knowledge that being LGBTI+ is punishable and less worthy of protection than that of "normative" gender and sexuality. This is what drives political, social and cultural bias and prejudice, it is rooted within the lineage of discrimination faced by LGBTI+ through violence, slurs, and exclusion.

In the last 50 years, LGBTI+ lives have shifted dramatically in experience. Once being LGBTI+ in Ireland was synonymous with a life of isolation, stigma and violence. However, in present day Ireland, many LGBTI+ people live 'out and proud', visible, valued in their families and communities and live happy, successful and fulfilled lives. This has been made manifest through a combination of political and legislative developments and an overall move towards a more socially and culturally inclusive Ireland. With the Irish gay rights movement establishing itself in the 1970s, the tireless dedication of LGBTI+ activists resulted in the decriminalisation of homosexuality in 1993 which signalled a progressive effect for LGBTI+ rights and equality which would follow in the proceeding 20 years. During the last two decades the Irish LGBTI+ community has gained access to the same rights and protections as their heterosexual, cisgender counterparts in many ways such as the introduction of the

¹ Offences Against the Persons Act, 1861

Equal Status Act (2000), Employment Equality Acts (1998-2015), Civil Partnership Act (2010), Irish Human Rights and Equality Commission Act (2014) Marriage Equality Act (2015), Gender Recognition Act (2015) and the Children and Family Relationship (Amendment) Act (2018). However, the historical discrimination and vilification of LGBTI+ lives still haunts Irish society, and although LGBTI+ people have now achieved legislative and constitutional equality, we have much work to do to eradicate stigma and prejudice, myths and stereotypes that linger consciously and unconsciously in public attitudes and behaviour. Homophobia is not unfortunately a memento of the past. Many of the young LGBTI+ people in our services nationwide are still subjected to acts of violence, victimization and the LGBTI+ community as a whole are often targeted through hateful rhetoric which seeks to harm, isolate and degrade LGBTI+ people and their lived experiences.

The law at present is insufficient in combating the physical violence experienced by the LGBTI+ community and equally ill-equipped to combat effectively instances of hate speech, bias-motivated speech, hostility and prejudice both in public spaces, in person and/or face to face and also online. BeLonG To Youth Services calls for a number of recommendations to be applied to the existing Prohibition of Incitement to Hatred Act 1989 to account for the ways in which LGBTI+ people and other marginalised communities are victimised but inadequately protected by Irish law.

Discussion, Research and Important Issues

BeLonG To Youth services recently conducted our first School Climate Research with Columbia University² which sought to assess the lived experiences of LGBTI+ young people within Irish post-primary schools. Many of the results highlighted the unsafe school climate in which LGBTI+ young people were consistently victimised within the school community as a direct result of their LGBTI+ identity or another marginalised aspect of their lived experience (appearance, class, race). Some of the key findings related to student safety and protect were:

- 73% of LGBTI+ students felt unsafe at school. 47% because of their sexual orientation and 27% because of their gender expression.
- 3 in 10 LGBTI+ students missed at least one day in the past month because they felt unsafe or uncomfortable.
- The majority of LGBTI+ students (86%) felt deliberately excluded by peers with 74% experiencing being the focus of rumours or lies.
- 77% of LGBTI+ students were verbally harassed (e.g. name calling or being threatened) based on their sexual orientation, gender, gender expression or ethnic origin.
- 38% of LGBTI+ students were physically harassed (e.g. being shoved or pushed), 25% because of their sexual orientation and 18% based on gender expression.
- 11% of LGBTI+ students were physically assaulted (e.g. punched, kicked or injured with a weapon) because of their sexual orientation, 8% because of their gender expression.
- 43% of LGBTI+ students were sexually harassed (e.g. unwanted touching or sexual remarks).
- 39% of LGBTI+ students experiencing cyberbullying via social media, telephone and email over the past year.

Often school communities will be described as a microcosm of society as a whole and this would appear to be true in the case of the findings of this report. Irish society has established itself as a leader in LGBT equality

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in the context of many world-first strategies³, legislative developments⁴ and referenda reform⁵, however, national research and the experiences of the LGBTI+ community would demonstrate that the socio-cultural acceptance of LGBTI+ identity does not reflect these legislative / policy changes and political progression.

In July 2018 a report by the Irish Council for Civil Liberties⁶ highlighted that Ireland has among the highest rates of hate crime against people of African background and transgender people in the EU. The report said that during the criminal justice process, the hate element of the crime is often lost from the case from being reported as a crime to the Gardaí, to the offender being sentenced by the judge. The report also highlighted that the lack of laws against hate crime meant that there were no policies in place for crimes motivated by prejudice in Ireland.

Hate crime and hate speech, often entangled together, seek to target an individual based on personal characteristics that they cannot or should not be forced to hide. Within Crime Surveys for England (2011/2012 and Wales (2012/2013) victims of hate crime and hate speech were found to be twice as likely to report fear, sleep disturbances, anxiety or panic attacks, feelings of vulnerability or loss of confidence. Equally, members of a targeted identity group report many of the effects felt by the direct member and alter their behaviour in response to the crime (Perry and Alvi, 2012). This has detrimental effects on the targeted community who begin self-policing and hiding their identities in order to avoid being victimised; suddenly 'out and proud' members of the community are fearful to be recognised as LGBTI+ for fear of attack or stigmatisation through hate speech or violence. With a rise in hate crime and hate speech, instances of prejudice highlight "a manifestation of divisions within society, it is argued that hate crime/hate speech further exacerbates tensions, threatening the social fabric" (Iganski, 2001). Without sufficient legislation to combat and effectively handle instances of hate crime and hate speech the prejudice and hatred produced or inflamed by such messaging from individuals or groups normalises and encourages hatred and violent behaviour towards marginalised communities. It is clear that the law is insufficient in tackling these issues for a number of reasons.

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Issue 1: Protected characteristics covered by the 1989 Act

Significantly the act has a limited list of protected characteristics and does not account for the diversity present within Irish society. Many aspects of personhood can be subjected to hate speech based on cultural and social bias or potential ignorance. However, the effect of hate speech on an already marginalised and vulnerable community can be devastating. There are extremely vulnerable groups in society who are left unprotected by the Act. BeLonG To Youth Services recommends that the act be updated to capture the diversity within Irish society and acknowledge the existing vulnerability of these communities or their potential vulnerability in being subjected to hate speech. We believe that the following should be added to the protected characteristics within the act:

- Antibody status e.g. HIV status
- Gender expression
- Gender identity
- Sex characteristics
- Class
- Ability/disability both physical and intellectual

Equally BeLonG To Youth Services recognises 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 the fundamental human rights of others.

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.

Within this context, any limitations or restrictions placed upon the individual or group through changes to the law must do so only as an instrument to protect the rights of those subjected to victimisation on the basis of hate speech. An individual's right to expression cannot circumvent another's right to safety and a life free from violence, prejudice, and harm.

Hate Speech and hate crimes (discrimination, hostility, violence, and prejudice) can have overlapping and interdependent motivations across multiple identity grounds for example an LGBTI+ person of colour with a disability. All prejudice including racism, homophobia, transphobia, sexism, ableism etc. have roots in same system of inequality and oppression. In the review of the Act, the law must specifically account for

intersectionality especially where the criminal threshold on one ground may be met and not on another.

Issue 2: Use of the term "hatred" in the Act

Under the present Act, in order to commit an offence, the words or material must be intended, or likely to stir up hatred against one or more of the protected groups identified in the Act. The use of the term "hatred" presents a high threshold in which an individual or group must meet in order to be charged⁷.

"Hatred" is not defined within the context of the Act and is presented through its ordinary culturally understood definition which is insufficient in assessing the nature of attitudes, actions and speech of an individual. The United Nation uses the wording "incitement to discrimination, hostility and violence"⁸. The International Covenant on Civil and Political Rights (ICCPR) guarantees equality and non-discrimination in the enjoyment of rights. The ICCPR places an obligation on State Parties to prohibit hate speech. Article 20(2) provides that: "Any advocacy of national, racial or religious hatred that constitutes **an incitement to discrimination, hostility or violence** shall be prohibited by law."⁹ The Republic of Ireland is a signatory to the ICCPR and is obliged to ensure that there is a workable prohibition against hate speech on the statute books.

The complexity and nuance to the nature of the word "hatred" presents a clear obstacle to prosecution under the 1989 Act as it evades a clear definition. BeLonG To recognises both the significance of the word in mapping to international context and law and the socio-cultural understanding which is implicit within phrases such as hate speech and hate crime.

We as an organization support expanding the definition of "hatred" within the Act to encompass discrimination, hostility, violence, and prejudice.

Issue 3: Application of the Act to online speech

The context of the 1989 Act presented a very different Ireland in which marginalised groups were existing, many of whom kept their identities covert if possible, to avoid instances of discrimination, hostility and hatred. Societies' technological advancements present an opportunity for members of marginalised communities to connect and remove themselves from atmospheres of isolation. However, there is also a clear inability within the act to discern how capable the legislation is in effectively

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responding to instances of hate speech (discrimination, hostility, violence, and prejudice) or potential online hate crime.

Galop, an LGBTI+ anti-violence charity produced a report on the scale and nature of online hate crime and hate speech against LGBTI+ people in the UK. They reported that 84% of respondents experienced more than one occurrence of online abuse, and 59% of respondents experienced six or more occurrences of online abuse. They reported that verbal abuse, insults, threats, intimidation, harassment, outing and doxing (the Internet-based practice of researching and broadcasting private or identifying information about an individual or organization) are common components of anti-LGBT+ online hate crime. Furthermore, they found that trans, non-binary, and intersex people were subjected to more frequent online hate speech, which was generally more severe, more threatening, and had greater impact and consequences.¹⁰

Recording of hate speech by civil society has revealed that there is much overlap between white supremacist, Islamophobic, particularly anti-refugee and anti-LGBTI+ content in Ireland and abroad¹¹. While there are a small number of 'producers' of such content, there are many more reproducing that content across all social media platforms.¹² Social media pages of news outlets play an important role in channelling racially-loaded toxic contents through the comment threads on their posts. The way mainstream media frame and present news also has an impact on the comments posted. Expressions of racism online are punctuated with misogynist, homophobic, racist, and transphobic attacks directly targeting women, people of different ethnic backgrounds, and members of the LGBTI+ community.¹³

There is no clear responsibility for hateful social media content amongst public authorities. The Press Ombudsman only deals with complaints about newspapers, magazines and some online news services, but not social media. There is little incentive for news outlets to moderate their social media pages for hateful content. The Broadcasting Authority of Ireland deals only with broadcast media, but has made producers responsible for audience expressions of hatred which are broadcast.¹⁴ An Garda Síochána are not currently equipped with the necessary resources

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¹¹ L. Michael, iReport.ie Reports of Racism in Ireland: July-December 2018 (ENAR Ireland, 2019).

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to undertake investigations into online harassment, and have very limited capacity to deal with the wider issue of online hate speech¹⁵. There have been calls from a wide range of digital and legal experts for the State to take a larger role in monitoring and addressing online hate speech.¹⁶ A range of approaches to understanding, tracking and reporting hate speech have been undertaken by civil society and human rights institutions to tackle this problem. Reports of hate content to social media platforms, even by 'trusted parties', are largely deemed to not to breach community guidelines.¹⁷ Further, approaches which rely on individual reports are restricted by the burden on targeted minorities to report, the low level of bystander reporting and the harassment of those who attempt to 'call out' racism online.¹⁸

The effects of online hate speech has also been captured in international literature. Hawdon, Oksanen and Räsänen (2014) surveyed 1000 people between 15 and 30 years old and found that more than 50% respondents were exposed to hate speech or hate material. It was found within the research that the younger the respondent, the more likely they were to have been exposed to online hate. Keen and Georgescu (2014) found that online hate often escalated to individuals perpetrating violent physical crimes and online discourse was often used as a rationale for the violence. Both Chan, Ghose and Seamans (2014) and Chakraborti and Garland (2009) found that online groups, forums and websites were used to recruit individuals into violent, bias and prejudicial motivated groups and utilised the uncensored nature of online spaces to raise funds and become more visible and accessible to those with existing biases towards marginalised communities.

Many of our most important public and civic spaces exist online and the capabilities deriving from social media platforms to shape public attitudes are immense. Social media facilitates the rapid spread of ideas online, and hate speech is no exception. Neo-Nazi, far right, and fascist groups have all capitalised on social media's broad reach, easy access, and anonymity to spread racist, homophobic, and misogynist rhetoric through targeted online posts, videos, forum discussions etc¹⁹.

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Online spaces and the potential policing of them presents several issues with respect to culpability that need to be addressed in any reform of the Act including:

- Share/Retweet, an individual is not the original poster but none the less engages and spreads the content
- Like/Favourite/Thumbs Up, an individual's once again is not the original poster but validates the content
- Facebook/Twitter Algorithms and unanticipated dissemination and corporate liability for same
- Editorial Responsibility of Group Administrators
- Closed groups
- Anonymous online spaces such as 4Chan, Discord, and Gab

Social media companies broadly follow international and EU legal guidelines when it comes to policy rules regulating hate speech on their platforms. However, a challenge arises as their community standards prohibit content the "*directly attacks*" a protected group but not content which would be considered a "*degrading generalisation*" likely to stir up prejudice indirectly against a protected group.¹⁹

The ability to share content across a diverse range of social media platforms with ease means that content can be rapidly disseminated leading to multiple 'posts', 'retweets', 'shares' with or without comment from the sharer included. The sheer volume and scope of proliferation of the content online (potentially across multiple platforms) makes reporting the totality of offending content to platform operators difficult to achieve. What's more, different community guidelines across different platforms have led to radically different decisions about what constitutes hate speech online by the various social media companies.

BeLonG To Youth services recommends that within the context of the Online Safety and Media Regulation Bill, 2019 that the 'Online Safety Commissioner' envisioned within the heads of Bill be empowered to develop statutory online community guidelines which would apply across all social media platforms ending the era of self-regulation of hate speech online.

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 to, 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. In considering the current ineffectiveness of the Act this necessity to prove intent or likelihood must be reconsidered as it is clearly an obstacle to prosecution. The difficulty in accounting for intent has allowed for cases,

including cases of online hate speech, to be dismissed on the basis that there was reasonable doubt as to whether there had been intent to incite hatred.²⁰

In order to mitigate this clear barrier to prosecution the nature of intent to incite hatred must be taken on a balance of probability and should fall in line with the An Garda Síochána's Diversity & Integration Strategy 2019-2021, which defines a hate incident as an incident "which is **perceived by any person** to, in whole or in part, be motivated by hostility or prejudice".²¹

Recommendations

- The department should develop new legislation to effectively deal with hate crime, however, in the interim, BeLonG To youth services recommend that hate motive becomes an aggravating factor in which judges *must* take into account at sentencing for any criminal offence.
- The list of protected characteristics should be extended to include the following:
 - Antibody status
 - Gender expression
 - Gender identity
 - Sex characteristics
 - Class
 - Ability/disability both physical and intellectual
- Expand the definition of "hatred" within the act to encompass discrimination, hostility, violence and prejudice and other terms which would more greatly protect the potential vulnerability of marginalised communities.
- Expand the Act to include online hate speech and look to international law to inform the progression of the legislation.
- Amend the Online Safety and Media Regulation Bill, 2019 to empower the 'Online Safety Commissioner' envisioned in the heads of bill to create statutory online community guidelines which would apply across all social media platforms operating within the state.
- Proof of 'intent to incite hatred' must be on a balance of probability and should fall in line with the An Garda Síochána's Diversity &

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Integration Strategy 2019-2021, which defines a hate incident as an incident “which is **perceived by any person** to, in whole or in part, be motivated by hostility or prejudice”.

- Establish voluntary programs of restorative justice as part of sentences, community service or education programs, where the victim agrees to same, in order to mitigate the likelihood of reoffence.
- In instances where ignorance or a clear lack of awareness regarding the likelihood to incite hatred is evident sentencing should be replaced entirely with community service or a form of community/perpetrator reconciliation through organized, structured and supported restorative justice.

Questions and Further Information

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