



**Submission to the Department of Justice and Equality public consultation on hate  
speech legislation**

**13 December 2019**

Amnesty International Ireland (AI) welcomes the Department of Justice and Equality's review of, and public consultation on, Ireland's legislation on hate speech, the Prohibition of Incitement to Hatred Act 1989, and how it can be improved. We further welcome the Department's ongoing review of, and commitment to future public consultation on, legislation to address hate crimes.<sup>1</sup> In this submission, we provide some general observations on human rights and hate speech legislation, rather than specifically comment on the provisions in the 1989 Act.

**Hate speech**

The requirement that states prohibit hate speech in law is derived from Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), which states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

As Article 20(2) ICCPR makes clear, advocacy of hatred is more than just the expression of ideas or opinions that are hateful towards members of a particular group. It requires a clear

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<sup>1</sup> "Ministers Flanagan and Stanton launch consultation on hate speech", press release, 24 October 2019, available at <http://www.justice.ie/en/JELR/Pages/PR19000263>.

AI generally understands the term hate crime to apply to acts against people or property (including violent acts against persons, extreme forms of harassment or intimidation, or criminal damage to property), which are crimes under domestic law (and whose criminalisation is consistent with international human rights law and standards), where the victim or target of the offence is selected because of their real or perceived connection to or membership in a group defined by a protected ground, including race, ethnicity (including membership of the Traveller community in Ireland), language, national or social origin, sex/gender, indigenous status, descent, religion or belief, immigration status, disability, sexual orientation or gender identity.

Hate crimes constitute a form of discrimination because the target is chosen on the basis of personal characteristics that constitute protected grounds under international human rights law. Hate crimes implicate a number of human rights which are protected under international and regional law, including the right to be free from discrimination as well as the right to life, physical integrity, and the right to be free from torture and other ill-treatment.

Measures that states should take to prevent hate crimes include ensuring that hate crimes are prohibited in law; diligently investigating any possible discriminatory motive of a crime; and collecting data, disaggregated by type of crime and discriminatory motive, in order to inform the creation of better policies to prevent future hate crimes.

showing of intent to incite others to discriminate, be hostile (experience intense and irrational emotions of opprobrium, enmity and detestation) toward, or commit violence against, the group in question.

As explained below, states must comply with their obligation under the ICCPR to prohibit in law – though not necessarily to criminalise - advocacy of hatred as defined under Article 20(2) ICCPR. Such prohibitions in law, especially where they carry a criminal penalty, should be formulated precisely. Indeed the CERD Committee has stated “concern that broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the [CERD] Convention”.<sup>2</sup> The law and its application must also comply with the ICCPR’s provisions on freedom of expression, and in particular must meet the requirements of necessity and proportionality, in compliance with the three-part test in Article 19(3) of the ICCPR.

AI notes the finite grounds covered by the Prohibition of Incitement to Hatred Act 1989, which is limited in its ambit to hatred against groups on account of their race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation. In line with the with the non-exhaustive grounds set out in the ICCPR, AI calls on states to prohibit advocacy of hatred on any discriminatory basis, including gender, disability, political opinion or other status.

### Freedom of expression and hate speech

Article 19 of the ICCPR provides the right to freedom of expression, which includes “the freedom to seek, receive and impart information and ideas of all kinds”. Article 19(3) provides that the right may be subject to certain restrictions, but these “shall only be such as are provided by law and are necessary (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals”.

With regard to the relationship between ICCPR Articles 19 and 20, and the delicate balance to be struck, the UN Human Rights Committee in its 2011 General Comment No 34 on the rights to freedom of opinion and expression has said:

“Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every other case, in which the State restricts freedom of expression, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.”<sup>3</sup>

Prohibiting advocacy of hatred requires a careful balancing of the right to non-discrimination and the right to freedom of expression. It is well established in the UN and European Court of Human Rights systems that the right to freedom of expression extends to expression which shocks, offends and disturbs. Discriminatory expression which falls short of the definitions of advocacy of hatred constituting incitement should not be subject to criminal

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<sup>2</sup> General Recommendation No. 35: Combating Racist Hate Speech, UN Doc. CERD/C/GC/35, para. 20.

<sup>3</sup> General Comment No. 34, UN Doc. CCPR/C/GC/34, paras. 50-52.

punishment, nor to any other restrictions which do not meet the three part of test of legality, legitimate aim and necessity/proportionality set out in article 19(3) of the ICCPR.

Where hate speech is criminalised as a part of the state's duty under Article 20(2) of the ICCPR, there should be intent to incite discrimination, hostility or violence identified in Article 20(2); and a likelihood that others will commit such violence or other harm; and a clear and direct link between the speech/expression and that violence or other harm that likely will be incited.

The International Convention on the Elimination of all forms of Racial Discrimination (CERD) prohibits a broader range of expression than does ICCPR Article 20(2), requiring states to make criminally punishable, among other things, "all dissemination of ideas based on racial superiority or hatred"; though it states that this provision must be applied "with due regard to" freedom of expression and other rights in the UDHR. In this regard, the UN Committee on the Elimination of all forms of Racial Discrimination (CERD Committee) has provided the following advice:

"The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity."<sup>4</sup>

Therefore, in order to address hate speech and fulfil Article 4 of CERD without infringing the right to freedom of expressions it is not necessary for states to rely on the prohibition in law, still less criminalisation, of the full range of expression identified in article 4(a).

### **Rabat Plan of Action**

The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence was published by the Office of the High Commissioner for Human Rights in 2013 to provide guidance for states in implementing the international obligation of prohibition of incitement to hatred.<sup>5</sup> It elaborates on the delicate balance between Articles 19 and 20 of the ICCPR, and contains a useful typology of three broad levels of different levels of discriminatory expression:

"In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others."<sup>6</sup>

With regard to the first of these – i.e. essentially hate speech – it sets out criteria for identifying what falls in this category:

"[A] high threshold [should] be sought for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 of the International Covenant on Civil and Political Rights. In order to establish severity as the underlying consideration of the thresholds, incitement to hatred must refer to the most severe and deeply felt form of opprobrium. To assess the severity of the hatred, possible elements may include the cruelty

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<sup>4</sup> General Recommendation No. 35: Combating Racist Hate Speech, para. 12.

<sup>5</sup> Rabat Plan of Action, UN Doc. A/HRC/22/17/Add.4, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add4\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add4_en.pdf).

<sup>6</sup> Para. 20.

or intent of the statement or harm advocated, the frequency, quantity and extent of the communication. In this regard, a six-part threshold test was proposed for expressions considered as criminal offences:

(a) **Context:** Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(b) **Speaker:** The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;

(c) **Intent:** Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

(d) **Content and form:** The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(e) **Extent of the speech act:** Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

(f) **Likelihood, including imminence:** Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct."<sup>7</sup>

### Implementation of law

It is not sufficient that states have in place robust laws criminalising and prohibiting hate speech (within the parameters described above). It is also important that states protect human rights without discrimination (ICCPR Articles 2(1) and 26). States must exercise due diligence to prevent, investigate, punish, and redress the harm of human rights abuses by non-state actors - i.e. private individuals or groups - as articulated by the UN Human Rights Committee:

"The positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that

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<sup>7</sup> Para. 29.

would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”<sup>8</sup>


Article 5(b) of CERD requires states parties to guarantee, without discrimination, the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

### **Other measures to combat hate speech**

Restricting expression, in isolation, is an ineffective means to combat the attitudes and behaviours underpinning discrimination, and effective protection and social inclusion of marginalised groups requires broader interventions by the state. This is also reflected in the CERD Committee’s General Recommendation No. 35: Combating Racist Hate Speech. Accordingly, states should also focus their efforts on concrete positive actions that should be taken to counter stereotypes, eradicate discrimination and foster greater equality.

Any legislative measures should take place within a context of broad ranging public policy measures to tackle the root causes of intolerance, including strengthening the capacities of communities to access and express a range of views and information and engage in debate; training and sensitising law enforcement authorities; public policy measures and a regulatory framework which promote pluralism and diversity of the media, including new media, and which promotes universal and non-discrimination in access to and use of means of communication. In this latter regard, it is important that the law - and its implementation - is sufficient to address hate speech in online media. In the context of the Department’s ongoing work on hate speech and hate crime, we note its statement that the Department of Communications, Climate Action and the Environment is preparing legislation in relation to the regulation of tech companies in respect of harmful online content.<sup>9</sup> This is an area where AI agrees action is urgently needed by tech companies and states, and we would welcome the opportunity to submit information to this process in due course.<sup>10</sup>

**ENDS//**

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<sup>8</sup> General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>9</sup> “Ministers Flanagan and Stanton launch consultation on hate speech”, press release, 24 October 2019.

<sup>10</sup> See for instance the recommendations set out in AI’s 2018 report, *#Toxic Twitter: Violence and abuse against women online*, AI Index: ACT 30/8070/2018, available at <https://www.amnesty.org/download/Documents/ACT3080702018ENGLISH.PDF>.

