



**Association for Criminal Justice Research and
Development (ACJRD)**

**Submission to:
The Department of Justice and Equality**

Review of The Prohibition of Incitement to Hatred Act, 1989.

ACJRD seeks to promote reform, development and effective operation of the Criminal Justice System

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1 1 Introduction

- 1.1** The Association for Criminal Justice Research and Development (ACJRD) is a non-governmental, voluntary organisation which seeks to promote reform, development and effective operation of the criminal justice system. It does so mainly by providing a forum where experienced personnel can discuss ways of working in an informal setting, by promoting study and research in the field of criminal justice and by promoting the highest standards of practice by professionals associated with criminal justice. ACJRD informs the development of policy and practice in justice.
- 1.2** The ACJRD's membership is varied but is largely comprised of individuals who have experience working within the criminal justice system and who have a strong interest in criminological matters. These include legal practitioners, academics, Criminal Justice Agencies and NGOs.
- 1.3** The ACJRD's approach and expertise is informed by the 'hands on' expertise of practitioners, academics and agencies who deal with various aspects of the criminal justice system enhanced by the contribution of people with diverse experiences, understandings and practices.
- 1.4** However, the views expressed in this submission are those of ACJRD in its independent capacity and are not those of individual ACJRD members or member organisations of agencies or their employees.

2 Preamble

- 2.1** The Association for Criminal Justice Research and Development (ACJRD) welcomes this opportunity to make a submission to the Department of Justice and Equality ("the Department") in relation to the statutory review of the Prohibition of Incitement to Hatred Act, 1989.
- 2.2** It is noted that The Department is a "public body" within the meaning of the Irish Human Rights and Equality Commission Act 2014 and that by virtue of section 42 of that Act, there is a duty on the Department, in the performance of its function, including its present review of legislation on hate speech, to consider the need to eliminate discrimination, promote equality of opportunity and treatment and protect human rights as objectives in this review process.
- 2.3** It is further noted that the Department proposes to separately develop new legislation to deal with hate crime. As part of that process it is conducting comparative research into the approach adopted to hate crime legislation in other countries and this research has not yet concluded.
- 2.4** The Department in its consultation document asks how legislation on hate speech can be improved and identifies four preliminary issues that will be addressed with others identified by ACJRD.

3 Executive Summary

The following is a list of the recommendations emanating from discussions based on readings listed at the end of the submission.

Recommendation One: The interpretation of **definitions** in section 1 of the 1989 Act must be reviewed and updated.

Recommendation Two: The protected grounds/characteristics covered by the 1989 Act should be expanded in new legislation to incorporate a definition that extrapolates from both definitions outlined at 6.3 and 6.4 below but clarifying that the perception of the victim/other person is a 'reasonable' one. The definition of grounds/characteristic should also include disabilities and be future proofed to include all potential categories of persons who can be victims of hate speech and hate crime.

Recommendation Three: Provision should be made whereby the definition of hate speech and hate crime is expanded to include demonstrations of prejudice/hostility/bias.

Recommendation Four: The publication in whatever manner of words, action, or material intended or likely to result in the victim experiencing hate which is defined to include prejudice/hostility/bias should suffice as a crime in itself i.e. a subjective test from the victim's perspective; the hatred of the perpetrator should not be a necessary proof.

Recommendation Five: The ACJRD is of the view that the present law may not be sufficiently wide to capture all such modern-day communications such as all e-mail and other communications on social media.

Recommendation Six: The developing law should incorporate a 'whole of world' as well as a 'whole of government' approach to the borderless international nature of Cybercrime which includes hate speech and hate crime, incorporating the initiatives that already exist and are being further developed.

Recommendation Seven: Ireland should ratify the Convention on Cybercrime (Budapest Convention) and the additional Protocol to it concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

Recommendation Eight: Ireland should ratify Protocol No. 12 of the European Convention on Human Rights. Ireland is already a signatory to this anti-discrimination treaty.

Recommendation Nine: Racist and xenophobic motivated threats (to the life, personal security or integrity of the victim or threats to seriously damage the property of the victim) made through a computer system should be explicitly criminalised.

Recommendation Ten: As industry self-regulation presents conflict of interest issues, provision needs to be made for oversight to ensure independent audit/evaluation/assessment, including adherence to notice and takedown requests, within accepted judicially interpreted norms, to protect freedom of expression rights.

Recommendation Eleven: There is urgent need for legislation in this area. There should be a collaborative approach taken that identifies the connections and similarity and definitions of harm caused between cybercrime (cyberbullying) and hate speech and hate

crime. Given the enormous impact of these wrongs on Ireland's children, there needs to be a focus on restorative justice resolution, rather than criminalising children.

Recommendation Twelve: Legislators should consider incorporating a whole of Government approach by including current Government Policies and Recent and Proposed Legislative Reform, that are potentially relevant and similar in form to Hate Speech and Hate Crime

Recommendation Thirteen: By reference to EU Conventions, and specifically, Article 33 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 11.V.2011) (Istanbul Convention), Domestic Violence Legislation and precedent from neighbouring jurisdictions, Irish Legislators should implement a crime of Misogyny as a hate Crime to capture hate speak/hate crime in a gender context.

Recommendation Fourteen: The *mens rea* should include recklessness as to whether the words, action or material caused the victim to experience hate which is defined to include prejudice/hostility/bias.

Recommendation Fifteen: Miscellaneous additional new offences should be considered to include those outlined in this submission, consideration should be given to simultaneous review of related civil legislation, there should be a statutory provision to have hate considered as an aggravating factor in sentencing, disaggregated data on hate speech and crime should be collected and published and state-funded improvements for victim reporting should be created.

Conclusion

ACJRD have considered the current legislation from thirty years ago by profiling certain aspects of The Prohibition of Incitement to Hatred Act, 1989, reflecting on Hate Speech and Hate Crime in 2019 and moving on from 1989 statutory definitions by proposing new definitions of the victim groups which encompass communications in speech, writing or other behaviour and definitions of "broadcast", "recording" and "distribute". This submission then goes on to contemplate the impact of the evolution of technology, freedom of speech considerations and harmful communications and digital safety for children. In the context of 'whole of government' strategies that are currently advocated and embraced by our legislators, this submission then deliberates current Government policies and proposed legislative reform, and international conventions and recommendations, making connections between common themes that are potentially relevant to legislative reform of Hate Speech and Hate Crime. Miscellaneous new crimes are to include a recommendation that misogyny be categorised as a Hate Crime. The *Mens Rea* of the 1989 crimes is considered with a recommendation that it be broadened.

Given the enormous changes that have occurred in the past thirty years in the *actus reus* of crimes of hate the question therefore arises as to whether The '89 Act should be repealed in its entirety as not being fit for purpose and be replaced with a new Act that deals with both Hate Speech and Hate Crime in circumstances where a consolidated legislative approach is best practice and has a greater possibility of ensuring positive outcomes for those who prosecute such crimes to vindicate the rights of those harmed.

4 Profiling certain aspects of The Prohibition of Incitement to Hatred Act, 1989

4.1 The Prohibition of Incitement to Hatred Act, 1989 (the '89 Act) is a short piece of legislation of 12 sections described as an act to prohibit incitement to hatred on account of race, religion, nationality or sexual orientation.

4.2 The interpretation of definitions in section 1 The '89 Act denotes as follows:

4.2.1 Hatred is defined as '... hatred of a group of persons in the state or elsewhere ...'

4.2.2 The broadcasting definition is confined to wireless telegraphy.

4.2.3 Some generic and broad definitions of "distribute" "publish" "recording" and "written material" did not anticipate modern methods of communication via the internet and its many platforms.

4.2.4 Section 2 refers to 'Actions likely to stir up hatred' is clearly within a context of incitement of others; unhelpfully it does not provide for hate speech directed at one individual by one/more individuals.

4.3 If the threatening, abusive or insulting materials in all the formats mentioned do not 'stir up' hatred and/or if the state cannot prove the accused persons intended the words to have that character or intended to incite, there is no crime.

4.4 The provision providing a defence in circumstances where the alleged perpetrator was in his/her private residence is clearly not appropriate in modern times where every home has technological devices.

4.5 Corporate bodies are not included in section 7 of The '89 Act.

4.6 Section 8 of the '89 Act references 'certain other proceedings' that do not appear to be clearly defined.

4.7 The question therefore arises as to whether The '89 Act should be repealed in its entirety and be replaced with a new Act that deals with both Hate Speech and Hate Crime.

5 Hate Speech and Hate Crime in 2019 – Moving on from 1989 Definitions

Genuine, society-altering, change has occurred in Ireland since the enactment of The '89 Act, at both macro-level and micro-level sociologies, that possibly could never have been predicted in 1980s Ireland. There is a perception of a level of discord within Irish society that sees individuals attack individuals and communities, all from behind a small or big IT device screen. Some thirty years since the enactment of that '89 Act, we live in a new era, in a country that is demographically different, with new cultures, new technology, new levels of discontent, fresh hate, prejudice and racism/bias and therefore a radically different approach is required to prevent harm and to regulate and sanction wrongdoers.

5.1 The word 'hatred' itself is not defined in the '89 Act.

5.1.1.1 The Cambridge English Dictionary defines hatred as 'an extremely strong feeling of dislike' and 'a strong feeling of dislike'.

- 5.1.1.2** It is submitted that a wider definition of hate should include prejudice, hostility and bias, each of which concepts require precise definition.
- 5.1.2** The broadcasting definition is confined to wireless telegraphy, which is wholly inadequate in the context of internet developments since 1989 and should therefore be brought in line with definitions that are commonplace within Department policies and legislative planning in the areas of Cybercrime and the Online Safety Action Plan 2018-2019.
- 5.1.3** Some generic and broad definitions of “distribute” “publish” “recording” and “written material” would benefit from updating to include modern methods of communication via the internet and its many platforms.
- 5.1.4** For completeness and clarity, consideration should be given to specifically referring in developing legislation to all communications by mobile phones and similar devices to include texts, emails and social media tools.

Recommendation One: The interpretation of **definitions** in section 1 of The '89 Act must be reviewed and updated.

6 Proposed New Definitions of the Victim Groups

- 6.1** New definitions should be introduced to reflect societal changes during the past thirty years and ensure that those definitions are 'future proofed' insofar as that is possible.
- 6.2** The '89 Act deals with incitement on the grounds of race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.
- 6.3** A Garda definition of hate crime was introduced as part of An Garda Síochána's Diversity and Integration Strategy 2019/2021, in October 2019. It defines hate crime as 'any criminal offence which is perceived by the victim or any other person to, in whole or in part, be motivated by hostility or prejudice based on actual or perceived age, disability, race, colour, nationality, ethnicity, religion, sexual orientation or gender'.
- 6.4** The 2019 UN Strategy and Plan of Action on Hate Speech defines hate speech as 'any kind of communication in speech, writing or other behaviour that attacks or uses pejorative or discriminatory language, with reference to a person or group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, dissent, gender or other identity factor'.

Recommendation Two: The protected grounds/characteristics covered by the 1989 Act should be expanded in new legislation to incorporate a definition that extrapolates from both definitions outlined at 6.3 and 6.4 above but clarifying that the perception of the victim/other person is a 'reasonable' one. The definition of grounds/characteristic should also include disabilities and be future proofed to include all potential categories of persons who can be victims of hate speech and hate crime.

7 Proposed New Definitions of Communications in Speech, Writing or Other Behaviour

7.1 In order to be an offence under the 1989 Act, the words or material must be intended or likely to stir up “hatred” against one of the protected lists of groups outlined at 6.2 above. The Department points out that this is a high threshold and states that it is considering whether it should be replaced by another term such as hostility or prejudice, for example. Hatred given its ordinary meaning would involve intense dislike or ill will.

Recommendation Three: Provision should be made whereby the definition of hate speech and hate crime is expanded to include demonstrations of prejudice/hostility/bias.

Recommendation Four: The publication in whatever manner of words, action, or material intended or likely to result in the victim experiencing hate which is defined to include prejudice/hostility/bias should suffice as a crime in itself i.e. a subjective test from the victim’s perspective; the hatred of the perpetrator should not be a necessary proof.

8 Definitions of “broadcast”, “recording” and “distribute”

8.1 The submission requires a consideration of whether the wording of the Act when defining terms such as “broadcast”, “recording” and “distribute” are broad enough to cover incitement via modern technologies and online behaviour and whether a more explicit wording mentioning these forms of communication might result in more successful prosecutions under the legislation.

Recommendation Five: The ACJRD is of the view that the present law may not be sufficiently wide to capture all such modern-day communications such as all e-mail and other communications on social media.

9 The Impact of the Evolution of Technology

9.1 The rapid evolution and development of information technology and especially handheld technology has brought about huge cultural and lifestyle changes in a relatively short space of time. However, the risks which accompany these developments have not been recognised with equal rapidity. The evolution and development of information technology and especially handheld technology has brought about huge cultural and lifestyle changes in a relatively short space of time.

9.2 The United Nations General Secretary Antonio Guterres stated in May 2019 ‘social media and other forms of communication are being exploited as platforms for bigotry.

9.3 Developments in this area also make it difficult to regulate and control the dissemination of hate speech. There are growing concerns over the self-regulatory capacity of the social media sector. The so-called snowball effect caused by the dissemination of hate speech online through sharing/re-tweeting/liking offending online comments highlights the rapid contagion effect of such commentary and the need for swift, decisive, effective and transparent responsiveness.

9.4 The Irish Government produced an Action Plan for Online Safety 2018/2019 in July 2018. This attempts to introduce a more coordinated whole of government response in this area and must be welcome.

9.5 Current National Initiatives include a welcome 'whole of government' approach. There has also been some seminal research carried out by independent researchers. The expertise gleaned from these existing national and international initiatives to include the following should inform the review of Hate Speech and Hate Crime:

National

- The National Advisory Council for Online Safety (NACOS) was established in 2018 and includes as part of its remit to provide advice to government on online safety policy issues with stakeholder input and engagement.
- An online safety hub called Be Safe Online was established in July 2018.
- Webwise.ie - an Internet safety initiative co-funded by the Department of Education and Skills (DES) and the EU that aims to be a key educational resource for teachers, schools, students and parents on online safety for children.
- The interface between The Department and Hotline.ie which is a service that is part of the Internet Service Providers Association (ISPAI), established within an industry self-regulatory framework. It provides a national reporting mechanism where the public can report in a secure, anonymous and confidential way, suspected illegal content online. It is understood that The Department is in discussions with Hotline.ie with a view to progress actions regarding enhanced measures to support improved cooperation between Hotline.ie and industry for taking down child abuse and other illegal material and to increase the ISP sign up to the code of practice and ethics..
- An Garda Síochána Diversity and Integration Strategy 2019-2021
- Anti-Racism Committee of The Migrant Integration Strategy
- Lifecycle of a Hate Crime: Country Report for Ireland shows that from the point at which a victim reports a crime to An Garda Síochána to the point at which a judge sentences an offender, the hate element of a crime is filtered out of the criminal justice process. This report was funded by the European Commission and is the product of a two-year international research project involving five EU states, coordinated by the Irish Council for Civil Liberties (ICCL). The Irish research was conducted by the Hate and Hostility Research Group at the University of Limerick. July 2018
- Hate Track: Tracking and Monitoring Racist Hate Speech Online - IHREC - Irish Human Rights and Equality Commission Siapera, Moreo, Zhou 2018 - an experimental, exploratory research project that combines social, scientific and computational methods to understand online racist speech in the Irish context using insights from civil society and experts in the field of race, racism and hate speech to build a computational tool that harvests and classifies Facebook and Twitter posts in terms of their probability to contain racially-loaded toxic contents. The tool is designed as a monitoring and diagnostic tool of the state of the Irish digital public sphere. While it is currently focused on racially-toxic contents, it can be scaled to other forms of hate and toxicity, such as misogyny and homophobia. Using Hate Track, a dataset was generated which was subsequently analysed in terms of the toxic repertoires it contained, the communities targeted, the kinds of people posting, and the events that trigger

racially-toxic contents. Workshops were held with students to identify their views on reporting racist hate speech online.

International

- The 2016 European Commission voluntary code of conduct with the leading internet companies to combat the spread of illegal hate speech online in Europe where IT companies undertook to have clear and effective processes to review notifications regarding illegal hate speech on their servers and remove/disable access to it within 24 hours.
- The 2018 European Commission Recommendation on Measures to Effectively Tackle Illegal Content Online. These are operational rules for the effective removal of illegal content.
- The EU Internet Forum ministerial level Forum which includes member states, Europol, the EU experts and industry/internet companies, which for now focuses on terrorism. The Forum's design could be expanded to include hate speech.
- EU wide coordination of national legislation on all audio-visual media as outlined in The EU Audio-visual Media Services Directive (AVMSD) of Nov 2018 that governs video sharing platform services (VSPS) and will introduce by co-regulation targeted and limited obligations on VSPs to protect minors from potentially harmful content and all audiences from hate speech. Services such as YouTube and aspects of Facebook's services are likely to fall within the scope of the Directive - these measures will only apply to the video aspect of the services and not the user comment underneath the videos. The transposition of this Directive into Irish law will require national legislation.
- The 2019 UN Strategy and Plan of Action on Hate Speech that defines hate speech as 'any kind of communication in speech, writing or other behaviour that attacks or uses pejorative or discriminatory language, with reference to a person or group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, dissent, gender or other identity factor
- The EU (recast) Receptions Conditions Directive
- EU Commission Recommendation on measures to effectively tackle illegal content online
- General Policy Recommendations of the European Commission Against Racism and Intolerance 1996-2016

Recommendation Six: The developing law should incorporate a 'whole of world' as well as a 'whole of government' approach to the borderless international nature of Cybercrime which includes hate speech and hate crime, incorporating the initiatives that already exist and are being further developed.

Recommendation Seven: Ireland should ratify the Convention on Cybercrime (Budapest Convention) and the additional Protocol to it concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

Recommendation Eight: Ireland should ratify Protocol No. 12 of the European Convention on Human Rights. Ireland is already a signatory to this anti-discrimination treaty.

10 Freedom of Speech considerations

10.1 Whilst recognising the constitutional protection afforded to freedom of expression, the ACJRD is of the view that racist and xenophobic motivated threats made through a computer system should be criminalised even where the threat is made through private communications.

10.2 Thirty independent UN experts have joined together to publish an open letter calling on States and social media firms to take action to curb the spread of hate speech. The experts gave a warning that generalising and describing entire groups of people as dangerous or inferior was not new to human history and had clearly led to catastrophic tragedies in the past. The experts said they had been receiving an increasing number of reports about hate speech and incitement to discrimination, hostility and violence, and felt it was time to speak out. On the other hand, they also showed concern about the abuse of hate speech as a term to undermine legitimate dissent, and they stressed the importance of promoting free expression.

“We urge States to promote and adopt policies of tolerance. States should actively work towards policies that guarantee the rights to equality and non-discrimination and freedom of expression, as well as the right to live a life free of violence, through the promotion of tolerance, diversity and pluralistic views.”

“Traditional and social media companies should exercise due diligence to ensure that they do not provide platforms for hate speech and for incitement to hatred and violence.”

“Hate speech, both online and offline, has exacerbated societal and racial tensions, inciting attacks with deadly consequences around the world,” they said. “Hate speech has become mainstream in all different political systems and is threatening democratic values, social stability and peace. Hate-fuelled ideas and advocacy coarsen public discourse and weaken the social fabric of countries.” They urged officials to refrain from spreading fear among the public against migrants or those seen as “other” for their own political gain.

[external link removed] GENEVA (23 September 2019)

10.3 In *Cybercrime and Civil Liberties* in the 2016 ACJRD Cybercrime Annual Conference papers Dr. TJ McIntyre, Chair of Digital Rights Ireland states that the fight against Cybercrime is heightened in Ireland due to the presence of many EMEA (European, Middle East and Asia) headquarters of internet firms such as Facebook, Google, Microsoft, Twitter and Apple.

10.3.1 As a result, the scope of Irish Law potentially extends to millions of users worldwide.

10.3.2 Self-regulation has been the common response to cybercrime raising questions like where does ‘the rule of law’ stand in such an environment e.g. the non-statutory use of internet blocking where fundamental rights and transparency/accountability come into sharp relief. Self-Regulation can also accommodate evasion for some internet providers.

10.3.3 Applicable Fundamental Rights Standards include ECHR Articles 6 and 13, Art 8 and Art 10. The ECtHR has identified Art 10 as a tripartite right, which can be invoked by the speaker, intermediary and recipient of online speech. The rights of those seeking blocking in particular circumstances, have been invoked using Article 1, Protocol 1 (copyright) and Article 8 (privacy) but the application of a proportionality test can halt 'blanket blocking' where the ban is not solely targeted at the allegedly offensive content.

10.3.4 Removal of content at source and improved parental control on mobile phones are alternatives to blocking. A suggestion regarding the protection of civil liberties in circumstance of the adoption of a blocking structure suggest that the following matters would need to be accommodated by such regulation:

- Legitimacy, transparency and accountability
- A legislative basis for any state blocking that is framed by ECHR norms
- Work on Civil Society transparency tools
- Tackling problematic private blocking
- Facilitating decentralisation and voluntary blocking
- Resisting anti-circumvention measures (bans on VPNs, open Wi-Fi, etc)

Recommendation Nine: Racist and xenophobic motivated threats (to the life, personal security or integrity of the victim or threats to seriously damage the property of the victim) made through a computer system should be explicitly criminalised.

Recommendation Ten: As Industry Self-regulation presents conflict of interest issues, provision needs to be made for oversight to ensure independent audit/evaluation/assessment including adherence to notice and takedown requests, within accepted judicially interpreted norms to protect freedom of expression rights.

11 Harmful Communications and Digital Safety for Children

11.1 The risks of harm are particularly stark when it comes to children. Through their online activities they are regularly exposed to content risk (illegal and inappropriate material) and conduct risk (participation in inappropriate behaviour).

11.2 12% of eight-year olds spend 61 full days online per year; 92% of 8 to 13-year-olds own their own smart device. This is according to a survey conducted by Cybersafe Ireland of almost 4000 children aged between 8 to 13 years old in 2018. (source: Cybersafe Ireland annual report 2018). One third of 11 to 18-year-olds have been exposed to harmful, user-generated content, including gory images, hate speech, drug related content, self-harm related content, etc. (Source: ISPCC/Vodafone Cyber Safety Quantitative Research June 2018)

11.3 On average 20-40% of young people and one in four teenagers report being a victim of cyberbullying (Rebecca Dennehy, Cybercrime 2016 ACJRD). One definition of cyberbullying is '... where a person or group engage in any negative action intended to inflict harm and discomfort on another' and it is usually carried out through phones or the internet. Seven categories of behaviour have been identified: flaming, harassment, impersonating, outing and trickery, exclusion, denigration and cyberstalking.

- 11.4** Legislative responses fall short of the advancement of wrongs being perpetrated in cyberspace i.e. Postal and Communications Services Act 1983 (sending offensive messages),
- 11.5** Given the nature of these offences, rather than criminalising every such act, a restorative justice process might assist children to understand the harm caused by engaging in cyberbullying and its consequences.

Recommendation Eleven: There is urgent need for legislation in this area. There should be a collaborative approach taken that identifies the connections and similarity and definitions of harm caused between cybercrime (cyberbullying) and hate speech and hate crime. Given the enormous impact of these wrongs on Ireland's children, there needs to be a focus on restorative justice resolution, rather than criminalising children.

12 Current Government Policies and Recent and Proposed Legislative Reform, potentially relevant to reform of Hate Speech and Hate Crime

Taking cognisance of 'whole of Government' approaches to policy making and legislative reform, several initiatives are identified where constructive cross-referencing could determine better outcomes for society.

- 12.1** It is noted that work is ongoing on the Harassment, Harmful Communications and Related Offences Bill 2017. Several new offences are proposed in the Bill, which are welcomed, including online or digital harassment, sending threatening or indecent messages by any form of online communication. However, it does not appear that this proposed legislation will capture online hate speech.
- 12.2** The Department conducts the present review of the Prohibition of Incitement to Hatred Act, 1989 in tandem with its review of the Defamation Act 2009. It would be constructive to ensure that a complementary approach is taken to regulating hate speech, including the provision of accessible civil remedies to those targeted by hate speech.
- 12.3** A Private members Bill, the Digital Safety Commissioner Bill 2017, was introduced to the Dáil in November 2017. The Irish Law Reform Commission recommended in its 2016 Report on Harmful Digital Communication and Digital Safety that such an Office would have two core functions: the first being educational, concerning online safety, and the second function involving enforcing a system of 'notice and takedown' of harmful digital communications by digital service undertakings, including the development of a code of practice on take-down procedures. The establishment of such an Office is welcomed as independent oversight of accountability and compliance with the law and industry codes and standards is required. Statutory enforcement powers are essential, as are penalties for non-compliance
- 12.4** There was an announcement in February 2017 that Government intends to appoint a statutory Digital Safety Commissioner with the authority to compel social media platforms to remove harmful content promptly from their services. It was proposed that the new office would be tasked with drafting a statutory code of practice on digital safety. It is hoped that this code will encompass hate speech.

- 12.5** The Lesbian, Gay, Bisexual, Transgender and Intersex inclusion strategy 2019/2021 includes at action 21.1 an action to bring forward legislative proposals to ensure incitement to hatred and hate crimes against LGBT+ people are adequately addressed in our law by the end of 2019. Action 21.3 undertakes to implement a fully functioning online system for reporting hate crime by 2020. Action 21.5 is to commence the publication of statistics for recorded instance of the crime by 2021. These developments are welcomed, and we urge that they are completed in a timely manner.

Recommendation Twelve: Legislators should consider incorporating a whole of Government approach by including current Government Policies and Recent and Proposed Legislative Reform, that are potentially relevant and similar in form to Hate Speech and Hate Crime.

13 Misogyny as Hate Crime

13.1 Developments in UK

- 13.1.1** Nottinghamshire Police could not change hate crime definitions but they did have the power to classify misogyny as hate crimes for internal recording purposes. That reclassification has allowed them to keep data resulting in more victim reporting which demonstrate that a staggering 93.7% of women from that county have been targeted with misogyny. Three further UK counties have replicated this classification process. “It’s those hostile actions and behavio[u]rs that, for whatever reason, have not risen to the level of being considered worth punishing that set the tone for society,” said Kristen Houser, the chief public affairs officer for the U.S.-based National Sexual Violence Resource Center. “[They’re] like scaffolding for the more egregious crimes.” [external link removed]

13.2 Scottish Legislation

- 13.2.1** Upskirting has been a crime in Scotland since the enactment of The Sexual Offences (Scotland) Act 2009. The offender motive for this crime has been described therein as being aimed at obtaining sexual gratification or causing humiliation, distress or alarm to the victim

13.2.2 Irish Legislation

- 13.2.2.1** The recent ratification by Ireland of the Istanbul Convention and the implementation of the Domestic Violence Act 2018 that incorporates Coercive Control presents as an opportunity to integrate its definitions into a hate speech/hate crime paradigm.
- 13.2.2.2** Section 39 (1) states [in summary] ‘A person commits an offence where he or she knowingly and persistently engages in behaviour that (a) is controlling or coercive, (b) has a serious effect on a relevant person, and (c) a reasonable person would consider likely to have a serious effect on a relevant person.
- 13.2.2.3** Subsection (2) of the aforementioned section states that for the purposes of subsection (1), a person’s behaviour has a serious effect on a relevant person if the behaviour causes the relevant person (a) to fear that violence will be used against him or her, or (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities.

13.2.2.4 It is conceivable that hate speak/hate crime would cause 'serious alarm or distress' as outlined at s.39 (2) (b) in that it potentially 'has a substantial adverse impact on his or her usual day-to-day activities'. Therefore, an offence denoting the *mens rea* of coercive control incorporating amended definitions of hate speak/hate crime in a gender context should be manifest in developing legislation.

13.3 Article 33 of the Istanbul Convention states:

13.3.1.1 'Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised'

Recommendation Thirteen: By reference to EU Conventions, and specifically, Article 33 of the Istanbul Convention, Domestic Violence Legislation and precedent from neighbouring jurisdictions, Irish Legislators should implement a crime of Misogyny as a hate Crime to capture hate speak/hate crime in a gender context.

14 *Mens Rea* of Hate Speech/Hate Crime

For all of the offences in The '89 Act it is necessary to prove that the action was intended or likely to stir up hatred. The Department is considering whether the need to prove intent or likelihood within the act should be changed, for example, to include circumstances where the person was reckless as to whether the action would stir up hatred.

14.1 The present law makes prosecution in this area difficult and that the threshold is too high. If the culprit explicitly denies that it was their intention to stir up hatred, it is necessary to establish whether the action was likely to stir up hatred. In these circumstances, the context in which the action occurs becomes significant, whether that be words uttered in the presence of appalled bystanders or writings within a widely read and established weekend newspaper, consumed in the sober environment of the breakfast table. What is criminalised becomes far from certain. It should be sufficient that the culprit was reckless as to whether the words, action or material would stir up prejudice or hostility. Being confined to incitement, the '89 Act does not meet the current needs of society to prosecute individual perpetrators harming individual victims.

Recommendation Fourteen: The *mens rea* should include recklessness as to whether the words, action or material caused the victim to experience hate which is defined to include prejudice/hostility/bias.

15 Further issues identified

Violence is criminalised under:

- The Criminal Justice (Public Order) Act 1994,
- The Non-Fatal Offences against the Person Act, 1997 and
- The Criminal Damage Act, 1991.

15.1 Racist behaviour is not expressly criminalised in Irish law, except where it comes within the narrow scope of the 1989 Act.

- 15.2** There is no provision in Irish law defining common offences of a racist or trans phobic nature as specific offences.
- 15.3** Separate offences should be introduced of public incitement to violence, hatred or discrimination, public insults and defamation against a person or group of people on prohibited grounds, such as race, colour, nationality, religion, ethnic or national origins, membership of the travelling community, disability, gender identity, language, or citizenship. Consideration should be given to including ageism as a prohibited ground.
- 15.4** In addition, offences should be introduced which criminalise the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates a group of persons on grounds of race, colour, language, religion, nationality or national or ethnic origin, membership of the travelling community, disability, gender identity, language, or citizenship.
- 15.5** Offences should be introduced which criminalise the public denial, trivialisation, justification or condoning of crimes of genocide, crimes against humanity or war crimes.
- 15.6** It was recommended at para 12.2 above that the present review should dovetail with the Department's review of the Defamation Act 2009. In addition, as matters presently stand defamation proceedings are excluded from the provision of civil legal aid under the Civil Legal Aid Act 1995 and it is recommended this omission should be reviewed, most particularly where constitutional rights are at stake.
- 15.7** There is no statutory provision to allow for the racist or other hate motivation of a crime to be considered as an aggravating factor. Hate crime can be addressed at the discretion of the sentencing judge where racist motivation can be considered an aggravating factor, at the discretion of the judge. It should be noted in this context that Article 4 of COUNCIL FRAMEWORK DECISION 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law requires that Member States ensure that racist motivation is considered in sentencing.
- 15.8** An improved mechanism for collecting disaggregated data on hate crime including hate speech should be established. Data should be recorded on the hate crime motive established at all stages of investigation, prosecution, conviction and sentencing. This data should be published and be made available to all members of the public.
- 15.9** Alternative reporting mechanisms should be set up to encourage victims to report hate crime incidents, such as a reporting system through free call telephone lines operated by relevant NGOs working in the area.

Recommendation Fifteen: Miscellaneous additional new offences should be considered to include those outlined in this submission, consideration should be given to simultaneous review of related civil legislation, there should be a statutory provision to have hate considered as an aggravating factor in sentencing, disaggregated data on hate speech and crime should be collected and published and state-funded improvements for victim reporting should be created.

Conclusion

ACJRD have considered the current legislation from thirty years ago by profiling certain aspects of The Prohibition of Incitement to Hatred Act, 1989, reflecting on Hate Speech and Hate Crime in 2019 and moving on from 1989 statutory definitions by proposing new definitions of the victim groups which encompass communications in speech, writing or other behaviour and definitions of “broadcast”, “recording” and “distribute”. This submission then goes on to contemplate the impact of the evolution of technology, freedom of speech considerations and harmful communications and digital safety for children. In the context of ‘whole of government’ strategies that are currently advocated and embraced by our legislators, this submission then deliberates current Government policies and proposed legislative reform, and international conventions and recommendations, making connections between common themes that are potentially relevant to legislative reform of Hate Speech and Hate Crime. Miscellaneous new crimes are to include a recommendation that misogyny be categorised as a Hate Crime. The *Mens Rea* of the 1989 crimes is considered with a recommendation that it be broadened.

Given the enormous changes that have occurred in the past thirty years in the *actus reas* of crimes of hate the question therefore arises as to whether The ‘89 Act should be repealed in its entirety as not being fit for purpose and be replaced with a new Act that deals with both Hate Speech and Hate Crime in circumstances where a consolidated legislative approach is best practice and has a greater possibility of ensuring positive outcomes for those who prosecute such crimes to vindicate the rights of those harmed.

Readings (Alphabetical)

Beyond Hate Crime Journal: Perspectives on Racism in Ireland Irish Network against Racism (INAR) supported by Pobal [external link removed]

COUNCIL FRAMEWORK DECISION 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [external link removed]

Countering racism and xenophobia in the EU: fostering a society where pluralism, tolerance and non-discrimination prevail [external link removed]

Cybercrime: ACJRD Annual Conference 2016: [external link removed] **Istanbul Convention** [external link removed]

EU Commission Recommendation on measures to effectively tackle illegal content online [external link removed]

ECRI REPORT ON IRELAND (fifth monitoring cycle) Adopted on 2 April 2019 Published on 4 June 2019 [external link removed]

EU draws up sweeping rules to curb illegal online content Mehreen Khan and Madhumita Murgia July 24 2019 [external link removed]

European Commission and IT Companies announce Code of Conduct on illegal online hate speech May 2016 [external link removed]

**European Commission Against Racism and Intolerance (ECRI)
Roadmap to Effective Equality** [external link removed]

Glossary [external link removed]

Leaflet ECRI 2019 ENG.pdf

Guides Related to Hate Crime Organization for Security and Co-operation in Europe 2014 [external link removed]

Hate Track: Tracking and Monitoring Racist Hate Speech Online - IHREC - Irish Human Rights and Equality Commission Siapera, Moreo, Zhou 2018 [external link removed]

Lifecycle of a Hate Crime: Country Report for Ireland coordinated by the Irish Council for Civil Liberties (ICCL). The Irish research was conducted by the Hate and Hostility Research Group at the University of Limerick. July 2018 [external link removed]

Minister Stanton delivers Ireland’s National Statement to CERD in Geneva - The Department of Justice and Equality [external link removed]

National LGBTI+ Inclusion Strategy 2019-2021 [external link removed]

OHCHR | Hate speech: UN experts make joint call for action by states and social media firms 23 September 2019 [external link removed]

Prosecuting Hate Crimes: A Practical Guide OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2014 [external link removed]

The Legal Framework for Addressing “Hate Speech” in Europe Sejal Parmar Assistant Professor, Department of Legal Studies, Central European University in *Addressing Hate Speech in the Media: The Role of Regulatory Authorities and Judiciary* CoE International Conference in partnership with The Croatian Agency for Electronic Media November 2018 [external link removed]

The UN Strategy and Plan of Action on Hate Speech: tackling discrimination, hostility and violence | Universal Rights Group [external link removed]

The EU (recast) Receptions Conditions Directive SI 230 of 2018

[external link removed]

The Government's Action Plan for Online Safety 2018-2019, Progress Report 2018

[external link removed]

UN official urges Ireland to introduce hate crime legislation

[external link removed]