



SUBMISSION ON LGBTI
INCLUSION STRATEGY
SUBMISSION TO THE PUBLIC
CONSULTATION ON THE
REVIEW OF THE INCITEMENT
TO HATRED ACT, 1989

By LGBT Ireland

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1. About LGBT Ireland

LGBT Ireland is a national charitable organisation working to improve the visibility, inclusion and rights of LGBTI+ people living in Ireland. Through our national helpline, online, and face to face services we provide confidential support and information to thousands of LGBTI+ people and their family members each year.

Informed by the issues and experiences raised through our frontline services, we also work extensively in the area of policy and legislative reform to ensure that LGBTI+ people's voices are heard in the policy and practice developments that effect their lives.

The submission below is informed by the issues and experiences of the LGBTI+ people and their family members who contact us. As a network organisation with seven regional LGBTI+ member services, we also have a strong regional focus and the recommendations outlined below are deeply rooted in the knowledge and experience of our members working across the country.

2. The prevalence of Hate Speech and Hate Crimes against LGBTI+ People in Ireland

Through our confidential **helpline, online and peer support services**, we regularly hear from LGBTI+ people who have been victims of hate speech due to their LGBTI+ identities. We have had reports of people being shouted at in an offensive and derogatory way, repeated threats to 'out' individuals who are not out within their family or community, offensive graffiti on people's homes and threats of physical and/or sexual violence. These incidences have taken place in public spaces, on public transport, in people's neighbourhoods, schools, colleges and workplaces, as well as online through social media, websites and dating Apps.

These incidents can have a deep and lasting impact on those who are victimised, leaving them feeling unsafe and fearful of further and escalated harassment. Many of those who have been targeted report that it put a significant strain on their mental health, impacted on their ability to attend school, college or work and negatively affected their intimate relationships and family life.

For those we work with who face additional marginalisation, especially LGBTI+ people who are **seeking asylum** or members of the **Travelling community**, challenges of facing down verbal insults and threats of violence from other residents [in Direct Provision] or members of their own communities are regularly reported within our peer support groups and training spaces.

A growing body of Irish research also points to the level of Hate Speech and Hate Crime against LGBTI+ people. The recent study published by BeLonG To Youth services with Columbia University¹ into the lived experiences of LGBTI+ young people within Irish post-primary schools, provides evidence of the unsafe school climate experienced by **LGBTI+ young people** within the school community as a direct result of their LGBTI+ identity or another marginalised aspect of their lived experience (appearance, class, race).

Some of the key findings related to student safety and protection were:

¹ <http://belongto.org/wp-content/uploads/2019/11/Key-Findings-School-Climate-Survey-2019-1-1.pdf>

- 73% of LGBTI+ students felt unsafe at school. 47% because of their sexual orientation and 27% because of their gender expression.
- 3 in 10 LGBTI+ students missed at least one day in the past month because they felt unsafe or uncomfortable.
- The majority of LGBTI+ students (86%) felt deliberately excluded by peers with 74% experiencing being the focus of rumours or lies.
- 77% of LGBTI+ students were verbally harassed (e.g. name calling or being threatened) based on their sexual orientation, gender, gender expression or ethnic origin.
- 38% of LGBTI+ students were physically harassed (e.g. being shoved or pushed), 25% because of their sexual orientation and 18% based on gender expression.
- 11% of LGBTI+ students were physically assaulted (e.g. punched, kicked or injured with a weapon) because of their sexual orientation, 8% because of their gender expression.
- 43% of LGBTI+ students were sexually harassed (e.g. unwanted touching or sexual remarks).
- 39% of LGBTI+ students experiencing cyberbullying via social media, telephone and email over the past year.

Older LGBTI+ people also reported experiencing significant verbal and physical abuse and harassment in an Irish study into the lives of older LGBT people undertaken in 2011. The *Visible Lives Study*² found that half of all participants had been verbally insulted because they were LGBT and almost 20% had been punched or kicked because of their LGBT identity. 25% had been threatened with physical violence and 20% had people threaten to 'out' them.

Both studies show the levels of verbal and physical abuse and harassment that LGBTI+ have faced and continue to face in our society. Given these findings it is unsurprising that in the Burning Issues 2 consultation report published in 2016³ by the National LGBT Federation, the introduction of hate crime legislation and the strengthening of Incitement to Hatred legislation were the top legal reforms identified by the LGBT community.

Without sufficient legislation to combat and effectively handle instances of hate crime and hate speech the prejudice and hatred produced or inflamed by such messaging from individuals or groups normalises and encourages hatred and violent behaviour towards marginalised communities. It is clear that the current Act fails to tackle the everyday, oppressive and damaging effect on LGBT+ people who are victims of hate crime and hate speech, in a number of core ways.

² GLEN, 2011. *Visible Lives Study: Identifying the experiences and needs of older Lesbian, Gay, Bisexual and Transgender people*. https://lgbt.ie/wp-content/uploads/2018/06/attachment_233_Visible_Lives_-_Key_Findings_Nov_2011.pdf

³ National LGBT Federation. (2016). *The Burning Issues 2 Report*. <http://nxf.ie/wp-content/uploads/2016/06/Burning-Issue-2-Report-by-NXF.pdf>

Issue 1: Protected characteristics covered by the 1989 Act

The Act currently addresses incitement on the grounds of race, colour, nationality, religion, ethnic or national origins, membership of the travelling community and sexual orientation. The grounds included in the Act are however, limited. There are extremely vulnerable groups in society who are left unprotected by the Act.

ILGA Europe defines LGBTI-phobic hate crime and hate speech as “violence and speech and/or aggression towards LGBTI people due to their actual or perceived sexual orientation, **gender identity and/or sex characteristics**. It includes homophobic **and transphobic** hate crime and hate speech.”⁴

The Act currently only lists sexual orientation and does not address gender or gender identity. Therefore, it does not address transphobic hate speech, or hate speech against people based on gender identity and/or sex characteristics. Both Irish and international research has consistently shown exceptionally high levels of verbal harassment regularly experienced by transgender people.⁵ If unamended the Act will continue to leave vulnerable transgender people outside the scope of its protection.

Within the An Garda Síochana Diversity & Integration Strategy 2019-2021, both sexual orientation and gender have been listed as basis for hate crimes and hate incidents. They have also explicitly stated that ‘gender’ includes gender identity, transgender, intersex, gender expression and gender exploration.⁶

The 2014 STAD: Stop Transphobia and Discrimination Report showed that although types of assaults and hate crimes against transgender people varied, all included insults and verbal abuse. Furthermore, when respondents in the research were asked about the motive for the assault, all responded that it was a combination of their **gender identity or gender expression** and sexual orientation. This illustrates that with these assaults, the motive is rooted in not just homophobia, but also transphobia.⁷ Therefore, there is great need for the inclusion of gender identity as well as sexual orientation as a listed identity characteristic in the Act.

Recommendation: Include gender expression, gender identity, sex characteristics, as listed identity characteristics in the Act.

⁴ ILGA Europe on Hate Crime & Hate Speech, <https://ilga-europe.org/what-we-do/our-advocacy-work/hate-crime-hate-speech>

⁵ Dr. Fergus Ryan, Hate Speech, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397731

⁶ An Garda Síochana Diversity & Integration Strategy 2019-2021, <https://www.garda.ie/en/crime-prevention/community-engagement/community-engagement-offices/garda-national-diversity-integration-unit/diversity-and-integration-strategy-2019-2021-english-v1-1.pdf>

⁷ STAD: Stop Transphobia and Discrimination Report, <https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/TENI-STAD-Report.pdf>

Issue 2: Use of the term “hatred” in the Act

Under the Act, in order to be an offense, the words or material must be intended or likely to stir up hatred against one of the protected list of groups. The use of the term “hatred” in the act sets a high standard which is difficult to meet.⁸ The lack of a definition of the term “hatred” adds even more difficulty. Because of this, the Act may only address the most deplorable situations of hate speech, where hatred is evident and clear. This means the Act is ineffective in addressing hate speech which is still offensive, insensitive and upsetting, however might not be considered extreme enough to stir up hatred.

The United Nation uses the wording “incitement to discrimination, hostility and violence”⁹. The International Covenant on Civil and Political Rights (ICCPR) guarantees equality and non-discrimination in the enjoyment of rights. The ICCPR does place an obligation on State Parties to prohibit hate speech. Article 20(2) provides that: “Any advocacy of national, racial or religious hatred that constitutes **incitement to discrimination, hostility or violence** shall be prohibited by law.”¹⁰ By using language such as this may be both helpful in defining and lowering the often inaccessible standard set in the Act.

If the term “hatred” were to be replaced or not, addressing hate speech does not mean limiting or prohibiting freedom of speech or expression. It means keeping hate speech from escalating into something more dangerous¹¹, which is prohibited under law.

Issue 3: Application of the Act to online speech

Although the growth of online spaces has brought many benefits to LGBT+ people, the anonymity and lack of usual social boundaries in these spaces has rendered the online environment permissive of much abuse and hate for LGBT+ people.

The context of the 1989 Act presented a very different Ireland in which marginalised groups were existing, many of whom kept their identities covert if possible, to avoid instances of discrimination, hostility and hatred. Societies’ technological advancements present an opportunity for members of marginalised communities to connect and remove themselves from atmospheres of isolation. However, there is also a clear inability within the act to discern how capable the legislation is in

⁸ Dr. Fergus Ryan, Hate Speech, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397731

⁹ UN Strategy and Plan of Action on Hate Speech
<https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>

¹⁰ Office of the High Commissioner for Human Rights, Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred Work in Progress,
<https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>

¹¹ UN Strategy and Plan of Action on Hate Speech
<https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>

effectively responding to instances of hate speech (discrimination, hostility, violence, and prejudice) or potential online hate crime.

Galop, an LGBT+ anti-violence charity produced a report on the scale and nature of online hate crime and hate speech against LGBT+ people in the UK. They reported that 84% of respondents experienced more than one occurrence of online abuse, and 59% of respondents experienced six or more occurrences of online abuse. They reported that verbal abuse, insults, threats, intimidation, harassment, outing and doxing (the Internet-based practice of researching and broadcasting private or identifying information about an individual or organization) are common components of anti-LGBT+ online hate crime. Furthermore, they found that transgender, non-binary and intersex people were subjected to more frequent online hate speech, which was generally more severe, more threatening, and had greater impact and consequences.¹²

Recording of hate speech by civil society has revealed that there is much overlap between white supremacist, Islamophobic, particularly anti-refugee and anti-LGBTI+ content in Ireland and abroad¹³. While there are a small number of ‘producers’ of such content, there are many more reproducing that content across all social media platforms.¹⁴ Social media pages of news outlets play an important role in channelling racially-loaded toxic contents through the comment threads on their posts. The way mainstream media frame and present news also has an impact on the comments posted. Expressions of racism online are punctuated with misogynist, homophobic, racist, and transphobic attacks directly targeting women, people of different ethnic backgrounds, and members of the LGBTI+ community.¹⁵

There is no clear responsibility for hateful social media content amongst public authorities. The Press Ombudsman only deals with complaints about newspapers, magazines and some online news services, but not social media. There is little incentive for news outlets to moderate their social media pages for hateful content. The Broadcasting Authority of Ireland deals only with broadcast media, but has made producers responsible for audience expressions of hatred which are broadcast.¹⁶ An Garda Síochána are not currently equipped with the necessary resources to undertake investigations into online harassment, and have very limited capacity to deal with the wider issue of online hate speech¹⁷. There have been calls from a wide range of digital and legal experts for the State to take a larger role in monitoring and addressing online hate speech.¹⁸ A range of approaches to understanding, tracking and reporting hate speech have been undertaken by civil society and human rights institutions to tackle this problem. Reports of hate content to social media platforms, even by ‘trusted parties’, are largely deemed to not to breach community guidelines.¹⁹

¹² Galop UK, Online Hate Crime Report, <http://www.galop.org.uk/wp-content/uploads/2017/08/Online-hate-report.pdf>

¹³ L. Michael, iReport.ie Reports of Racism in Ireland: July-December 2018 (ENAR Ireland, 2019).

¹⁴ <https://www.ihrec.ie/app/uploads/2018/11/HateTrack-Tracking-and-Monitoring-Racist-Hate-SpeechOnline.pdf>

¹⁵ <https://www.ihrec.ie/app/uploads/2018/11/HateTrack-Tracking-and-Monitoring-Racist-Hate-SpeechOnline.pdf>

¹⁶ <https://www.irishtimes.com/news/ireland/irish-news/complaint-over-racist-comments-on-4fm-upheld-1.1565652>

¹⁷ <https://www.rte.ie/news/politics/2019/1016/1083823-cyber-crime-oireachtas/>

¹⁸ <https://www.iccl.ie/wp-content/uploads/2019/10/ICCL-Online-Harassment-Submission.pdf>

¹⁹ <https://www.businesspost.ie/insight/online-hate-speech-where-will-the-line-be-drawn-0a79af5f>

Further, approaches which rely on individual reports are restricted by the burden on targeted minorities to report, the low level of bystander reporting and the harassment of those who attempt to ‘call out’ racism online.²⁰

The effects of online hate speech has also been captured in international literature. Hawdon, Oksanen and Räsänen (2014) surveyed 1000 people between 15 and 30 years old and found that more than 50% respondents were exposed to hate speech or hate material. It was found within the research that the younger the respondent, the more likely they were to have been exposed to online hate. Keen and Georgescu (2014) found that online hate often escalated to individuals perpetrating violent physical crimes and online discourse was often used as a rationale for the violence. Both Chan, Ghose and Seamans (2014) and Chakraborti and Garland (2009) found that online groups, forums and websites were used to recruit individuals into violent, bias and prejudicial motivated groups and utilised the uncensored nature of online spaces to raise funds and become more visible and accessible to those with existing biases towards marginalised communities.

Many of our most important public and civic spaces exist online and the capabilities deriving from social media platforms to shape public attitudes are immense. Social media facilitates the rapid spread of ideas online, and hate speech is no exception. Neo-Nazi, far right, and fascist groups have all capitalised on social media’s broad reach, easy access, and anonymity to spread racist, homophobic, and misogynist rhetoric through targeted online posts, videos, forum discussions etc²¹.

Online spaces and the potential policing of them presents several issues with respect to culpability that need to be addressed in any reform of the Act including:

- Share/Retweet, an individual is not the original poster but none the less engages and spreads the content
- Like/Favourite/Thumbs Up, an individual’s once again is not the original poster but validates the content
- Facebook/Twitter Algorithms and unanticipated dissemination and corporate liability for same
- Editorial Responsibility of Group Administrators
- Closed groups
- Anonymous online spaces such as 4Chan, Discord, and Gab

Social media companies broadly follow international and EU legal guidelines when it comes to policy rules regulating hate speech on their platforms. However, a challenge arises as their community standards prohibit content that “*directly attacks*” a protected group but not content which would be considered a “*degrading generalisation*” likely to stir up prejudice indirectly against a protected group.¹⁹

²⁰ <https://www.ihrec.ie/app/uploads/2018/11/HateTrack-Tracking-and-Monitoring-Racist-Hate-Speech-Online.pdf>

²¹ <https://www.ihrec.ie/app/uploads/2018/11/HateTrack-Tracking-and-Monitoring-Racist-Hate-Speech-Online.pdf>

The ability to share content across a diverse range of social media platforms with ease means that content can be rapidly disseminated leading to multiple ‘posts’, ‘retweets’, ‘shares’ with or without comment from the sharer included. The sheer volume and scope of proliferation of the content online (potentially across multiple platforms) makes reporting the totality of offending content to platform operators difficult to achieve. What’s more, different community guidelines across different platforms have led to radically different decisions about what constitutes hate speech online by the various social media companies.

LGBT Ireland recommends that within the context of the Online Safety and Media Regulation Bill, 2019 that the ‘Online Safety Commissioner’ envisioned within the heads of Bill be empowered to develop statutory online community guidelines which would apply across all social media platforms ending the era of self-regulation of hate speech online.

Issue 4: Proving intent or likelihood

It is unlikely that the lack of successful prosecutions under the 1989 Act is only down to the wording of the Act. The Acts ineffectiveness in relation to online hate speech is likely hugely tied to the requirement to prove that the action was intended or likely to stir up hatred which is discussed below.

The requirement to prove that the action was intended or likely to stir up hatred is a defining element which has rendered the Act highly ineffective in combating hate speech. This has allowed for cases, including cases of online hate speech, to be dismissed on the basis that there was reasonable doubt as to whether there had been intent to incite hatred.²²

In order to mitigate this clear barrier to prosecution the nature of intent to incite hatred must be taken on a balance of probability and should fall in line with the An Garda Síochana’s Diversity & Integration Strategy 2019-2021, which defines a hate incident as an incident “which is **perceived by any person** to, in whole or in part, be motivated by hostility or prejudice”.²³

²² Amanda Haynes & Jennifer Schweppe, Lifecycle of a Hate Crime: Country Report for Ireland (2017)

²³ <https://www.garda.ie/en/crime-prevention/community-engagement/community-engagement-offices/garda-national-diversity-integration-unit/diversity-and-integration-strategy-2019-2021-english-v1-1.pdf>

3. Recommendations

- The department should develop new legislation to effectively deal with hate crime, however, in the interim, LGBT Ireland recommends that hate motive becomes an aggravating factor in which judges *must* take into account at sentencing for any criminal offence.
 - The list of protected characteristics should be extended to include; Gender expression, gender identity, and sex characteristics.
 - Expand the definition of “hatred” within the act to encompass discrimination, hostility, violence and prejudice and other terms which would more greatly protect the potential vulnerability of marginalised communities.
 - Expand the Act to include online hate speech and look to international law to inform the progression of the legislation.
 - Amend the Online Safety and Media Regulation Bill, 2019 to empower the ‘Online Safety Commissioner’ envisioned in the heads of bill to create statutory online community guidelines which would apply across all social media platforms operating within the state.
 - Proof of ‘intent to incite hatred’ must be on a balance of probability and should fall in line with the An Garda Síochána’s Diversity & Integration Strategy 2019-2021, which defines a hate incident as an incident “which is **perceived by any person** to, in whole or in part, be motivated by hostility or prejudice”.
 - Establish voluntary programs of restorative justice as part of sentences, community service or education programs, where the victim agrees to same, in order to mitigate the likelihood of reoffence.
 - In instances where ignorance or a clear lack of awareness regarding the likelihood to incite hatred is evident sentencing should be replaced entirely with community service or a form of community/perpetrator reconciliation through organized, structured and supported restorative justice.
-