



Irish Council for  
**Civil Liberties**



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

**Submission to the Department of Justice and Equality**

**Author: Doireann Ansbro**  
*Senior Research and Policy Officer*

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## Introduction

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The Irish Council for Civil Liberties (ICCL) welcomes this consultation process, while noting that it has been eight years since the Committee on the Elimination of Racial Discrimination (CERD Committee) first recommended a review of the Prohibition of Incitement to Hatred Act 1989.<sup>1</sup>

We also note the somewhat unclear terms of reference of this consultation, given that submissions are primarily invited on the Incitement to Hatred Act, while consideration of appropriate responses to hate crime do not appear to be prioritised. ICCL has previously highlighted the legal and policy gaps in Ireland in the regulation of hate crime.<sup>2</sup> We believe that possible legislative and policy responses to hate speech should be considered alongside proper consideration of appropriate responses to hate crime, and we urge the Government to consider these two inextricably linked issues together as it develops further stages of consultation in this area.

Nevertheless, in this paper we address directly the question of whether and how Ireland should legislate for hate speech from the perspective of what human rights law permits and requires of the State, with particular reference to the right to freedom of expression and the rights to equal treatment and freedom from discrimination.

ICCL attaches fundamental importance to freedom of expression in our democratic society. Freedom of expression is the bedrock of any society. When people are free to express themselves, new opinions and ideas can grow and spread. We need to be free to criticise leaders and politicians and we must be able to discuss structures which oppress us or those around us. From our establishment in 1976, ICCL has consistently campaigned for Irish law to respect and protect the right to freedom of expression, including a long-running campaign to repeal censorship of political speech under Section 31 of the Broadcasting Act, and more recent campaigns in defence of artistic expression and in favour of repeal of the constitutional criminalisation of blasphemy. The right to freedom of expression is protected under the Irish Constitution, the European Convention on Human Rights, (ECHR), (implemented into Irish Law by the European Convention on Human Right Act 2003); the EU Charter on Fundamental Rights and Freedom (EU Charter), (relevant when EU law is being applied in Ireland) and the UN International Covenant on Civil and Political Rights (ICCPR), which Ireland has ratified and is therefore obliged to comply with.

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<sup>1</sup> CERD/C/IRL/CO/34, 2 April 2011, accessed:

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD)

<sup>2</sup> Lifecycle of a Hate Crime, ICCL 2017.

The State has a duty to create an enabling environment for free expression, which is fundamental for a flourishing democracy, the protection of human dignity and full political participation by all members of society. All individuals within a State's jurisdiction have a right to freely exchange ideas, views and experiences without fear of discrimination or violence. This is how democracy works.

These rights in digital and non-digital spaces. It has been recognised for the last decade that states must also guarantee expression rights in electronic or 'online' modes of expression.<sup>3</sup> Free, uncensored, and unhindered online media are essential in any society and constitute one of the cornerstones of democracy.

At the same time, ICCL is concerned that incidents of hate crime and hate speech are on the rise in Ireland and across the world and, in some cases, take the form of racialised political strategies. And while the internet is now recognised as a forum which can amplify inequality,<sup>4</sup> until very recently the seriousness of online hate speech has not been recognised.<sup>5</sup>

Online or off, some forms of extreme hate speech pose a risk to the right to freedom of expression. Hate speech can have a chilling effect on expression and political participation where individuals or groups self-censor for fear of harassment, hateful responses or incitement to hatred and violence. The use of extreme forms of hate speech can create an atmosphere of racial hatred and can be used to incite violence, hostility and discrimination. In its most extreme form, hate speech can form part of a strategy to commit genocide.

The State has a duty to protect the right to freely participate in public life and the right to freedom of expression of all individuals under its jurisdiction. As part of its duty to create an enabling environment for free expression, some exceptional limits on clearly and narrowly defined forms of hate speech may be required. Restrictions on speech are permitted within human rights law, where such restrictions are prescribed by law, necessary in a democratic society and proportionate to a legitimate aim.

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3 UN Human Rights Committee, General Comment No.34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, (2011), available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>; Joint Declaration on Freedom of Expression and the Internet adopted by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE), the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, (2011), available at: <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=849&IID=1>

4 Farries, E; Ansbro, D; Tierney G (2019) 'Online harassment', ICCL Submission to the Joint Committee on Justice and Equality: <https://www.iccl.ie/wp-content/uploads/2019/10/ICCL-Online-HarassmentSubmission.pdf>

5 Williams, Matthew L., Burnap, Peter, Liu, Han, Javed, Amir and Ozalp, Abdullah 2019. Hate in the machine: Anti-black and anti-Muslim social media posts as predictors of offline racially and religiously aggravated crime. *British Journal of Criminology* 10.1093/bjc/azz049

This submission will address what human rights standards apply to the right to freedom of expression, as well as the rights to be treated equally and to be free from discrimination; what different forms hate speech may take and what international human rights law requires and permits as a response to different forms of hate speech. We will also address current legal framework in Ireland and what measures should be taken beyond the law to counter hate speech both in relation to online speech and beyond a regulatory environment.

## **1. What are the human rights standards applying to freedom of expression?**

The Irish Constitution protects freedom of expression subject to “public order” and “morality”.<sup>6</sup> The ECHR protects freedom of expression under article 10(1), including the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” Article 10(2) outlines that the exercise of these freedoms carry “duties and responsibilities” and may be subject to restrictions for a range of reasons, including those that are prescribed by law, necessary in a democratic society and necessary for the protection of the rights of others.<sup>7</sup> The EU Charter of Fundamental Rights also protects the right to freedom of expression under its article 11.8.<sup>8</sup>

The ICCPR provides under article 19(1) and (2) that “Everyone shall have the right to hold opinions without interference” and “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Like article 10(2) of the ECHR, article 19(3) of the ICCPR outlines when these rights may be restricted. It also highlights that the exercise of these rights carries “special duties and responsibilities” and may therefore be restricted where such restrictions are “provided by law and are necessary:(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.”

However, international standards require that the exercise of the right to freedom of expression should not aim at the destruction of the rights and freedoms of others,

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<sup>6</sup> Article 40.6.1.i protects “the right of the citizens to express freely their convictions and opinions”, subject to “public order and morality”.

<sup>7</sup> The full list of permitted restrictions under article 10(2), ECHR are as follows- those that are: “prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

<sup>8</sup> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

including their right to free expression and their right to equality and non-discrimination.<sup>9</sup> Hate speech can have a chilling effect on the right to freedom of expression of individuals and groups, as well as infringing on their rights to be treated equally and without discrimination. Where speech takes the form of abuse, harassment or degrading treatment it can be considered a violation in and of itself. Speech which incites the commission of crimes against individual or groups in society can lead to violations of the right to respect for private and family life, bodily integrity, freedom from torture and inhuman and degrading treatment, or even the right to life. Thus, once hate speech reaches a certain threshold of harm, human rights law permits its prohibition, including through criminalisation.

## **2. What human rights standards are relevant to combating discrimination and upholding equality before the law?**

The Irish Constitution protects equality before the law;<sup>10</sup> and the right of all citizens to be protected from unjust attack on their life and person.<sup>11</sup> The EU Charter protects the right to equality under article 20<sup>12</sup> and the right to be free from discrimination under a large range of grounds under article 21<sup>13</sup>. The promotion of equality is at the heart of the ECHR, included in its preamble. Article 14 of the ECHR prohibits discrimination in the enjoyment of all rights set out in the Convention, including the right to freedom of expression.<sup>14</sup>

The ICCPR in article 2 not only provides that all rights within the Covenant must be enjoyed without distinction but also requires States, under article 20, to prohibit by law incitement to hatred and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; as well as propaganda for war. Article 26 protects equality under the law and prohibits discrimination.

The UN Convention on the Elimination of Racist Discrimination (CERD), to which Ireland is a state party, requires States to combat racism, including by prohibiting certain behaviours. Article 4 requires states to “condemn all propaganda and all

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9 Universal Declaration of Human Rights, Article 30 states: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

10 Article 40.1 provides that “All citizens shall, as human persons, be held equal before the law”.

11 The Constitution also provides that the its laws shall “defend and vindicate the personal rights of the citizen” (40.3.1) with particular reference to the need to protect from “unjust attack” and vindicate the life and person of every citizen.

12 Article 20 provides: “Everyone is equal before the law.”

13 Article 21 provides: “Any discrimination based on any ground such as 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 shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”

14 Article 14 of the ECHR provides: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination”.

### **3. What forms can hate speech take?**

There is no consistent definition of ‘hate speech’ under human rights law. However, different bodies and mechanisms have sought to agree a common understanding of the term. A particularly authoritative definition in terms of applying the ECHR is the definition agreed by the Committee of Ministers of the Council of Europe, and approved by the European Court of Human Rights<sup>15</sup> which states that ‘hate speech’ shall be understood as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”<sup>16</sup>

The UN’s International Committee on the Elimination of Racial Discrimination, (CERD Committee) in its General Comment 35, (GC 35) defines ‘hate speech’ as “a form of other-directed 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.”<sup>17</sup> Of particular note is paragraph 7 of GC 35, which states:

“Racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives. In line with their obligations under the Convention, States parties should give due attention to all manifestations of racist hate speech and take effective measures to combat them.”<sup>18</sup>

In this General Comment, the CERD committee has encouraged States when considering what speech can be considered hate speech to consider five particular

<sup>15</sup>The European Court of Human Rights *Gündüz v. Turkey*, App. No. 35071/97 (2004), paras 22 and 43.

<sup>16</sup>Council of Europe, Committee of Ministers Recommendation No. R (97) 20, Adopted October 1997. See <https://rm.coe.int/1680505d5b>

<sup>17</sup>UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 on combatting racist hate speech, 26 September 2013, CERD/C/GC/35, para 7.

<sup>18</sup>UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 on combatting racist hate speech, 26 September 2013, CERD/C/GC/35, para 7. Para 6 of this GC provides: “Racist hate speech addressed in Committee practice has included all the specific speech forms referred to in article 4 directed against groups recognized in article 1 of the Convention — which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin — such as indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups”.



elements: the content and form of speech; the prevailing economic, social and political climate prevalent (particularly relevant where there are pre-existing patterns of discrimination against ethnic or other groups); the position or status of the speaker in society (politicians and other influential public speakers have a particular responsibility); the reach of the speech and the objectives of the speech.<sup>19</sup>

#### **4. What does human rights law require and permit in efforts to combat hate speech?**

##### **The hate speech pyramid**

International human rights law draws a distinction between those forms of extreme hate speech which must be prohibited; those forms which may be prohibited; and those forms of speech which are problematic from the perspective of intolerance, but should not be prohibited. The relationship between these different categories of hate speech is sometimes referred to as the 'hate speech pyramid'.<sup>20</sup>

##### **Extreme hate speech**

There are clear rules regarding only the most extreme speech: that which causes exceptional and egregious harms. This type of speech **MUST** be prohibited. Examples of this type of speech include direct and public incitement to genocide and incitement to other discriminatory violations of international criminal law, such as the war crime of persecution<sup>21</sup> on political, racial or religious grounds.

The ICCPR also requires that propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. This approach has its roots in our living memory of the Holocaust and a desire to never again allow genocidal political leaders to spread messages of hatred and bloodshed. Part of the reason the categories of speech which require prohibition is so limited at the international level lies in different approaches to free speech across different jurisdictions. For example, there is a notable distinction between the North American approach which, in general, requires a threat of immediate physical harm in order to limit speech and the European approach which allows for interferences on very narrow grounds.

##### **Hate speech which interferes with others' rights**

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19 See CERD GC 35, para 15, as adapted from the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, para. 22.

20 See Article 19, Toolkit on Hate Speech, 2015, at p. 19.

21 The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN Treaty Series, vol. 78, p. 277, Article 3(c) and the Rome Statute of the International Criminal Court (1998) (Rome Statute), ICC).

Article 19 (3) of ICCPR provides a basis for States to also prohibit hate speech that interferes with the rights of others. This means that where necessary and proportionate, States can legislate to restrict or regulate certain types of hate speech. Again, human rights law provides that only the most extreme types of speech that threaten the cornerstone principles of our democracy, including the right to bodily integrity, equality and non-discrimination, should be regulated by law.

It should also be noted that part of the permissive framework under human rights law for the regulation of extreme forms of hate speech is the requirement on the State to provide adequate remedies for victims of human rights abuses. This requirement is present in ICCPR<sup>22</sup>, ECHR<sup>23</sup>, and the EU Charter<sup>24</sup>. Article 6 of CERD, in particular, focuses on securing effective protection and remedies for victims of racial discrimination and the right to seek “just and adequate reparation or satisfaction” for damage suffered.<sup>25</sup> It is important that civil, administrative and alternative remedies must also be made available and criminal sanctions are reserved for the most extreme forms of hate speech.

Of fundamental importance where a State seeks to criminalise hate speech is that it must be used as an exceptional measure and last resort, and reserved for the most serious cases where the nature and extent of the impact on targeted persons and groups is taken into account.<sup>26</sup> Any such legislation must meet the requirements of precision, legal certainty, proportionality and necessity.<sup>27</sup> Other forms of hate speech, that which might cause deep offence for example, should be combated by other means, including education, monitoring, alternative remedies and an enabling environment for powerful counter-speech.

An environment that supports the flourishing of freedom of expression makes counter-speech available to confront, expose and stand up to those who use hate speech. This can have a strong and lasting impact in the fight against discrimination in all its forms. This is also why Ireland needs to reform its defamation laws, which in their current form can have a chilling effect on the ability of people to call out hate speech.

## **5. Regulatory measures**

While the circumstances in which hate speech should be proscribed in law are limited, the State may also have obligations to take further steps to combat a broader category of hate speech. Under human rights law the promotion of equality

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22 Article 2(3), ICCPR

23 Article 13, ECHR

24 Article 47, EU Charter.

25 See further CERD GC 35, para 8

26 CERD GC 35, para 12.

27 See Human Rights Committee general comment No. 34, paras. 22- 25; 33-35.



requires proactive measures that aim to increase understanding and tolerance.<sup>28</sup> Article 7 of CERD emphasises the role of “teaching, education, culture and information” in the promotion of interethnic understanding and tolerance. In its 2011 report on Ireland, the CERD Committee made a wide range of recommendations, including the need to prioritise embedding a culture of tolerance and understanding through education in schools and beyond.<sup>29</sup>

The CERD Committee also emphasised the need for education initiatives for the judiciary and prosecutors.<sup>30</sup> ICCL believes this is of significant importance, given the difficulties that arose (*see more on page 8*) with the implementation of the Incitement against Hatred Act 1989.

ICCL also believes that the Government must conduct more research and data gathering about the extent and effect of hate speech online and offline in order to inform an appropriate regulatory and policy response. This includes supporting An Garda Síochána to put in place proper systems for data gathering, recording of incidents, and identifying hot spots or particularly problematic repeat issues.

This is in line with the CERD Committee’s recommendation that: “educational, cultural and informational strategies to combat racist hate speech should be underpinned by systematic data collection and analysis in order to assess the circumstances under which hate speech emerges, the audiences reached or targeted, the means by which they are reached, and media responses to hate messages.”<sup>31</sup>

Whatever their form, responses to hate speech should never have the effect of shutting down legitimate debate or lead to the policing or surveillance of private conversations, either online or offline. Unfair censorship not only impinges on the right to freedom of expression but may fail to address the underlying social causes of the prejudices that drive some forms of hate speech.<sup>32</sup>

## **6. Political speech**

ICCL also calls on the Irish Government to ensure that politicians and other influential public figure are appropriately called out where they engage in hate speech. Public officials must address anxieties and misperceptions that render some parts of the public susceptible to advocacy of racial hatred. The CERD Committee has highlighted the importance of providing persuasive counter-

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28 Article 19, Toolkit on Hate Speech, 2015, para 4.

29 Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland, 4 April 2011, para. 19.

30 Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland, 4 April 2011, para. 19.

31 CERD GC 35, para 38.

32 Article 19, Toolkit on Hate Speech, 2015, para 4.

narratives that challenge the concerns or anxieties in the public domain. It also recommends training for public officials on the dangers of hate speech and the importance of promoting equality. It also recommends that public bodies should have in place clear rules governing the conduct of individuals speaking in their capacity as public officials and that ethical codes and “no discrimination” policies should be adopted by political parties and candidates for election.<sup>33</sup>

## **7. The limitations of the current Irish legal framework on hate speech**

Currently, Irish law prohibits incitement to hatred through the Incitement to Hatred Act 1989. This would appear to go some way towards meeting the requirement under Article 20 ICCPR, as outlined above on page 4. However, this law has long been regarded as inadequate to address extreme hate speech in Ireland. The number of successful prosecutions under the act has been notably low.<sup>34</sup> The Irish Human Rights and Equality Commission (IHREC) has said that the low rate of prosecutions under the Act “calls into question the effectiveness and accessibility of these sanctions.”<sup>35</sup>

The ineffective operation of the 1989 Act has been attributed to a number of key issues. IHREC has highlighted the “apparent reluctance of the Director of Public Prosecutions to prosecute or grant leave to prosecute complaints made under the Act, with reasons to not seek prosecution attributed to insufficient evidence, definitional difficulties, the role of prosecutorial discretion, and procedural issues.”<sup>36</sup> The ineffectiveness of the 1989 Act was highlighted in a 2014 report on the implementation of the EU Framework Decision on combating racism and xenophobia.<sup>37</sup> The recommendations of the European Commission on Racism and Intolerance, published in June 2019, also make suggestions for additional criminal offences under Irish law.<sup>38</sup>

ICCL considers that more research is needed to understand why this Act has been ineffective. If it is a question of lack of awareness among relevant stakeholders about the standard of evidence needed, the application of terms such as incitement

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33 CERD GC 35, para 50. 188.

34 See for example, <https://www.irishexaminer.com/ireland/man-cleared-of-online-hatred-against-travellers169325.html>

35 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, para. 188.

36 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, para.

37 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, \* COM/2014/027

38 ECRI, Report on Ireland (Fifth Monitoring Cycle), adopted 2 April 2019. See p.12 Available at <https://rm.coe.int/fifth-report-on-ireland/168094c575>

or hatred, then the remedy would appear to be in amending the legislation to create greater precision in terms of definitions and applicability and rolling out effective training for police, prosecutors and the judiciary.

## 8. Options for new legislation

If the State decides to expand the definition of hate speech included within the act, it must do so within the confines of its human rights obligations. ICCL considers that article 20 of the ICCPR may provide some leeway to include an expanded definition of hate speech to include the advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence. However, any such legislation must conform to the strict requirements that this article provides in terms of what kind of hate speech can be criminalised. As such, the following elements of the crime of racial hatred constituting incitement to discrimination, hostility or violence must be addressed within the legislation:

1. **Conduct of the speaker-** *the speaker must address a public audience, and their expression include: advocacy of hatred targeting a protected group based on protected characteristics, and constituting incitement to discrimination, hostility or violence.*

2. **Intent of the speaker-** *the speaker must specifically intend to engage in advocacy of discriminatory hatred, and intend for or have knowledge of the likelihood of the audience being incited to a discrimination, hostility or violence; A likely and imminent danger of the audience actually being incited to a proscribed act, as a consequence of the advocacy of hatred.*

3. **Advocacy** *should be understood as an “intention to promote hatred publicly towards the target group.” The idea of “promotion” is integral to advocacy; it implies more than merely stating an idea, but actually engaging in persuading others to adopt a particular viewpoint or mind-set. This may be through any medium of communication, including spoken, written or electronic.*

4. **Incitement** *involves a triangular relationship between the three principal actors: the “hate speaker” advocating discriminatory hatred to a public audience; the public audience, who may engage in acts of discrimination, hostility or violence, (although they don’t actually have to engage in such acts) and the target group, against whom these acts might be perpetrated.<sup>39</sup>*

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<sup>39</sup> This interpretation of the requirements of Article 20 is based on the interpretation by Article 19 in their Toolkit on Hate Speech, 2015. See also CERD GC 35, para 15, as adapted from the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, para. 22.

If the State decides to expand the type of hate speech criminalised by reforming this legislation, the importance of meeting the strict three-part test outlined in human rights law cannot be over-stated. All laws and policies must:

1. Be provided by law; meaning any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
2. Pursue a legitimate aim, including to ensure the respect of the rights or reputations of others;
3. Be necessary in a democratic society, requiring the State to demonstrate in a specific and individualised manner the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

## **9. Protected Grounds**

Discriminatory hatred has been defined as hatred that is advocated on the basis of an individual or group belonging to a protected category under human rights law. Different treaties list different, usually non-exhaustive, protected categories and may include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, indigenous origin or identity, disability, migrant or refugee status, sexual orientation, gender identity or intersex status.

ICCL considers that the Irish legislation may be reformed to expand the list of protected categories to include a modern understanding of the range of protected groups, reflected in more recent human rights treaties, including the EU Charter and the UN Convention on the Rights of Persons with Disabilities. We note that the Criminal Justice (Victims of Crime) Act 2017 provides a list of personal characteristics which may be the basis of biased or discriminatory treatment.<sup>40</sup> While this list should not be viewed as exhaustive – for example there are pertinent discussions regarding the inclusion of socio-economic status – it may provide a useful starting point.

## **10. Online hate speech**

Online hate speech, particularly on social media platforms, is now a significant and acknowledged social problem. Distressingly, recent research shows that online speech is correlated to hate crimes offline. A 2019 study shows for example that as

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<sup>40</sup> Criminal Justice (Victims of Crime) Act 2017, s. 15 (2) (d).

the number of "hate tweets" made from one location increased, so did the number of racially or religiously aggravated crimes at that location.<sup>41</sup>

ICCL is also cognisant that new and emerging methods of communication may also present particular challenges in this context, including the challenges posed by algorithmic decision making and autonomous programming in relation to online communications, for example. Crafting protections that are responsive to these correlational problems will require engagement with a wide range of stakeholders.

At the fore, ICCL observes that recent debates and legislative proposals in Ireland attempting to regulate in parallel 'harmful' speech online have shown to be incompatible with international human rights standards on freedom of expression, particularly insofar as they have failed to precisely define what harmful content is.<sup>42</sup> We would caution against use of the same overly broad language when responding to hate speech. We also observe that comprehensive reform for hate speech must necessarily engage online speech regulatory reform projects, and that these intertwined efforts should further acknowledge the work done by the Law Reform Commission<sup>43</sup> and also engage the regulatory frameworks being explored at the EU level (see for example the European Commission's developing Digital Services Act).

With these caveats in mind, the ICCL made a submission to the Department of Communications, Climate Action and Environment in April 2019 on the regulation of online content,<sup>44</sup> a submission to the Joint Committee on Justice and Equality on online harassment, harmful communications and related offences in October 2019<sup>45</sup>, and a joint submission with CIVICUS to the Committee on Communications, Climate Action and Environment regarding The Digital Safety Commissioner Bill 2017. We take the opportunity to reiterate some of the relevant recommendations within those submissions:

- **Rights compliant moderation**
  - States should only seek to restrict content, other than criminal behaviour, pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity

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41 Williams, Matthew L., Burnap, Peter, Liu, Han, Javed, Amir and Ozalp, Abdullah 2019. Hate in the machine: Antiracist and anti-Muslim social media posts as predictors of offline racially and religiously aggravated crime. *British Journal of Criminology* 10.1093/bjc/azz049

42 <https://www.iccl.ie/wp-content/uploads/2018/11/Digital-Safety-Commissioner-Bill-2017-ICCL-CIVICUSSubmissions.pdf>

43 Law Reform Commission, Report on Harmful Communications and Digital Safety (LRC 116, 2016)

44 Farries, E (2019) 'Regulation of online content'. ICCL Submission to The Department of Communications, Climate Action and Environment <https://www.iccl.ie/wp-content/uploads/2019/07/190415-Online-content-regulation-ICCLsubmission-FINAL.pdf>

45 Farries, E; Ansbro, D; Tierney G (2019) 'Online harassment', ICCL Submission to the Joint Committee on Justice and Equality: <https://www.iccl.ie/wp-content/uploads/2019/10/ICCL-Online-Harassment-Submission.pdf>

and legitimacy’ (in this context the question of whether there are specific offences related to hate speech has a special significance).<sup>46</sup>

- Legal ambiguities relating to moderating online content should be resolved in favour of respect for freedom of expression, privacy, and data protection principles.
- **Transparency**
  - Transparency is essential for both corporate platform and state content moderation. Transparency includes at minimum full disclosure of the rules used to moderate content and how those rules are applied together with functional appeals processes and accountability for wrongful takedown.
  - Blanket monitoring o Blanket monitoring, particularly by cloud services and infrastructure, software and platform services, should be prohibited in order to protect fundamental rights. This includes prohibiting automated monitoring tools including filters that are used to surveil content generally and indiscriminately online.
- **Other Measures**
  - In line with the UN Guiding Principles on Business and Human Rights<sup>47</sup> and Ireland’s National Action Plan on Business and Human Rights<sup>48</sup>, ensure that social media companies are engaging in proper due diligence when it comes to the human rights impact of their activities and services. In particular, under principle 10 of the implementing standards, encourage businesses to engage with human rights reporting standards, including the UN Principles Reporting Framework.<sup>49</sup>
  - The government should undertake a comprehensive research project, supported by civil society organisations, to effectively assess the impact and consequences of different forms of online harassment, including hate speech, on victims. The conclusions and recommendations of this research should inform legislative and other responses.
  - An education campaign directed at the population as a whole should be undertaken in order to discuss and promote appropriate social norms

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46 UN Doc A/HRC/38/35 (18 June–6 July 2018) and see the Santa Clara Principles On Transparency and Accountability in Content Moderation’, available at: <https://santaclaraprinciples.org>

47 UN OHCHR (2011). Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework  
[https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

48 Government of Ireland (2017) National Plan on Business and Human Rights 2017-2020  
<https://www.dfa.ie/media/dfa/alldfawebstitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf>

49 The UN Guiding Principles Reporting Framework (nd) <https://www.ungpreporting.org/>



online. Currently, unacceptable behaviour offline is often considered acceptable online. This needs to be addressed.

### **General recommendations on combating hate speech:**

1. The government must respond to hate speech with a variety of measures, including legislative, regulatory and other measures, that are appropriate to the form of speech used, while ensuring it creates an enabling environment for freedom of expression.
2. The government should provide for a range of remedies where victims of hate speech have suffered a serious violation of their rights, primarily in civil and administrative law as well as non-legal mechanisms for redress such as mediation and alternative dispute resolution.
3. Some non-regulatory methods for combating hate speech should be introduced – including measures towards the promotion of an atmosphere of tolerance and understanding, data gathering and monitoring. The Government should provide sufficient support to IHREC in its role as a national human right monitoring body and ensure that An Garda Síochána play a proper role in data gathering, reporting and responding to hate crime within its sphere of competence.
4. The State should improve implementation of existing legislation as a first step in improving the regulatory environment. This will require research and training across the criminal justice system. As a second step, the State may consider revising existing legislation to ensure greater precision of legal terms and definitions. All legislation should conform to Ireland’s human rights obligations, including ensuring that restrictions on freedom of expression are provided for by law, necessary in a democratic society and proportionate to a legitimate aim.
5. The State should consider reforming existing legislation in line with modern approaches to defining protected groups.
6. Regarding hate speech online, responses must be subject to the same rights respecting framework as responses to hate speech offline. Government interventions here must still be prescribed by law. Censorship and generalized monitoring are no more lawful online than off. Regulatory initiatives are developing at the EU level, and the government should follow these developments to avoid overlap in laws.
7. Hate crime should be legislated for as a matter of urgency. The criminalisation of hate crime should be viewed as a measure which fosters intolerance of both hateful behaviour and speech.

*For media queries:*

**Sinéad Nolan:**  
sinead.nolan@iccl.ie or 087 4157162

## **Submission**

© Irish Council for Civil Liberties 2020

Unit 11, First Floor, 34 Usher's Quay, The Liberties,  
Dublin 8, Ireland D08 CV6X

 +353-1-9121640

 [info@iccl.ie](mailto:info@iccl.ie)

 [www.iccl.ie](http://www.iccl.ie)



Irish Council for  
**Civil Liberties**