

Submission on Review of Incitement to Hatred Act 1989.

“The Hate Speech Consultation.”

Submission made by the Irish Freedom Party

1. The principal concern of the Irish Freedom party in respect of any proposed change to the legislation is that it may undermine the constitutionally guaranteed right of freedom of expression which Irish people at present enjoy.

The central importance of freedom of expression.

The guarantee of freedom of expression is considered essential to the proper functioning of any democratic state. If opinions cannot be openly expressed without fear of reprisal or recrimination it is impossible to develop a proper political culture which will enable the healthy functioning of a liberal, open society. This principle has been recognised from ancient times, being first enunciated by Solon, the renowned Athenian lawmaker from the 5th century BC, one of the founding fathers of Athenian democracy¹.

It is, of course, clear that throughout history, institutions, monarchs, and tyrants have seen freedom of expression and freedom of thought as being a threat to their exercise of power and their ability to govern in the manner they choose. However, since the political advances of 18th-century enlightenment, it has become accepted that no form of government which precludes freedom of speech and freedom of expression can be considered legitimate. This is now axiomatic in states which refer to themselves as democratic. No European or Western democracy will openly advocate a general prohibition of freedom of expression. In countries such as Ireland and the United States this principle finds its expression in constitutional law. In Ireland the relevant provision is under that part of the constitution dealing with *Fundamental Rights – Personal Rights*, and the constitution states under article 40.6.1 As follows:

6 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

i The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful

¹ Jones T. Colliers Encyc.

liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.

This Protection is somewhat less absolute than that given by the First Amendment to the United States Constitution. However, regarding free speech the Irish constitution only sees a role for the state in specific circumstances including sedition or the advocacy of the overthrow of the state and the undermining of the authority of the state and of public order. Reference is also made to the undermining of public morality. (This causes difficulty of interpretation at present in a society where there is no broad agreement on what constitutes immoral behaviour). It is also of note that even though there are certain limited exclusions regarding the protection of freedom of expression, that there is no such exclusion in respect of criticism of government policy. This is of particular note in the present circumstance as much of the demand for the introduction of restriction of freedom of speech comes as a demand to restrict the speech of those who are critical of specific government policies, for example, those in regard to climate policy, immigration, or the defence of free speech itself.

The concept of “Hate Speech “in history and recently.

The consultation document issued by the government on this process makes wide reference to the twin concepts of "hate speech" and "hate crime" and it is worth examining from where these terms originated. Despite their clearly Orwellian phraseology they do not actually appear in George Orwell's classic work, *Nineteen Eighty-Four*. While the terms "Newspeak" and "Thought Crime" appeared in Orwell's work, the terms "hate crime" or "hate speech" do not, though the terms are clearly derived from Orwell's work. These terms do not appear in the 1989 legislation and it is extremely worrying to see such dystopian terminology, which has no historical or legal precedent, now appearing freely in a government consultation document as if there were widespread agreement on the meaning or appropriateness of these highly charged terms, which there is not.

The first modern prohibition against speech which was regarded as intending to promote hate appeared in the UN Universal Declaration on Human rights, a 1948 document which appeared in the same year as Orwell's classic and which was drafted in the wake of the second world war, largely by the victorious powers. It should be noted that the section dealing with prohibition on incitement to hatred was included in that declaration at the insistence of the

delegation from Stalin's Soviet Union². It was opposed trenchantly by the Western powers, but the Soviet Union made it a condition of signing the declaration that it be included. The Western powers acceded, even though they knew that the prohibition would be used by the Soviet Union to repress freedom of speech within its own country. However, they felt that getting the Soviet Union to sign up would have some benefits. How wrong they were! They also considered it impossible to imagine that any Western power would use this provision as a means of repressing freedom of speech within their own countries.

However, again they were wrong to have such confidence in their own institutions: Within the past 30 years the concept of "hate speech" has increasingly been used by Western states as a means of bypassing their own protections of freedom of speech over a wide range of areas. This is particularly the case in the areas of racial and sexual politics.

The concept has been dramatically accelerated over the past 10 years with the political concept of "hate", (at best an inexact and relative term) having been expanded to the point where it is frequently used, often on quite fatuous grounds, to prevent expression of dissent. For example, in many areas of sexual politics, traditional morality, in any event traditional Christian morality, relating to sexual matters such as homosexuality and adultery, is presented as the promotion of hate and intolerance and this interpretation is used as a means of undermining the protections of the right to freedom of worship and religious association.

This has now become a widespread practice in countries such as the United Kingdom and Sweden and legislation aimed at prohibition of hate is regularly used against Christian pastors and Christian practitioners in these countries. These countries, which have regularly been cited by international watchdogs³ as abusers of basic civil rights provisions present a salutary warning to us not to go the same route.

The potentially destructive effect of changes to the legislation.

While it may be argued that there has not been a large number of prosecutions under the incitement to hatred legislation, the truly chilling effect of incorporating such imprecise terms as "hate speech" into legislation is the impact it will have on culture, in the areas of employment, media and the provision of services. Over the past several years many politically and culturally

² Morsink Johannes *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999).

³ *Dangerously Disproportionate: The ever-expanding National Security State in Europe*. Amnesty International 2017.

active organisations and activists have forced innocent people out of employment or out of business by using modern media to threaten and intimidate their employers or their business associates because of comments they made or opinions they expressed. This is a truly dreadful situation which brings us straight back to the days of the 19th century when, for example, Negroes and Catholics could be openly discriminated against in the United States and in Ireland. In many areas of employment, it is now sufficient to express an opinion which varies from modern Orthodoxy to have one's career terminated. This has certainly been seen in high-profile media cases in Ireland over the past two years, where highly talented journalists have had their careers destroyed for expressing the “wrong” opinions. Increasingly this destructive power will be used against religious minorities such as Christians or less favoured sexual groups such as young heterosexual men. The incorporation of the concept of hate into legislation will have huge potential to facilitate and encourage the existing activist programs of cultural intimidation and exclusion against those who don't "fit in".

This is a classic example of legislation which is intended to achieve inclusivity being used to create the direct opposite, and it is a warning to those who believe that all human problems can be solved by legislation.

Intellectual Background to the concept of “Hate Speech”.

The recent tendency to undermine the importance of free speech is based on the largely Marxist interpretation of culture as being based on conflicts between competing power groups within society which are reinforced by hidden societal norms and methods of language which promote inequalities in a subconscious manner. Language is seen as a central element in this hidden oppression and this is why language is central to the obsessions of the “politically correct” movement, much to the dismay of people who fall foul of the proscriptions of political correctness without having any clear understanding of why.

In addition to the Marxist idea of culture as ongoing power struggle, the linguistic theories developed by certain of the French post-modernist/deconstructivist philosophers such as Marcuse, Derrida and Foucault,⁴ have led to the idea that language itself is a “loaded concept” which cannot be used to determine truth, but which is used by the oppressor against the oppressed, sometimes unconsciously. These ideas are now axiomatic to the modern left but have the tendency to undermine reason, which is based on language, as a means

⁴ Lamont Michele, *How to become a Dominant French Philosopher, The case of Jacques Derrida*, November 1987, *American Journal of Sociology*.

of resolving dispute, or more significantly as a means of achieving truth or justice. Such ideas if implemented would effect a fundamental change to Western culture and would in many respects rob that culture of its central means of achieving either equitable resolution of dispute or equality and justice before the law. They also represent a fundamental attack against the nature of the culture of empiricism, the scientific method as it applies to the social sciences, and civil and religious liberties, all of which are central to the direction and purpose of the Irish state as expressed in the Irish constitution.

The immediate potential danger.

For these reasons many have referred to the above linguistic and cultural theories, often defined as “Cultural Marxism” and associated with the “Frankfurt School” as a series of poisonous ideologies which will wreak havoc on any society where they come to be seen as the central cultural norms.

In many of the influential areas of modern Irish society however, these ideas have now, without popular support, gained an intellectual ascendancy which often goes unquestioned, without ever having been subjected to a rigorous scrutiny, either at a popular or at an intellectual level.

What therefore at first sight it seems unjustifiable to any reasonable person (i.e. restriction of free expression) is justified on the basis that language is unclear and on the basis of an unproven historical narrative of injustice, which injustice must be set to right. However, it is correlative of the acceptance of restriction of free expression that achieving truth or justice becomes impossible. If Truth cannot be spoken without fear of legal sanction then Justice, which depends on Truth can never be attained. This will make the achievement of an ordered and equitable society impossible, as such a society will fail to offer a coherent standard against which actions can be judged. It represents not just a potential disaster in ordinary social and legal discourse, but an attack against the entire scientific method on which technological progress is based.

Potential political abuse.

The government should therefore be under no illusions about the importance of what is at stake. It has always been accepted in common law that there are certain things that should not be said, such as wilfully taking away a person's good name, direct incitement to violence against another person or against another identifiable group of persons, or deliberate falsification of facts in order

to deceive a large group of people for fraudulent purposes. These, however, are very specific and identifiable and can be dealt with through the common law.

A politically motivated restriction on freedom of speech is a very different matter because freedom of speech is the essence of politics, as expression of dissent is the essence of democracy.

If anyone doubts that the present push to restrict what may be said online and in ordinary debate will have a political bias, they need only look to the manner in which restrictions are already imposed by the social media giants, many of whom have a far higher GDP than the state of Ireland. Such groups have been widely criticised for having only restricted critical comments in the religious field against certain religions but not against others, and having prohibited racially disparaging comments against some races while ignoring those against others. Prohibitions on freedom of expression should only be used in extreme cases but if they are to be used at all then unless they are absolutely equally applied across all circumstances, they have a deeply pernicious effect on society with a rankling sense of injustice being caused among any group which is not protected, and which sees itself thereby as being oppressed.

Potential to corrupt the legal system.

The tendency to allow active discrimination and denigration against only certain ethnic or cultural groups within society because they are seen to have been historically "the oppressor" derives entirely from the cultural Marxist worldview with its oversimplified narrative of conflict as the driver of history. Those who advocate restrictions on freedom of speech and freedom of expression now, frequently do so as a means of addressing what they see as historical societal wrongs. This leads to the absurd situation that manifest and clearly unjust discrimination against specific individuals can be justified on the basis that they belong to an alleged "privileged" group, and as such, unjust attacks against them can be made to appear justified as part of an historical narrative of restitution. Such a situation inevitably leads to **a dual system of justice** leading to the corruption of law and the destabilisation of society. History however shows, that those who today see themselves as gaining through such a system, and who consciously promote injustice against others, can easily have injustice turned against them at a future date. In the absence of coherent and just law, as the former Lord Chancellor of England, Sir Thomas More pointed out, there is no protection against the devil.

The issue of causing offence.

It can never be accepted that the causing of offence by telling the truth can be grounds for proscription. Nor can it be accepted that the expression of a moral or ethical view regarding human behaviour, albeit one with which certain parties disagree, can be used as a reason for proscription.

Such attacks against free expression of legitimate ideas can never be carried out in a just fashion and inevitably lead to certain currently accepted ideas being favoured over others. This leads to increased anger, censoriousness and tension within society generally, and increased fear in investigating history, social science, psychology, spirituality, and even the technical sciences. Justification cannot be made for allowing any state body to censor ideas because they may be offensive to others, as to do so is to take sides between two conflicting views and to assume that one has validity while the other does not. Such conflicting views are to be resolved in the marketplace of ideas and in normal civil debate.

2. The four questions asked on the consultation document.

Question 1. Are there other groups, other than those mentioned in the legislation to whom protection should be specifically extended?

The use of Online portals and social media have been used extensively to persecute individuals and to attack persons who have expressed opinions which are not considered to be “orthodox” or “normal”. This persecution frequently extends to loss of employment, exclusion from education and online shaming, which is the equivalent of internal banishment at a social level and can have disastrous psychological consequences for the individuals concerned.

The legislation as exists at present makes no provision to protect individuals or groups who express ideas which others find challenging. This is undoubtedly a major loophole in the law whereby specific discrimination, long prohibited in legislation in the “real world” can be entered into online without any fear of consequence. In this sense, in a perverse way, the existing desire to increase tolerance, and to a lesser extent the existing legislation, has been used to dramatically increase intolerance in respect of people holding different opinions from that of current “normality”. This tendency to intolerance has also crept into a refusal to acknowledge the legitimacy of religious positions such that religious discrimination is now regularly and openly practised under the perverse guise of promoting inclusivity. Similarly, withdrawal of services and refusal to offer services to groups or individuals on the basis of their opinions and beliefs should be specifically prohibited.

While legislation offers protection, and prohibits discrimination, on the grounds of sexual orientation it offers no similar or equivalent protection on the grounds of sex, or what is sometimes referred to as gender. Yet there is widespread evidence of discrimination in areas of employment and employment promotion on the basis of sex. Such discrimination should be specifically prohibited.

Question 2. The use of the term “hatred”. Is the term “hatred” the correct term to use in the act? If not, what should it be replaced with and are there implications for free speech?

The Problem with “Hate”.

The problem here is that “hate” is a difficult concept to define and as stated in the consultation document the term is given its normal meaning in the language when interpreted by the courts. However, when we speak of the concept of hate this word is used differently in different contexts and given the notorious imprecision of the English language the potential for abuse and mal-interpretation of law is very clear. Similarly, when one is relying on the use of the term within language for something which is central to legislation, and where the use of that term within language can change dramatically over short periods of time, the potential for legislation to become oppressive is obvious. Some years ago when the Catholic Archbishop of Armagh visited an Oireachtas committee he was shown an article which appeared in a Catholic newspaper which was critical of the European Union, possibly trenchantly so, and he was asked to justify it on the basis that it appeared to promote hatred against the European Union and would thus be potentially contrary to legislation. This clearly represents a misuse of the intention of the 1989 legislation which was to protect specific individuals and groups and it shows that the concept of hate can be used to protect political or other government institutions from criticism which may be entirely legitimate.

“Hate” can mean entirely different things to different people, and a hatred of wrongdoing, injustice or criminality can be an entirely beneficial thing for society, while a hatred in matters relating to personal preference for example in food and clothing should be a matter of indifference to it.

Also, the term is imprecise in that it is entirely dependent on the degree to which the hatred in question is expressed. What is seen by the speaker as just and reasonable criticism of, shall we say, the positions taken by a particular religious group on a social issue, may be seen by members of that group as an effort to promote hatred against them. A judge may have to arbitrate on this but in either event one group or the other may feel they have not received justice. Also,

clearly, any group which becomes adept at using the court system against what it perceives as its enemies can use the threat of litigation to close down what may be perfectly legitimate criticism of its activities.

For these reasons we feel that the imprecise term of “hate” is insufficient in itself and should be replaced with the term such as “hatred to the point of inciting violence” or “hatred to the point of encouraging a criminal act”.

The legislation which is being reviewed however is not specifically confined to the matter of hatred or dissension. It also deals specifically with matters of persecution and discrimination. The promotion of persecution to the point of loss of employment, education or social opportunities should also be specifically sanctioned by the legislation.

Question 3. Should the legislation be changed to make prosecutions for incitement to hatred online more effective?

In light of the comments above it is difficult at first glance to see why online posts should be treated differently to other publications. However, there is one significant difference and it is the matter of editorial control. In any newspaper an editor would have a legal knowledge and will have an understanding of when a journalist is passing over a line which is inappropriate both from the point of view of libel and slander as well as from the point of view of infringing legislation. No such editorial control exists online and indeed providers of online portals have strenuously refused to accept the responsibilities normally associated with publishers. This of course has not stopped them from exercising editorial control, but it has stopped them from being required to exercise that control in an even-handed manner. An interesting case is proceeding against Google in the United States at present for what is seen by the plaintiffs as a discriminatory use of online editorial control⁵.

If prosecutions are to be taken under any legislation it is important to protect innocent persons who make comments that they feel are appropriate or who may find themselves on the wrong end of what is often an extremely complex and unclear legislative provision. Prosecutions against online posts may be manifestly unfair to well-intentioned individuals with potentially disastrous consequences for them and such prosecutions would also have the potential to render use of online fora effectively impossible for discussing important civil, political and religious matters.

Most importantly of all is that private fora such as Facebook, WhatsApp, Twitter et cetera should be entirely protected from prosecution. It may be appropriate that where a particular account achieves a certain level of “following” above say 5,000 persons that it then becomes a public forum with requirement to appoint

⁵ PragerU v Google, US Federal Court.

an editor to approve content. Obviously, this creates difficulty to people who have very large circles of friends, but the likelihood is that a team of online advisers would soon grow up to protect individuals from unexpected prosecution. However, the possibility of an invasive prohibition against private online conversations is as reprehensible an idea as the suggestion that private conversations between individuals should be censored or regulated by government.

Question 4. Is the requirement to prove intent excessive and if so with what should it be replaced?

It would clearly place an innocent party in an extremely difficult position if they make what they believe is a perfectly reasonable comment having no intent of causing offence or incitement and they find that they could be prosecuted by being reckless in the sense that the words they used may have caused either significant offence to some party or caused another party to have developed a sense of hatred. Those parties which recklessly or unjustifiably take offence or who believe they have been given justification for hating others are the real source of the problem rather than a person who makes what they see as an entirely reasonable statement. There are at the present time far too many individuals and groups who spend a great deal of their time looking for something against which to take offence!

The "difficulty" of proving intent (if "difficulty" is the correct term) can perhaps be overcome by having a more precise definition of what constitutes the wrongdoing in the first place. Intent will always be a private matter. If on the other hand the term "incitement to hate" is replaced with a series of prohibitions against incitement to commit specific acts, then the legislation becomes much more usable. It is a good deal easier to prove that there was intent to incite violence, if this is the issue, than that there was an intent to encourage hate, given the clear lack of clarity on what the word "hate" actually means.

Conclusions.

Incorporating the concept of hate into legislation is of itself fraught with difficulty, and we believe that the prohibition against incitement to hate should be more carefully defined to refer to prohibitions against incitement to commit specific acts which are unjust or violent.

It appears to us that the extensive efforts to prevent hate and to promote inclusivity have in very many instances achieved the direct reverse of what was originally intended and resulted in the persecution and exclusion of people because of their legitimately held beliefs or religious positions.

Legislation should concentrate more on the elimination of discrimination against people and this should include discrimination against people holding opinions or beliefs as well as including discrimination against people because of their sex. State authority has no role to play in the regulation or surveillance of private conversations, correspondence or online communications. Any such surveillance or regulation should only be carried out under judicially sanctioned and temporary licence where there is credible evidence of a crime being committed.

Making the operators of online portals liable for prosecution in respect of content that has been held to constitute incitement to violence is likely to prevent these online portals from providing the very useful function of enabling otherwise voiceless people to have input to debate and a means of expressing their opinions. On the other hand, making the individuals liable is likely to result in a very large number of innocent people being prosecuted for doing something that they had no idea was wrong.

It would appear to us therefore that the only way of dealing with the issue of incitement to violence online is to provide an independent authority, paid for by the online providers, which would adjudicate on whether a particular post has strayed into the area of incitement to commit violent acts against named groups, and to issue a written notice or strike order to the publishers who would then be liable to sanction if they did not act quickly.

Other than this, efforts to regulate the Internet will do a great deal more harm than good. The nature of the Internet is to be chaotic: that is its advantage which has shown many significant benefits to society in many different areas. We should accept that the internet is largely impossible to regulate but perhaps coming up with a system as outlined above would enable its worst abuses to be dealt with.

We advocate that any proposed restrictions of online fora should only relate to specific incitements to violence, slanders, sexual or violent indecency, or efforts to incite physical conflict against a specific group.

In particular, we believe that any significant changes to the legislation must guard against the possibility of infringement on the liberty of freedom of expression without which a just and democratic society cannot prevail. If the legislation is to be in any way “strengthened” it should be strengthened to protect individuals who have been persecuted because they expressed opinions which have fallen outside of currently accepted cultural orthodoxy.

Submission Made on Behalf of:

The Irish Freedom party, a Registered Political Party in Ireland.

November 2019. Author M. Leahy, member of Árd Comhairle.