

## **Submission on the Review of the Prohibition of Incitement to Hatred Act, 1989**

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### **A. Introduction**

1. Fianna Fáil welcomes the opportunity to make a submission on the review of the Prohibition of Incitement to Hatred Act, 1989 (“**the 1989 Act**”).
2. We now live in a society which is far more diverse and multi-cultural than was the case in 1989. Unfortunately, this growing diversity has led to some racial intolerance, discrimination and racial violence in Ireland.<sup>1</sup>This cannot be tolerated, and it is the responsibility of legislators to ensure that as much preventative legislation as possible is in place.
3. As worryingly, inflammatory racist speech has crept into Irish public discourse, with migrants and members of the travelling community bearing the brunt of ill-informed and racist commentary. Some electoral candidates have cynically chosen to speak against groups in our society to seek the populist vote and this is not acceptable.
4. It is axiomatic that the 1989 Act is no longer fit for purpose and needs to be modernised to effectively combat this rise in hate speech and racial intolerance. The fact that since its enactment in 1989, only five convictions under the Act have been recorded,<sup>2</sup> demonstrates its ineffectiveness.
5. While an overhaul of the 1989 Act is essential, a combination of different strategies is necessary to properly address hate speech, hate crime and discrimination in Ireland. Addressing the 1989 Act is merely one of several measures that needs to be taken as a matter of urgency. Immediate legislative reform and fresh measures are required to tackle hate crime and hate speech which falls below the threshold of criminality.

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<sup>1</sup> A recent survey by the Immigrant Council of Ireland said there were 240 reports of racist incidents in 2015, an 11 per cent rise from the previous year. About 40 per cent of these incidents were against Muslims.

Lifecycle of a Hate Crime: Country Report for Ireland reveals that Ireland has one of the highest rates of hate crime against people of African background and transgender people in the EU.

<sup>2</sup> Correct as of June 2017: According to documents released by the Courts Service under the Freedom of Information Act, there have been 44 prosecutions under the 1989 Act since 2000, of which five resulted in convictions. Only two people have been imprisoned under the 1989 legislation, one for a month in 2012 and one for four months in 2014

6. Effective change is now long overdue.<sup>3</sup> The 1989 Act has fundamental structural problems which have existed for 30 years, rendering the Act toothless and ineffective since inception.
7. If we are serious about addressing hatred and intolerance and serious about creating a safe, fair and inclusive multicultural society, this should begin by amending the 1989 Act to render it effective to respond to modern forms of hate speech.

## **B. Striking a Balance**

8. Notwithstanding the significant challenges we face to create a diverse, respectful and pluralistic society, Fianna Fáil recognises the danger of knee jerk reactions to recent high-profile incidences of racial intolerance and hate speech.
9. There is a delicate balance to be struck between freedom of expression, as protected by Article 40 of the Constitution and Article 10 of the European Convention on Human Rights (“**ECHR**”), on the one hand, and the rights of communities and individuals to be protected from attack and persecution.
10. A modern, democratic society needs ensure that its citizens may express freely their convictions and opinions, unconstrained by the disciplines of reason and objectivity.
11. However, it is beyond controversy that the right to freedom of expression is not an absolute right and may be limited in certain circumstances.<sup>4</sup> The challenge is identifying where the tipping point should be.
12. Hate speech is a legitimate limit on a citizens’ right to express freely their convictions and opinions. However, if we are to limit the constitutional right of freedom of expression to such a degree as to criminalise certain conduct which would otherwise constitute an enjoyment of that right, it is imperative that the relevant legislation clearly and precisely defines what conduct is criminal and is effective in prosecuting such offences.

## **C. The 1989 Act**

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<sup>3</sup> Ireland ratified the UN International Convention on the Elimination of All forms of Racial Discrimination as long ago as 2000 and Durban Declaration and Programme of Action in 2001

<sup>4</sup> Article 10(2) of the ECHR

13. The singular fact that in the 30 years since its enactment, only five convictions have been recorded, demonstrates the ineffectiveness of the 1989 Act.
14. The requirement (contained in section 2 of the 1989 Act) to prove that the Defendant either intended to, or in the circumstances, was likely to, stir up hatred, has been described as the “Achilles heel” of the 1989 Act<sup>5</sup>, and is undoubtedly the principal reason behind the dearth of convictions. Indeed, it is arguable that the requirement of evidence of an intention to “stir up” hatred means that a conviction could only be secured where racist material is sent between racists, but not where the victim group is directly targeted.
15. The weakness in this legislative language was evident in the 2011 case of a man charged with inciting hatred by creating an anti-traveller facebook page. While the page featured posts suggesting that Traveller babies should be used as “shark bait” and that travellers could be used for testing new drugs for viruses, the case was dismissed by a District Court judge who ruled there was reasonable doubt as to whether the accused had intended to stir up hatred towards Travellers.
16. This vague and almost impossible requirement of proof of an intent to stir up hatred has rendered the 1989 Act “effectively rudderless.”<sup>6</sup>

#### **D. Specific Reform**

##### **(i) The Protected Characteristics**

17. The current list of seven distinct characteristics which are protected under the 1989 is too narrow. Notably, the Act provides no protection and does not criminalise incitement to hatred against a myriad of minority groups. For example, the 1989 Act does not criminalise incitement to hatred against asylum seekers; refugees; disabled people and/or transgender people.
18. The recent racist abuse directed towards a young mixed-race couple who participated in a Lidl television advertisement aptly demonstrates the unnecessary limitations in the

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<sup>5</sup> Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) Bar Review 178

<sup>6</sup> Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) Irish Criminal Law Journal 16

current 1989 Act. It is arguable that had the authors of the vicious online posts been prosecuted under the 1989 Act, they would not have been convicted on the grounds either that the hatred they incited was not against a group of persons with one of the seven identified characteristics in the 1989 Act.

19. Fianna Fáil submits that the list of characteristics should be broadened and equalised with the nine prohibited grounds of discrimination provided for under the Equal Status Acts 2000 to 2015 – which better reflect the diversity of modern Ireland and are broader in their scope than the seven identified characteristics provided for in the 1989 Act.
20. Furthermore, the limitation in the 1989 Act which restricts the application of the Act to incitement to hatred against *groups* of persons only, is unduly restrictive. There is no good reasons why incitement to hatred against an individual should not be criminalised.

#### **(ii) The Internet**

21. While the 1989 Act seems to encompass online behaviour<sup>7</sup>, given the fact that the internet, offers a “substantial means to promote hatred and facilitate hate speech”<sup>8</sup>, it is submitted that specific provision should be made to deal with abusive and hate-filled online speech.
22. The 1989 Act does not address the liability (whether criminal or civil) of internet intermediaries or those who re-publish hate speech. This is a significant lacuna in the current legislation and needs to be addressed.

#### **E. Conclusion**

23. The rise of hate speech in Ireland, coupled with the very low conviction rate, means demonstrates that the 1989 Act is not fit for purpose and requires immediate reform and amendment.

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<sup>7</sup> As it extends to words used, behaviour or material displayed in “any place other than inside a private residence.” Section 2(1)(b)

<sup>8</sup> Law Reform Commission, Report on Harmful Communications and Digital Safety (LRC 116, 2016) at para 2.245.

24. However, while the laudable desire to address the growing issue of racial intolerance in Ireland is a laudable aim, Fianna Fáil advocates a cautious and considered approach to reform so as to ensure that any further limitation on a citizen's right to express freely their convictions and opinions is proportionate and necessary.
25. While some increased limitation may be necessary to take account of technological developments and modern forms of communications, the real challenge is to render the legislation effective, so that those who do engage in criminal hate speech can be effectively prosecuted.

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