

Submission to the Department of Justice and Equality

on Hate Speech Public Consultation

The Department's document for this public consultation on hate speech states : *"The legislation enacted in 1989 made incitement to hatred (hate speech) a crime in Ireland. This reflects our society's rejection of displays of prejudice, bias or hostility, especially those based on fundamental aspects of a person's identity which cannot or should not be changed or concealed."*

While TVG would wholeheartedly agree with the intent of this statement, we cannot agree that the Prohibition of Incitement to Hatred Act 1989 has given any meaningful effect to this intent. The legislation has largely been useless, as evidenced by hardly any prosecutions (and not being effective as a preventative tool against hate speech either).

Need for Urgent Action

Deficiencies with the Prohibition of Incitement to Hatred Act 1989 are not new. They go back as far as the Task Force Report on the Travelling Community, 1995 (possibly even further back). The first Progress Report of its Monitoring Committee recommended in 2000 *"The Prohibition of Incitement to Hatred Act, 1989 should be reviewed in order to address its shortcomings."* (C3, p12), and it further noted *"The Minister for Justice, Equality and Law Reform has acknowledged the criticism and following his request a review of the legislation has commenced in his Department."* (p34). This was in the year 2000.

Here we are 20 years later, with no changes in the intervening years, but another review. Over the last 20 years reviews and actions have been promised to the UN, the EU and the Council of Europe by various governments past and present. While we welcome this review and our opportunity to partake, we note that the time for change and action is long overdue, considering the worrying rise in hate speech. We do not need another review followed by no action.

Proving `Intent or Likelihood`

One of the major issues and failures of the existing legislation is the requirement for intent (or its likelihood) in stirring up hatred. The burden of proof for criminal convictions is high in any case, proving intent on top of this, is one of the major contributors to the act being ineffective. Clearly the outcome, the effect, is what needs to be central to hate speech, irrespective of intent. At a very minimum `threatening abuse` should be a standalone offence, without it being coupled with `intent or likelihood`. Indeed, the very low rate of prosecutions or convictions over the last 30 years is a key indicator for the need to widen a new act beyond intent or likelihood.

The Department itself refers to considering the notion of `recklessness` to broaden prosecutable actions vis-a-vis hate speech. The criminal justice system deals with drivers, who injure or kill other road users, while driving. Judgements are based on the outcomes of their actions, while intent is not an issue. `Recklessness` – along with the concept of `dangerous driving` - is considered for driving offences. Similar principles like `recklessness` or `endangerment` should also apply to hate speech.

Hate Speech Aimed at Individuals

The existing legislation does not include hate speech aimed at individuals. Hate speech is currently particularly prevalent on social media, where it is frequently targeted at individuals, due to their membership of a particular group (e.g. Travellers). Indeed, the Department itself recognises that there are “*individual victim[s]*” of hate speech in its own document for this consultation. To ensure that any new legislation is effective, and to avoid any doubts, grey areas or pitfalls, it should be inclusive of all hate speech, irrespective of whether it is aimed at a group or an individual.

Shifting the `Burden of Proof`

The existing equality legislation (as the TVG understands it), works from a principle of `shifting the burden of proof`. Once a prima facie case of discrimination has been established, the onus is on a service provider to prove it is not discriminatory. While this is civil law, consideration should be given, how the same principle could be applied to hate speech legislation. In any case, consideration should be given to incorporate hate speech into civil law, so victims themselves can challenge perpetrators directly in the courts (or court-like adjudication systems).

Defamation, Civil Law & IHREC

On the one hand, there are individuals, who if they think they are being defamed, can take a civil case against defamation (if they have the financial resources to do so). Public discourse says that defamation laws in Ireland are too prohibitive. On the other hand, there is the criminal Incitement to Hatred legislation, proven to be utterly ineffective. TVG does not hold the legal expertise to hold a definite view on defamation law, and whether it is too restrictive, or not. Nevertheless, we do believe that hate speech is a form of defamation targeted at both individuals and groups, and that remedies, similar to defamation remedies, should be accessible to both individuals and groups in civil law too. Consequently the TVG adds its voice to bodies like ECRI, CERD and IHREC that in order to adequately respond to hate speech and hate crime, a legislative framework must consist of not only criminal law, but also administrative and civil.

Hate speech is mostly aimed at marginalised communities, lacking the financial means to access such civil law (or the associated financial risks of taking a case). Consideration should be given to incorporating hate speech into civil law, and to expand the role of the Irish Human Rights & Equality Commission to provide the necessary supports, similar to the equality legislation, and the groups covered by same.

Hate Crime

We note that the “*Department recognises that although hate speech and hate crime are legally distinct, the real-world experiences of hate crime and hate speech are often very closely linked*”, and TVG concurs with this.

Hate speech by one individual, may lead to a hate crime by another, or by a group. This needs to be recognised and incorporated into any new hate speech legislation, in a way that reasonable inferences can be drawn - so no demagogue can walk away from the outcomes of their utterances.

`Hostility` to Replace `Hatred`

TVG does not have the legal expertise to authoritatively consider the limitations of the term `Hatred`. However the Department`s document for this consultation, seems to clearly suggest, that such limitations exist.

It appears to us, that the term `Hostility` seems to be an appropriate replacement, taken into account and balancing `freedom of expression` considerations (but we defer to the better expertise of organisations like FLAC on this matter).

Expanding `Protected Characteristics`

TVG is a human rights-based Community Development Project, working in solidarity with other marginalised communities. We believe that people with disabilities, as well as gender, gender identity, age and family status should be included in expanded hate speech legislation (similar to the equality legislation).

Social Media, Online Speech, Platforms & Publishers

Regarding *“modern technologies and online behaviour”* the Department itself considers *“whether a more explicit wording mentioning these forms of communication might result in more successful prosecutions under the legislation”* – so clearly there must be a problem. Elsewhere in the document the Department stated intent is *“that Ireland’s legislation on hate speech is fit for purpose and is effective in meeting the real needs of communities and individuals who are living with the impacts of hate speech”*. Elsewhere the Department also states that *“Care is needed not to include characteristics which are in any way unclear”*.

It is the TVG`s view that hate speech legislation should be wide-ranging, clear and unambiguous. To be effective, it needs to be inclusive of online posts restricted to `followers` or `friends` (whether theoretical, or real). A racist sticker on a lamp post is only going to be seen by a limited numbers of the public, just like all social media posts – hate speech legislation needs to cover all of this.

Legislation needs to be clear and unambiguous, otherwise it quickly turns into disrepute. There seems to be a grey area, when it comes to the responsibility for racist/hate speech comments on social media pages (e.g. the Facebook page of a paper). Is the racist comment and its removal the responsibility of the publisher of the page (i.e. the paper), or the platform (Facebook)? TVG contends that the purpose of hate speech legislation is largely preventative, i.e. to stop it from occurring by outlawing it. Therefore we suggest that the platform, the administrator/publisher of the page and the social media platform should all be held legally responsible for racist/hate speech content.

The Department's document for this public consultation on hate speech states : *"Improvements in our hate-speech legislation are one element in a wider suite of measures across all areas of Government which are designed to address hatred and intolerance."*, and TVG takes this opportunity to address some of the wider issues, beyond the Prohibition of Incitement to Hatred Act (and extensions into civil law already made above), here.

Need to Move beyond Voluntary Anti-Racist Protocols for Political Parties

Anti-racist protocols signed by political parties are an important gesture, but hardly worth the paper beyond that. The events in the recent by-elections in Wexford & Fingal have proven it once more. Here in Cork we have a local councillor, who has made a career on his public anti-Traveller commentary (along with anti-Muslim and anti-migrant comments) being rewarded by his political party, by being appointed to the Local Traveller Accommodation Consultative Committee – this despite complaints by the TVG to his political party. Clearly politics will always overrule any commitments in voluntary protocols.

The Department and the Government need to explore ways, how anti-racist commitments by political parties can be made mandatory in terms of compliance, so they will not be sidelined at the first opportunity, when it is required by `politics`. This consideration of mandatory regulation of politicians and election candidates has to go beyond political parties and needs to also include Independents (as the Peter Casey election campaign has shown).

Press & Broadcast Media

When it comes to Travellers (or Gypsies, Roma, asylum seekers and refugees), it seems as if `anything goes`, when it comes to the media. We refer to it as the `Big-Fat-Gypsy-Weddings Effect` - a ratings war by the media on the backs of some of the most marginalised communities. In the name of `balance`, platforms are given to publicise racist, offensive, contrarian views in a way that is never given when disabled people, older persons or children are being discussed. Why is that?

The powers and remits of the Broadcasting Authority of Ireland (BAI) and the Press Council (PC) are far too limited. The PC applies to a limited, voluntary membership, has short timelines for complaints and is very restrictive on who can take a complaint, while the BCI timelines for complaints are shorter still, and it offers a `right to reply` where strong external action by the BCI might be required instead.

Both institutions need to be reviewed and strengthened, within a mandatory human rights & equality framework. Reliance on NUJ guidelines does no longer suffice, especially with so many media practioners outside of the NUJ in any case.

We repeat our earlier observation, that there seems to be a `grey area` when it comes to responsibility for (racist and offensive) comments left on social media pages of press or broadcast media. Is this the responsibility of the media outlet, or the social media platform provider? Any ambiguity in this area should be addressed by holding both parties liable (along with the commenter).

National Action Plan Against Racism (NPAR)

There has been no NPAR since 2008, even though TVG, and other likeminded groups, have consistently highlighted the need for one – but to no avail. The divisive strategy of Peter Casey in the presidential election was one clear indicator for the need for such a plan. If that was not evidence enough, recent events in Oughterard, Achill and elsewhere (regarding proposed accommodation for asylum seekers), and the comments (past & present) of election candidates in the recent by-elections in Wexford & Fingal, further highlight the urgent need for a comprehensive, inclusive and encompassing new NPAR.

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