



Irish Council for
Civil Liberties

Media Briefing: ICCL submission to the Public Consultation on the Review of the Prohibition of Incitement to Hatred Act

In December 2019 the Irish Council for Civil Liberties (ICCL) submitted a policy paper to the Department of Justice and Equality in response to its request for views from the public about a potential review of the Prohibition of Incitement to Hatred Act.

ICCL welcomed the review, despite it coming 8 years after a UN human rights body recommended it. But we also noted that laws and policies in relation to incitement and hate speech should be dealt with alongside proper responses to hate crime, which are currently inadequate.

ICCL: a champion of freedom of expression

Since our inception in 1976, ICCL has consistently defended the right to freedom of expression as a cornerstone of our democratic society. Our work in this area has included a campaign against the political censorship of Section 31 of the Broadcasting Act, notwithstanding that such a position was deeply contentious during the Troubles. We stood against censorship laws which impeded advocacy for LGBTIQ+ rights, and we continue to call for the repeal of the Censorship of Publications Act today. In 1978, ICCL was the first body to call for Freedom of Information legislation. Over the years ICCL called for the repeal of legislation criminalising blasphemy up to the referendum last year. We continue to criticise Irish defamation laws because of their chilling effect on free expression. We believe the same free expression rights should exist online and off and continue to make recommendations on the regulation of online expression and content moderation.

Hate speech as a threat to freedom of expression

Freedom of expression applies to everyone equally. When people – particularly minorities or oppressed groups – feel free to express their ideas and who they are, democracy flourishes. It is through exercising this freedom that positive social change can, and always has, come about. Hate speech has a chilling effect on freedom of expression because targetted groups may self-censor for fear of attack. In fact, often that is the very point of such speech. Hate speech therefore threatens freedom of expression.

A tiered approach to tackling hate speech

In our submission, we set out a tiered approach to dealing with hate speech, an approach which follows international best practice in human rights and complies with obligations under international human rights treaties which Ireland has signed and ratified. International law draws a distinction between extreme hate speech which must be prohibited; hate speech which may be prohibited; and deeply offensive speech which is problematic and should be combatted but should not be prohibited. This is known as the hate speech pyramid.

Hate speech does not have one clear definition but an authoritative definition has been promoted by the UN Committee on the Elimination of Racial Discrimination, which defines it as a form of speech which:

“rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society”

Extreme Hate Speech

Human rights law obliges Ireland to prohibit extreme hate speech in law. Extreme hate speech requires a certain threshold of harm and includes incitement to genocide, propaganda for war, or any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This approach is rooted in living memory of the Holocaust. It seeks to outlaw hate speech strategies which may accompany genocide.

Legislation that outlaws extreme forms of hate speech can conform with human rights law, as long as it meets the requirements of precision, legal certainty, proportionality and necessity. This means only the narrowest form of speech should be outlawed as is necessary to protect the fundamental rights of others, including the right to bodily integrity and the right to life. Everyone must be able to understand when hate speech crosses the line and becomes a criminal offence. In general, extreme hate speech is understood to include some element of potential action against a targeted group. The ultimate arbiter on what constitutes extreme hate speech should always be a judicial authority.

The Prohibition of the Incitement to Hatred Act appears to seek to meet this international obligation but is problematic for a number of reasons, including that its language is imprecise, it does not include all of groups that are potentially targeted by hate speech and prosecutions have proven to be extremely difficult. Why they have proven difficult requires more research, including consultations with affected groups, an analysis of complaints by victims, investigations by Gardaí and attempted prosecutions by the DPP. There may also be a need for more training for police and legal professionals who would use it.

Hate Speech and Deeply Offensive Speech

ICCL does not advocate criminalisation as a response to hate speech except in the most extreme circumstances outlined above. However, hate speech which does not reach the threshold for criminalisation nonetheless seriously impacts on the rights of others – the right to freedom of expression and the right to be treated equally in particular – and so it must be dealt with accordingly. Human rights law allows for the prohibition of severe hate speech that does not meet a criminal threshold. However, ICCL has not seen the evidence based argument that the prohibition of non extreme hate speech is necessary in law at this time in Ireland. ICCL urges the State to carry out or commission further research with impacted groups.

However, the State is clearly obliged to take effective action against hate speech and deeply offensive speech. This includes robust public policies and public campaigns to counter stereotypes, eradicate discrimination and promote equality, as well as to monitor the types and prevalence of hate speech to inform proper responses. Education and training for legal professionals, public representatives, police, and other relevant actors must also be developed to counter hate speech and ensure appropriate responses. Political commitments to addressing anxieties that lead to racism are important and politicians and high profile speakers should be held to a higher standard when it comes to combating hate speech.

Key to enabling counter-speech are the criminalisation of hate crime and the decriminalisation of defamation. No-one should fear attack in expressing who they are. Similarly, no-one should fear legal proceedings because they call out intolerance, hate speech, or hate crime.

Online Hate Speech

Online hate speech is correlated with offline hate attacks. However, legislative attempts to deal with online hate speech in Ireland have been overly broad in their language. For example, “harmful” with reference to content or messages is not a helpful definition in this instance. In previous papers, ICCL has recommended that legal ambiguities around non-criminal content be resolved in favour of human rights principles like freedom of expression and the right to privacy. Blanket monitoring of content should be prohibited. We recommend radical transparency from online platforms around the rules used to moderate content. We also recommend online platforms engage with reporting standards including the UN Principles Reporting Framework.

ICCL Recommendations

- More research is needed to understand why the Prohibition of Incitement to Hatred Act has been ineffective in securing prosecutions. This includes analysing complaints, investigations and unsuccessful prosecutions. Groups who are the targets of hate speech should also be consulted. Conclusions from this research should be used to inform appropriate legislative and other responses, in compliance with human rights law.
- If the current Prohibition of Incitement to Hatred Act is to be amended, it should properly reflect human rights law and criminalise only hate speech which has a direct link to incitement to violence or other criminal acts targeted at individuals or groups on the basis of their identity.
- Proper legal guidance is necessary for practitioners to assess the severity of hate speech. This guidance should include the need to take into account the severity of the conduct and intent of the speaker; the actual promotion or advocacy of hatred; and likelihood of or actual incitement to violence or other criminal acts as a triangular relationship between the hate speaker, their audience and the intended target.
- Irish legislation should be amended to expand the list of groups protected from extreme hate speech to reflect current human rights standards. Legislation restricting extreme hate speech will need to meet the three part test of legality, proportionality and necessity. This means it must impact the right to freedom of expression as minimally as possible to protect the rights of others.
- A variety of responses are necessary to combat non-extreme hate speech and deeply offensive speech. These actions include education and training (for legal professionals, public representatives, police, and other relevant actors), robust public policies and public campaigns intended to counter stereotypes, eradicate discrimination and promote equality; monitoring of the forms and types of hate speech to inform proper responses; and clear political commitments.
- Effective legislation to deal with hate crime should be introduced as a matter of urgency.
- The law on defamation should be reformed so that it does not have a chilling impact on counter-speech.
- We reiterate our previous calls for standards of speech which apply offline to also apply online.