

# Review of the Prohibition of Incitement to Hatred Act 1989

*December 2019*



**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

# **Review of the Prohibition of Incitement to Hatred Act 1989**

Irish Human Rights and Equality Commission submission to the Department of  
Justice and Equality public consultation

*December 2019*

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## About the Commission

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014*. The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to make recommendations to the Government to strengthen, protect and uphold human rights and equality in the State. In its Statement of Strategy 2019-2021, the Commission has resolved to prioritise proactively advancing certain aspects of its work, in areas including socio-economic rights, disability, promoting access to justice, and combatting racism and promoting intercultural understanding. The Commission has committed to playing a leadership role in combatting racism and promoting intercultural understanding, stating that "countering racism and hate speech is imperative to the building of acceptance of diversity and respect for the dignity of all persons".<sup>1</sup>

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<sup>1</sup> Irish Human Rights and Equality Commission (2019) [Statement of Strategy 2019-2021](#), p.8.

# 1. Introduction

Hate speech has a serious impact on both its victims and on society, alienating its targets to damage the community cohesion that is fundamental to a democratic society.<sup>2</sup> As noted in the Department’s consultation document, hate speech affects more than its direct victims “as it has a ripple effect which spreads far beyond the individual victim and can, if not dealt with, lead to a more divided society where entire communities feel unsafe”.<sup>3</sup>

Hate speech occurs in many domains of everyday and public life.<sup>4</sup> Internationally, the majority of hate speech incidents occur online,<sup>5</sup> and there is evidence to suggest that this is the case in Ireland.<sup>6</sup> Online hate speech has an immediate impact and an enhanced reach,<sup>7</sup> as well as the potential to shape politics and the public debate offline.<sup>8</sup> In its many forms, hate speech can serve to foster a climate of hostility that excludes targeted groups from the public sphere.<sup>9</sup> In this way, hate speech potentially silences the free speech of its victims.<sup>10</sup>

Empowering all groups to fully exercise their right to free speech is fundamental to tackling hate speech, as such empowerment “promotes intercultural understanding and tolerance, assists in the deconstruction of racial stereotypes, facilitates the free exchange of ideas, and offers alternative views and counterpoints”.<sup>11</sup> The relationship between prohibiting hate speech and enabling freedom of expression to flourish should be seen as complementary,

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<sup>2</sup> European Commission against Racism and Intolerance (2016) [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, p.4.

<sup>3</sup> See Department of Justice and Equality (2019) [Review of the Prohibition of Incitement to Hatred Act 1989 Public Consultation. October 2019](#), p.2.

<sup>4</sup> See Lucy Michael (2018) [Reports of racism in Ireland: 17<sup>th</sup>+18<sup>th</sup> quarterly reports of iReport.ie, July–December 2017](#), p.7.

<sup>5</sup> ECRI (2016) [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, p.4.

<sup>6</sup> 113 of the 125 hate speech incidents ENAR recorded in the period July – December 2017 occurred online. See Lucy Michael (2018) [Reports of racism in Ireland: 17<sup>th</sup>+18<sup>th</sup> quarterly reports of iReport.ie, July–December 2017](#), p.7.

<sup>7</sup> ECRI (2016) [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, p.4.

<sup>8</sup> Aisling Twomey (2017) details how a Facebook page entitled ‘Get them out’, which targeted hate at members of the Roma community, was used to initiate a street protest against Roma people living in Waterford city. See Aisling Twomey (2017) ‘A Civil Society Perspective on Anti-Traveller and Anti-Roma Hate’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (2017) *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland*. Palgrave Macmillan.

<sup>9</sup> Alexander Tsesis, (2009) ‘[Dignity and Speech: The Regulation of Hate Speech in a Democracy](#)’, *Wake Forest Law Review*, Vol. 44, 2009, p.497-532.

<sup>10</sup> Committee on the Elimination of Racial Discrimination (2013) [General Recommendation No. 35](#), para.28.

<sup>11</sup> *Ibid.*, para.29.

“and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other.”<sup>12</sup>

There is no universal definition of hate speech in international human rights law. Hate speech can be explicit, or it can take the form of indirect, coded language.<sup>13</sup> The Commission understands hate speech to be a broad spectrum of discriminatory discourse. Not all forms of hate speech constitute criminal offences and hate speech cannot be addressed through the criminal law alone. In terms of responding to hate speech, three subcategories of expression can be identified across the spectrum of hate speech:

- expression that constitutes a criminal offence;
- expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; and
- 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 convictions of others.<sup>14</sup>

The focus of the Department’s consultation is reform of the *Prohibition of Incitement to Hatred Act 1989*. Incitement to hatred is a particularly severe form of hate speech that is internationally recognised to require a criminal law response.<sup>15</sup> The Commission has previously voiced concerns about the effectiveness of this legislation,<sup>16</sup> as have international human rights and equality monitoring bodies; the European Commission against Racism and Intolerance (ECRI) has recently criticised the legislation’s limited scope and has recommended the amendment of the criminal law to include a wider range of expression-based offences.<sup>17</sup>

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<sup>12</sup> CERD (2013) [General Recommendation No. 35](#), para.45.

<sup>13</sup> Para.7, CERD (2013) [General Recommendation No. 35](#).

<sup>14</sup> Office of the High Commissioner for Human Rights (2013) [Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred \(Rabat Plan of Action\) A/HRC/22/17/Add.4](#), para.12.

<sup>15</sup> For example, such recognition can be observed in the EU Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law.

<sup>16</sup> For example, see IHREC (June 2014) [Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights](#), at para 188.

<sup>17</sup> See ECRI (2019) [ECRI Report On Ireland \(fifth monitoring cycle\)](#), Adopted on 2 April 2019, Published on 4 June 2019.

Section 3 of this submission discusses relevant human rights norms and standards on incitement to hatred. Section 4 considers the scope of the 1989 Act and Section 5 addresses reform of the act with specific reference to the consultation questions posed. Where criminal law is used to address severe forms of hate speech, further measures beyond such law are needed to ensure there is adequate institutional capacity to implement it. Section 6 outlines some such measures with regard to the monitoring and recording of such offences by An Garda Síochána.

However, the Commission is of the view that all forms of hateful expression necessitate a response.<sup>18</sup> Thus, Section 2 of this submission first considers a range of measures responding to hate speech that could be taken in areas including media regulation and self-regulation, codes of conduct for public bodies and elected representatives, counter speech, education and awareness raising, and support for victims.

The Commission notes that its concerns about hate speech arise in the wider context of developments internationally, as many countries in Europe and further afield have embraced a narrow and inward-looking vision of what former High Commissioner for Human Rights Zeid Ra'ad al-Hussein describes as “increasingly strident, zero sum nationalism”.<sup>19</sup> The Commission believes that strong leadership needs to be shown in response to these developments. The State can show such leadership by promoting reforms and initiatives that aim to ensure that hate-motivated behaviour is consistently identified and challenged.

Finally, while this submission makes recommendations to inform the Department’s review of the *Prohibition of Incitement to Hatred Act 1989*, further reforms to the criminal law may be needed to address other severe forms of hate speech<sup>20</sup> and should be considered as part of a wider reform of hate crime law. The Commission may expand on these criminal law reforms in the Department’s forthcoming consultation on hate crime.<sup>21</sup>

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<sup>18</sup> McGonagle (2013) *The Council of Europe against online hate speech*, p.6.

<sup>19</sup> Zeid Ra'ad Al Hussein (2018) ‘[Human rights are not a luxury](#)’, *Washington Post*, 15 June.

<sup>20</sup> For example, direct abuse towards an individual on the grounds of a protected characteristics in the absence of a wider intention or likelihood to stir up hatred.

<sup>21</sup> The Department has indicated a separate consultation on hate crime will be held in 2020.

## 2. Responding to hate speech

While criminal sanctions are necessary for condemning severe forms of hate speech, the human sentiment of hatred cannot be eliminated by legal prohibition alone.<sup>22</sup> What is ultimately required is to address and counter the conditions conducive to the use of hate speech.<sup>23</sup> As the guidance of human rights and equality bodies has emphasised, criminal sanctions are therefore only one component of the required response to hate speech.<sup>24</sup> Before responding to the Department's questions regarding the prohibition of incitement to hatred in criminal law, this submission therefore considers a range of measures that could be taken in areas including media regulation and self-regulation, codes of conduct for public bodies and elected representatives, counter speech, education and awareness raising, and support for victims.

### Media regulation and self-regulation

Objective media play an essential role in the dissemination of information in a democratic society. It is crucial therefore that media avoid disseminating information which could have the effect of promoting intolerance.<sup>25</sup> The European Commission against Racism and Intolerance (ECRI) recommends that States "use regulatory powers with respect to the media (including internet providers, online intermediaries and social media), to promote action to combat the use of hate speech" and in this regard encourages the use of self-regulation as a means of ensuring that any control over freedom of expression is as limited

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<sup>22</sup> United Nations (2012) *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, para.32.

<sup>23</sup> ECRI (2016) [General Policy Recommendation No. 15](#), para.2.

<sup>24</sup> See European Commission Against Racism and Intolerance (ECRI) (2016) [General Policy Recommendation No. 15 on Combatting Hate Speech](#); Committee on the Elimination of All Forms of Racial Discrimination (2013) [General recommendation No. 35: Combating racist hate speech](#); United Nations (2012) [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), U.N. doc. A/67/357.

<sup>25</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation no. 35*, para.40.



as possible.<sup>26</sup> Self-regulation includes adherence to codes of journalistic ethics, the adoption of codes of professional practice and the effective implementation of terms of use.<sup>27</sup>

## Press codes and journalistic ethics

A free media plays a fundamental role in promoting an open, democratic, and equal society. The right of the press to freedom of expression is afforded special protection under the Irish Constitution. Article 40.6.1°(i) of the Constitution provides that the State must seek to ensure the media (the “organs of public opinion”) can exercise their “rightful liberty of expression”, provided they “shall not be used to undermine public order or morality or the authority of the State”.<sup>28</sup> Irish courts have recognised “the need for vigorous and informed debate on issues of importance” and for “substantial justification” on an “excessive or unreasonable interference with the conditions necessary for such debate”.<sup>29</sup>

The Press Council of Ireland and Office of the Press Ombudsman are statutory self-regulatory bodies providing oversight of the press in Ireland.<sup>30</sup> These bodies consider complaints relating to newspapers (print and online), magazines and online-only news publications. Principle eight of the Press Council of Ireland’s Code of Practice provides:

“Newspapers and magazines shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness or age”.<sup>31</sup>

According to the handbook accompanying the code of practice, the Council may decide not to uphold a complaint for a wide range of reasons, including where the publication concerned has taken or offered to take sufficient remedial action to resolve a complaint.<sup>32</sup>

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<sup>26</sup> ECRI (2016) [General Policy Recommendation No. 15 on Combatting Hate Speech](#), p.7-8.

<sup>27</sup> CERD (2013) [General Recommendation No. 35](#).

<sup>28</sup> Article 40.6.1°(i), [Constitution of Ireland](#).

<sup>29</sup> *Cogley v RTE* [2005] I.R. 79 at para 94.

<sup>30</sup> The bodies are recognised in statute under the *Defamation Act 2009*.

<sup>31</sup> ‘Principle 8 – prejudice’, Press Council of Ireland, [Code of Practice](#). In 2017, 14.7% of complaints received by the Council concerned an alleged breach of this principle of the code. See Press Council of Ireland, [Annual Report 2017](#), p.9.

<sup>32</sup> Press Council of Ireland & Office of the Press Ombudsman (2014), [Code of Practice for Newspapers and](#)

Sufficient remedial action by a publication can include the publication of a correction, a clarification or apology, a right of reply, or the amendment or deletion of online material.

We are currently seeing a growing circulation of racist and hate speech and discriminatory discourse in public commentary and in the public sphere both online and offline. In this challenging context the role of the press in ensuring an informed, objective and respectful public debate is fundamental in supporting an open, democratic, and equal society for all. Given this, it is important that standards and codes of practice are actively implemented and are kept under review to ensure that the sanctions available are effective and responsive to the current trends.

**The Commission recommends that there be appropriate support and training available to editors and journalists as to the nature and dynamics of hate speech.**

**Where hateful material is published by the press, the Commission supports the swift imposition of remedial action such as the publication of a correction, clarification or apology, a right of reply, or the amendment or deletion of hateful content online.**

**Codes of practice should be actively supported and implemented and should be kept under review to ensure that the sanctions available are effective and responsive to the current trends.**

## **Social media standards and take-down procedures**

The Commission notes the emergence of ‘notice and take-down’ procedures as the primary mechanism of self-regulation for social media platforms. These mechanisms have been codified at the European level, with the European Commission having agreed in 2016 a *Code of conduct on countering illegal hate speech online* with Facebook, Microsoft, Twitter and YouTube.<sup>33</sup> By agreeing to the code, the companies commit to having in place “clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content” and also commit to reviewing the

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[Magazines: Handbook, January 2014](#), p.4.

<sup>33</sup> Other companies to have since joined the code of conduct include Instagram, Google+, Snapchat, Dailymotion and Jeuxvideo.com.

majority of valid notifications for removal of illegal hate speech within 24 hours.<sup>34</sup> The code does not provide for the administration of penalties or sanctions if signatories fail to abide by these commitments.<sup>35</sup>

Notice and take-down processes have been criticised for being ad-hoc in nature, meaning “individuals are at the mercy of each company, its regime and approach as to whether it will take the impugned material down and how quickly it will do so”.<sup>36</sup> These processes have also been criticised for placing the primary responsibility to identify hateful content on users, rather than on the companies themselves.<sup>37</sup> Further, the efficacy of notice and take-down processes is difficult to assess due to a lack of information on the number of people employed to investigate notifications and on the scale or outcome of reported infringements.<sup>38</sup>

The Law Reform Commission has recommended the establishment of a monitoring and oversight body to regulate the operation of notice and take-down processes.<sup>39</sup> The Minister for Communications, Climate Action and Environment has proposed to introduce an Online Safety and Media Regulation Bill to regulate the content shared on social media platforms by “setting a clear expectation for service providers to take reasonable steps to ensure the safety of the users of their service” and establish an Online Safety Commissioner to oversee the new regulatory framework.<sup>40</sup>

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<sup>34</sup> European Commission (2016) [Code of conduct on countering illegal hate speech online](#).

<sup>35</sup> This point was noted in House of Commons Home Affairs Committee (2018) [Hate crime: abuse, hate and extremism online](#), p.13.

<sup>36</sup> See Dr Geoffrey Shannon (2017) [Statement to the Oireachtas Joint Committee on Children and Youth Affairs](#), p.3.

<sup>37</sup> House of Commons Home Affairs Committee (2018) [Hate crime: abuse, hate and extremism online](#), p.12.

<sup>38</sup> See para 3.17 of the Law Reform Commission (2016) [Report on Harmful Communications and Digital Safety](#). Social media companies have consistently refused to clarify with precision the number of staff or the amount of money they are committing to moderate the content on their platforms. See House of Commons Home Affairs Committee (2018) [Hate crime: abuse, hate and extremism online](#), p.15.

<sup>39</sup> See Law Reform Commission (2016) [Report on Harmful Communications and Digital Safety](#) LRC 116 – 2016 (available at <http://www.lawreform.ie/fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf>).

<sup>40</sup> Department of Communications, Climate Action and Environment (2019) [Regulation of Harmful Online Content and the Implementation of the revised Audiovisual Media Services Directive](#) (press release). The Commission notes that the Broadcasting Authority of Ireland has proposed that remit of the new regulator should include regulating both “open” online services (e.g. social media platforms) and “encrypted” online services (e.g. private messaging services). See Broadcasting Authority of Ireland (2019) [Submission to the Department of Communications, Climate Action & Environment Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Service Directive](#), p.59. Concerns have been raised that this proposed remit to access, monitor and censor private

The Commission notes that these initiatives to better regulate harmful content online are developing in the context of a forthcoming revision of the EU Audiovisual Media Services Directive.<sup>41</sup> The revised directive will extend the scope of EU broadcasting regulations to online video-sharing platforms, the scope of which will include social media platforms such as Facebook and YouTube.<sup>42</sup> It will place new requirements on these platforms, including to take measures to protect the general public from audiovisual content that contains incitement to violence and hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter of the European Union.<sup>43</sup>

The revised Directive also provides greater clarity regarding determinations of regulatory jurisdiction over media service providers operating in more than one Member State.<sup>44</sup> As noted by the Department of Communications, Climate Action and Environment, Ireland will have a significant role to play in regulating many relevant services on an EU-wide basis.<sup>45</sup>

The revised Directive encourages regulation through the adoption of codes of conduct, with the enforcement of these codes to be provided for by effective and proportionate sanctions

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communications goes beyond the provisions of the Directive and would represent an infringement of the rights to privacy, freedom of expression and freedom of association. See Irish Council for Civil Liberties (2019) [Statement on BAI's proposals for internet regulation](#). Proposals to introduce a similar regulatory framework were recently published by the UK Government. These proposals would place a statutory 'duty of care' on companies to take more responsibility for the safety of their users and tackle harm caused by content or activity on their services. Compliance with this duty of care would be overseen and enforced by an independent regulator, which would be mandated to require annual transparency reports from companies outlining the prevalence of harmful content on their platforms and what countermeasures they are taking to address these. A consultation on the proposed regulatory framework closed on 1 July 2019. See HM Government (UK) (2019) [Online Harms White Paper](#).

<sup>41</sup> [DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services \(Audiovisual Media Services Directive\) in view of changing market realities](#). The deadline for the implementation of the provisions of the Directive is 19 September 2020 – see Department of Communications, Climate Action and the Environment (2019) [Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive: Explanatory Note](#).

<sup>42</sup> [DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL](#), para.6(1).

<sup>43</sup> [DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL](#), para.9. These grounds include “sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”. See Article 21(1) of the [Charter of Fundamental Rights of the European Union](#).

<sup>44</sup> [DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL](#), para.3.

<sup>45</sup> Department of Communications, Climate Action and the Environment (2019) [Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive: Explanatory Note](#).

for non-compliance.<sup>46</sup> Where the regulatory authorities of a Member State deem that a code of conduct has proven not to be sufficiently effective, the Directive provides for the Member State to require media service providers under their jurisdiction to comply with more detailed or stricter rules to ensure compliance with the Directive and with EU law.<sup>47</sup>

Regarding notice and take-down procedures, the OSCE recommends:

“States should require internet intermediaries to adopt and effectively implement clear and transparent policies and procedures governing the removal of illegal content disseminated by users through their services or networks. Those procedures should be subject to due process, including adequate oversight and effective appeal mechanisms, and ultimately be subject to independent judicial review and remedies”.<sup>48</sup>

**The Commission is of the view that, in the context of the forthcoming revision to the EU Audiovisual Media Services Directive, the State should show leadership by developing a comprehensive regulatory framework to combat online hate speech.**

**Under this framework, the operation of notice and take-down procedures for removing illegal content online should be subject to codes of practice, compliance with which should be promoted by way of effective and proportionate sanctions. The framework should also ensure there is transparency with regard to the prevalence of online hate speech and the measures being taken by internet intermediaries to address it.**

**The Commission supports the establishment of an independent statutory body to monitor and enforce compliance with the new regulatory framework.**

## Broadcasting standards

In contrast to the self-regulatory model of press regulation, broadcasting is subject to structural and content regulation under the *Broadcasting Act 2009*. This regulatory framework operates by way of a licensing regime overseen by the Commission for

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<sup>46</sup> DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, para.1.

<sup>47</sup> DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, para.5.

<sup>48</sup> OSCE (2019) [The Tallinn Guidelines on National Minorities and the Media in the Digital Age & Explanatory Note](#), para.37.

Communications Regulation (ComReg), the body which grants broadcasting licenses. Under the *Broadcasting Act 2009*, television and radio broadcasters must not broadcast “anything which may reasonably be regarded as causing harm or offence, or as being likely to promote, or incite to, crime or as tending to undermine the authority of the State”.<sup>49</sup>

The Broadcasting Authority of Ireland (BAI) monitors compliance by broadcasters with broadcasting rules. The BAI *Code of Programme Standards* was prepared under the *Broadcasting Act 2009* and broadcasters are required to comply with its principles, including the following:

“The manner in which persons and groups in society are represented shall be appropriate and justifiable and shall not prejudice respect for human dignity. Robust debate is permissible as is the challenging of assumptions but programme material shall not stigmatise, support or condone discrimination or incite hatred against persons or groups in society in particular on the basis of age, gender, marital status, membership of the Traveller community, family status, sexual orientation, disability, race, nationality, ethnicity or religion.”<sup>50</sup>

As part of its monitoring role, the BAI considers complaints relating to broadcasts, where viewers and listeners consider that the broadcaster has not complied with the BAI’s codes and rules.<sup>51</sup> The BAI publishes the decisions of its compliance committee.<sup>52</sup>

Hate speech in broadcasting has been the subject of complaint.<sup>53</sup> For example, in 2016 the BAI upheld a complaint regarding a radio show during which a caller expressed views which were “extremely racist in nature and amounted to hate speech”. The caller was given “repeated opportunities to air these views” and the BAI Compliance Committee held that these views should not have been broadcast in such an extensive manner as there was no editorial justification.<sup>54</sup>

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<sup>49</sup> Section 39(1)(d), *Broadcasting Act 2009*.

<sup>50</sup> Principle 5, BAI *Code of Programme Standards* (available at <http://www.bai.ie/en/codes-standards/#al-block-4>).

<sup>51</sup> The viewer or listener must first raise the complaint directly with the broadcaster.

<sup>52</sup> These decisions are published on the BAI’s website, [www.bai.ie](http://www.bai.ie).

<sup>53</sup> The BAI informed the ECRI that in the last five years, nine complaints were submitted invoking Principle 5 of the BAI Code of Programme Standards. Three of these complaints were upheld as breaches of the code. See ECRI (2019) *ECRI Report On Ireland (fifth monitoring cycle)*, adopted on 2 April 2019, Published on 4 June 2019, para.38.

<sup>54</sup> See Broadcasting Authority of Ireland (2016) *Broadcasting Complaint Decisions, May 2016*, p.15-18.

When the BAI upholds a complaint of a breach of its codes and rules, it will in most cases publish and distribute information about the complaint,<sup>55</sup> but “does not have any power to award to any party, costs or expenses”.<sup>56</sup>

**The Commission is of the view that compliance with regulatory mechanisms aiming to prevent hate speech, such as codes of conduct, should be supported by way of dissuasive sanctions for breach of their provisions.**

## Codes of conduct for public officials, election candidates and elected representatives

Public officials, election candidates and elected representatives play a crucial role in shaping political discourse.<sup>57</sup> Political discourse that fosters a climate of hostility and intolerance can exclude targeted groups from the public sphere,<sup>58</sup> directly contradicting for targeted groups the right to freedom of opinion and expression.<sup>59</sup> Moreover, there is evidence to suggest that the use of exclusionary, nationalist rhetoric by elected officials is positively correlated with the occurrence of hate crime incidents.<sup>60</sup>

The Commission believes it is imperative that public officials, election candidates and elected representatives avoid making statements which promote or endorse hatred. Formal rejection of hate speech by high-level public officials can play an important role in promoting

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<sup>55</sup> “the broadcaster concerned will broadcast a summary of the BAI’s decision, unless it considers it inappropriate to do so. This could include the name of the person who made the complaint. This will be done at a time and manner suitably similar or close to the timing of the original broadcast which prompted the complaint. In most instances, a copy of the decision of the BAI will be published and distributed to media. This document will include a summary of the initial complaint, the initial response from the broadcaster and the broadcaster’s response to the BAI (where relevant). The programme, broadcast date and the name of the complainant will also be published”. See Broadcasting Authority of Ireland (2017) [A Guide for Listeners & Viewers to the Complaints Process & the Broadcasting Authority of Ireland](#), p.24.

<sup>56</sup> Broadcasting Authority of Ireland (2017) [A Guide for Listeners & Viewers to the Complaints Process & the Broadcasting Authority of Ireland](#), p.24.

<sup>57</sup> CERD (2013) [General Recommendation No. 35](#), para.15

<sup>58</sup> Alexander Tsesis, ‘[Dignity and Speech: The Regulation of Hate Speech in a Democracy](#)’, *Wake Forest Law Review*, Vol. 44, 2009, p.497-532.

<sup>59</sup> United Nations (2012) [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), para 62

<sup>60</sup> Olga Chyzh, Mark Niemany and Clayton Webb (2019) ‘The Effects of Dog-Whistle Politics on Political Violence’, Working paper, available on Professor Chyzh’s website: <http://www.olgachyzh.com/research/>.



a culture of tolerance and respect throughout society.<sup>61</sup> International human rights and equality monitoring bodies recommend self-regulation in this regard, encouraging States to support codes of conduct which clearly prohibit the use or endorsement of hate speech by public figures, and provide for suspension and other sanctions upon breach of their provisions.<sup>62</sup>

The *Civil Service Code of Standards and Behaviour* provides that civil servants are required “to ensure non-discriminatory language is used in all communications, both internal and external, including display material and documents in electronic form”.<sup>63</sup> However, the Commission notes that the codes of conduct in place for office holders, TDs, and Senators do not clearly prohibit hate speech.<sup>64</sup> The Commission has previously recommended that an electoral commission be mandated to develop and promote standards in political discourse for election candidates.<sup>65</sup>

The Commission notes that the *Public Sector Standards Bill 2015*,<sup>66</sup> currently at third stage before Dáil Éireann, proposes to establish a duty for every public official “to maintain proper standards of integrity and concern for the public interest”.<sup>67</sup> The Bill would also establish a Public Sector Standards Commissioner to issue a model code of conduct to be adapted for

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<sup>61</sup> CERD (2013) [General Recommendation No. 35](#), para.37.

<sup>62</sup> ECRI (2016) [General Policy Recommendation No. 15](#), p.7.

<sup>63</sup> Standards in Public Office Commission (2008) [Civil Service Code of Standards and Behaviour](#), para.10.

<sup>64</sup> The Code of Conduct for Office Holders is based on a principle of ethical conduct which includes for office holders a duty “to promote the common good, fairly and impartially ... and to observe the highest ethical standards in the performance of their duties.” The Code describes a successful ethics regime as one where Members can be guided by “the general principle that the public interest should always take precedence over the interests of the individual and, perhaps more importantly, over the interests of a political party whether in power or in opposition”. See SIPO (2003) [Code of Conduct for Office Holders, as drawn up by the Government pursuant to section 10\(2\) of the Standards in Public Office Act 2001](#), para.1.4. The Code of Conduct for Members of Dáil Éireann other than Office Holders and the Code of Conduct for Members of Seanad Éireann both provide that members of these houses must exercise their influence “to advance the public interest”. See SIPO (2002) [Code of Conduct for Members of Dáil Éireann other than Office Holders](#) and SIPO (2002) [Code of Conduct for Members of Seanad Éireann](#).

<sup>65</sup> Irish Human Rights and Equality Commission (2019) [Recommendations on the Establishment of an Electoral Commission](#), p.6.

<sup>66</sup> In January 2019 the Minister for Public Expenditure and Reform, sponsor of the bill, reported on its progress through the legislative process: “the Public Sector Standards Bill 2015 was published on 23 December 2015 and completed Second Stage in the Dáil on 20 January 2016. Committee Stage commenced on the 6th of April 2017, where sections 1 to 42 of the 66 sections in the Bill were agreed. Much work has been completed since the Bill was considered in Committee...my Department has been working tirelessly on various items regarding the Bill, with a view to facilitating the speedy passage of the Bill through the Oireachtas, once Committee Stage is re-commenced”. See [PQ 1638/19 1639/19](#).

<sup>67</sup> Section 10, [Public Sector Standards Bill 2015](#).



use in further codes guiding public officials to comply with the legislation.<sup>68</sup> The Commissioner would also be mandated to “promote, through training, education and research, and guidelines issued for the purpose by the Commissioner, the highest standards of conduct and integrity among public officials”.<sup>69</sup>

**The Commission recommends that codes of conduct for public officials and election candidates should clearly prohibit the use or endorsement of hate speech. These codes should provide for appropriate sanctions for breach of their conditions.**

## Counter-speech

A culture of public discourse in which people can freely articulate and debate experiences and deconstruct stereotypes is essential to combatting hate speech.<sup>70</sup> Acts of counter speech directly confronting and condemning hateful rhetoric can help to foster such a culture.<sup>71</sup>

Public officials and elected representatives have a crucial role to play in this regard; prompt interventions from these figures can deter further hateful incidents from occurring and prevent tensions escalating between groups, while also opening space for further counter-speech by the targets of hate speech and their allies.<sup>72</sup> Condemnation by high-level public officials has taken on added importance in light of concerns about extremist groups attempting to vindicate their use of hate speech by invoking the freedom of expression debate, attempting to cast themselves as defenders of free speech.<sup>73</sup>

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<sup>68</sup> Section 30, [Public Sector Standards Bill 2015](#).

<sup>69</sup> Section 30, [Public Sector Standards Bill 2015](#).

<sup>70</sup> United Nations (2012) [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), para.62.

<sup>71</sup> ARTICLE 19 (2015) [‘Hate Speech’ Explained: A Toolkit](#), p.49.

<sup>72</sup> ECRI (2019) [ECRI Report On Ireland \(fifth monitoring cycle\)](#), Adopted on 2 April 2019, Published on 4 June 2019, paras.41.

<sup>73</sup> United Nations (2012) [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), para.65

For public officials to respond with counter-speech, they must be able to recognise hate speech and the prejudice of which it is symptomatic, express sympathy and support for its targets, and articulate its harms to society as a whole.<sup>74</sup>

In drawing attention to the proactive role that public officials can play in responding to hate speech, the Commission raises the Public Sector Equality and Human Rights Duty provided for in Section 42 of the *Irish Human Rights and Equality Commission Act 2014*.<sup>75</sup> Under this provision, all public bodies in Ireland are obliged to promote equality, prevent discrimination and protect the human rights of their customers, service users and everyone affected by their policies and plans.

**The Commission recommends that public officials and elected representatives be provided with training in equality and non-discrimination to ensure they are equipped to recognise and respond effectively to hate speech.**

## Education and awareness raising

Prevention is an essential element of any strategy to combat hate speech. In this regard it is crucial that the State provides education on human rights and equality, tolerance and knowledge of other cultures and religions.<sup>76</sup> The school system is an important focus for providing such education; school curricula and materials should be informed by and address human rights themes and seek to promote mutual respect and understanding of difference.<sup>77</sup> Regarding education for the public more broadly, the State should support information campaigns and awareness raising activities which call attention to the harms of hate speech.<sup>78</sup> Findings from the *Hate Track* research project part-funded by the Commission illustrate the need for digital literacy to be a central component of education

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<sup>74</sup> Ibid., p.49.

<sup>75</sup> S.43, [Irish Human Rights and Equality Commission Act, 2014](#).

<sup>76</sup> United Nations (2012) [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), p.17.

<sup>77</sup> CERD (2013) [General Recommendation No. 35](#), para 32. In March 2019, the Commission held a youth consultation event to inform its reporting to the CERD committee under the State's forthcoming examination under the Convention. Participants shared their experiences of discriminatory speech in school settings and teachers' failure to intervene. They also emphasised the importance of education as a means of promoting intercultural understanding and tackling the root cause of the discrimination they experience.

<sup>78</sup> CERD (2013) [General Recommendation No. 35](#), para 36.

and awareness raising programs, given the prevalence of online hate speech in Ireland.<sup>79</sup> Comprehensive measures to promote digital literacy should accompany any new online safety laws that are brought forward, as proposed by Government.

**The Commission believes that education and information initiatives promoting intercultural understanding and tolerance for diversity are essential to combatting hate speech.**

### Support for victims

Hate speech has a serious impact on its victims. It can lead those targeted to feel afraid, insecure, and humiliated, leading to a loss of self-confidence and self-esteem, and these feelings can lead to more serious mental and physical health problems developing. Hate speech has consequences for every aspect of the lives of its targets, their families and the communities to which they belong.<sup>80</sup>

It is imperative that comprehensive support is provided to victims of hate speech experiencing these serious effects. Central to this support is the provision of counselling and guidance, by appropriately trained counsellors, as soon as possible after the hate speech incident has occurred and throughout any remedial or criminal justice process which ensues.<sup>81</sup> All victims reporting a hate speech incident to the Gardaí should be assessed for access to the special measures provided for by the *Criminal Justice (Victims of Crime) Act*

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<sup>79</sup> Eugenia Siapera, Elena Moreo, Jiang Zhou (DCU, 2018), [Hate Track: Tracking and Monitoring Racist Speech Online](#), p.5.

<sup>80</sup> Latvian Center for Human Rights (2008) [Psychological Effects of Hate Crime – Individual Experience and Impact on Community](#).

<sup>81</sup> ECRI (2016) [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), para.106.

2017.<sup>82</sup> Supports such as these are essential for ensuring that victims of hate speech are not prevented from seeking redress by fear or emotional obstacles.<sup>83</sup>

As hate speech harms not only the individual targeted but the group and wider community to which they belong, support services must also respond on a collective level. Community Impact Statements, which are used in the United Kingdom, Canada and Australia, may be a valuable tool to consider in this regard, recognising the wider impacts that this kind of crime has on the community.<sup>84</sup> The complex task of examining the structural dynamics of hate might be informed by a whole-of-community approach, in asking, for example, how the structural disadvantage of minority groups combines with discrimination.

**The Commission is of the view that comprehensive support for victims of hate speech, and the groups and communities to which they belong, is an essential element of any strategy to combat hate speech.**

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<sup>82</sup> Under the Act, Gardaí investigating an alleged offence are required to assess whether victims are vulnerable to secondary and repeat victimisation, intimidation and retaliation, having regard to the victim's "age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, [and]communications difficulties". Where it appears that a victim is vulnerable in this regard, or that the alleged offence may have been committed with a bias motive on the basis of these or other personal characteristics, the Gardaí can put in place special victim support measures during the course of an investigation of the alleged offence and any related criminal proceedings. Special measures can include interviews being conducted in a location specially designed or adapted for the purpose; interviews being conducted by someone who has specialised training; the trial taking place without the presence of the general public; measures to ensure the victim avoids contact with the alleged offender (this could mean testifying from behind a screen or from a different room over a video link); and the victim not being cross-examined about their private life if it is not related to the criminal offence. See sections 15-21, [Criminal Justice \(Victims of Crime\) Act 2017](#).

<sup>83</sup> ECRI (2016) [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#).

<sup>84</sup> A Community Impact Statement is described by Dublin City Council as: 'a statement compiled by a consortium of stakeholders in a community, including the Police, describing the impact of anti-social-behaviour on a specific neighbourhood or identifiable group of people. It is used as the basis for developing a focused action plan on such a problem. It is also used as a benchmark against which progress can be measured' (see <https://www.dublincity.ie/councilmeetings/mgConvert2PDF.aspx?ID=11502>). The Garda Síochána Inspectorate recommended introducing Community Impact Statements and Dublin City Council has recommended introducing pilot schemes in three areas in Dublin, see <https://www.dublincity.ie/councilmeetings/documents/s12645/COMMUNITY%20IMPACT%20STATEMENTS%20Presentation%20June%202017.pdf>.

### 3. Prohibiting incitement to hatred: Human rights norms and standards

The guidance on responding to hate speech<sup>85</sup> put forth by international and regional human rights and equality bodies recognises that while criminal sanctions alone are not sufficient to eradicate the use of hate speech, they are an appropriate and necessary response to the most severe forms of hate speech, such as incitement to hatred. The consequences of incitement to hatred are serious; it can normalise prejudice and discrimination, cause members of targeted groups to feel vulnerable to attack and excluded from the wider community, and potentially lead to violence or public disorder.<sup>86</sup> Criminal sanctions acknowledge and respond to this by codifying the social condemnation of hate in law, communicating to victims, offenders and wider society that hate will not be tolerated.<sup>87</sup>

The **EU Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law** requires Member States to punish certain acts carried out in a manner likely to incite violence or hatred against a group of persons or one or more of its members as defined by reference to race, colour, religion, descent or national or ethnic origin.<sup>88</sup> These acts include:

- publicly inciting to violence or hatred, including by public dissemination or distribution of tracts, pictures or other material;
- publicly condoning, denying or grossly trivialising
  - crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court (hereinafter 'ICC'); or

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<sup>85</sup> See European Commission Against Racism and Intolerance (ECRI) (2016) [General Policy Recommendation No. 15 on Combatting Hate Speech](#); Committee on the Elimination of All Forms of Racial Discrimination (2013) [General recommendation No. 35: Combating racist hate speech](#); United Nations (2012) [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), U.N. doc. A/67/357.

<sup>86</sup> Scottish Government / Lord Bracadale (2018) [Independent Review of Hate Crime Legislation in Scotland](#), p.58.

<sup>87</sup> Scottish Government / Lord Bracadale (2018) [Independent Review of Hate Crime Legislation in Scotland](#), p.59.

<sup>88</sup> EU [Council Framework Decision 2008/913/JHA](#).

- the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945.<sup>89</sup>

A certain discretion is afforded to Member States to punish only conduct which is *either* (i) carried out in a manner which is likely to disturb public order *or* (ii) which is threatening, abusive or insulting. Ireland makes the conduct of ‘stirring up hatred’ dependent on it being threatening, abusive or insulting (as discussed further below).<sup>90</sup>

Ireland is also bound to the **European Convention on Human Rights** (ECHR), Article 10 of which provides that “everyone has the right to freedom of expression”, including “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.<sup>91</sup> Freedom of expression is a fundamental human right; it is an indispensable condition for the full development of the person and foundation stone for every free and democratic society.<sup>92</sup> Freedom of expression provides the vehicle for the exchange and development of opinions, ensuring there is democratic accountability by enabling people to freely debate issues and raise concerns with government. The right to freedom of expression underpins many other rights, including freedom of assembly and association, the exercise of the right to vote, and the right to participate in public affairs.<sup>93</sup>

Freedom of expression is not an absolute right; the ECHR provides that freedom of expression rights “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society” for a number of reasons, including “for the prevention of disorder or crime” and “for the protection of the reputation or rights of others”.<sup>94</sup>

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<sup>89</sup> Ibid., Article 1.

<sup>90</sup> European Commission (2014) [Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law](#).

<sup>91</sup> Article 10 of the [European Convention on Human Rights](#). Article 11 of the Charter of Fundamental Rights of the European Union and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) protect freedom of expression rights in similar terms to those provided for in the ECHR. See Article 11 [Charter of Fundamental Rights of the European Union](#); Article 19 ICCPR/ Article 40 of the Constitution of Ireland protects the right to freedom of expression domestically in Ireland.

<sup>92</sup> Dominika Bychawska-Siniarska (2017) [Protecting The Right To Freedom Of Expression Under The European Convention On Human Rights: A Handbook for Legal Practitioners](#), p.11-12.

<sup>93</sup> Ibid.

<sup>94</sup> Article 10(2) ECHR.

While the ECHR does not contain an explicit obligation for States to prohibit incitement to hatred, the European Court of Human Rights (ECtHR) nonetheless assesses cases alleging incitement to hatred in two ways. Firstly, in terms of the prohibition on the abuse of rights under Article 17 ECHR.<sup>95</sup> Article 17 ECHR forbids an interpretation of the ECHR which aims to negate any other rights protected by, or values underlying, the Convention.<sup>96</sup> The incitement of hatred negates the Convention's underlying values of tolerance, social peace and non-discrimination, and therefore on the basis of Article 17 ECHR does not enjoy the protection of free expression rights<sup>97</sup> or rights associated with free assembly and association.<sup>98</sup> Article 17 ECHR ensures that free expression rights will not assist in the assertion of opinions which seek to negate agreed historical facts, for example, Holocaust denial.<sup>99</sup> Neither can Article 10 support the distribution of leaflets which spread racially discriminatory ideas,<sup>100</sup> or defend acts which comprise aggravated hostility towards a religious group.<sup>101</sup>

Secondly, the ECtHR assesses incitement to hatred in terms of restricting the right to free expression under Article 10 where the expression is hate speech but not to the degree that it negates ECHR fundamental values under Article 17.<sup>102</sup> While Article 10 protects expressions that offend, shock and disturb,<sup>103</sup> the ECtHR has refused to uphold freedom of expression rights in cases involving expressions which: are considered to be inciting of hostility;<sup>104</sup> involve the circulation of homophobic leaflets;<sup>105</sup> involve condoning terrorism

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<sup>95</sup> Article 17 ECHR reads: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

<sup>96</sup> *Seurot v France* (Application no 57383/00) Admissibility decision of 18 May 2004. See [Factsheet of the European Court of Human Rights on Hate Speech](#).

<sup>97</sup> In *Pavel Ivanov v Russia* (Application no 35222/04) Admissibility Decision of 20 February 2007 an applicant could not enjoy the protection of Article 10 ECHR where he published a series of articles depicting Jewish people as a source of evil in Russia. See [Factsheet of the European Court of Human Rights on Hate Speech](#).

<sup>98</sup> In *WP and Ors v Poland* (Application no 42264/98) Admissibility Decision of 2 September 2004, the applicants could not rely on rights protected under Article 11 ECHR in order to include in their association's constituting documents anti-Semitic statements. See [Factsheet of the European Court of Human Rights on Hate Speech](#).

<sup>99</sup> See, for example, *Garaudy v France* (Application no 65831/01) Admissibility Decision of 24 June 2003; *Honsik v Austria* (Application no 25062/94) Admissibility Decision of October 1995 and *Marais v France* (Application no 31159/96) Admissibility Decision of 24 June 1996. See [Factsheet of the European Court of Human Rights on Hate Speech](#).

<sup>100</sup> *Glimmerveen and Hagenbeek v the Netherlands* (Application no. 8348/78).

<sup>101</sup> *Norwood v the United Kingdom* (Application no 23131/03); *Belkacem v Belgium* (Application no (application no. 34367/14).

<sup>102</sup> See Council of Europe (2019) [Factsheet of the European Court of Human Rights on Hate Speech](#).

<sup>103</sup> *Handyside v United Kingdom* (Application no 5493/72) Judgment 7 December 1976

<sup>104</sup> *Sürek (no.1) v Turkey* (Application no 26682/95) Judgment 8 July 1999.

<sup>105</sup> *Vejdeland and Others v. Sweden* (Application no. 1813/07) Chamber Judgment 9 February 2012.

and glorifying violence;<sup>106</sup> or incite ethnic hatred,<sup>107</sup> including by way of videos posted online on social media sites.<sup>108</sup> Where recognising an infringement of the right to freedom of expression, the ECtHR has found the imposition of a criminal conviction can violate the proportionality principle,<sup>109</sup> illustrating the need for a wide range of responses to hate speech.<sup>110</sup>

In addition to ECHR and EU law, **international human rights instruments** explicitly require the State to prohibit incitement to hatred. Article 20(2) ICCPR requires States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.<sup>111</sup> Article 4 of the International Convention on the Elimination of Racial Discrimination (CERD) contains various obligations to condemn and take active measures to eradicate all incitement to or justification of discrimination based on ideas of racial or ethnic superiority.<sup>112</sup>

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<sup>106</sup> *Leroy v France* (Application no 36109/03) Judgment 2 October 2008.

<sup>107</sup> *Balsytė-Lideikienė v. Lithuania* (Application no 72596/01) Judgment 4 November 2008.

<sup>108</sup> *Belkacem v. Belgium* (Application no. 34367/14) Judgment 27 June 2017.

<sup>109</sup> *Jersild v. Denmark*, (Application no. 15890/89) Judgment 22 August 1992, para 35.

<sup>110</sup> Indeed, the Court has encouraged the imposition of fines as an appropriate means of striking a fair balance between free speech for the individual and society’s interest in promoting tolerance and mutual respect, in line with the values underpinning the Convention. See *Šimunić v. Croatia* (Application no. 20373/17) Judgment 22 January 2019.

<sup>111</sup> Article 20(2) ICCPR. Measures taken to prohibit incitement to hatred in accordance with Article 20(2) are subject to the conditions set out in Article 19(3) ICCPR. See Para.50 Human Rights Committee (2011) [General Comment No. 34 – Article 19: Freedoms of opinion and expression CCPR/C/GC/34](#).

<sup>112</sup> Under Article 4 ICERD, States Parties (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination. Ireland has lodged a reservation/interpretative declaration under Article 4 such that “the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. In 2011, the UN Committee on the Elimination of Racial Discrimination (CERD Committee) stated that there was no compelling evidence to justify Ireland’s reservation/interpretative declaration to Article 4 CERD and recommended its withdrawal. See Para. 17, Committee on the Elimination of Racial Discrimination (2011) [Consideration of reports submitted by States parties under article 9 of the Convention Concluding Observations of the Committee on the Elimination of Racial Discrimination, Ireland](#). ECRI has also urged States to withdraw any reservations to Article 4 ICERD. See ECRI [General Policy Recommendation No. 15](#). The former Irish Human Rights Commission has previously recommended that this reservation be withdrawn. See Irish Human Rights Commission (2010) [Submission to the UN CERD Committee on the Examination of Ireland’s Combined Third and Fourth Periodic Reports](#), November 2010, para.8.



## 4. Scope of the Prohibition of Incitement to Hatred Act 1989

The *Prohibition of Incitement to Hatred Act 1989* ('the 1989 Act') criminalises certain behaviour and expression that is likely or intended to provoke hatred against a group of persons. The means through which a person can stir up hatred under the 1989 Act include: the publication or distribution of written material; the use of words, behaviour or display of written material; or the distribution, showing, or playing of a recording of visual images or sounds. Persons involved in broadcasting which is likely to stir up hatred or preparing or possessing material with a view to distributing, displaying or broadcasting the material, may also be guilty of committing an offence under the 1989 Act. The offence of incitement does not have to involve communication with the intended victims; it is addressed to other persons for the purpose of persuading them to commit an offence against these victims.<sup>113</sup>

In its most recent review on Ireland,<sup>114</sup> the ECRI pointed out that the 1989 Act does not cover the following elements of hate speech:

- the legislation does not provide for separate offences of public incitement to violence, hatred or discrimination; public insults; and defamation
- it lacks the offences of incitement to violence and to discrimination
- it applies only where a group of persons is targeted but not an individual
- there is no reference to the ground of language
- the above-mentioned acts are not criminalised per se but only where they are intended or likely to stir up hatred.

The ECRI further noted that “there are no provisions penalising the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a group of persons” or provisions “on the public denial, trivialisation, justification or condoning of crimes of genocide, crimes against humanity or war crimes”.<sup>115</sup> It also drew

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<sup>113</sup> See p.57 Jennifer Schweppe and Dermot Walsh (2008) [Combating Racism and Xenophobia through the Criminal Law: A Report Commissioned by the National Action Plan Against Racism](#).

<sup>114</sup> ECRI (2019) [ECRI Report On Ireland \(fifth monitoring cycle\)](#), Adopted on 2 April 2019, Published on 4 June 2019.

<sup>115</sup> ECRI (2019) [ECRI Report On Ireland \(fifth monitoring cycle\)](#), para.5.

attention to the absence of “provisions setting out criminal liability for racial discrimination in the exercise of one’s public office or (private) occupation”.<sup>116</sup>

Direct abuse towards an individual on the grounds of a protected characteristic is not necessarily prohibited under the 1989 Act, in the absence of a wider intention, or likelihood, to stir up hatred.<sup>117</sup> Instead, such actions may be prosecuted under other criminal statutes. For example, section 6 of the *Criminal Justice (Public Order) Act 1994* makes it an offence to “use or engage in any 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”.<sup>118</sup> In addition, harassment is an offence under section 10 of the *Non-Fatal Offences Against the Person Act 1997*. However, these offences do not incorporate a hate element.

The 1989 Act is the only criminal statute that prohibits hate speech in Irish criminal law. Given the wide range of forms in which hate speech can occur, this means only the most serious cases of hate speech – those concerning incitement to hatred – currently attract criminal sanction in Ireland.

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<sup>116</sup> ECRI (2019) [ECRI Report On Ireland \(fifth monitoring cycle\)](#), para.6.

<sup>117</sup> Under the Framework Decision, the victims of incitement comprise either a group of persons or a member of such a group, though a number of States (like Ireland) refer only to a group of people. See European Commission (2014) [Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law](#).

<sup>118</sup> Section 6, [Criminal Justice \(Public Order\) Act, 1994](#).

## 5. Reforming the 1989 Act

Courts Service figures show that since 2000,<sup>119</sup> there have been 44 prosecutions under the 1989 Act, resulting in just five convictions, two of which resulted in imprisonment.<sup>120</sup> Of the 44 prosecutions initiated under the 1989 Act, 22 cases were struck out or dismissed by the court and seven were withdrawn by the Director of Public Prosecutions.<sup>121</sup> Moreover, as reported by the State to the European Commission against Racism and Intolerance (ECRI), the police have recorded just seven incidents under section 2 of the 1989 Act since 2014, with only two cases going for prosecution.<sup>122</sup>

Noting the low rate of prosecutions under the 1989 Act, the Commission has taken the view that the Act is “inadequate to effectively address hate speech that calls for a response in criminal law”.<sup>123</sup> The ineffective operation of the 1989 Act has been attributed to a number of issues which are consistently identified in analysis of the legislation. One key issue is the apparent reluctance of the Director of Public Prosecutions to prosecute or grant leave to prosecute complaints made under the 1989 Act, with reasons to not seek prosecution falling into the following four categories:<sup>124</sup>

- insufficient evidence (e.g. evidence of intent to incite hatred);
- definitional difficulties in the 1989 Act (e.g. definition of ‘hatred’, characterising the ‘general public’ which is the intended audience of incitement);
- prosecutorial discretion (e.g. the DPP’s case could be proved more easily under another piece of legislation, such as a public order offence) and

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<sup>119</sup> The Courts Service has indicated that there are no figures available for before 2000. However, the Department of Justice and Equality reportedly stated that no convictions had been recorded under the Act before the year 2000. See Conor Gallagher (2017) [‘Courts Service reveals five convictions for hate crime since 1989’](#), *Irish Times*, 19 June 2017.

<sup>120</sup> Law Society of Ireland (2018) [Submission on Ireland’s Combined 5th, 6th And 7th Periodic Report to the UN Committee on the Elimination of Racial Discrimination](#), para.5.2.

<sup>121</sup> Conor Gallagher (2017) [‘Courts Service reveals five convictions for hate crime since 1989’](#), *Irish Times*, 19 June 2017.

<sup>122</sup> ECRI (2019) ECRI Report on Ireland (fifth monitoring cycle), para.21. The outcomes of the two cases which progressed to prosecution is pending as of June 2019.

<sup>123</sup> Irish Human Rights and Equality Commission (2019) [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland’s Combined 5th to 9th Report](#), p.41.

<sup>124</sup> See p.100-101 Jennifer Schweppe and Dermot Walsh (2008) [Combating Racism and Xenophobia through the Criminal Law: A Report Commissioned by the National Action Plan Against Racism](#).

- procedural issues (e.g. expiration of time limit for summary proceedings).

According to a report of a conversation with the Director of Public Prosecutions published in 2008, there were at that time two primary reasons for the limited number of prosecutions under the 1989 Act:

“first, there are difficulties with proving intent to stir up hatred, particularly in a situation where there is an altercation where one party shouts abuse – a third party needs to be stirred up in order for the situation to come within parameters of the 1989 Act; and secondly, because of this, other offences are generally charged for ease of prosecution.”<sup>125</sup>

Concerns about the same issues were voiced by legal practitioners and Gardaí in a 2017 study on the operation of the 1989 Act.<sup>126</sup>

## Response to question 1: Protected characteristics covered by the 1989 Act

Question 1 of the Department’s public consultation document reads as follows.

*Are there other groups in society with shared identity characteristics, for example disability, gender identity, or others, who are vulnerable to having hatred stirred up against them and should be included in the list of protected characteristics?*

The 1989 Act currently prohibits incitement to hatred on grounds of race, colour, nationality, religion, ethnic or national origins, membership of the Travelling community or sexual orientation.<sup>127</sup> This covers all of the grounds set out in EU Council Framework Decision 2008/913/JHA, except for ‘descent’. However, it does not align to Irish equality legislation in omitting the grounds of gender, disability, civil status, family status and age.

Under the *Criminal Justice (Victims of Crime) Act 2017*, special victim support measures during the course of an investigation of an alleged offence and any related criminal

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<sup>125</sup> See p.101 Jennifer Schweppe and Dermot Walsh (2008) [Combating Racism and Xenophobia through the Criminal Law: A Report Commissioned by the National Action Plan Against Racism](#).

<sup>126</sup> Amanda Haynes and Jennifer Schweppe (2017) [Lifecycle of a Hate Crime: Country Report for Ireland](#), p.53-57.

<sup>127</sup> It should be noted that the proposed legislation was initially titled the Prohibition of Incitement to Racial, Religious or National Hatred Bill, 1988. In its passage through the Oireachtas, the protected grounds of membership of the Traveller community and sexual orientation were inserted. See Equality Authority (2006) [Traveller Ethnicity. An Equality Authority report](#).

proceedings must be provided to victims who are vulnerable to secondary or repeat victimisation, intimidation and retaliation on the basis of their “age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, [and] communications difficulties”.<sup>128</sup>

The Commission is concerned that the characteristics covered by the 1989 Act at present represents a shortcoming in the legislative framework. Research funded by the Commission has found that expressions of racism online are punctuated with misogynist and transphobic attacks in the Irish digital sphere.<sup>129</sup> Further, the commitment to “ensure enhanced protection for people with disabilities against hate crime” in the *National Disability Inclusion Strategy 2017-2021* speaks to the necessity of including disability as a protected ground.<sup>130</sup> An Garda Síochána’s *Diversity and Integration Strategy 2019-2021* sets out working definitions of hate crime and non-crime hate incidents; the personal characteristics protected therein include age, disability, race, colour, nationality, ethnicity, religion, sexual orientation or gender.<sup>131</sup>

At a minimum, the grounds upon which incitement to hatred is prohibited should be aligned to the grounds protected under equality legislation.<sup>132</sup> However, it is important to note that the Commission has previously recommended that Irish equality legislation be amended to prohibit discrimination on the ground of socio-economic status and to include a definition of multiple discrimination.<sup>133</sup> The Commission has also recommend that equality legislation be amended to cover acts targeted at individuals based on “actual or perceived sex characteristics, gender identity and gender expression”.<sup>134</sup>

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<sup>128</sup> Sections 15-21, Criminal Justice (Victims of Crime) Act 2017

<sup>129</sup> Ref. Hate Track p.

<sup>130</sup> Department of Justice and Equality (2017) [National Disability Inclusion Strategy 2017-2021](#), p.14.

<sup>131</sup> An Garda Síochána (2019) [Diversity and Integration Strategy 2019-2021](#), p.21.

<sup>132</sup> The Commission has recommended that socio-economic status be included as a protected ground under Irish equality legislation. See IHREC (2017) [Observations on the Equality \(Miscellaneous Provisions\) Bill 2017](#).

<sup>133</sup> IHREC (2017) [Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women: Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland’s combined sixth and seventh periodic reports](#). January 2017. P.34.

<sup>134</sup> *Ibid.*, p.65. See also Irish Human Rights and Equality Commission (2016) [Observations on the General Scheme of the Equality / Disability \(Miscellaneous Provisions\) Bill, November 2016](#). The aim of the recommended amendments is to ensure that equality legislation explicitly protects intersex persons, persons identifying as gender non-binary, and people discriminated against on the basis of how their gender identity is perceived by others.

**The Commission recommends that at a minimum the grounds upon which incitement to hatred is prohibited should be aligned to the grounds protected under Irish equality legislation.**

**The Commission recommends that consideration be given to prohibiting incitement to hatred on further grounds, including socio-economic status, actual or perceived sex characteristics, gender identity and gender expression.**

## **Response to question 2: Defining key terms in the 1989 Act**

Question 2 of the Department’s public consultation document reads as follows.

*Do you think the term “hatred” is the correct term to use in the Act? If not what should it be replaced with? Would there be implications for freedom of expression?*

The word ‘hatred’ is defined in the 1989 Act in terms of “hatred against a group of persons” which is based on their “race, colour, nationality, religion, ethnic or national origins, membership of the Travelling community or sexual orientation”.<sup>135</sup> The 1989 Act therefore seeks to determine what hatred means in relation to the target of the hatred and not in relation to 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”.<sup>136</sup>

The terms ‘threatening’, ‘abusive’, ‘insulting’ and the phrase ‘stir up’ are not defined under the 1989 Act. This may be impeding effective prosecution of complaints under the legislation, as indicated by the comments of the Director of Public Prosecutions in 2008 noted above.<sup>137</sup>

In implementing Council Framework Decision 2008/913/JHA, most EU Member States refer to both violence and hatred, and this is considered by the European Commission to be

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<sup>135</sup> [Section 1\(1\), Prohibition of Incitement to Hatred Act 1989](#).

<sup>136</sup> See p 60 Schweppe and Walsh (2008). ECRI on the other hand, defines hatred in terms of ‘a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group’. See ECRI (2017) [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015..

<sup>137</sup> See p.100-101 Jennifer Schweppe and Dermot Walsh (2008) [Combating Racism and Xenophobia through the Criminal Law: A Report Commissioned by the National Action Plan Against Racism](#).

relevant in terms of effectiveness. Ireland has submitted that the concept of violence is effectively covered in the term ‘hatred’.<sup>138</sup>

The UN Human Rights Council recommends that States should include robust definitions of key terms in legislative provisions prohibiting incitement to hatred.<sup>139</sup> The European Commission against Racism and Intolerance also emphasises the importance that provisions be drafted in a clear and precise manner, as without clarity and precision “there is a likely absence of legal certainty as to scope of the conduct that is prohibited”.<sup>140</sup> In this regard, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression draws attention to the following definitions of key terms developed by expert consultation and discussed at the OHCHR expert workshops on incitement:<sup>141</sup>

- a) “**Hatred**” is a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group;
- b) “**Advocacy**” is explicit, intentional, public and active support and promotion of hatred towards the target group;
- c) “**Incitement**” refers to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups
- d) “**Discrimination**” is understood as any distinction, exclusion or restriction made on the basis of race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, language, religion, political or other opinion, age, economic position, property, marital status, disability, or any other status that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of public life;
- e) “**Hostility**” is a manifestation of hatred beyond a mere state of mind.

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<sup>138</sup> See European Commission (2014) [Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.](#)

<sup>139</sup> Human Rights Council (2013) *Rabat Plan of Action*, para.21.

<sup>140</sup> ECRI (2016) [General Policy Recommendation No. 15 on Combatting Hate Speech](#), p.175.

<sup>141</sup> United Nations (2012) *Report of the Special Rapporteur*, para.44.

f) “**Violence**” is the use of physical force or power against another person, or against a group or community, which either results in, or has a high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation.

**The Commission recommends that robust definitions of key terms be included in a reformed legal framework prohibiting incitement to hatred.**

**The Commission recommends that the 1989 Act be amended to provide for the offences of incitement to “hostility” and incitement to “violence” in addition to incitement to hatred.**

### Response to question 3: Application of the 1989 Act to online hate speech

Question 3 of the Department’s consultation document reads as follows.

*Bearing in mind that the Act is designed only to deal with hate speech which is sufficiently serious to be dealt with as a criminal matter (rather than by other measures), do you think the wording of the Act should be changed to make prosecutions for incitement to hatred online more effective? What, in your view, should those changes be?*

EU law requires Member States to ensure that laws prohibiting incitement to hatred extend to cases where the conduct is committed through an information system and the offender is within the territory of the Member State, even if the content hosted is not, and to cases where the material is hosted within the territory of the Member State whether or not the offender commits the conduct when physically present in its territory.<sup>142</sup> Internationally, the majority of hate speech incidents occur online,<sup>143</sup> and there is evidence to suggest that this is the case in Ireland.<sup>144</sup> The HateTrack research project found that there is a reluctance to report online racist hate speech in Ireland, with one reason for this being a perception that doing so “is pointless because online racism is too pervasive and intractable”.<sup>145</sup>

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<sup>142</sup> Article 9(2). [Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.](#)

<sup>143</sup> ECRI (2016) [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, p.4.

<sup>144</sup> 113 of the 125 hate speech incidents ENAR recorded in the period July – December 2017 occurred online. See Lucy Michael (2018) [Reports of racism in Ireland: 17<sup>th</sup>+18<sup>th</sup> quarterly reports of iReport.ie, July–December 2017](#), p.7.

<sup>145</sup> Eugenia Siapera, Elena Moreo, Jiang Zhou (DCU, 2018), [Hate Track: Tracking and Monitoring Racist Speech Online](#). This project used a broad definition of hate speech, extending its analysis beyond incitement to hatred



The first prosecution under the 1989 Act dealing with online material concerned the creation of a Facebook page in 2009 which contained an explicit racial slur directed at the Traveller community.<sup>146</sup> The prosecution failed in the District Court, with the Judge not finding evidence beyond reasonable doubt that there was intent to incite hatred towards members of the Traveller community.<sup>147</sup> The Court took into account that the accused had only posted on the site once; however by the time Facebook acted to have the page removed, 644 people had joined the page and many more had viewed it.<sup>148</sup> As the Law Reform Commission points out, this case illustrates how online hate speech can be quickly viewed by many people and remain accessible long after it occurs.<sup>149</sup> Further, the case illustrates that it is other aspects of the 1989 Act, namely the requirement to establish intent to incite hatred, that make the Act ineffective.

While the Department raises the prospect of amending the wording of the Act to make prosecutions for incitement to hatred online more effective, the Commission notes that such a prospect has been already been considered by the Law Reform Commission.<sup>150</sup> In this regard the Law Reform Commission considered “that reform of online hate speech laws needs to be undertaken as part of an overarching reform of hate crime, as the problems with Ireland’s hate crime laws extend beyond the potential difficulty with applying them in the online setting”, and recommended that online hate speech “should be addressed as part of the general reform of hate crime law”.<sup>151</sup>

**Given the need for robust definitions of key terms to be included in legislation prohibiting incitement to hatred, the Commission recommends the 1989 Act be amended to make explicit reference to its application to online incitement to hatred.**

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to include racially-loaded toxic speech, with a view to better capturing the dynamics of hateful speech online as described to the researchers in focus group consultations with civil society organisations. See p.27-29.

<sup>146</sup> The title of the page in question was ‘Promote the use of knacker babies as shark bait’.

<sup>147</sup> PILA (2011) *Irish District Court dismisses Traveller Facebook hate speech case*, 5 October 2011 (available at <https://www.pila.ie/resources/bulletin/2011/10/05/irish-district-court-dismisses-traveller-facebook-hate-speech-case>).

<sup>148</sup> Law Reform Commission (2016) *Report on Harmful Communications and Digital Safety*, p.116.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid. p.118-119.

<sup>151</sup> Ibid.

## Response to questions 4 and 5: Proving intent or likelihood under the 1989 Act

Questions 4 and 5 of the Department's public consultation document read as follows.

*In your view, does the requirement that an offence must be intended or likely to stir up hatred make the legislation less effective?*

*If so, what changes would you suggest to this element of the 1989 Act (without broadening the scope of the Act beyond incitement)?*

The mental element (*mens rea*) required to prove an offence under the 1989 Act is intention or likelihood. Under the 1989 Act the prosecution is required to demonstrate that an accused intended to stir up hatred or it was likely, having regard to all the circumstances, that the expressed opinion would stir up hatred. While intention is the highest threshold that can be set in terms of the mental element of crimes, it has been suggested that the standard of 'likelihood' is "much less stringent".<sup>152</sup> Nevertheless, given the difficulties in prosecuting offences under the 1989 Act as mentioned above, the Commission agrees with the Department's suggestion to lower the standard to recklessness.<sup>153</sup> The ECRI recognises that where incitement to hatred "can reasonably be expected from a particular use of hate speech, it would thus be reckless for it to be used",<sup>154</sup> and notes that such an approach is in keeping with ECtHR rulings that have upheld the imposition of criminal sanctions for remarks which should have been appreciated to be likely to incite hatred in the given circumstances.<sup>155</sup> Lowering the standard to recklessness would align the 1989 Act with other legislation; intent or recklessness is the *mens rea* threshold for a charge under s.6 of the *Criminal Justice (Public Order) Act 1994*,<sup>156</sup> and under s.2 (assault) & s.10 (harassment) of the *Non-Fatal Offences Against the Person Act 1997*.<sup>157</sup>

**The Commission is of the view that the requirement for an offence to be intended or likely to stir up hatred makes the 1989 Act less effective.**

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<sup>152</sup> Daly, (2007) Prohibition of Incitement to hatred Act, ICLJ, 16-23.

<sup>153</sup> Department of Justice and Equality (2019) [Review of the Prohibition of Incitement to Hatred Act 1989 Public Consultation. October 2019](#), p.6.

<sup>154</sup> ECRI (2016) [ECRI General Policy Recommendation No. 15 on Combating Hate Speech, at para.17.](#)

<sup>155</sup> Ibid., [at para.18. The ECtHR rulings referenced are: Zana v. Turkey](#) [GC], no. 18954/91, 25 November 1997 and [Süreç v. Turkey](#) (no. 1) [GC], no. 26682/95, 8 July 1999.

<sup>156</sup> [Section 6](#) of the *Criminal Justice (Public Order) Act 1994*

<sup>157</sup> [Section 2](#) and [Section 10](#) of the *Non-Fatal Offences Against the Person Act 1997*.

**The Commission recommends that the *mens rea* threshold required to prove an offence under the 1989 Act is lowered to recklessness.**

### Ensuring effective prosecution

Section 8 of the 1989 Act stipulates that prosecutions for offences created under sections 2-4 of the 1989 Act can only proceed by or with the consent of the Director of Public Prosecutions. Schweppe and Walsh report that this provision was anticipated “to help ensure that prosecutions are only brought on the basis of sufficient evidence and pursuant to a consistent policy”.<sup>158</sup> Reviewing the legislation for the State in 2008, they suggest that “by subjecting prosecutions to the prior consent of the DPP, the State is helping to ensure that the more broadly defined offences [under the 1989 Act] are not used inappropriately to encroach on privacy and expression rights”.<sup>159</sup> However, Schweppe and Walsh then assert that “a more satisfactory balance between freedom of expression and the punishment of race hate might be achieved through the publication of guidance on the principles that will govern the DPP’s decision to prosecute and, by extension, his consent to prosecution by a third party”.<sup>160</sup> The Office of the Director of Public Prosecutions most recently published *Guidelines for Prosecutors* do not offer prosecutorial guidance on prosecuting incitement to hatred offences.<sup>161</sup>

**The Commission recommends that the Office of the Director of Public Prosecutions consider amending its Guidelines for Prosecutors to include prosecutorial guidance on prosecuting incitement to hatred offences.**

Haynes and Schwepp also note that an individual may be charged with another criminal offence, such as a public order offence, for the purposes of prosecutorial expediency.<sup>162</sup>

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<sup>158</sup> Schweppe and Walsh (2008) *Combating Racism and Xenophobia through the Criminal Law*, p.70.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Office of the Director of Public Prosecutions, *Guidelines for Prosecutors*, 4th Edition - October 2016.

<sup>162</sup> Amanda Haynes and Jennifer Schweppe (2017) *Lifecycle of a Hate Crime: Country Report for Ireland*, p.53-57.

Haynes and Schweppe interviewed Gardaí about prosecuting under the legislation.<sup>163</sup> One Garda interviewee stated that pursuing charges under public order legislation is preferable because the prosecution process will be quicker for both the Gardaí and the alleged victim.<sup>164</sup> Another Garda interviewee reported being dissuaded from seeking a decision to prosecute under the 1989 Act by his supervisor in order to “keep it simple”.<sup>165</sup>

**The Commission recommends that consideration be given to amending Section 8 of the 1989 Act to allow prosecutions under the Act to be taken without the prior approval of the DPP.**

If section 8 of the 1989 Act is amended to allow Gardaí to prosecute without the prior approval of the DPP, it may still be the case that a particular action will be more easily charged under another Act, e.g. *the Criminal Justice (Public Order) Act 1994*, *Non-Fatal Offences Against the Person Act 1997*. Prosecutors will therefore require training to better understand the importance of pursuing hate speech charges in cases where charges might be more easily brought under another piece of legislation. This will require a cultural shift in prosecutorial practice.

**The Commission recommends that training be provided to ensure that prosecutors have a comprehensive understanding of the importance of pursuing incitement to hatred charges in cases where a particular action might be more easily charged under another Act.**

## 6. Monitoring and recording hate speech

A revised legislative framework prohibiting incitement to hatred will require complementary measures to ensure there is adequate institutional capacity to realise its effective implementation in practice, including through investigation and with regard to monitoring and recording hate speech.

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<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

## Police recording of crime and non-crime incidents

An Garda Síochána has facilitated the recording of crime with a discriminatory motive since 2002 under Garda HQ Directive No 188/2002, which mandated that racist motivations be entered on the Police Using Leading Systems Effectively (PULSE) system.<sup>166</sup>

The Commission notes that the integrity of An Garda Síochána's system of recording hate crime rests on the officers' knowledge and understanding of hate crime and the process for recording incidents on PULSE. Concerns have been raised about the extent of awareness within the Gardaí of what constitutes hate crime or a hate-related incident, how it should be recorded, and the importance of it being recorded.<sup>167</sup>

The Garda Síochána Inspectorate has reported on deficiencies in systems and processes that hinder the investigation of racist incidents, finding that the levels of recording are 'very low'.<sup>168</sup> At present, recorded hate crime data does not attain the standards of quality required for the status of national statistics.<sup>169</sup> All recorded crime statistics are currently categorised as 'Statistics Under Reservation' and will remain as such until the CSO is satisfied that a stronger data governance framework is operational in An Garda Síochána and the quality of the data output improves.<sup>170</sup>

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<sup>166</sup> The recording of discriminatory motives occurs at the point of logging crimes onto PULSE. Prosecutions (i.e. charges or summons) are recorded separately on PULSE and linked to the associated crime incident record. However, despite its introduction in 2002, it seems that An Garda Síochána did not begin to officially compile hate crime data until 2006. See D. McInerney (2017), 'Policing Racism on the Island of Ireland', in A. Haynes, J. Scheppe, and S. Taylor, *Critical Perspectives on Hate Crime*, p.428. In November 2015, the recording of crimes with a 'discriminatory motive' was reformed, amending both recording categories and the recording process. As part of an update of PULSE 6.8, the five pre-existing recording categories were replaced and extended to eleven categories of discriminatory motives.

<sup>167</sup> J. Carr (2017), 'Recording and Reporting Racist Hate Crime: Police and Civil Society Responses', p.373 and A. Haynes and J. Scheppe (2017), 'The disappearing of hate crime in the Irish criminal justice process', in A. Haynes et al. (eds.), *Critical Perspectives on Hate Crime*.

<sup>168</sup> Garda Síochána Inspectorate (2014), [Crime Investigation](#) and CSO (2018), [Review of the Quality of Recorded Crime Statistics: Based on 2017 Data Provided by An Garda Síochána](#).

<sup>169</sup> The Irish State has not made official statistics on police-recorded hate crime publicly available since the end of 2016.

<sup>170</sup> CSO, *Review of the Quality of Recorded Crime Statistics*. The Commission notes the recent quality improvement proposal shared by the CSO with An Garda Síochána in July 2018. The quality proposal outlines key actions to improve the quality of PULSE data for statistical purposes emphasising the need to improve data in respect to relevance, completeness, timeliness, accuracy, as well as coherence and consistency. According to the document, 'in order for the CSO to be able to compile statistics in which users can have trust, sound data quality principles and methodologies must be employed by An Garda Síochána at the recording stage so as to ensure a high standard of quality in the underlying administrative data source' (see p.29).

In contrast to criminal incidents, currently, the PULSE system does not offer a menu of flags for reporting prejudice-motivated non-crime incidents. While non-crime incidents can be recorded separately in the attention and complaints section on PULSE, there is no data retrieval system on PULSE for prejudice-motivated non-crime incidents. Consequently, these incidents will only be identified as being prejudice motivated if the Garda officer dealing with the matter manually types a description of the incident into the relevant narrative box.<sup>171</sup>

The *Diversity and Integration Strategy 2019-2021* of An Garda Síochána, published in October 2019, introduces a working definition of ‘hate crimes’<sup>172</sup> and ‘non-crime hate incidents’.<sup>173</sup> This strategy also has several objectives focused on improving the identification, reporting, investigation, and prosecution elements of hate crime. For example, it includes commitments to develop an initial online reporting facility for hate crime; deliver clear guidelines regarding the identification and recording of hate crime and non-crime hate incidents to all Gardaí and Garda staff; develop an IT mechanism to record non-crime hate incidents; update the Garda PULSE system to introduce an alert mechanism to highlight hate crimes; and conduct an analysis of hate crime trends and patterns.<sup>174</sup>

**Noting the commitments in the new Diversity and Integration Strategy 2019–2021, the Commission recommends the timely comprehensive reform of the PULSE system, including the implementation of a stronger governance framework and overall improvements in data collection by An Garda Síochána in line with Central Statistics Office standards.**

**The Commission recommends that guidelines and protocols for the recording of discriminatory motives are developed transparently and made publicly available.**

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<sup>171</sup> Carr, ‘Recording and Reporting Racist Hate Crime’, p.373.

<sup>172</sup> ‘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.’ See An Garda Síochána, [Diversity and Integration Strategy 2019–2021](#), p.6.

<sup>173</sup> ‘Any non-crime incident which is perceived by any 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’. See An Garda Síochána, *Diversity and Integration Strategy 2019-2021*, p6. An Garda Síochána, *Diversity and Integration Strategy 2019–2021*, p.6.

<sup>174</sup> An Garda Síochána, *Diversity and Integration Strategy 2019–2021*, pp.7–8.

The Commission recommends that members of An Garda Síochána should be equipped to understand, recognise, and thoroughly investigate all instances of hate crime through dedicated training, both during general training at Garda College and through specialist modular learning at in-service level, including targeted training for:

- assisting victims of specific types of hate offences
- accurate, reliable, and timely data recording on PULSE.

### Alternative reporting mechanisms

Collaboration with non-police organisations and other third parties can provide safe spaces to report and access support.<sup>175</sup>

Third-party schemes can target those groups most at risk of being victimised and/or who are least likely to report crimes to police.<sup>176</sup> These mechanisms need to be adequately maintained, updated, and publicised, as well as evaluated to assess their effectiveness in practice.<sup>177</sup> The Commission notes that the new An Garda Síochána *Diversity and Integration Strategy 2019–2021* includes a commitment to facilitate third-party referrals of hate crime from non-government organisations or civil society organisations.<sup>178</sup>

Considering the phenomenon of underreporting of hate crime and hate incidents, the Commission also notes the value of victimisation surveys in bridging the reporting gap.<sup>179</sup>

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<sup>175</sup> In its recent Action Plan, the UK government expressed its support for alternative modes of reporting when stating ‘Giving victims the opportunity to report hate crime without approaching the police directly – for instance to a third party such as a local charity – has been shown to improve the accessibility of the criminal justice system.’ See UK Home Office (July 2016), [Action Against Hate: the UK Government’s Plan for Tackling Hate Crime](#), p.31.

<sup>176</sup> In the UK, for example, third-party reporting centres are recognised as important for disabled people to report hate crime at locations accessible to them. See UK Home Office, *Action Against Hate*.

<sup>177</sup> See Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (2018), [Understanding the Difference: The Initial Police Response to Hate Crime](#).

<sup>178</sup> An Garda Síochána, *Diversity and Integration Strategy 2019–2021*, p.7.

<sup>179</sup> In the context of hate crimes, victimisation surveys have been identified as providing a better indication of the true volume of hate crimes, as well as valuable information about the impact on victims, identifying specific communities at risk, providing information about changing patterns of violence, and helping to assess the level of confidence amongst victims in the police and other criminal justice agencies. See OSCE Office for Democratic Institutions and Human Rights (2014), [Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide](#). See section 5 for further information on victimisation surveys.

**The Commission recommends that the State consider the establishment of alternative reporting mechanisms by which victims or witnesses can report hate crime offences, including the establishment of third-party reporting mechanisms in partnership with civil society organisations.**

**The Commission recommends the use of victimisation surveys, which include hate crime specific questions, and are supplemented by booster samples of groups traditionally underrepresented or excluded from standard national surveys.**





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