



Údarás Náisiúnta Míchumais
National Disability Authority

03 January 2020

Department of Justice and Equality
51 St Stephen's Green
Dublin 2

Subject: Review of the Prohibition of Incitement to Hatred Act 1989

Dear Sir / Madam,

I am writing to you in relation to the Department's consultation on the review of the **Prohibition of Incitement to Hatred Act 1989**. Thank you for the opportunity to contribute in this regard.

The National Disability Authority (NDA) is an independent statutory body with a duty to provide information and **evidence-informed** advice to Government and officials in the public sector on disability matters, and to promote Universal Design. The comments and advice below address issues related to this review, which fall within the NDA's competencies and expertise.

The NDA advises that a review of the Prohibition of Incitement to Hatred Act 1989 ("the 1989 Act") is merited, given in particular the absence of protections for persons with a disability, the current prevalence of online hate speech directed at a range of groups and individuals and the low number of prosecutions under the legislation. The NDA notes in particular that since 2010, there have been only 12 cases prosecuted under the 1989 Act, resulting in two sentences of imprisonment (**Government of Ireland, Combined fifth to ninth periodic reports submitted by Ireland under article 9 of the Convention on the Elimination of All Forms of Racial Discrimination, due in 2014**).

At the outset, the NDA recognises that incitement to hatred provisions raise fundamental questions about the balance to be struck between the right to freedom of



expression, and the rights of minority groups, including persons with disabilities, to be protected from hate speech. The NDA also notes that the 1989 Act seeks to criminalise certain forms of behaviour and expression to the extent that they are likely to provoke hatred or are intended to provoke hatred against a group of persons on account of certain characteristics, as opposed to individuals.

Issue 1: Protected characteristics covered by the 1989 Act

The 1989 Act prohibits actions intended or likely to stir up hatred against a group of persons on account of their “race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation”. The NDA notes that protected characteristics under the 1989 Act do not include persons with a disability. The absence of protections for persons with disabilities under the 1989 Act was highlighted in research undertaken by the Centre for Criminal Justice and Human Rights, University College Cork on **Access to Justice for People with Disabilities as Victims of Crime in Ireland, 2012**, and funded by the NDA under its Research Promotion Scheme.

Ireland ratified the **UN Convention on the Rights of Persons with Disabilities (UNCRPD)** in 2018. Article 16 of the UNCRPD requires States Parties to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse. The NDA notes that incitement to hatred may itself constitute abuse, and may contribute to acts of exploitation and violence. Extending protections against incitement to hatred to persons with a disability offers protection against such harmful abuse.

In addition, Article 8 of the UNCRPD concerns the raising of public awareness and the combating of stereotypes, prejudices and harmful practices. The NDA advises that extending the list of protected characteristics to persons with a disability sends a powerful message that hateful attitudes are unacceptable.

Hate speech against persons with a disability has been raised in a number of country reviews under the UNCRPD. For instance, in its Concluding Observations on Norway (2019) and the United Kingdom (2017), the UN Committee on the Rights of Persons with Disabilities expressed concern about hate speech towards people with a disability in both jurisdictions.

The NDA notes that a number of jurisdictions, such as Northern Ireland and Canada, prohibit incitement to hatred against persons with a disability. In addition, the issue of extending protections against incitement to hatred on the basis of disability is currently the subject of discussion in Scotland.

In 2014, the Law Commission of Scotland recommended that incitement to hatred offences not be extended to include persons with a disability (**Law Commission, Hate Crime: Should the Current Offences be Extended?**, 2014). The Law Commission considered that the type of hate speech typically found in relation to disability was far less likely to satisfy the requirements for an incitement to hatred offence than that found in relation to race and religion. As a consequence, the Law Commission expressed the view that there would be fewer successful prosecutions for incitement to hatred offences against persons with a disability than there are now for the existing protected groups (race, religion and sexual orientation).

The NDA notes since the 2014 Law Commission report, an **Independent Review of Hate Crime Legislation in Scotland, 2017**, was published. It took the opposite view to the Law Commission, recommending that incitement to hatred offences should be extended to persons with a disability. The review highlighted the undesirability of having a hierarchy of protected characteristics. It also rejected the Law Commission's argument that the legislation should not be extended as there might be fewer convictions in respect of persons with a disability as opposed to persons with other characteristics.

The NDA advises that the 1989 Act be amended to include persons with a disability in the list of protected characteristics.

Issue 2: Use of the term “hatred” in the 1989 Act

The 1989 Act prohibits certain forms of threatening, abusive or insulting conduct that are intended or likely to stir up “hatred” against a group of persons on account of certain characteristics. The NDA notes that the 1989 Act does not define ‘hatred’ itself in terms of the nature and intensity of feelings or emotions that must be generated in order to qualify as “hatred” rather than some lesser feeling or emotion. However, it is recognised that “hatred” is a strong emotion, with a high legal threshold.

Experts have raised concerns that “[t]his lack of firm guidance on the central ingredient of the offence is not helpful for Gardaí, prosecutors, judges and juries who are required to make decisions in the enforcement of the Act within their respective spheres” (**Jennifer Schweppe and Dermot Walsh, Combating Racism and Xenophobia through the Criminal Law - A Report Commissioned by the National Action Plan Against Racism, 2008**).

The NDA notes proposals in the consultation document that the term “hatred” could be replaced by “hostility” or “prejudice”. While the NDA does not take a position on whether the term “hatred” should be replaced with alternative wording, it highlights the following for consideration.

First, limits imposed upon freedom of expression, such as criminalisation of incitement to hatred, hostility or prejudice, must comply with constitutional law and international human rights law. These include the following:

Irish Constitution

The guarantee of freedom of expression set out in Article 40.6.1.i of the Irish Constitution protects 'the right of the citizens to express freely their convictions and opinions'. But, this protection is limited, since 'organs of public opinion' may not be used 'to undermine public order or morality or the authority of the State'.

European Convention on Human Rights

Article 10 of the **European Convention on Human Rights** (ECHR) provides the right to freedom of expression and information, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". It includes the freedom to hold opinions, and to receive and impart information and ideas. In this regard, "it is applicable not only to 'information' or ideas' that are favourably received or regarded as inoffensive or as matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population" (**Handyside v the United Kingdom [1976] 1 EHRR 737**).

The ECHR does not contain any obligation on States to prohibit any form of expression. That being so, the European Court of Human Rights has stated that "as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance..." (**Erbakan v Turkey, App. No. 59405/00**).

The NDA notes that the European Court of Human Rights has exercised strict supervision in cases where criminal sanctions have been imposed by the State for expression offences, and in several instances it has found that the imposition of a criminal conviction violated the proportionality principle (e.g. **Jersild v Denmark (1995) 19 EHRR 1**).

International Covenant on Civil and Political Rights

Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Ireland ratified in 1989, also protects the right to freedom of expression. However, limitations on this right can be permitted where they:

- are provided for by law
- pursue a legitimate aim, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order, or of public health or morals; or
- are necessary in a democratic society

Article 20(2) of the ICCPR, which Ireland ratified in 1989, provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” In **General Comment No. 34**, the Human Rights Committee, which monitors implementation of the ICCPR, stressed that while States are required to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19(3).

Other international instruments and standards

A number of other international and regional human rights instruments also deal with the issue of hate speech and incitement to hatred against racial minorities, including the **UN Convention on the Elimination of All Forms of Racial Discrimination**, which Ireland ratified in 2000.

Second, Jennifer Schweppe and Dermot Walsh argue that “hatred” has a high legal threshold and is inevitably an uncertain concept (**Combating Racism and Xenophobia through the Criminal Law**). They suggest that greater certainty and simplification could be achieved by lowering the threshold to concepts which have a more objective core and a much greater consensus in interpretation. However, they opine that a lower threshold of ‘ridicule’ or ‘contempt’ would intrude too deeply into freedom of expression. They therefore conclude that, despite its subjective vagueness, it is difficult to improve on “hatred” as the appropriate trigger for the application of the criminal law to the public expression of hateful views and opinions.

The NDA is of the opinion that the options mentioned in the consultation document, namely “hostility” and “prejudice”, are lower legal thresholds than “hatred”, but higher than “ridicule” or “contempt”. Séamus Taylor argues that “hatred” goes significantly beyond “hostility” (**Responding to Racist Incidents And Racist Crimes in Ireland – An Issues Paper for the Equality Authority, 2010**). Similarly, Jennifer Schweppe & Dermot Walsh express the view that “hostility” is a lower standard of animosity than “hatred” (**Combating Racism and Xenophobia through the Criminal Law**).

In light of the foregoing, the NDA advises that replacement of the term “hatred” should be afforded careful consideration by the Department, taking into account international standards.

Issue 3: Application of the 1989 Act to online speech

The NDA notes that the 1989 Act predates the widespread usage of the internet, which is one of the primary mediums, if not the primary medium, for expressing hate speech today. The 1989 Act is not limited to offline behaviour as it extends to words used, behaviour or material displayed in “any place other than inside a private residence.” The definitions under the legislation are wide enough to cover online

broadcasting, publication and social media discourse. Nevertheless, concerns have been raised about the effectiveness of the 1989 Act in dealing with online hate speech.

The Law Reform Commission, in its **Report on Harmful Communications and Digital Safety, 2016**, expressed its view that the 1989 Act has proven “particularly ineffectual in combating online hate speech”. In particular, the Commission drew attention to a 2011 prosecution for online hate speech, which was taken under section 2 of the 1989 Act. In the so-called “Traveller Facebook case”, the accused person had created a Facebook page entitled “Promote the use of knacker babies for shark bait”. The District Court dismissed the case on the basis that there was a reasonable doubt that there had been intent to incite hatred against the Traveller community. The Court took into account that the accused had only posted on the site once and had given an apology. However, while the accused only posted on the page once and sent it to three others before forgetting about it until notified by Facebook to remove it, 644 people had joined the page and many others may have viewed the page. Some of those who joined, also contributed further abusive material to the page.

According to the Law Reform Commission, the “Traveller Facebook” 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 NDA advises that the concerns expressed by the Law Reform Commission regarding online hate speech be addressed as part of the review of the 1989 Act.

The NDA also notes that the definitions of “broadcast”, “distribute”, “publish” and “recording” under the 1989 Act refer to broadcasting, distributing, publishing and recording to “the public or a section of the public”. According to the Department of Justice and Equality’s consultation document, this may not be sufficient to capture modern day communications, where posts on social media sites can be limited to followers or “friends” and it could therefore be argued that the material was not for “public” consumption. This raises a question about how any reform of the 1989 Act would interact with the provisions of the proposed Online Safety Act and role of the Online Safety Commissioner. The NDA advises the Department to take the opportunity presented by the review to bring clarity to this matter.

Issue 4: Proving intent or likelihood

The 1989 Act criminalises certain behaviour and expression that is likely or intended to ‘stir-up’ hatred against a group of persons.

Legal experts disagree about the effectiveness of the requirement to prove that the action was intended or likely to stir up hatred. Conor Keogh describes the requirement to prove intent or likelihood as the “Achilles heel” of the 1989 Act, and that, arguably, it is the reason why there have been so few prosecutions (**The**

Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) Bar Review 178). Tom Daly, however, argues that the “is likely to” element of “stirring up” facilitates convictions for cases in which the expression “is either not intended to be heard by others, or simply not intended or expected to incite others to hatred”, ultimately incorporating a threshold of negligence to a criminal act (**‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) Irish Criminal Law Journal 16).**

According to the consultation document, the Department of Justice and Equality 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 their action would stir up hatred.

The NDA notes that, as a general principle, criminal liability arises only where the accused has engaged in the prohibited conduct (actus reus) with the appropriate state of mind (mens rea). To satisfy the mens rea test it must normally be shown at least that the accused intended or was reckless with respect to his or her commission of the components of the prohibited conduct. However, an offence under section 2 of the 1989 Act can be proved in one of two ways, which differ in respect of what the prosecution must prove about the state of mind of the accused. The prosecution must either:

1. prove that the accused used, published or distributed the offensive material with the **intention** to stir up hatred
2. prove that the offensive material, having regard to all the circumstances, was **likely** to stir up hatred, **irrespective of whether the accused intended to stir up hatred or not**

In the first option, the prosecution must prove that the material was threatening, abusive or insulting and that the accused intended to stir up hatred. The prosecution do not have to show that the material itself was likely to stir up hatred. Recklessness on the part of the accused will not suffice.

According to experts in this area, it is difficult to prove an intention to stir up hatred (**Combating Racism and Xenophobia through the Criminal Law**). The prosecution will have to prove that the accused used the offensive material specifically with the intent to stir up hatred. If there is a reasonable doubt that the accused had some other intent, the offence will not be established.

In the second option, the prosecution will have to prove not only that the accused’s words or conduct was threatening, abusive or insulting, but also that it was likely, having regard to all the circumstances, to stir up hatred. If the prosecution can prove that the words or conduct were of that nature, then it is not necessary to go further and prove that the accused intended to stir up hatred or was reckless as to this fact.

The NDA notes that the introduction of a recklessness standard would mean that a person could be prosecuted where they were reckless as to whether the offensive material would stir up hatred (rather than intending this to be the case).

ARTICLE 19, an international human rights organisation which defends and promotes freedom of expression and freedom of information, recommends that domestic legislation should always explicitly state that the crime of incitement to hatred is an intentional crime (**Prohibiting incitement to discrimination, hostility or violence, 2012**). They argue that criminal culpability that is less than intent, such as “recklessness”, would not meet the threshold of Article 20(2) of the ICCPR.

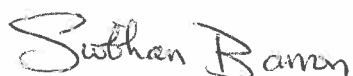
Similarly, the **Rabat Plan of Action, 2013**, which seeks to clarify the scope of state obligations under Article 20 of the ICCPR on the prohibition of incitement to discrimination, hostility or violence, also states that intent is required. The **Rabat Plan of Action** stipulates that recklessness is not sufficient for an act to be an offence under Article 20 of the ICCPR, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of material.

However, a test of recklessness in relation to incitement to hatred offences does exist in some jurisdictions, for instance in Queensland and the Australian Capital Territory (**James Chalmers and Fiona Leverick, A Comparative Analysis of Hate Crime Legislation, 2017**).

The NDA advises that the Department consider the potential implications of introducing a test of recklessness, including by examining jurisdictions where such a test exists and having due regard to the right to freedom of expression.

The NDA is willing to engage further with the Department on any specific considerations around hate speech and people with disabilities. We note that the Department is also working on the issue of hate crime and that the Gardaí have commenced work in this area on a non-statutory basis and would welcome engagement with the Department on the issue of hate crime.

Yours sincerely,



Siobhan Barron

Director