THE BAR OF IRELAND

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Submission by Council of The Bar of Ireland to the Department of Justice and Equality on the Review of the Prohibition of Incitement to Hatred Act 1989

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Introduction

The Council of The Bar of Ireland ("the Council") is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers.

The Council has prepared this submission at the request of the Department of Justice and Equality for the purposes of its review of the Prohibition of Incitement to Hatred Act 1989.

Executive Summary

The Prohibition of Incitement to Hatred Act 1989 criminalises certain conduct that is intended or is likely to stir up hatred against certain protected groups. The importance of such legislation cannot be gainsaid. However, there are fundamental weaknesses in the Act which limit its overall effectiveness. Amendments are urgently needed. Any such amendments must take into account the requirement to respect constitutional rights including freedom of expression and the right to a fair trial.

The Council submits that amendments should be made to certain existing definitions in the Act; the requirement to prove that conduct was intended or likely to "*stir up hatred*"; and the grounds upon which incitement to hatred is prohibited. The following specific amendments are recommended:-

i. The Act should be amended so as to criminalise threatening, abusive or insulting conduct, where the person engaging in that conduct intends to spread, promote, advocate, incite or justify hatred or violence against a group or an individual member of that group based on race; colour; nationality; religious belief; ethnic or national origins; membership of the Traveller community; sexual orientation; gender; gender identity and gender expression; disability; or age;

ii. That provision should be made for the intention element to be presumed where hatred is the natural and probable consequence of the conduct or words used on the occasion in question; and that such presumption may be rebutted.

iii. The Act should be amended to facilitate prosecutions for material published online. The term "*written material*" should be defined as including a visual representation, a sign, images, photographs and drawings. "*Publish*" and "*distribute*" should be defined as meaning publishing and distributing to another individual, whether in the State or elsewhere. The reference in s. 2 to the use of words, behaviour or display of written material "*in any place other than inside a private residence*" should amended so as to make clear that it includes conduct engaged in on the internet.

Beyond these proposals, other potential amendments are deserving of consideration, including the penalties specified under the 1989 Act; the defences contained therein; and the need for a standalone offence of hate speech against individuals.

The Statutory Framework

The Prohibition of Incitement to Hatred Act 1989 criminalises threatening, abusive or insulting conduct that is intended or is likely to "*stir up hatred"* against certain protected groups. "*Hatred"* in this context is defined in s. 1 of the Act in the following terms:-

> "'*Hatred' means hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation*."

Section 2 provides that it shall be an offence for a person to:-

a) publish or distribute written material;
b) use words, behave, or display written material in any place other than a private residence;
c) use words, behave, or display written material in a private residence in a manner that can be seen or heard by persons outside; or
d) to distribute, show or play a recording of visual images or sounds,

where the material, words or behaviour are threatening, abusive or insulting in nature and are intended or are likely to stir up hatred. It is a defence under the section for a person to

prove that he was not aware of the content of the material or recording concerned and had no reason to suspect that the material or recording was threatening, abusive or insulting. Further, where the offence relates to behaviour taking part in a private residence, it is a defence to show that the person had no reason to believe that the words, behaviour or material would be heard or seen by a person outside the residence, or was unaware that they might be threatening, abusive or insulting.

Section 3 provides that where an item involving threatening, abusive or insulting visual images or sounds is "*broadcast*", criminal liability attaches to the person providing the broadcasting service, all persons who produced or directed the item, and any person who engages in threatening, abusive or insulting behaviour or words in the item, so long as it can be shown that those persons intended to stir up hatred or that hatred was likely to be stirred up by the item. "*Broadcast"* is defined by s. 1 as meaning the "*transmission, relaying or distribution by wireless telegraphy or by any other means or by wireless telegraphy in conjunction with any other means of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not*". The section provides for various defences: for instance, on the basis that there was no reason to suspect that the item would be broadcast, or where the person at issue did not know and had no reason to suspect that the item concerned would involve the material to which the offence relates.

Section 4 provides that it is an offence for a person to (a) prepare or to be in possession of any written material with a view to its being distributed, displayed, broadcast or otherwise published, in the State or elsewhere, or (b) to make or be in possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published, in the State or elsewhere, where the material or recording is threatening, abusive or insulting and is intending or is likely to stir up hatred. It is a defence for a person to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting.

A person guilty of an offence under ss. 2, 3 or 4 is liable on summary conviction to a fine of up to €2,500 and / or to imprisonment for a term not exceeding six months. The penalties

following conviction on indictment are a fine of up to €25,400 and / or imprisonment for a term not exceeding two years. It should be noted that s. 8 provides that where a person is charged with an offence under the above sections, "*no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions*."

There is little guidance provided in the Act itself as to the meaning of certain key terms contained therein. For instance, essential terms such as "*stir up*", "*hatred*" and "*threatening, abusive or insulting*" are not defined. In addition, the Act has received very little judicial consideration. The only reported decision appearing to give any real consideration is that of Edwards J. in *Minister for Justice v. Petrášek.*[1] The result is that the exact operation of certain provisions of the 1989 Act is unclear.

Between 2000 and 2017, 44 prosecutions under the Act were taken and five of these resulted in convictions.[2] A number of interrelated explanations might be tendered for the paucity of prosecutions and convictions:-

- The 1989 Act sets down a range of difficult proofs which must be established by the prosecution in order to secure a conviction. For example, it may be hard for the prosecution to establish that conduct was intended or was likely to result in the extreme emotion of "*hatred".*

- It will often be possible to prosecute hate speech under a more general provision of the criminal law which contains less onerous proofs. Many incidents might be captured under s. 6 of the Criminal Justice (Public Order) Act 1994. This criminalises "*threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned*".

- There is little real incentive for the prosecution to opt specifically for a prosecution under the 1989 Act as opposed to prosecuting for a more general offence. The penalties

[1] [2012] IEHC 212, (Unreported, High Court, Edwards J., 16th May 2012).

[2] Irish Times, "Courts Service reveals five convictions for hate crime since 1989", available at << [link removed]

provided under the Act are not particularly high: the six month sentence available on summary prosecution and two year sentence available following conviction on indictment fall far short of the penalties provided under many other provisions on the statute book. Further, the hate motive involved in a crime can be taken into account by a judge sentencing for a general offence.[3] This means the "*hate*" element will not necessarily be neglected if the prosecution choose to prosecute for a general offence as opposed to an offence under the 1989 Act.

- It appears that the requirement to seek authorisation from the DPP for proceedings under the 1989 Act has tended to deter gardaí from specifically prosecuting under that Act.[4]

The combination of these circumstances would seem to mean that the prosecuting authorities have ample incentive to prosecute under a general criminal provision rather than under the 1989 Act, and that there are difficulties in proving those cases that are brought under the Act.

Despite this situation, it is clear that the State needs workable criminal legislation which is capable of tackling conduct is aimed at inspiring hatred and violence against persons in society based on their fundamental characteristics. Such legislation clearly demonstrates that conduct of that nature is not acceptable in democratic society. While it might often be possible to fall back on more general pieces of criminal legislation to prosecute a hate speech offence, this may not always be the case. Further, a prosecution specifically for hate speech can send an equivocal message as to society's disdain for particular conduct.

At the same time, it is clear that other considerations must be taken into account in how such legislation is framed. The State is obliged to give due respect to the right to freedom of expression, as protected under the Irish Constitution and the European Convention on Human Rights. While it is clear that hate speech receives greatly attenuated rights protection, the defining line between hate speech and other forms of expression which

[3] See *DPP v. Elders* [2014] IECA 6, (Unreported, Court of Appeal, 10th November 2014).

[4] Haynes & Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (2018), available at << [link removed]

simply offend or shock is an unclear one, and this calls for care when deciding on the scope of legislation which criminalises speech. Further, any piece of criminal legislation must respect certain fundamental principles, such as the right to a fair trial, the presumption of innocence, and the need for a *mens rea* requirement. Failure to adequately observe these requirements in legislation can leave same open to constitutional challenge in the courts.

It is the view of the Council of the Bar of Ireland that the 1989 Act should be amended with the above objectives and considerations in mind. This submission sets out proposals for amendments that might be made to the 1989 Act so as to improve its functionality whilst ensuring proper protection of the right of freedom of expression and taking adequate regard of constitutional principles relating to criminal legislation.

Scope of this Submission

The Department's invitation for submissions on review of the 1989 Act raises four specific issues to be considered in relation to reform of the legislation, which might be summarised as follows:-

i. Should the 1989 Act criminalise the incitement to hatred against a broader range of groups in society?

ii. To secure a conviction under the 1989 Act, should it be necessary to prove that the conduct was intended or was likely to "*stir up hatred*" against a group, or is this too exacting a requirement?

iii. Are any changes to the 1989 Act needed in order to facilitate prosecutions for material posted online?

iv. Is the *mens rea* requirement contained in the 1989 Act appropriate, *i.e.* that the accused intended to instil hatred, or that the conduct was likely to instil hatred? ,

This submission addresses those issues directly and in sequence. However, for completeness, comment should be made at this juncture regarding other aspects of the 1989 Act that might be considered for reform.

First, it is appropriate that consideration be given to the nature of the penalties provided under the 1989 Act. It is limited to providing for a maximum penalty of two years imprisonment on indictment, which is one of the lowest penalties available following conviction on indictment. The penalty of six months on summary conviction is unremarkable. Consideration should be given to whether these penalties are appropriate and provide an effective sanction in all cases, given the potentially serious conduct that might constitute an offence under the 1989 Act.

Second, the nature of the defences set down in the 1989 might also be reassessed. At present, the Act is essentially limited to providing for a defence where a person was not aware of the content of the material concerned and had no reason to suspect that the material was threatening, abusive or insulting. One significant defect in the Act – that there is no defence where a person cannot be said to have had any appreciation that the material would instil hatred – is addressed elsewhere in this submission. However, consideration should be given to adding other defences, such as a defence of fair comment on matters of public interest, defence provisions which carefully set out the acceptable range of religious expression, and perhaps defences relating to artistic expression. Such defences would ensure that freedom of expression is adequately protected.

Third, it is clear that the 1989 Act specifically addresses the problem of incitement to hatred. This may be viewed as a type of hate speech, but it is clear that the 1989 Act does not criminalise *all* types of hate speech. Notably, the Act contains no criminal prohibition on abusive or insulting remarks directed at an individual based on his or her personal characteristics, such as race, nationality or religion. Such conduct is beyond the ambit of ss. 2, 3 or 4 given the requirement in those offences that conduct be intended or likely to instil hatred: for example, racist material targeted against a particular individual is unlikely to result in that individual hating other members of that race. It is not possible to amend the existing offences in the 1989 Act to criminalise such conduct without changing those offences beyond all recognition and significantly broadening the Act. The Department's review does not seek a view on whether such an amendment is appropriate. For those reasons, this submission does not suggest amendments to the Act so as to address this

omission from the 1989 Act. However, consideration should be given as to whether such an offence should be introduced, either in the 1989 Act or elsewhere.

Issue 1: Protected Characteristics Covered By 1989 Act

In its present form, the 1989 Act criminalises threatening, abusive or insulting conduct which is intended or is likely to stir up hatred against a group of persons on account of their (i) race; (ii) colour; (iii) nationality; (iv) religion; (v) ethnic or national origins; (vi) membership of the Traveller community; or (vii) sexual orientation. The Act does not prohibit behaviour intended or likely to stir up hatred on the basis of other identifying features such as gender, age or disability. This leaves an individual free to engage in conduct aimed at inspiring hatred on such other grounds, save to the extent that the conduct might contravene general provisions of the criminal law.

The first issue to be considered in reviewing the 1989 Act is whether this situation should be addressed by extending the scope of the Act to prohibit conduct intended or likely to stir up hatred based on a broader range of fundamental characteristics than the seven currently provided for. Some guidance as to additional identifying characteristics that could be included in the Act is provided by Article 14 of the European Convention on Human Rights and Article 21 the UN Charter of Fundamental Rights, the cornerstone anti-discrimination provisions in two major international human rights instruments. Drawing inspiration from these provisions, additional characteristics that could be protected under the 1989 Act include sex, genetic features, language, political or other opinion, property, birth, disability, age, and membership of a national minority.

There are a number of factors which weigh against any decision to extend the scope of the 1989 Act.

First, any extension of the Act would amount to a restriction of the right to freedom of expression, as protected by the Irish Constitution and the European Convention on Human Rights. While there is an obvious need to avoid undue restrictions on this right, it should be noted that the European Court of Human Rights has made it clear that incitement to

hatred is a form of expression which receives a very limited degree of protection and is more readily open to restriction by the State than other types of expression.[5]

A second consideration is that the range of fundamental characteristics protected under 1989 Act would appear to be in line with what is required under Ireland's international obligations in relation to hate speech. For instance, Article 1 of the 2008 EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law provides that Member States shall criminalise the offence of "*publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin*". Similarly, Article 20(2) of the International Covenant on Civil and Political Rights requires that any "*advocacy of national, racial or religious hatred"* be prohibited by law. It is clear that the 1989 Act already deals with speech inspiring hatred on these grounds, and an extension is not necessary to cater for same.

Thirdly, the 1989 Act does not appear to be anomalous when compared to other jurisdictions. As discussed by Schweppe, the most commonly protected characteristics under hate crime legislation in Western democracies are race, religion, and sexual orientation, though gender identity, gender expression and disability have been included in a limited number of jurisdictions.[6]

These are certainly relevant considerations in assessing whether the Act should be expanded, but they are not determinative. As against these, there are a range of factors which suggest that it is appropriate to extend the Act to prohibit speech which would inspire hatred against a broader range of societal groupings than is the case at present.

First, there is no clear rationale or justification for limiting the 1989 Act to prohibit hate speech against certain societal groups only, while leaving an individual free to engage in conduct aimed at stirring up hatred based on other fundamental characteristics. Many of

[5] See, for example, *Norwood v. United Kingdom* (App. No. 23131/03, 16th November 2004); *Leroy v. France* (App. No. 36109/03, 2nd October 2008); and *Féret v. Belgium* (App. No. 15615/07, 16th July 2009).

[6] Jennifer Schweppe, "Defining Victim Groups in Hate Crime Legislation: Certain and Precise?" (UL 2017) available at: [link removed]

the identifying characteristics which fall outside the current ambit of the Act are as fundamental or immutable as the characteristics which do receive protection. It is not possible to sensibly differentiate between the odiousness attaching to conduct aimed at inspiring hatred based on the characteristics currently protected by the 1989 Act, and that attaching to actions aimed at inspiring hatred based on other fundamental characteristics. To take one basic example: it cannot be coherently argued that conduct intended to inspire hatred against persons with a particular physical disability is less harmful or deserving of opprobrium than conduct inspiring hatred against persons of a particular nationality. Concerns about protecting freedom of expression could not sensibly permit hate speech on grounds of gender, age or disability: there is simply no logical reason for permitting hate speech on those grounds but restricting it on the grounds presently outlawed by the 1989 Act. In sum, the policy of the 1989 Act in prohibiting hate speech on certain grounds but freely permitting it on others would appear to be arbitrary and without justification.

Secondly, and on a related note, the policy embodied by the 1989 Act is clearly questionable. In stark terms, Irish criminal law intervenes to punish actions aimed at spreading hatred against a limited number of societal groups, but otherwise leaves a person free to stir up hatred against other groups in society, based on fundamental characteristics such as gender or disability, despite the harm potentially caused by such behaviour. This is surely not a desirable social situation to be provided for under the criminal law, and amounts to a failure to safeguard the dignity of all within society.

Thirdly, extending the 1989 Act would bring the protection provided by Irish hate speech law into line with that provided by equality legislation. The 1989 Act is confined to providing protection to seven groups in Irish society that share certain characteristics. By contrast, a conscious legislative choice has been made to provide protection under Irish law to a number of other groups in relation to fundamental aspects of their social life in the State: the Equal Status Act 2000 and Employment Equality Act 1998 both prohibit discrimination in the workplace or in relation to provision of goods and services on grounds of gender; family status; sexual orientation; religious belief; age; disability; race, colour, nationality or ethnic or national origin; and membership of the Traveller community. The 1989 Act is ultimately rooted in the same objectives underlying the above pieces of equality legislation and it would seem as a matter of logic that it should extend

protection to the same groups. It is anomalous that certain societal groups entitled to equality protection under law are essentially left without any legal protection against speech aimed at inciting hatred against them.

Finally, at a practical level, the 1989 Act should be broad enough to deal with all forms of hate speech that actually pose a problem in contemporary Irish society. Some guidance in this regard is provided by the working definition of a hate crime adopted by An Garda Síochána in October 2019:-

> "*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*."

Further guidance is provided by the manner in which the Garda PULSE system operates. That system is used to record complaints of crimes that occur within the State. It allows for gardaí to record a "*discriminatory motive*" for an alleged offence. The motives which can be recorded – ageism, anti-disability, anti-Muslim, anti-Roma, anti-Semitism, anti-Traveller, gender related, homophobia, racism, sectarianism, and transphobia – give some indication of the hate-inspired offences that are taking place in Irish society at present. It is clear from this that members of An Garda Síochána are presently dealing with hateful actions which target groups identifiable by a range of characteristics protected by the 1989 Act. If it is to be relevant in tackling the real issues of hate speech that present in contemporary society, the 1989 Act must be broad enough to prohibit incitement to hatred against such groups.

In the final analysis, there are a number of considerations pointing towards expanding the coverage of the 1989 Act so as to outlaw conduct intended or likely to inspire hatred against groups based on an additional range of identifying characteristics. In particular, there is no clear rationale for protecting societal groups with certain identifying characteristics above others; there is a need to redress the distasteful policy embodied by the 1989 Act of outlawing certain types of incitement to hatred while freely permitting others; the protection provided by the 1989 Act is out of kilter with the protection afforded under Irish equality legislation; and there is a real need to provide a piece of hate speech legislation capable of being used by members of An Garda Síochána to prosecute the hate

crimes that they actually encounter in reality. As against that, there are few factors which favour the retention of the 1989 Act in its current form. It is respectfully suggested that in those circumstances, it is appropriate to expand the scope of the 1989 Act.

The question then is what additional grounds should be included within the ambit of the 1989 Act. It is respectfully submitted that the Act should prohibit conduct aimed at inspiring hatred against persons based on one of the following identifiable characteristics:-

i. Race;
ii. Colour;
iii. Nationality;
iv. Religious belief;
v. Ethnic or national origins;
vi. Membership of the Traveller community;
vii. Sexual orientation;
viii. Gender;
ix. Gender identity and gender expression;
x. Disability;
xi. Age.

As will be apparent, this list adds four identifying characteristics to those already contained in the 1989 Act. These characteristics are inspired by the protections provided by the Equal Status Act 2000 and the Employment Equality Act 1998, as well as the nature of hate crimes that members of An Garda Síochána actually deal with in practice. It is further inspired by the Criminal Justice (Victims of Crime) Act 2017, which requires that in the course of a criminal investigation, gardaí take account should be taken of "*the personal characteristics of the victim*", which include age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, and communications difficulties. It is submitted that each of the additional four characteristics is a fundamental or immutable characteristic which is identifiable and is shared by appreciable portions of society.

One concern which might arise is whether the additional characteristics considered above are too vague, such that it would be difficult for the prosecution to show that conduct was

intended or likely to invoke hatred based on one of those grounds. It is of course possible that the prosecution might encounter difficulties with proofs on the facts of a specific case. However, it does not appear that there is any basis for suggesting that there would be generalised difficulties which might hamper a prosecution based on one of the additional grounds suggested above. Some reassurance might be gleaned by having regard to the fact that discrimination on certain of the proposed grounds – namely, gender, age and disability – is frequently litigated under the provisions of the Equal Status Act 2000 and Employment Equality Act 1998, and there do not appear to be any systemic problems in doing so.

Issue 2: The Requirement to Prove "Hatred" in 1989 Act

The 1989 Act criminalises certain conduct which is intended or is likely to "*stir up hatred*" against groups based on their fundamental characteristics. That term is not defined in the legislation and there is limited judicial guidance available, meaning that it is not clear what exactly must be proved by the prosecution in order to secure a conviction. This gives rise to the second issue canvassed in this review, which is whether the term "*hatred*" is the correct term to use in the Act or should be replaced with any other term instead.

While the review has focused on the requirement to prove "*hatred*", it is respectfully submitted that this is just part of the issue that arises in terms of what the prosecution must prove. First, issues arise by virtue of the fact that the prosecution must prove that conduct was intended or likely to "*stir up*" that hatred. This is an expression which has no parallel in other areas of Irish criminal law. The legislation should be amended to be far clearer about what exactly needs to be shown by the prosecution, and go to the heart of what the 1989 Act aims to prevent: conduct that is intended to spread, promote, advocate, incite or justify hatred.

Another issue arises by virtue of the fact that under a strict interpretation, the 1989 Act only prohibits conduct which is intended or is likely to promote hatred "*against a group of persons in the State or elsewhere*" based on certain fundamental characteristics. In other words, it is not an offence to engage in conduct intended or likely to promote hatred against an *individual person* based on that person's fundamental characteristics. This is a bizarre situation: a person might escape criminal liability for highly insulting and hate-filled comments made in relation to an individual person on the basis that they were a personal

attack, rather than being aimed in a more general way against members of a group. Quite apart from this, it also appears to conflict with Ireland's obligations under Article 1 of the 2008 EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. This provides that each Member State shall take measures necessary to criminalise publicly inciting to violence or hatred directed against "*a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin*" (emphasis added). It is submitted that the legislation should be amended so that conduct aimed at inspiring hatred against an individual based on fundamental characteristics should also be criminalised.

The issue of whether the requirement to prove that conduct was intended or likely to stir up "*hatred"* should be amended is more problematic. On the one hand, the use of this standard poses certain issues. First, in its ordinary meaning, "*hatred"* refers to an emotional state of a particularly heightened intensity. There is invariably a huge amount of subjectivity involved in determining whether an individual has acted with that emotional state or whether particular conduct was likely to trigger such an emotional state. It is questionable whether such a subjective concept has a place within criminal legislation, which should be capable of being interpreted consistently and with certainty from court to court. Secondly, "*hatred*" is a very high standard to use as it refers to an extreme emotion. The practical consequence is that highly-damaging conduct which is aimed against protected groups might escape without criminal sanction. It would appear open at least in principle for a person to escape liability on the basis that he or she did not intend to provoke "*hatred*", but merely intended to ridicule a group, slander the group, or provoke resentment. Thirdly, and in a similar vein, the Act does not touch on reprehensible conduct in relation to incitement of violence against a particular group based on identifiable characteristics, which is a fundamental part of hate speech.

Some guidance on alternative definitions that might be used can be drawn from various sources:-

- In Recommendation No. R. 97(20) from 30th October 1997, the Committee of Ministers of the Council of Europe defined hate speech as "*all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred*

based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

- In its General Policy Recommendation No. 15 on hate speech from 8th December 2016, the European Commission against Racism and Intolerance defined hate speech as "*the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression*."

- Article 20(2) of the International Covenant on Civil and Political Rights provides that "*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*."

It appears, from the above, that it would be open to amend the 1989 Act so as to criminalise conduct that goes beyond simply inciting hatred, but also that which incites hostility, prejudice, denigration, vilification or violence.

The major obstacle to expanding the 1989 Act to outlaw such conduct is that a balance must be struck with the right to freedom of expression, as protected under the Irish Constitution and the European Convention on Human Rights. It is clear that expressions that seek to spread, incite or justify hatred or violence receive little rights protection: see *Gunduz v. Turkey*[7] and *Vejdeland v. Sweden.*[8] However, more care must be taken in restricting other forms of expression which, though shocking, distasteful or abhorrent, fall short of an effort to incite hatred or violence. While it might appear desirable to restrict expression that inspires hostility or vilification of others, this captures a very broad range of speech and there must be a real concern that this would represent too great an encroachment on freedom of expression. In those circumstances, it is respectfully submitted that it is appropriate to retain the "*hatred*" standard in the 1989 Act and to refrain from criminalising efforts at instilling emotions such as "*hostility*", "*prejudice*" and "*vilification*". That said, it would appear appropriate to criminalise efforts to incite violence.

[7] App. No. 35071/97, 4th December 2003.
[8] App. No. 1813/07, 9th February 2012.

The international definitions referred to above and the case law of the European Court of Human Rights makes it clear that there is little issue with prohibiting this.

Based on all of the above, it is respectfully submitted that the 1989 Act should be amended in the following ways: (i) it should use a clearer term than "*stir up"* and provide a clearer description of conduct which is prohibited, *i.e.* conduct that is intended to spread, promote, advocate, incite or justify hatred; (ii) the Act should criminalise behaviour aimed at promoting hatred or violence; and (iii) it should cover conduct intended to attack an individual as well as a group. As a suggested definition, the 1989 Act should prohibit threatening, abusive or insulting conduct, where the person engaging in that conduct intends to spread, promote, advocate, incite or justify hatred or violence against a group or an individual member of that group based on the fundamental protected characteristics held by that group and considered more fully above.

An issue which arises is whether a person should ever be criminally liable where he or she acts in an offensive way but does not actually intend to spread hostility or hatred against a group. This falls to be considered later in this submission, under the heading of issue 4.

Issue 3: Prosecutions Under 1989 Act For Online Speech

The 1989 Act has been criticised for its perceived ineffectiveness when it comes to facilitating prosecutions for internet-based hate speech. The Law Reform Commission, in its 2016 Report on Harmful Communications and Digital Safety, summarised many of these criticisms. The Commission noted that "*online hate speech*" is criminalised by the 1989 Act as the legislation applies to words used, behaviour or material displayed in "*any place other than inside a private residence*". However, it went on to state that respondents to the issues paper questioned the adequacy of the 1989 Act for dealing with online hate speech, commenting that the Act was not designed to deal with the internet and that there might potentially be difficulty in prosecuting the use of "*static images, such as photographs, 'memes' or pictures*". The Commission also refers to the "*Traveller Facebook case*", where the District Court dismissed a prosecution under s. 2 of the 1989 Act on the basis that it had not been proven beyond a reasonable doubt that the defendant intended to incite hatred against the Traveller community. The comment is made that:-

"*This case illustrates the difficulties with online hate speech compared to its offline equivalents. Once an abusive comment is made it can spread very fast, be viewed by many people and remain accessible long after the content was posted*."

The Commission ultimately recommended that online hate speech should be addressed as part of the general reform of hate crime law. This provides the context for the third issue arising in this review: should the wording of the 1989 Act should be changed to make prosecutions for online incitement to hatred more effective?

To put this question in context, it is worth briefly considering the various ways in which online material can be circulated. An individual might write a post, blog or message. An individual might also send photographs, videos or static images (including "memes"), perhaps accompanied by a caption. Content can be shared with varying degrees of publicity. On one end of the spectrum, an individual might host content on a publicly accessible website. On the other end, the individual might send content in private messages to a select number of others. Between these extremes, there are varying degrees to which material might be shared: it might be sent to a group on Facebook, shared with a Whatsapp group, or may be viewable by followers or friends on various social media platforms.

There is no doubt that s. 2 of the 1989 Act could be used to prosecute the publication of certain content that might appear online. In the first instance, it allows for the prosecution of a person who publishes or distributes written material. "*Written material*" includes any sign or other visual representation. This would appear to certainly capture written messages which might be written on a computer or phone, and arguably captures images and photographs that might be posted online. "*Publish*" in this context means "*publish to the public or a section of the public*", while distribute means "*distribute to the public or a section of the public*". While the Act does not specifically state that it applies to content which is published or distributed online, there is no logical reason why it would not. Therefore, it appears that it would be possible to prosecute under s. 2 for written messages or visual representations which an individual actually places online through his or her own actions or otherwise distributes, such as by sharing or forwarding content. Publication or distribution could be to the public at large (for example, by hosting them on an open website) or to a section of the public (including followers, friends or groups).

Section 2 also applies to the distribution of recordings of visual images or sounds, and this suggests that a prosecution could be instituted for video or audio clips which are shared or distributed through online means to the public at large or a section thereof. The section also applies to the use of words, behaviour or display of written material "*in any place other than inside a private residence*". This is arguably less useful in capturing online conduct: the reference to "*any place*" could arguably be interpreted as a physical place, given the mention of a "*private residence*".

Although s. 2 can be used to prosecute online conduct in its current form, it is respectfully suggested that a number of amendments to the 1989 Act would eliminate any uncertainty and enhance the effectiveness of prosecutions under this section:-

- First, the Act should be amended so as to specify that the term "*written material"* includes the common visual images that might be posted online: for instance, photographs, images, signs and drawings.

- Secondly, the terms "*publish"* and "*distribute*" should be amended to specify that they include publishing or distributing material through any means, including through use of the internet, on websites, or through messaging applications.

- Thirdly, the 1989 Act currently provides that the terms "*publish*" and "*distribute*" mean publication or distribution to the public or a section of the public. These definitions are capable of causing some difficulty. It is possible to conceive of arguments that could be made to the effect that a message sent to a private or restricted group on a social networking website does not constitute a message sent to a "*section of the public*". The only clear way of avoiding this potential issue is by revising the definition of "*publish*" and "*distribute*" so that they relate simply to publication and distribution to another individual, rather than requiring the publication or distribution to be to a segment of the "*public*". It should be recognised that such a change has the capacity to criminalise private messages exchanged between small groups of individuals. This does not materially expand the scope of the 1989 Act: it already criminalises words and behaviour in any place other than a private residence, even where they occur in private conversation between individuals.

- Fourthly, a potential issue relates to whether the 1989 Act in its current form criminalises the publication or distribution of material within the State only, or whether it also has applicability to material which is published or distributed to individuals outside of the State. The uncertainty in this regard arises from the fact that in several sections, the 1989 Act makes specific reference to the fact that it applies to conduct directed towards aims "*in the State or elsewhere*". By contrast, the definition of publication and distribution in the 1989 Act do not state that they include publication or distribution "*in the State or elsewhere*". This potentially leaves it open to an accused person to argue that an offence is only committed where publication or distribution occurred in the State, and proving this in relation to online content might be very onerous indeed. To avoid this potential issue, the definitions of "*publish*" and "*distribute*" should be amended to make it clear that they refer to publication or distribution to individuals in the State or elsewhere.

- Finally, the section's reference to the use of words, behaviour or display of written material "*in any place other than inside a private residence*" could be amended so as to make clear that it includes conduct engaged in on the internet.

Section 3 of the 1989 Act is less relevant to the prosecution of online hate speech. It imposes criminal liability where certain "*visual images or sounds*" are broadcast. In this context, "*broadcast*" means:-

> *"…[T]he transmission, relaying or distribution by wireless telegraphy or by any other means or by wireless telegraphy in conjunction with any other means of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not."*

The first major limitation is that the section applies only to "*visual images or sounds*", and in an online context that translates to video or audio clips only. Those clips would have to be "*broadcast*": in other words, distributed with the intention that they be received directly by the general public. Relatively few communications on the internet are distributed to the general public at large, and instead tend to be targeted towards specific subsets of the

general public. The invariable result is that it would be difficult to prosecute online hate speech under s. 3.

Section 4 of the 1989 Act criminalises the preparation or possession of certain written material or recordings of sounds or visual images with a view to its being distributed, displayed, broadcast or otherwise published. It is possible to conceive of circumstances in which this might facilitate a prosecution in relation to material that is posted online, though the above comments made in relation to the definitions of "*written material*" and "*distribution*" apply equally here. Amendments made to the definition of these terms in the 1989 Act would facilitate the more effective prosecution of online hate speech.

The limitations of ss. 3 and 4 of the 1989 Act beg the question as to whether they should be amended so as to facilitate prosecutions for online material. It is respectfully submitted that this is unnecessary: if the above amendments are made, s. 2 would prove a perfectly effective mechanism through which to prosecute online hate speech. However, two final comments should be made on the issue.

First, it is inevitable that there will occasionally be difficulties in terms of establishing the identity of an online publisher and attributing authorship to that person. These are difficulties inherent in any prosecution for online behaviour and it does not appear that any amendments to the 1989 Act could obviate these difficulties.

Secondly, it is worth addressing the comments raised by the Law Reform Commission in relation to the outcome of the "*Traveller Facebook case*". That case was dismissed due to a reasonable doubt as to whether the defendant intended to incite hatred against the Traveller community, based in part on the fact that the defendant had only posted once and had given an apology. This result had little to do with the specific fact that the material was published in online format, and the outcome does not point to any particular difficulties with online prosecutions under the 1989 Act which need to be addressed. Insofar as the case highlights the extent to which online content can rapidly spread, it is respectfully suggested that this points to the need for effective online enforcement as opposed to the need to amend the 1989 Act to facilitate prosecutions in any particular way.

Issue 4: Requirement to Prove Intent or Likelihood

To secure a conviction for any of the offences under the 1989 Act, the prosecution must show that the defendant engaged in conduct which either (i) was intended to stir up hatred; or (ii) having regard to all the circumstances, was likely to stir up hatred. The fourth issue which arises in this review is whether this need to prove intent or likelihood should be changed, "*for example to include circumstances where the person was reckless as to whether their action would stir up hatred*". Specific questions posed for consideration are whether the requirement to prove intention or likelihood makes the legislation less effective and whether changes could be made to this element of the 1989 Act.

It is respectfully submitted that the Act's requirement to prove intention or likelihood should be amended: not for the purposes of facilitating prosecutions, but to ensure that the Act properly respects the mandates of the Constitution in respect of criminal legislation. It is accepted that these changes might well mean that an accused person would be acquitted in circumstances where a conviction would follow under the 1989 Act as currently formulated. However, it is submitted that such changes are necessary to ensure that the Act passes constitutional muster.

Mens rea – the requirement for a guilty mind on the part of the accused – is a fundamental component of any criminal offence. A statutory provision which allows a person to be convicted on a strict liability basis or without any adequate appreciation that his or her actions were wrongful is susceptible to constitutional challenge: see *C.C. v. Ireland.*[9] It is essential for that reason that the 1989 Act contains sufficient requirements for the prosecution to prove *mens rea* before a person can be convicted for incitement to hatred.

In that light, the requirement to prove intention can scarcely be seen as objectionable – even though it might be difficult to prove in certain cases. The Act is problematic, however, as it also allows for the prosecution to secure a conviction where it is proved that particular conduct was *likely* to stir up hatred against a particular group. This is a standard which departs from the standard of recklessness typically used in criminal statutes as an alternative to intention, and is highly problematic for several reasons. First, it seems that

[9] [2006] IESC 33, [2006] 4 I.R. 1.

it is immaterial that the accused lacks appreciation of the potential consequences of his or her actions. The Act appears to allow a person to be convicted based on the potential consequences of his or her conduct, even where there is no appreciation of same. The defences included in the 1989 Act only cover a situation where the defendant has no idea of the content of material which is published or distributed, and do not cover the situation where there is a failure by the defendant to appreciate the *consequences* of distributing that material. Secondly, it does not seem that there is any need that there be a substantial risk of stirring up hatred: mere likelihood suffices. The 1989 Act therefore appears to come close to permitting a conviction on grounds of negligence, in relation to expression which is genuinely not expected to incite others to hatred.[10] This is a constitutionally dangerous situation.

One option therefore is to amend the 1989 Act so as to remove the reference to likelihood, and provide instead that a person may be convicted of an offence where he or she intends to promote hatred and that such intention can be presumed where hatred is the natural and probable consequence of the words used on the occasion in question. The amendment should also provide that any such presumption can be rebutted.

A second option would be to allow for a person to be convicted for an offence under the 1989 Act where he or she did not intend to promote hatred, but was reckless as to whether his or her actions would have this result. A similar *mens rea* requirement exists for an offence under s. 6 of the Criminal Justice (Public Order) Act 1994, which is similar in some ways to the offences created under the 1989 Act. Under this option, a conviction could be returned where the accused appreciated that there was a substantial risk of his or her actions promoting hatred but continued with them anyway: see the comments of the Supreme Court in *Clifford v. DPP.*[11]

A significant risk with the latter option is the substantive concern as to whether, at the level of principle, inchoate crimes are capable of being committed recklessly. This concern has even more force where, as here, we are dealing with a "hate crime" with all the stigma that attaches.

[10] See Daly, "Reform of the Prohibition of Incitement to Hatred Act 1989 — Part I" [2007] 17 (1) I.C.L.J. 1.
[11] [2013] IESC 43, [2013] 2 I.R. 396.

The safer course, therefore, might be option 1 above, namely removal of the reference to likelihood and inclusion of an express reference to the presumption of that may be rebutted.

Concluding Comments

In summary, this submission recommends that the 1989 Act be amended in the following ways:-

iv. The Act should be amended so as to criminalise threatening, abusive or insulting conduct, where the person engaging in that conduct intends to spread, promote, advocate, incite or justify hatred or violence against a group or an individual member of that group based on race; colour; nationality; religious belief; ethnic or national origins; membership of the Traveller community; sexual orientation; gender; gender identity and gender expression; disability; or age;

v. that such intention can be presumed where hatred is the natural and probable consequence of the conduct or words used on the occasion in question; and that such presumption of intention may be rebutted.

vi. The Act should be amended to make it more effective at facilitating prosecutions for material published online. In particular, "*written material*" should be expressly defined as including a visual representation, a sign, images, photographs and drawings. "*Publish*" and "*distribute*" should be defined as meaning publishing and distributing to another individual, whether in the State or elsewhere. The reference in s. 2 to the use of words, behaviour or display of written material "*in any place other than inside a private residence*" should amended so as to make clear that it includes conduct engaged in on the internet.

It is respectfully submitted that these changes to the 1989 Act will make it more relevant to dealing with hate speech in contemporary society; will ensure that it is more effective at facilitating prosecutions; and will ensure an adequate degree of respect for constitutional imperatives relating to freedom of expression and trial in due course of law.

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