



An Roinn Dlí agus Cirt
Department of Justice

Legislating for Hate Speech and Hate Crime in Ireland

Report on the Public Consultation 2020





Foreword by the Minister for Justice

Hate crimes are signal crimes.

They send a message to the victim, and to other people like them, that they are not safe, not wanted, or somehow not a real member of Irish society who is entitled to the same protections or the same freedoms as other people.

To keep safe, so the message goes, you must stay quiet, not speak out, not say who you are or who you love, not stray outside a small, confined life, not have the freedom to move around, to express who you are, to dress as you wish, to be proud of your community's history and achievements.

Victims of hate crime are made to feel afraid for the future, not just for themselves but for their friends, their loved ones, their children. This type of fear can lead to anger, and ultimately to a more divided society where whole communities can feel unsafe.

As Minister for Justice, I am determined to tackle these crimes and to ensure that those who seek to divide our communities and spread hatred and fear are dealt with effectively by our criminal justice system.

I want victims of hate crime to know that they will be treated with understanding, and perpetrators to know that their crimes will be reported, investigated and prosecuted, including where they incite other people to hatred from behind the protection of a screen or an anonymous account.

This consultation is a significant step toward new criminal legislation to deal with hate crime and incitement to hatred. It involved listening carefully to voices from all sides. Many of those who participated

have been victims themselves, others are concerned about the very real need to respect the human rights of everyone involved, including the right to freedom of speech, so that the new legislation is proportionate, as well as effective in achieving its aims.

This report presents the results of the public consultation, and the conclusions we have drawn from the research.

The next step is to draw on these conclusions and develop new legislative proposals, which will be published in the coming months.

I hope this will lead to a strong and effective legislative infrastructure to help tackle this serious form of crime which will also be evidence-based, while respecting important rights to freedom of expression and association.

The publication of this Report is a key part of fulfilling our commitment in the Programme for Government to introduce hate crime legislation within twelve months, and to review and update the 1989 Prohibition of Incitement to Hatred Act.

I encourage all stakeholders to continue to make their views known as we move towards drafting this legislation.



Helen McEntee

Helen McEntee TD
Minister for Justice



About this Report

At the heart of this report is the idea that public policy cannot be delivered effectively without public engagement, and that this requires openness and dialogue with people and communities. The report is one of the first to be delivered following the Department of Justice's Transformation Programme, the biggest restructuring of a government department in the history of the State. Transformation aimed to create a Department that is better able to address the challenges and opportunities of our new world by being more agile, more evidence-based and more open while remaining loyal to traditional Civil Service values of integrity, impartiality and professionalism. These values are reflected throughout the report.

The report provides a comprehensive overview of the contributions made by almost four thousand contributors who participated in the public consultation.



The report is structured in four parts



1. Introduction

The context and some of the challenges shaping Ireland's search for an effective response to hate speech and hate crime

2. Findings

Insights from the contributions received during the consultation and key findings from the research

3. Conclusions

Ten key conclusions from the findings, and how these can form the basis for an effective approach to hate speech and hate crime in Ireland

4. Appendices:

- Consultation paper
- Report on workshops
- Comparative research on approaches in neighbouring jurisdictions

PART 1

Introduction



This consultation identified certain key challenges that should be borne in mind when reading the report.

Effective and open communication with the public and other stakeholders will be essential to maintaining goodwill, realism and patience while the new legislation is debated, and thereafter while it beds in and is adjusted and developed in future years.



Defining Hate Speech and Hate Crime

Rather than using narrow, legal definitions, for this report we have chosen working definitions that reflect the real-life experiences that communities have told us they experience as hate speech and hate crime. Of course any legislative definition will need to be more precisely construed.

The term hate speech where used in this report includes both incitement (promoting or encouraging harm or unlawful discrimination against a person or group due to their real or perceived association with a protected characteristic), and direct verbal attacks intended to cause serious distress or alarm, due to a person's association with a protected characteristic in the mind of the perpetrator.

In legal terms the second form of hate speech described above is closer to hate crime, since the act in itself, even without the hate element, is already likely to be a criminal offence under existing law.

In this report, a hate crime means any criminal offence which is carried out by the perpetrator with a hate motive, due to the victim's real or perceived association with a protected characteristic.

Respect for Human Rights

It is essential that any new hate crime legislation is developed with careful attention to harmonising its protections with the fundamental human rights to freedom of expression and association.

Thresholds for criminal hate speech in particular need to be high, to avoid any disproportionate or unnecessary impingement on these fundamental rights which every person is entitled to enjoy.

Complexity

This is a difficult area to legislate well, because of its complexity. Great care will be needed in the development of the elements and proofs for any new offences.

For most criminal offences, proof that the perpetrator committed the relevant offence is sufficient, without having to prove why, and proving a hate motive can be difficult. This will be a significant issue for the development of new legislation, and must be recognised. Without a clear way to deal with this difficulty, it is unlikely that any new legislation to deal with hate crimes would be successful.



Before undertaking this research

Before undertaking this consultation, the Research and Data Analytics team in the Department of Justice undertook detailed, qualitative research to compare the effectiveness of different approaches to legislating for hate crime in some of our neighbouring jurisdictions. The report on this research is available at appendix 3.

The results of that research, combined with our deep, existing knowledge and the contributions and insights from experts and communities to this consultation will together inform the proposals for new hate speech and hate crime legislation in Ireland.

Why this consultation is important

The information gathered from this consultation will help the Department of Justice to develop better legislative proposals to deal with hate speech and hate crime.

The strong community engagement with the consultation will help us develop better policy and improve the decisions we make, by building our understanding of the lived experiences of the people who will be most impacted by our legislative changes. It will also help us to understand the specific requirements of communities or groups, and avoid some of the pitfalls that can arise when experts, despite having a great deal of abstract information, are lacking in the direct experience that is required for a true understanding of the complexities of people's lives and needs.

This consultation provides insights we would not otherwise have discovered and will help ensure that Ireland's approach to dealing with hate speech and hate crime is rooted in our own local experience rather than an imported model that may not necessarily be fit for purpose in an Irish context.

The Department of Justice is committed to improved transparency and greater accountability in our policy decisions.

We hope that publishing this consultation report will help ensure participants can see how and where their views and experiences have informed the development of the basis for Ireland's approach to hate speech and hate crime.



Methodology

The findings and conclusions in this report are drawn from a unique set of insights, which were gathered in partnership with civil society groups, experts, professional organisations, community groups and members of the public. This was done via:



An online survey composed of five questions which was publicly available on the Department of Justice website between October 2019 and January 2020



A detailed question and discussion paper which was distributed to stakeholder groups, and also publicly available on the Department website between October 2019 and January 2020



A series of seven independently facilitated discussion workshops around the country



A series of meetings with interested groups, organisations, academics, law enforcement, professionals and other experts

Who carried out the consultation?

This consultation was carried out by the Department of Justice's Criminal Justice Legislation division as part of its work to develop new legislation on hate speech and hate crime.

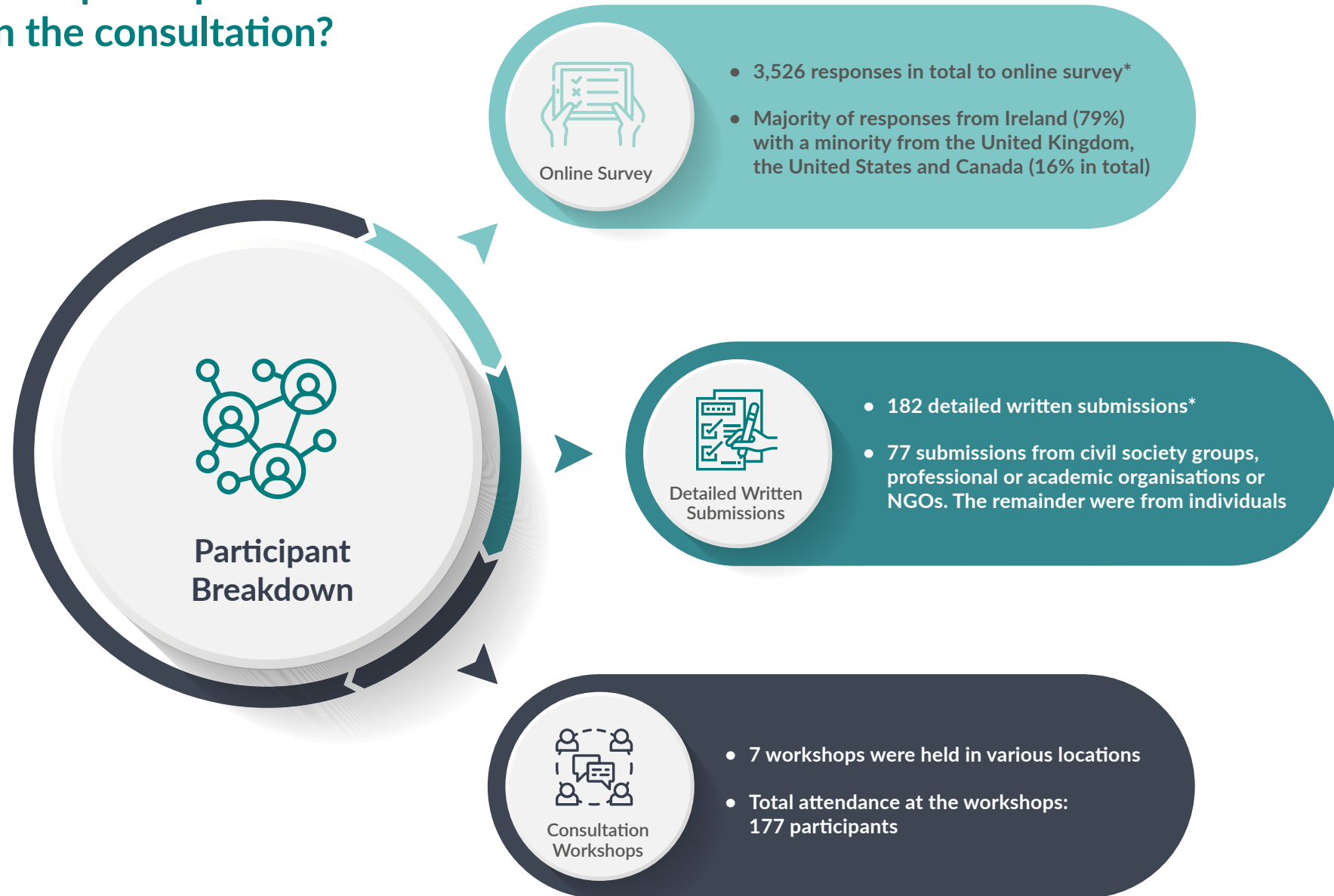
The project was overseen by a cross-functional group of Principal Officers in the Department of Justice, chaired by Criminal Justice Legislation and drawn from Criminal Justice Policy, Civil Justice and Equality Policy and Transparency divisions in the Department.

The results of the online survey were collated and analysed by the Research and Analysis division of the Department of Justice.

The discussion workshops were independently facilitated following a competitive tender process.



Who participated in the consultation?



*The submissions received as part of this consultation are available on the Department's website at www.justice.ie

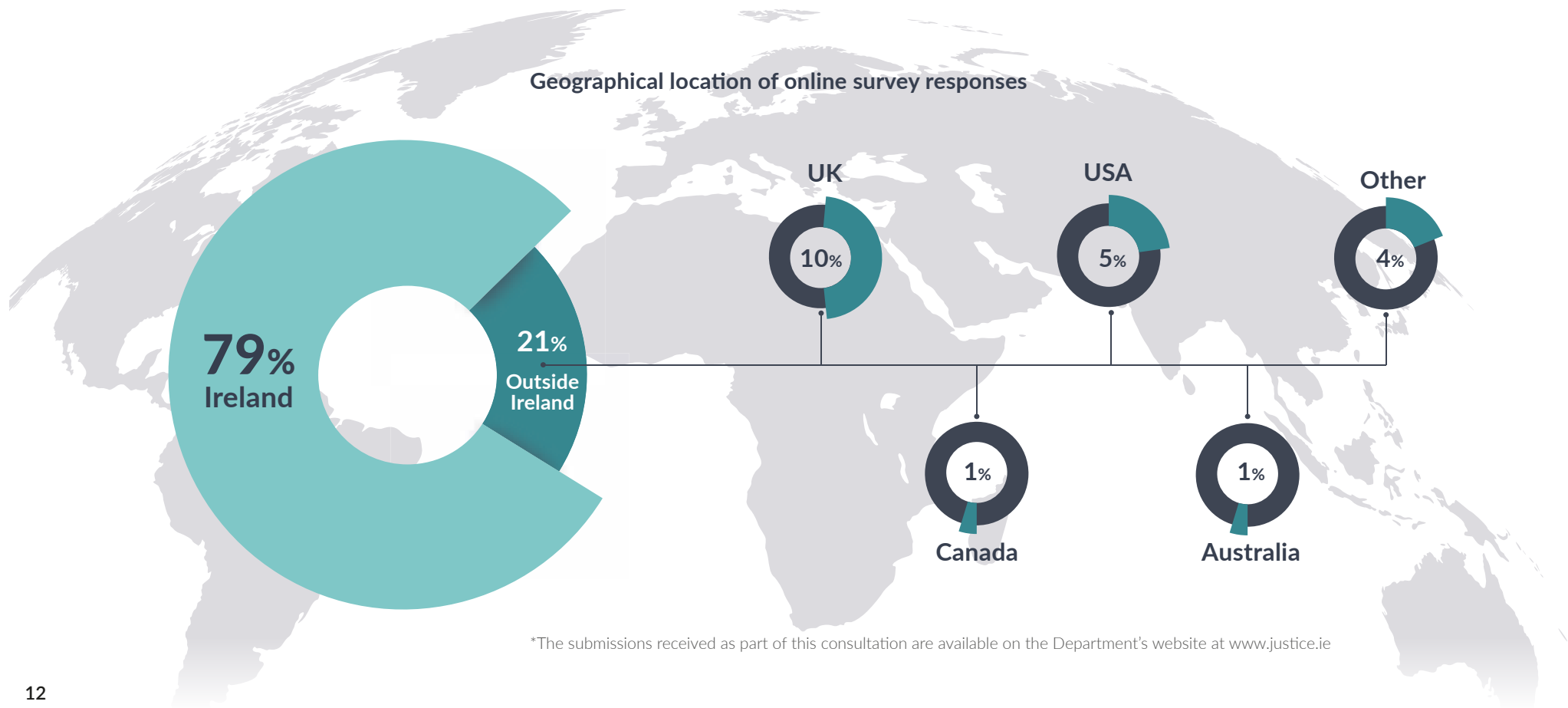
The information in this report is drawn from a number of sources. In total, more than 100 civil society groups, professional or academic bodies and community organisations participated in the consultation.

Online survey

An online survey composed of five questions was publicly available on the Department's website between October 2019 and January 2020. It was widely advertised on social media and in other forums. There were 3,526 responses to this survey (3,241 unique responses*, therefore 8% of the total were repeat responses) from members of the public sharing their views.

The majority of the responses were from Ireland, followed by the UK, the US and Canada.

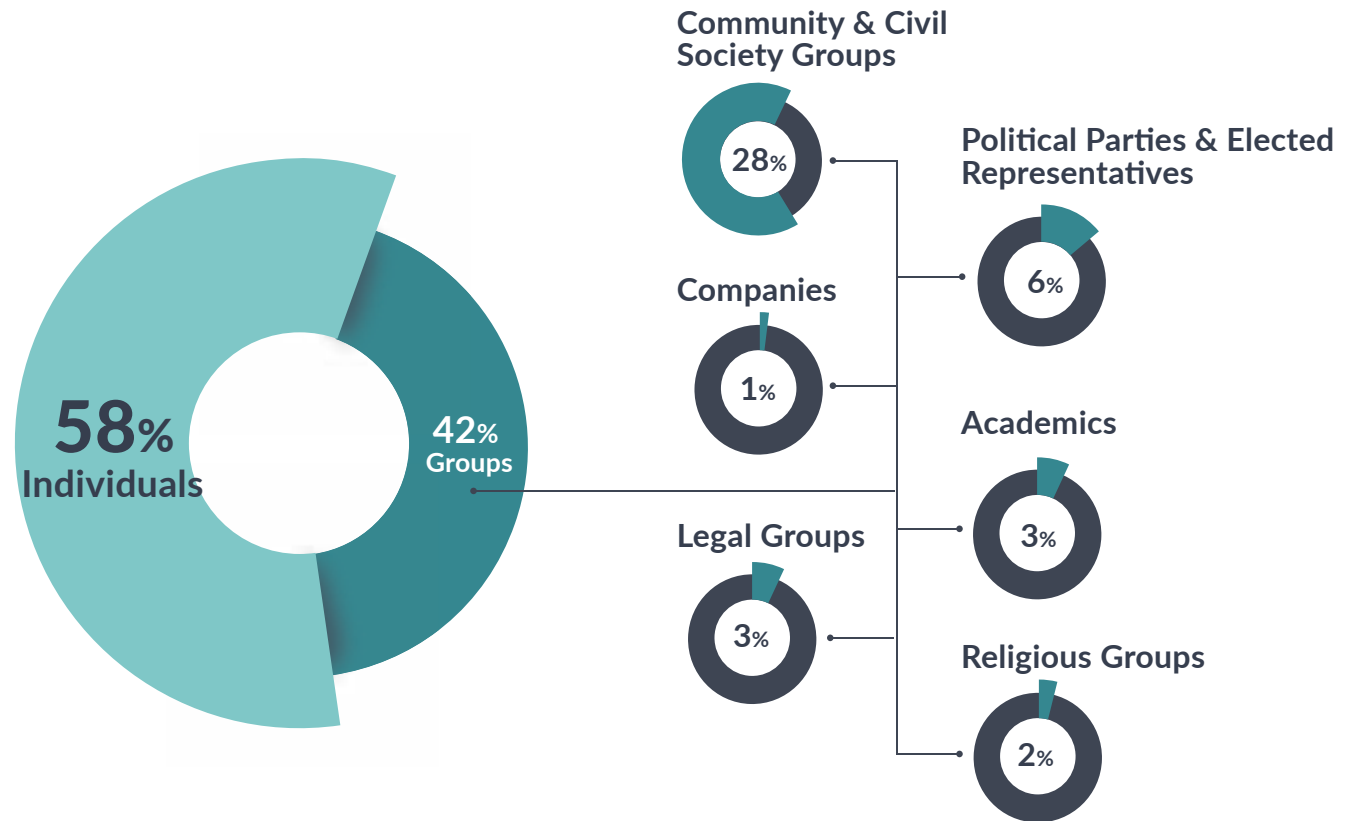
Analysis of the geographic location of survey responses was based on unique IP addresses. For this reason, there may be some margin of error with these figures, as they may be impacted by masking or rerouting of IP addresses.



The Department received more than 175 detailed written submissions from

- Members of the public
- Academic and legal experts
- Civil society organisations
- Law enforcement
- Community organisations

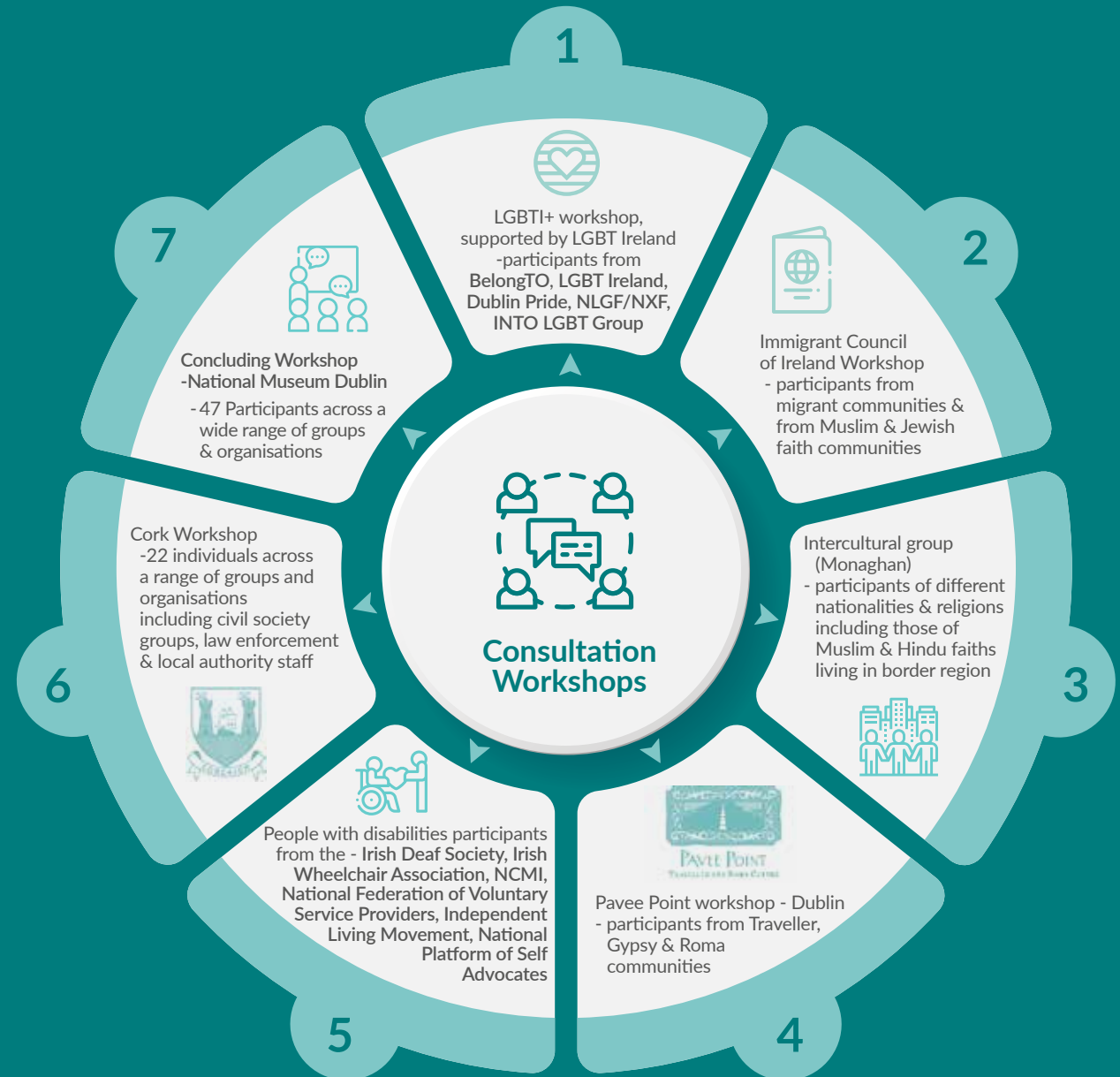
Written submissions by category



Consultation workshops

A series of seven independently facilitated discussion workshops was held around the country. The attendees were individuals and organisations who are part of, or working with, communities who are targeted in hate incidents.

The workshop format facilitated open discussion around a series of questions. The general themes and issues discussed were recorded and collated into a detailed report by the facilitators. This report can be found at appendix 2.



Do we really need new hate crime legislation?

Ireland's historic approach to hate crime has been defined by a sense of Ireland as a monocultural place, where no minority cultures exist and the problems of racial and religious bigotry, so prevalent in other countries, simply do not present a significant problem.

It is widely accepted that this traditional view cannot hold in the Ireland of today, whose society is so changed, so colourful and so diverse in comparison with the country of fifty years ago. But the stark reality is that Ireland was never monocultural. The Travelling community has been calling out examples of individual and systemic prejudice against its members for as long as that community has existed. People who are not of the traditionally pre-eminent sexual orientation, gender or religion have faced systemic and individual bias to a dismayingly degree, albeit that much of this was at various times entirely legal and occasionally even enshrined in the law of the land.

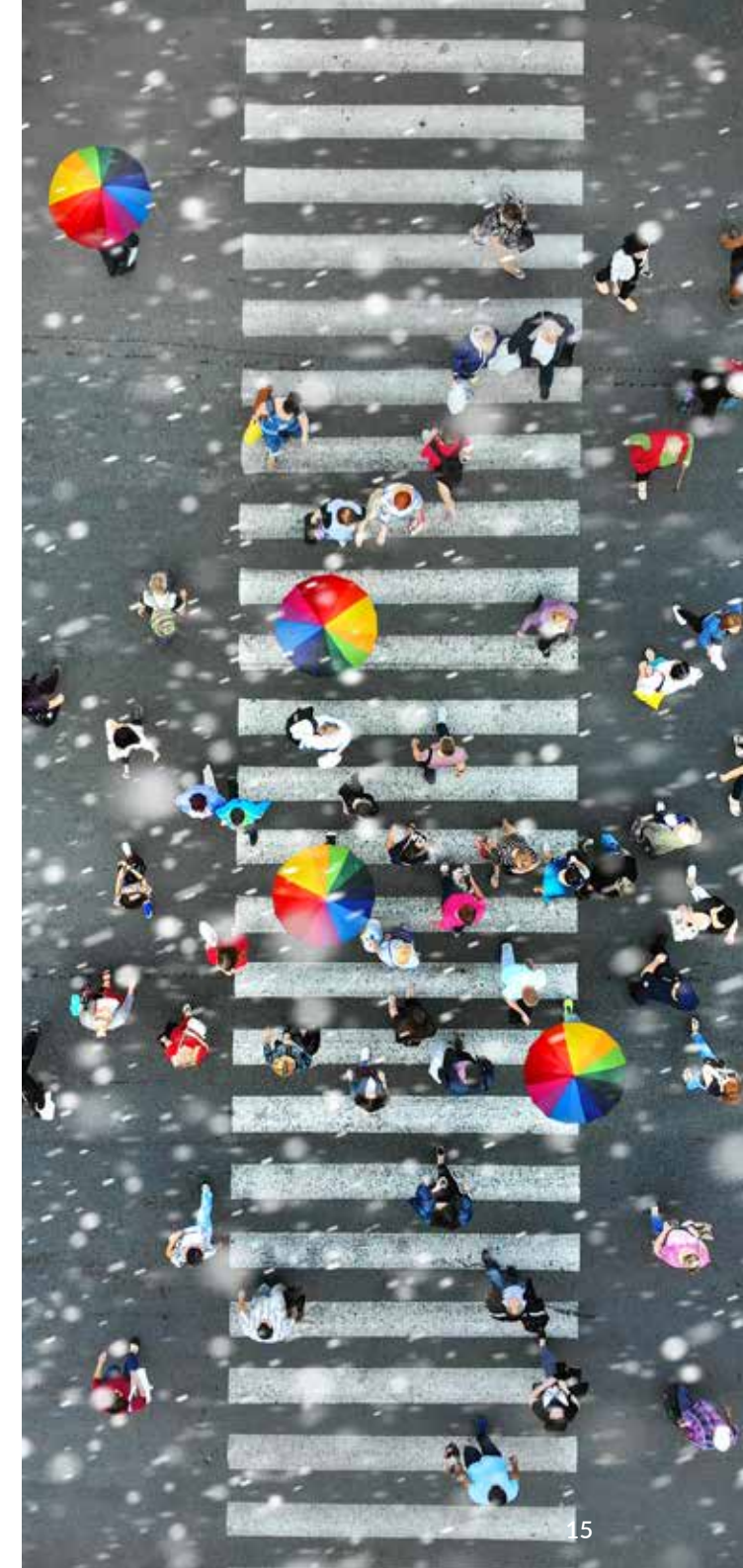
There have, of course, been powerful and effective voices over the years that have called for and driven forward changes that sometimes must have seemed impossible.

A deeper understanding of the problems and dangers of hate speech and hate crime has developed in Ireland, reflecting developments in the international sphere. Academics and experts have for some time seen the need, and called for

effective legislation to deal with these problems, swiftly and effectively wherever they occur.

There is general acceptance internationally that hate crimes cause a distinct form of harm. Hate crimes almost always include a 'signalling' element which (intentionally) produces distinct effects that can spread fear, isolation and anger laterally through communities, but also down through generations. Therefore, it can be useful to have specific forms of offences which recognise this harm and provide enhanced penalties where a base offence is aggravated by hate.

The development of new legislation in this area has wide community and cross-party support. The Government has reiterated its commitment to introducing such legislation in the Programme for Government – **Our Shared Future**.





Current legislative position - What is illegal at present under the 1989 Act?

The only legislation in force in Ireland which deals with hate-based offences is the Prohibition of Incitement to Hatred Act 1989.

Ireland does not currently have specific legislation dealing with hate crime, although a hate motive is an aggravating factor that judges can take into account (on a non-statutory basis) at sentencing for any criminal offence.

A hate crime occurs where an offence is committed that is already itself a crime (for example assault or criminal damage), but with the extra dimension that the victim is targeted because of their association, in the mind of the perpetrator, with a particular identity characteristic, perhaps their sexual orientation or ethnicity for example.

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)
 - 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) covers making or possessing hateful material

Problems with the current legal position

Ireland does not currently have any specific legislation to deal with hate crime. While at present, in sentencing for any offence, a judge may consider a hate motive to be an aggravating factor and may reflect this in the sentence handed down, even where this occurs (and there are few records available) it will not be reflected anywhere in the formal record of the conviction or sentence.

This means, for example, that a hate element will not be reflected in the charge against the accused, meaning that it may never be raised in front of the jury, and cannot be defended in the way that other parts of the offence can be, i.e. challenged by the defence in court. It also means that a pattern of such offences may not be apparent, even to those responsible for an offender's sentence management or probation.

The 1989 Prohibition of Incitement to Hatred Act is complex and intricate. At the time of its introduction, although it was forward-looking in certain respects (in particular the inclusion of sexual orientation and membership of the travelling community as protected grounds), there was little apprehension that such legislation would ever be needed in real terms. The principal reason for introducing the Act seems to have been that Ireland could not ratify the ICCPR (International Convention on Civil and Political Rights) without it. In reality, and with the benefit of hindsight, the structure of

the 1989 Act and the complexity built in to the offences within it have meant it is effectively not useful in practical terms for prosecution of incitement to hatred.

The 1989 Act contains provision for serious consequences, potentially up to and including a lengthy prison sentence, however there have been few prosecutions under the Act (in the region of 50 since 1989) and only a handful of convictions, some of which have resulted in high-profile acquittals. There are now clear difficulties in prosecuting under the legislation because of the difficulties in obtaining a conviction. Calls for the legislation to be reformed are widespread and appear to be well-founded.

The Act does not deal with any forms of hate speech other than incitement. It does not prohibit, for example, hate speech which is a direct attack on a person, or hate speech where there is no-one present who might be incited by the perpetrator (so where everyone else present is sympathetic to the victim, for example). It does not prohibit actions stirring up hatred against an individual, only a group.





What about the fundamental right to freedom of expression?

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, however, be necessary, proportionate and explicitly provided for in law. Any new legislation must respect the essence of the right to free 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.



Are other measures, apart from criminal law, needed?

Irish legislation in this area will sit within a wide body of international and Irish law designed to protect against racism, harassment, discrimination, defamation and many other related harms.

The criminal law, particularly as it applies to hate speech, should always be the measure of last resort. There is no doubt that criminal legislation alone will not solve the problem of hate speech, and is not suitable for dealing with many of the milder forms, which although harmful and far-reaching in their negative effects, do not reach the threshold for criminal prosecution. Measures ranging from education and awareness to codes of conduct and behaviour are essential to any comprehensive approach to tackling hate speech and hate crime, including by effective prevention.



Approaches to hate speech and hate crime in other countries

The approach to investigating and prosecuting incidents of hate speech and hate crime varies widely from country to country. Some countries have specific hate-based offences, others provide a sentence uplift where hate is an aggravating factor. Some do both.

In some places, it is necessary to prove that the perpetrator was motivated by hate, in others it is enough to show that they selected their victim because they belong to a certain group. Some countries recognise hate offences based in political expression, some restrict their offences to a couple of characteristics, for example race and religion.

All in all, there are many approaches to tackling hate crime internationally, reflecting the complex nature of these incidents and the requirement to protect people from criminal sanction where their behaviour does not warrant the application of the coercive powers of the State.

The report on the Department's research on the effectiveness of approaches in neighbouring jurisdictions can be found at appendix 3.

PART 2

Findings



Key Findings

Key findings in six areas emerged from the qualitative analysis of the submissions. These findings relate to:

1. Who the legislation really needs to protect
2. Which forms of incitement to hatred are, or are not, serious enough to be a crime
3. The need to integrate protections against incitement to hatred with the fundamental right to freedom of expression
4. The need for new offences to be clearer and more realistically prosecutable
5. The need for new laws to deal with the distribution of material inciting hatred
6. The need for other measures outside of criminal law to deal with hate

In the Findings on the following pages, themes that were most prominent in the responses to the consultation generally appear first in each section.

It was strongly apparent throughout the consultation that incitement to hatred and hate crime are closely related, and are consistently targeted at, and experienced by the same people and communities.

Current legislation is clearly regarded by the public and experts alike as inadequate and ineffective, and there is a broad consensus that new legislation is needed to deal effectively with both incitement to hatred and hate crime, and that this new legislation needs to be clear and workable in practice.



Important note on interpreting the findings

The respondents to this consultation were a self-selecting group rather than a random or representative sample.

No restrictions were placed on who could complete the survey or send in a submission, and inevitably it is more likely that people who have a particular interest in the subject or feel strongly about it were more likely to contribute.

The questions asked as part of the consultation were open-ended, with plenty of scope for participants to expand and give further information that they felt was relevant.

For all of these reasons, the precise numbers or percentages of different types of responses cannot be treated as representative of the views of Irish population in general, and we need to be careful in drawing conclusions from the information received.

The submissions have therefore been analysed and interpreted qualitatively (i.e. by their characteristics and features) not quantitatively (by their numbers or percentages in the overall group).

The information has been grouped into themes based on content. Several strong themes are apparent, which persist throughout all response types, and these are the themes discussed here.

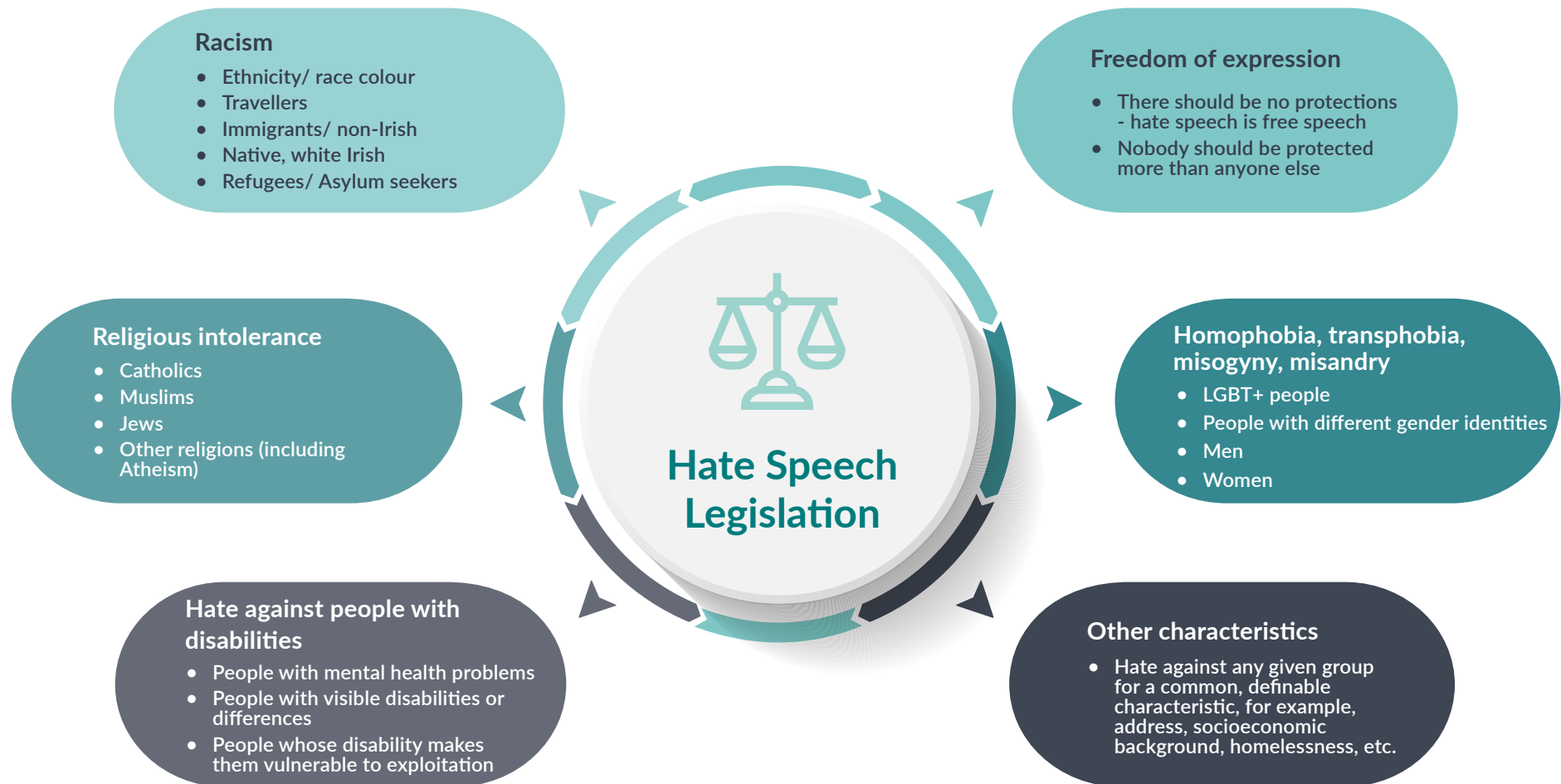
It is important to note that the findings and conclusions in this report are not drawn solely from the written submissions, but also take account of the views expressed during the consultation workshops, and the discussions that took place during a series of meetings with interested parties and groups from all sides who requested the opportunity to present their views in person.





1. Who does the new legislation really need to protect?

The list of protected characteristics should ensure the most commonly targeted identity characteristics are protected from this type of harm. The following types of prejudice were identified consistently by participants as giving rise to incidents of incitement to hatred and hate crime throughout.



Many of the characteristics highlighted in the consultation as requiring protection under Hate Crime legislation align with the nine grounds of Discrimination in the Equal Status Acts, although not all of these grounds appear to give rise to hate crimes currently (for example, marital status, or family status).

Racism

The protection mentioned most often in the consultation was the need for protection from racism. In recent years Ireland has become increasingly multicultural, and it is apparent that along with the increasing diversification in our communities, we have seen a rise in covert and overt racism.

There was considerable disquiet at the use of media and online platforms by public figures to promote racist stereotypes and harmful myths in order to generate attention for their campaigns.

There was frustration at the frequent excusing of racism by saying that a person didn't mean any harm – the argument that no harm was meant is not seen as a valid excuse for racist behaviour since its effect can be just as damaging, whether meant or not.

Religious intolerance

Religious background was another major theme in the responses to the consultation, with the majority of respondents believing that all faiths should be protected equally. This includes faiths that are traditionally associated with other countries and cultures such as Hinduism and Islam, and also religions traditionally associated with Ireland, including different forms of Christianity, Paganism, and also atheism or absence of religious belief.

Disability

The consultation reported ill-treatment and abuse on grounds of all kinds of disability, from

physical disability, to mental disability and mental illness. Individuals with disabilities and mental illness gave compelling descriptions of the types of hate they have been faced with because of their disability. Groups supporting individuals with disabilities emphasised the importance of protections for individuals with disabilities, particularly where, in certain instances, the individual may not fully understand that what is happening to them is in fact hate crime or hate speech, or may be unable to report or communicate what has happened.

Sex, gender, gender identity and sexual orientation

Many participants reported being the targets of hate crime and hate speech based on sexual orientation, gender or gender identity and emphasised the importance of these characteristics being protected under the new legislation. Incidents of homophobia, transphobia and misogyny were particularly of concern to participants.

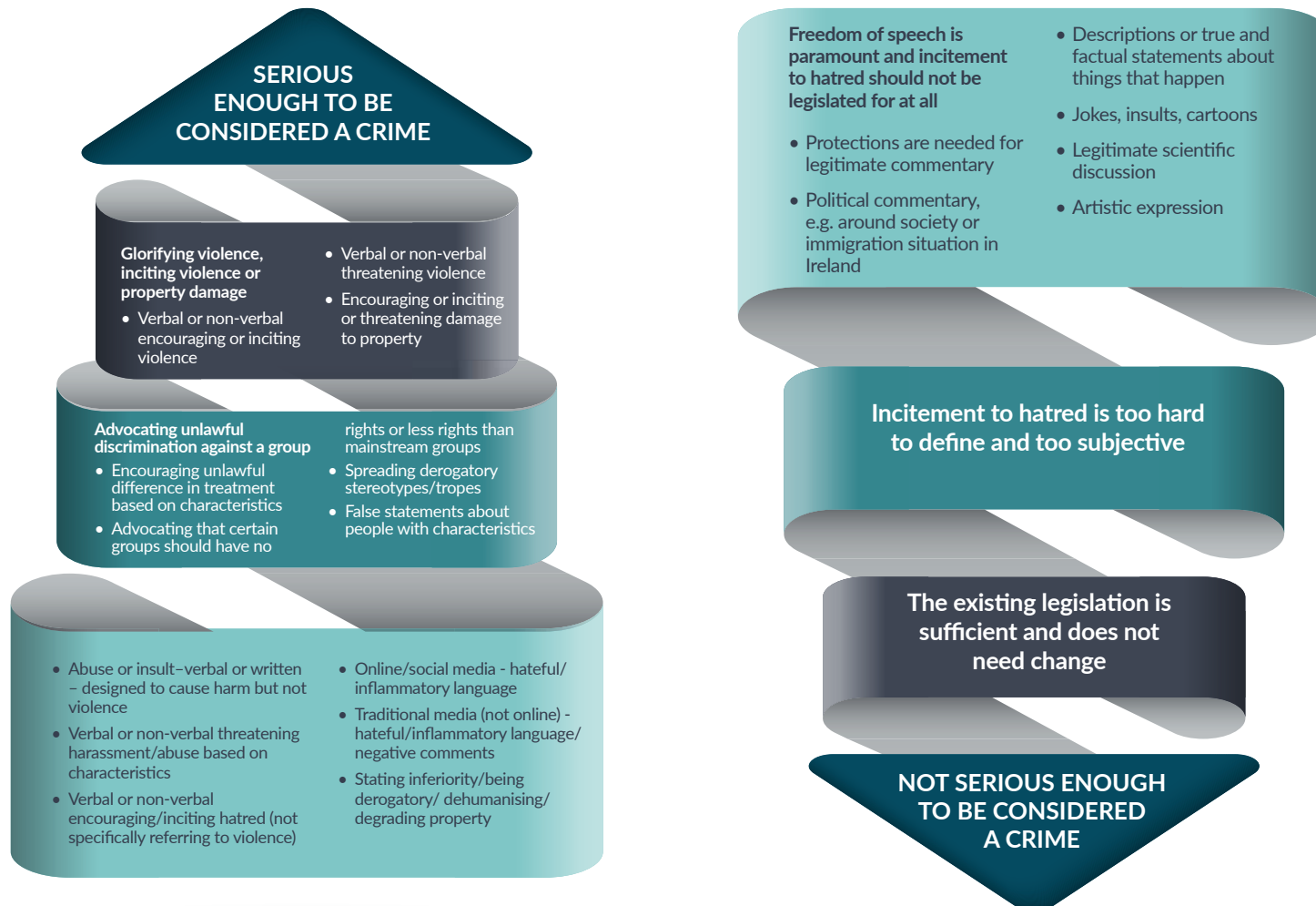
Other characteristics

A number of other characteristics were suggested as candidates for protection under the new legislation. These included, for example, socioeconomic status, employment type, and address (postcode prejudice).



2. What forms of incitement to hatred are serious enough to be a crime?

Current protections against incitement are not viewed as effective and there is a clear need for new protections from incitement to hatred.



When asked in the consultation what forms of incitement to hatred were serious enough to be considered a crime, some participants believed that free speech cannot ever be regulated, or the term “hate speech” is too vague and subjective to be legislated for. Some also suggested that the Prohibition for Incitement of Hatred Act 1989 is sufficient and fit for purpose and that no further legislative action is needed.



Other participants called for better legislation to deal with incitement to hatred, and specified the types of incitement that should be criminal. There were three strong themes throughout these responses:

- Actions glorifying violence, inciting violence, or inciting damage to property
- Encouragement or incitement to hatred (not specifically referring to violence)
- Advocating unlawful discrimination against a group.

It was apparent that actions glorifying violence, inciting violence, or inciting damage to property appear to many to be criminal. This includes verbal or non-verbal encouraging or inciting or threatening violence, or encouraging or threatening damage to property.

Our participants reported that many people in groups who are targeted by hate speech and hate crime live in fear of their personal safety and the safety of their possessions being compromised, and there was a widespread view that no member of Irish society should live in fear of physical violence.

Aside from promoting physical violence against a person or their property, participants felt that abuse and insult must also be considered. Abuse could be in written or verbal form, and while it does not cause physical injury or damage to property, participants considered that abuse causes a lot of harm to victims. Abuse included language that is derogatory, degrading or

dehumanising towards a group, or that would signal inferiority of a group.

Abuse or harassment may take a number of forms:

- Harassment or abuse based on characteristics
- Encouragement or incitement to hatred (not specifically referring to violence)
- Hateful or inflammatory language online (including social media)
- Hateful or inflammatory language in traditional media

Advocating unlawful discrimination against a group is another action that the consultation respondents classified as serious enough to constitute a crime. Discrimination against a group can come in many forms, such as:

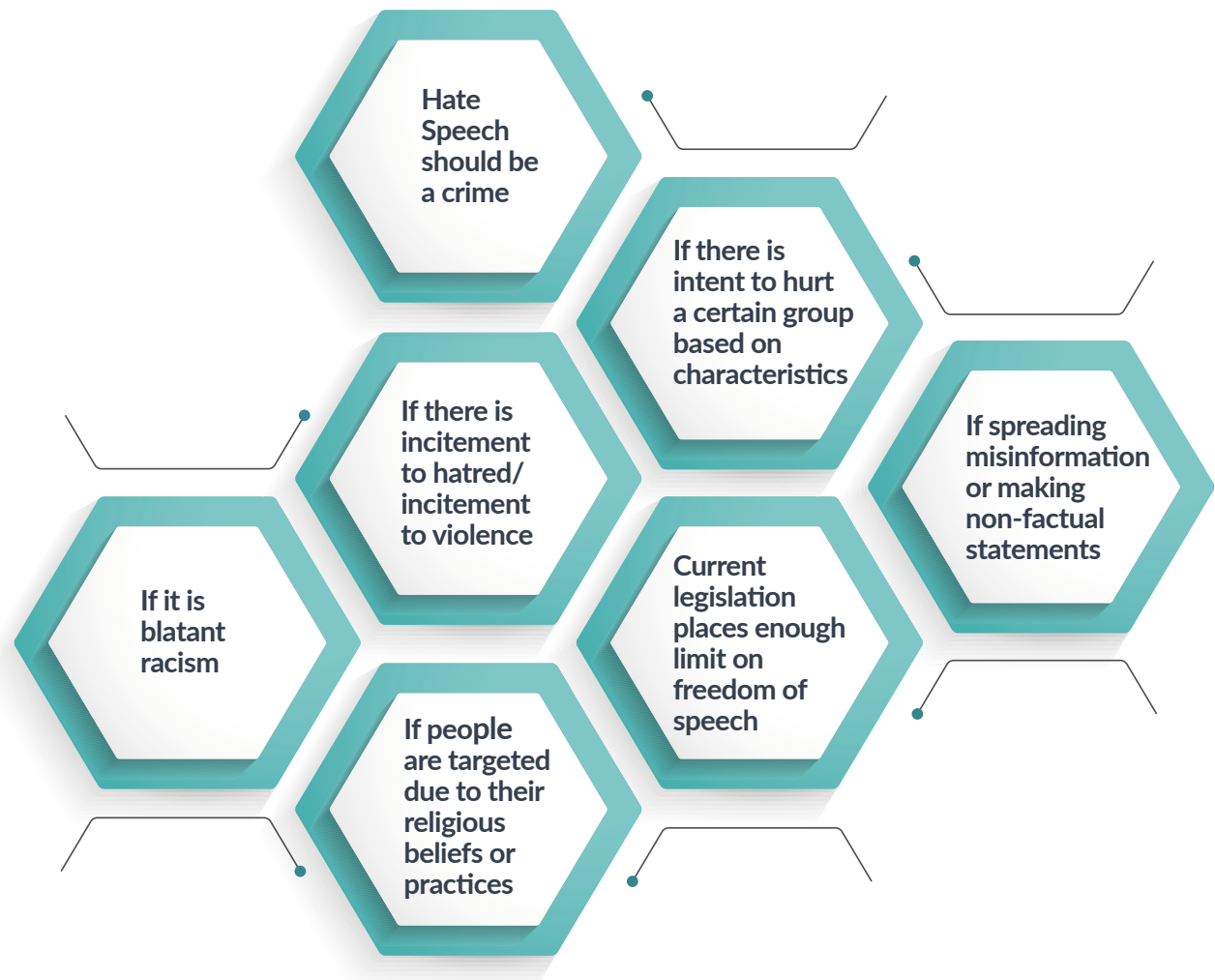
- Anything encouraging unlawful difference in treatment based on characteristics
- Advocating that certain groups should have no rights or lesser rights
- Spreading of derogatory stereotypes or tropes
- False statements about groups with certain characteristics

3. Free Speech: Integrating protections against incitement to hatred with the fundamental right to freedom of expression.

Freedom of expression is a right enjoyed by everyone in Irish society. It is enshrined in our Constitution, in the European Convention on Human Rights and widely recognised internationally. However, the right to freedom of expression is not absolute, and may be limited by law when it comes to the protection of other fundamental human rights.

Throughout the consultation process, we asked respondents their opinion on whether it is necessary or right to place limits on freedom of expression by making some forms of hate speech a crime.

Many participants felt that it would not be right to place any limits – that freedom of speech is paramount and cannot ever be restricted. Others pointed out that freedom of expression is not without its limits. Limits can be placed on freedom of expression to protect other fundamental human rights, provided those limitations are explicitly set out in the law, and are proportionate.





Many participants felt that freedom of expression has limits and should be regulated in certain circumstances.

Many responses suggested that incitement of hatred is too difficult to define and too subjective – they felt that this may present a difficulty in the development of legislation.

What particular protections do you think the law on incitement to hatred should offer?

When asked what protections the law on incitement to hatred should offer, it was apparent that participants are of the view that in the current legislation the bar is set too high, with the threshold for conviction being almost impossible to reach.

It was widely recognised, however, that the bar needs to be set reasonably high for what kinds of actions constitute criminal hate, without it being impossible to meet.

Participants felt that the severity of the penalty should reflect the severity of the offence, with higher penalties for repeat offenders. Suggestions for what might constitute a suitable penalty included compulsory referral for education, community service, fines and imprisonment.

Participants were of the view that public figures, or those with a wide platform for their views should be held to a higher standard, and that given their reach and audience, any instance of hate speech by a person with wide reach

or influence should be penalised with a higher level of severity.

Participants were strongly of the view that there is a greater need for protection from hate speech on social media, and that additional steps must be taken to prevent the promotion, publication and distribution of hateful content.

4. New offences need to be clearer and more realistically prosecutable

The 1989 Act contains provision for serious consequences, potentially up to and including a lengthy prison sentence, however there have been few prosecutions under the Act (in the region of 50 since 1989) and only a handful of convictions. Calls for the legislation to be reformed were prominent among our participants.

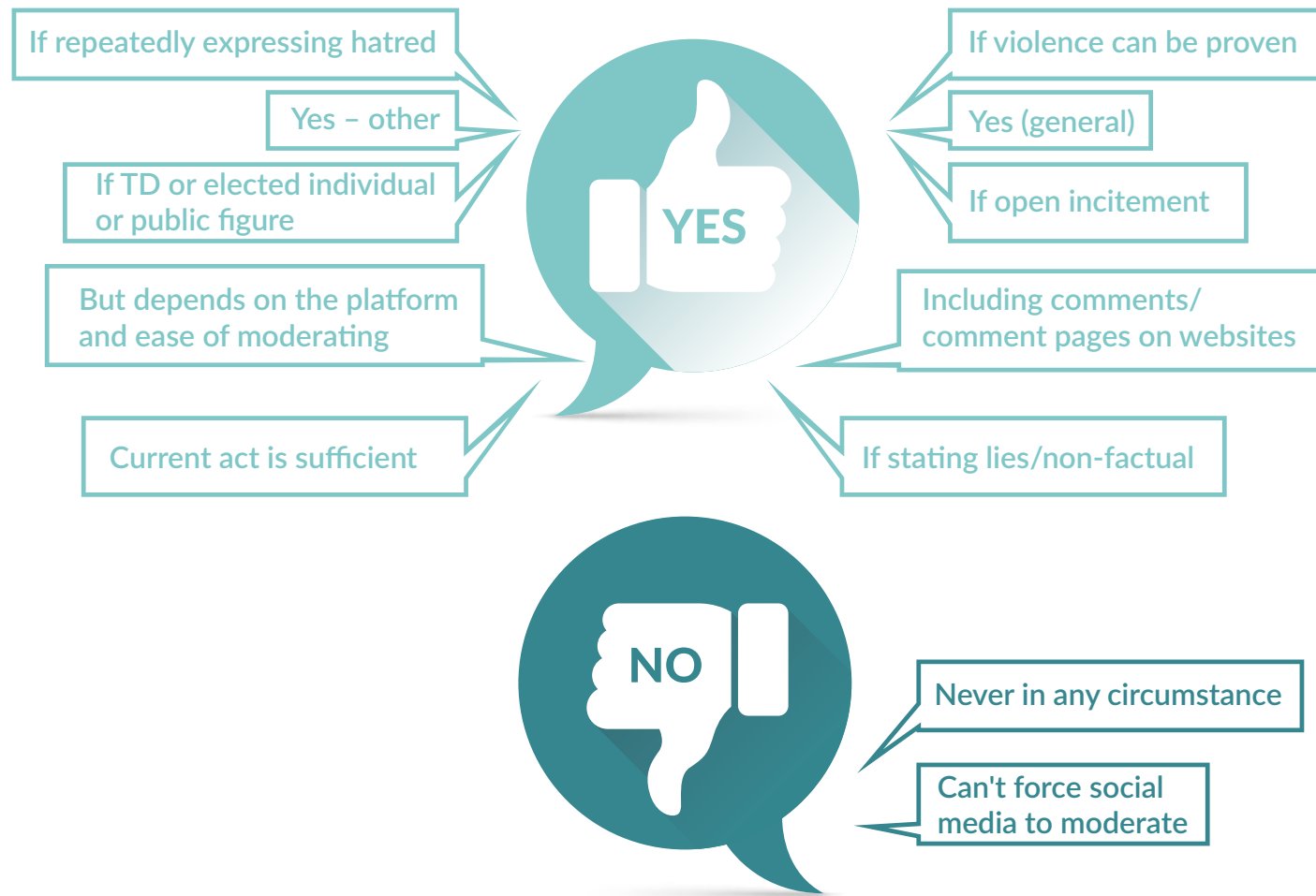
The Act does not deal with any forms of hate speech other than incitement. It does not prohibit, for example, hate speech which is a direct attack on a person, or hate speech where there is no-one present who might be incited by the perpetrator (so where everyone else present is sympathetic to the victim, for example). It does not prohibit actions stirring up hatred against an individual, only a group. Participants felt that any new law needs to be clear as to exactly what does and what does not constitute incitement to hatred.

There was a strong view that the threshold for prosecution under the proposed legislation need to be high, but not impossible to meet. Safeguards need to be put in place or prosecutions will not proceed. Protections for legitimate contributions also need to be worked into the law to ensure protection from prosecution for legitimate speech in relation to scientific research, art, political discourse and similar fields.



5. New laws will need to deal with the distribution of material inciting hatred

In the consultation process respondents were asked whether individuals who are actively involved in publishing, spreading, or distributing hate speech should be subject to prosecution. The most prominent themes mentioned in the responses are illustrated below.



Spreading hate speech to a wider audience can greatly increase the harm done



Respondents indicated that the spreading of hate speech greatly increases its harm, particularly given the wide reach and permanent nature of material distributed on the internet and via social media.

The comments sections of various media pages were identified as a problematic area, where users saw a lot of hate speech in response to news articles, for example.

The consultation asked participants if those publishing, spreading, or distributing hate speech, rather than directly targeting an individual in person, should be subject to prosecution. A portion of respondents believed that individuals should be responsible for the material they publish and distribute in all cases. Many other respondents agreed that they should be responsible, with certain caveats, which are outlined below.

If violence can be proven

Certain participants believed that publication and distribution of hate speech should only be criminalised where the hate speech in question is openly inciting violence, or where the sharing of the information may be a physical threat to the victim/s.

If open incitement to hatred

In this instance, respondents felt that publication of hate speech should be criminalised if the hate speech in question openly sought to stir up hatred in others.

Yes, including comments/comment pages on websites

Participants believed that publication and distribution of hate speech online and in traditional media should be criminalised, and that this should include publications in the comments sections of websites and social media. These comments sections were identified frequently by consultation respondents as an area populated by hate speech.

If stating lies/disinformation

Some respondents believed that traditional and online media should be monitored with a view to criminalise the spread of lies or disinformation about people with protected characteristics and members of those groups.

If repeatedly expressing hatred

Some respondents felt that in the initial instance of publication, distribution or spread of hate speech that a warning system should be sufficient, but following that there should be legal recourse to prosecute individuals who repeatedly publish, distribute or spread hate speech.

If speaker is a TD or election candidate or other public figure

There were a variety of views on whether TDs, elected individuals or other public figures should be held to a higher standard than an ordinary person regarding hate speech, and whether the penalty should be proportionate to the reach of the perpetrator. If public figures are to be



held to a higher standard it was suggested that any publications they distribute, be it in online or traditional media, be scrutinised to a higher standard than those with a minimal circulation.

Depends on the platform and ease of moderating

The platform on which the hate speech occurs and the ease of its moderation may also need to be taken into account in ensuring the legislation is operable.

Some contributors believe there should be penalties in place for the publication and distribution of hate speech, but they feel that the current legislation we have in place is enough, despite being drafted in the 1980s, before the advent of the digital world we live in today. Others felt that the 1989 Act is entirely unsuitable to deal with hate in an online environment.

A portion of respondents expressed their strong view that there should be no laws surrounding the distribution of materials inciting hatred. Some of this group felt that this type of moderation would not be appropriate in any case whatsoever, while others believed that it would be so difficult to apply that kind of moderation to social media as to make any Act legislating for it impractical in real terms.



6. Other measures outside of criminal law will be needed

Throughout the consultation, it was apparent that participants felt criminal prosecution should be the last resort in dealing effectively with hate speech.

While every effort should be made to prevent and eradicate hate speech, not every instance of hate speech is serious enough to be a crime. In many cases, action outside of criminal prosecution is more beneficial for the long term prevention of such incidents.

Our participants emphasised the importance of education in prevention, and felt that hate speech laws, although there to be used when needed, would be needed less, if prevention is effective.

Participants felt that clubs, workplaces, and professional bodies need to send out the message that hate speech will not be tolerated within their organisation, and also provide an avenue for recourse through internal disciplinary procedures.

Throughout the consultation, many victims report their first encounter with hate speech as coming from a person in a position of authority, such as a primary school teacher or healthcare professional.

Participants pointed to a need for training and education in professional settings in bias and hate speech. This training should help to raise awareness of hate speech and the damage it causes, and would make people more conscious of using speech that might be hateful.



Training, awareness, education

Participants felt that certain instances of hate speech arise from ignorance and lack of awareness and should not be dealt with via criminal law. Better training and awareness would be more useful in preventing such cases from happening in the future



Professional standards & formal codes of conduct & behaviour

Many participants' first encounter with hate speech was from a person acting in their professional capacity. Strong professional standards or codes of ethics and behaviour would help reduce instances of hate speech in professional environments

PART 3

Conclusions



Conclusions

Drawing on our findings, this report proposes ten conclusions. These conclusions are summarised below, and are explored in depth later in this chapter.

1

The 1989 Act is not effective in dealing with incitement to hatred and should be replaced by a single piece of legislation to deal with both incitement to hatred and hate crime

2

The characteristics protected by the new legislation should include all of those listed in the 1989 Act, and also gender, gender expression or identity, and disability

3

The definition of 'ethnicity' in the new legislation should explicitly include membership of the Travelling Community on the same footing as other ethnicities

4

New offences of incitement to hatred are needed & should prohibit:

- (i) deliberately or recklessly inciting hatred against a person or group of people due to their association with a protected characteristic, &
- (ii) displaying or distributing material inciting hatred

5

The new legislation should contain robust safeguards for freedom of expression, such as protections for reasonable and genuine contributions to literary, artistic, political, scientific or academic discourse, and fair and accurate reporting

6

Thresholds for criminal incitement to hatred should be high, for example incitement to harm or unlawful discrimination. However, it should not be necessary to show that anyone was actually influenced by the incitement or persuaded to act upon it

7

A company accused of displaying or distributing hateful material should be able to defend itself by showing that it has reasonable measures in place to prevent dissemination of this type of material in general, was complying with those measures at the time and was unaware and had no reason to suspect that this particular content was inciteful

8

To be meaningful, the new legislation must also deal effectively with hate crime. Threatening and abusive communications, criminal damage, harassment, assault and intimidation are all common forms of hate crime as described by participants in this consultation and specific, aggravated forms of existing criminal offences should be included in the legislation to deal with these and ensure that such crimes are properly categorised and recorded

9

Additional elements may be needed to help ensure the new legislation is effective, such as allowing alternative verdicts for juries where the aggravating 'hate' element is not proven, and including a general provision (for crimes that are not specific hate offences) to say that a judge will always consider whether hate should be an aggravating factor in sentence, and where it is, that this factor will be on the record

10

Not every hate incident is serious enough to be a crime – many incidents are better dealt with outside the criminal sphere and proper measures to ensure this happens will be needed. In the long term, prevention of such incidents is the most desirable outcome for all concerned. Success in this regard will depend almost entirely on non-criminal, education and awareness-based measures



1

The 1989 Act is not effective in dealing with incitement to hatred and should be replaced by a single piece of legislation to deal with both incitement to hatred and hate crime

The 1989 Act is complex and intricate. Although forward-looking in certain respects, at the time of its introduction there was little apprehension that such legislation would ever be needed in real terms; the principal reason for introducing the Act seems to have been that Ireland could not ratify the ICCPR (International Convention on Civil and Political Rights) without it. While the offences in the 1989 Act form the general basis for the incitement offences at (2) below, the structure of the 1989 Act and the complexity built in to the offences within it have meant it is effectively not useful in practical terms for prosecution of incitement to hatred.

Hate crimes rarely occur in isolation – they are often part of a pattern of incidents, and this pattern can escalate significantly in seriousness if left unchecked. The benefits of having specific hate offences in terms of data recording are clear – the true nature of the offence is recorded and investigated from the outset; the hate element is not ‘lost’; the person is charged with the particular offence; the evidence of the hate element is presented to the court and can be fairly assessed; and a hate motivation for a crime (or pattern of crimes) can be taken into account in making decisions about managing offenders during their sentence or after release back into the community on parole, for example.

Factors such as the list of bias indicators developed by the OSCE and the Fundamental Rights Agency of the EU may be useful in this regard.

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.



2

The characteristics protected by the new legislation should include all of those listed in the 1989 Act, and also gender, gender expression or identity, and disability

The proposed changes to the list of protected characteristics here are confined to those which have been identified as clearly necessary to address actual harms which are occurring at present. Other characteristics have been considered carefully and list should be kept under review, and revisited in the light of developments as the new legislation begins to operate.

Accepting hate speech and abuse on the grounds of disability, gender or gender identity as normal or inevitable creates an enabling environment where people who are different to the dominant group do not feel safe, and indeed promotes a climate where in reality they are less safe.

Adding these characteristics to the list of protected characteristics will have the additional benefit of making it more culturally acceptable to object to this kind of behaviour, and allow victims to have more confidence that their complaints will be taken seriously by the criminal justice system.

As with other hate crimes, this will also support better record keeping, the collection of better data, and hence the formulation of targeted response to potentially dangerous offenders, by ensuring that the hate element of their crime is recognised, addressed, and recorded.

Not every characteristic or group suggested in the consultation is proposed to be added to the protected list – in the interest of proportionality the proposed additions are confined to those who are most prominently targeted. As with any

new legislation, there will need to be monitoring of the law and how it performs over the coming years, to ensure that it is meeting its policy objectives.

If evidence emerges that a particular characteristic which is not protected under the legislation requires such protection, this should be revisited in due course.



3

The definition of 'ethnicity' in the new legislation should explicitly include membership of the Travelling Community on the same footing as other ethnicities

The Travelling community in Ireland has been formally recognised as a separate ethnicity since 2015. It was widely recognised by contributors to our consultation that Travellers are relentlessly targeted by hate speech, and that a significant portion of this is dismissed by mainstream opinion as if it were unintentional, or defended as if it were accurate.

Traveller respondents to our consultation were particularly concerned at disinformation and prejudice emanating from public figures or official sources who have a wide reach and significant influence on public opinion.

In common with other targeted groups, members of the Travelling community who share more than one protected characteristic are even more likely to be targeted and therefore doubly in need of protection.

The inclusion of Traveller in the main definition of ethnicity will be the first time in Irish statute that the Travelling community has been defined in legislation as being on the same footing as other ethnicities.





4

New offences of incitement to hatred are needed and should prohibit:

- (i) deliberately or recklessly inciting hatred against a person or group of people due to their association with a protected characteristic, and,
- (ii) displaying or distributing material inciting hatred



5

The new legislation should contain robust safeguards for freedom of expression, such as protections for reasonable and genuine contributions to literary, artistic, political, scientific or academic discourse, and fair and accurate reporting



6

Thresholds for criminal incitement to hatred should be high, for example incitement to harm or unlawful discrimination. However, it should not be necessary to show that anyone was actually influenced by the incitement or persuaded to act upon it



Two new offences are suggested in conclusions 4-6, above. These would be simpler and somewhat more straightforward than the offences in the 1989 Act. The new offences would include a number of elements, for example:

- The person must form the intention of, or be reckless as to whether they incite hatred (reckless in this context means they knew there was a substantial risk of inciting hatred and decided to press ahead regardless).
- The hatred can be against a person or a group (but always because of a protected characteristic). This is a change to the 1989 Act which confines the offence to incitement against a group, not an individual. The new offence would cover, for example, someone who incites hatred against one Roma individual (because they are Roma) who has recently moved into their neighbourhood. There would be no requirement to incite hatred against all Roma (in this example) in the new offence.
- The victim does not need to have the protected characteristic themselves, simply to be perceived by the perpetrator as being associated with it. For example, a person who is married to someone of a different race, or works providing services to the Trans community would be covered. This is a change to the existing position, where it is unclear whether a person targeted by association is covered. It would also not be required in the new offence for the offender's perception to be accurate. So, for example, the situation of a Sikh man wearing a turban who is targeted because the offender thinks they are Muslim would be covered, as would a person who is not gay but is perceived to be so by the offender. In the new offences it is the perception and motivation of the offender which makes the incident a hate incident.
- A presumption in relation to hate speech on a public forum will be needed. This is new (of course online platforms did not exist in 1989). It is intended to allow a court to presume that, for example, a person who posts something on social media while sitting in their bedroom does not expect it to be private. The person can rebut this by showing that, on the balance of probability, it isn't true (and they did in fact think it would be private), but if they can't do that, then the court will presume it was intended to be public.



- There should be no requirement for the material to be threatening, abusive or insulting in itself. This is a change from the 1989 Act which always requires the material itself to be threatening, abusive or insulting in nature. So, a broadcast or speech which is clearly designed to incite hatred, but is couched in polite or coded language, would be covered by the new offence.
- There should be a number of protections and exceptions, in order to protect free expression and genuine contributions to public discourse and the furtherance of the progress of humanity – the legislation is not intended to stifle legitimate debate or matters of public policy, academic discourse or artistic expression, only speech which is for the express purpose of inciting hatred (i.e. promoting or encouraging negative feeling against those perceived as associated with a protected characteristic, to a degree likely to lead to harm or unlawful discrimination against those people). The protection proposed here would apply to anything a reasonable person would consider to be a good faith (genuine) contribution to one of the listed fields.

7

A company accused of displaying or distributing hateful material should be able to defend itself by showing that it has reasonable measures in place to prevent dissemination of this type of material in general, was complying with those measures at the time and was unaware and had no reason to suspect that this particular content was inciteful

The approach proposed for a body corporate (i.e. to require that has its own effective measures in place to deal with hateful material generally, was complying with those measures at the time and had no reason to suspect the material it displayed was hate speech) is aligned with the approach being taken in the Online Safety and Media Regulation Bill being developed by the Department of the Environment, Climate and Communications. This legislation will

complement the hate speech legislation by establishing a robust regulatory framework to deal with the spread of harmful online content. It also provides for the appointment of an Online Safety Commissioner as part of a wider Media Commission to oversee the new regulatory framework for online safety. The Commissioner will govern this new framework through binding online safety codes and robust compliance, enforcement and sanction powers.





8

To be meaningful, the new legislation must also deal effectively with hate crime.

Threatening and abusive communications, criminal damage, harassment, assault and intimidation are all common forms of hate crime as described by participants in this consultation and specific, aggravated forms of existing criminal offences should be included in the legislation to deal with these and ensure that such crimes are properly categorised and recorded

Specific, aggravated hate crime offences should be confined to those which represent the most commonly experienced forms of hate incident. It is not proposed here to create aggravated forms of other offences (for example sexual offences or crimes for financial gain) however, it is clearly desirable that where these crimes are committed with a hate motive, this is considered at sentencing, and where an enhanced sentence is handed down, that this is placed on the record. The situation at present allows for this in theory, but without the recording element. The precise mechanism for including this requirement in any new legislation will need careful examination.

Currently in Ireland, in sentencing for any offence, a judge may consider a hate motive to be an aggravating factor and may reflect this in the sentence handed down. Even where this occurs (and there are few records available) it will not be reflected anywhere in the formal record of the conviction or sentence.

There are arguments for and against creating specific offences to deal with hate crimes: There is general acceptance internationally that hate crimes cause a distinct form of harm. In favour, hate crimes almost always include a 'signalling' element which (intentionally) produces distinct effects that can spread fear, isolation and anger laterally through communities, but also down through generations. Therefore, it is useful to have specific forms of offences which recognise this harm and provide enhanced penalties where a base offence is aggravated by hate.

The benefits of having specific hate offences in terms of data recording are also clear – the true nature of the offence is recorded and investigated from the outset; the hate element is not 'lost'; the person is charged with the particular offence and the evidence of the hate element is presented to the court and can be fairly assessed; and a hate motivation for a crime (or pattern of crimes) can be taken into account in making decisions about managing offenders during their sentence or after release back into the community on parole, for example.

Arguments against creating specific offences are principally grounded in the difficulty of proving the hate motive. For most offences, proof of the fact the perpetrator committed the relevant offence is sufficient, without having to prove why, and proving a hate motive can be difficult. This is a significant issue, and must be recognised. Clear measures will be needed to deal with this difficulty, as without these measures it is unlikely that any new legislation to deal with hate crimes would be successful.

A photograph of two children decorating a Christmas tree. One child is wearing a red and white Santa hat, and the other is wearing a red elf hat. They are both smiling and looking at the camera. The tree is decorated with various ornaments and lights.

9

Additional elements may be needed to help ensure the new legislation is effective, such as allowing alternative verdicts for juries where the aggravating ‘hate’ element is not proven, and including a general provision (for crimes that are not specific hate offences) to say that a court will always consider whether hate should be an aggravating factor in sentence, and where it is, that this will be reflected in the record

Alternative verdicts exist for certain offences already in Irish law. Section 9(4) of the Criminal Law Act 1997 allows for alternative verdicts in many trials on indictment. There are also specific statutory provisions for alternative verdicts in certain offences, for example a person prosecuted for aggravated sexual assault may be found guilty of the non-aggravated form where the jury is not satisfied that the aggravation aspect has been proven. This is a safeguard, which may address some of the concerns around the perception that prosecuting hate offences is too risky because of the possibility of the hate element not being proven to the jury’s satisfaction and the whole prosecution falling as a result.

It may also be useful to provide for a limited number of presumptions in the new legislation. These are sometimes called reverse burdens and they exist already in other places in our legislation, for example, in relation to misuse of drugs. In normal circumstances, the burden is entirely on the prosecution to prove every element of an offence. Where there is a presumption in law in favour of something, the normal burden of proof is reversed, and the defence must prove this is not the case, on the balance of probability.

In relation to hate speech, for example, if hate speech is broadcast on a public platform, it would be reasonable for the court to presume that the broadcast or publication was intended to be public. If the defendant wants to argue that the material was private and not intended

for public view, the burden will be on them to prove that this, on the balance of probability, was actually the case.



10

Not every hate incident is serious enough to be a crime – many incidents are better dealt with outside the criminal sphere and proper measures to ensure this happens will be needed

The criminal law, particularly as it applies to hate speech, should always be the measure of last resort. There is no doubt that criminal legislation alone will not solve the problem of hate speech, and is not suitable for dealing with many of the milder forms, which although harmful and far-reaching in their negative effects, do not reach the threshold for criminal prosecution.

In the long term, prevention of such incidents is much more desirable for all concerned. Success in this regard will depend almost entirely on non-criminal, education and awareness-based measures. Measures ranging from education and awareness to codes of conduct and professional standards are essential to any comprehensive approach to tackling hate speech and hate crime, including by effective prevention.

The lived experience as reported by participants in this consultation included many, many reports of a first experience of hate speech at the hands of a person in authority such as a primary school teacher, a health care professional, an immigration official or other interaction with a professional. This clearly speaks to the need for professional training in bias and the harm of hate speech, which is outside the scope of the criminal law.

Tackling hate speech and hate crime is 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.



What happens next?

The next steps are:

1. The Department of Justice will draw on the ideas in this Report to help develop the General Scheme (outline) of a new Hate Crime Bill, which will deal with both incitement to hatred and hate crime. This General Scheme will be brought to the Minister for Justice for approval.
2. The Minister for Justice will bring the General Scheme to Government for approval, and it will then be published and will go through the usual legislative scrutiny process.
3. When the scrutiny process is complete, the Department will work with the Office of the Parliamentary Counsel to draft a formal Hate Crime Bill based on the General Scheme.
4. Once the drafting process has finished, the Hate Crime Bill can be introduced in the Houses of the Oireachtas by the Minister for Justice.
5. The Bill will need to be debated and passed at all stages in both the Dáil and the Seanad before being sent to the President for signature.
6. Once the Bill is signed by the President it is enacted and becomes law.
7. You can find out more about how legislation passes through the Oireachtas and even view the debates live on www.oireachtas.ie.



PART 4

Appendices

1. Consultation paper
2. Report on consultation workshops
3. Comparative research on legislative approaches in neighbouring jurisdictions







An Roinn Dlí agus Cirt
Department of Justice