THE IONA INSTITUTE

GETTING THE BALANCE RIGHT: COMBATING INCITEMENT TO HATRED WHILE PROTECTING EXPRESSION OF MINORITY OR UNPOPULAR POLITICAL AND RELIGIOUS VIEWS

Submission of the Iona Institute to the Department of Justice and Equality public consultation on the review of the Prohibition of Incitement to Hatred Act 1989

(13 December 2019)

Free speech includes not only the inoffensive but the irritating, the contentious, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having … From the condemnation of Socrates to the persecution of modern writes and journalists, our world has seen too many examples of State control of unofficial ideas.

Sedley LJ in *Redmond-Bate v DPP*, (1999) 7 BHRC 375

[The right to freedom of expression under Article 10 of the European Convention on Human Rights] encompasses the right to express not only ideas 'that are favourably received or regarded as inoffensive, but also … those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindness without which there is no 'democratic society'.

European Court of Human Rights in *Handyside v United Kingdom* (1979) 1 EHRR 737

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Department of Justice and Equality published notice of a public consultation on the review of the Prohibition of Incitement to Hatred Act 1989 ("the 1989 Act") in October 2019 ("the Consultation Paper") and invited submissions from all members of the public, experts and groups. The Consultation Paper sought answers to 5 questions but also invited concrete proposals and suggestions for alternative approaches or other changes to the 1989 Act. It said comments were also welcome on the related issue of hate crime.

2. A summary of our recommendations is as follows:

   I. The Prohibition of Incitement of Hatred Act 1989 should not be amended. Instead a separate piece of legislation based on the UK's Malicious Communications Act 1988 should be considered. Whereas the former piece of legislation seeks to protect groups, the latter would seek to protect individuals, such as Fiona and Jonathan Ryan, and Katie Ascough.[1]

   II. Intent should still have to be proven when a charge of hatred is brought against someone. If we allow a person to be charged because someone perceives that the person in question 'hates' them, (or has made them a target of 'hostility' or 'prejudice'), then the chilling effect on freedom of expression and the undermining of the rights of the accused person will be too great.

   III. In any review of hate crime and hate speech law in this country, careful consideration should be given to the 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination' produced by the Office of the UN High Commissioner for Human Rights in 2012. In particular we draw attention to its high, six-part threshold test which must be met before any expressions can be considered as criminal offences. We note that by reference to the wording of Article 20 of the International Covenant on Civil and Political Rights, the Rabat Plan concludes that "negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant". This very clearly counts against any suggestion that

[1] This could include cases such as the one involving Fiona and Jonathan Ryan, the mixed-race couple used in an ad for the supermarket chain, Lidl, who were subjected to intense and intentional abuse online. It could and should cover individuals such as Katie Ascough, former President of the UCD Students' Union and a pro-life activist, who was also subjected to intense and targeted abuse when a successful campaign to have her removed from her position was launched. See https://www.joe.ie/news/katie-ascough-605842

the criminal law in this area should move towards a test for what counts as hate speech that depends exclusively on how a particular expression is perceived and has no regard for the intention of the speaker.

II. CLARIFYING KEY TERMS AND CONCEPTS

3. Difficulties with terminology and definitions are a well-recognised feature of legal and political debate about what is referred to colloquially as "hate speech" and "hate crime". These short-hand terms are convenient labels but there is a real risk that their use can obscure the very different configurations of rights, interests, social objectives, policy issues, laws and types of speech or conduct which can be fitted under these two very broad labels.

4. At the outset, therefore, it is important that any discussion of the 1989 Act should be prefixed by some clarification of the key terms and concepts at issue.

II.1 "Hate crime" vs "hate speech"

5. A helpful distinction is often drawn in the literature between "hate crime" and "hate speech"[2]. This distinction is adopted in the Consultation Paper which states that they are "*legally distinct*", though often in practice "*very closely linked*". The Consultation Paper states that "*a hate crime occurs where an offence is committed that is already itself a crime (for example assault or criminal damage), but where the victim is selected because of their association with a particular identity characteristic, perhaps their sexual orientation or ethnicity for example*" (emphasis added). In short, the term "hate crime" describes an offence known to the criminal law that is committed with a bias motive. A specific and separate consultation process is envisaged by the Department of Justice and Equality in relation to the development of new legislation to deal with hate crime in this jurisdiction.

II.2 Unpacking the concept "hate speech"

6. Unlike the term "hate crime", "hate speech" is a much more complicated and contested concept that resists any easy definition. It covers a variety of different phenomena and

[2] See, e.g., OSCE/OHIHR 2009; Haynes, A. and Schweppe, J. (2017).

these must be disaggregated before any meaningful policy discussion can take place. In this regard, Dr Tarlach McGonagle has accurately observed, in an Expert Paper for a 2013 Council of Europe Conference of Ministers, that:

> *""Hate speech" has not (yet) been defined in a watertight or authoritative way, either in international human rights law or in relevant scholarship. The term is a convenient shorthand way of referring to a broad spectrum of extremely negative discourse stretching from hatred and incitement to hatred; to abusive expression and vilification; and arguably also to extreme forms of prejudice and bias. Robert Post has posited that a certain threshold of intensity must be reached before a particular expression can be qualified as hate speech. He points to the Oxford English Dictionary entry for "hate": "an emotion of extreme dislike or aversion; detestation, abhorrence, hatred". For Post, the threshold or definitional prerequisite is the qualification, "extreme", because ordinary "intolerance and dislike are necessary human emotions which no legal order could pretend to abolish".*
>
> *From a legal perspective, the hate speech spectrum stretches from types of expression that are not entitled to protection under international human rights law (eg. Incitement to various specified acts), through types of expression that may or may not be entitled to protection, depending on the existence and weighting of a number of "contextual variables" (eg. extremely offensive expression), to types of expression that presumptively would be entitled to protection, despite their morally objectionable character (eg. negative stereotyping of minorities). The right to freedom of expression necessarily covers expression that may "offend, shock or disturb" certain groups in society (which is not the same thing as a right to offend). Democracy is not without its rough edges and tough talk is part of the cut and thrust of public debate and discourse.*
>
> *The challenge, then, is to identify the tipping point at which robust debate, contestation or criticism transforms into hate speech, or more precisely, a type of hate speech. It is important to differentiate between the various types of expression on the hate speech spectrum: they vary in terms of the intent of the speaker, the intensity of the expression, the severity of its impact, etc.*

Recognition of contextual factors can therefore usefully help to calibrate responses to, or formulate policies for, different types of hate speech. Further differentiation between forms of hate speech can be attained by determining whether the expression is: "direct (sometimes called 'specific') or indirect; veiled or overt; single or repeated; backed by power, authority, or threat, or not". These types of differentiation are of crucial relevance when attempting to gauge the impact of hate speech on its targets/victims."[3] (emphasis added; references omitted).

7. In a similar vein, Mark Tushnet identifies and gives examples of three components of what he calls the "'*speech is reasonably believed to cause harm' paradigm*". These are:[4]

   7.1. The *type* of expressions, e.g. "high-value speech" such as academic article or public speech dealing with public policy ("political speech"); "medium-value speech" such advertisements for commercial products ("commercial speech") and "low-value speech" such as obscenity or libellous statements.

   7.2. The *mechanism* by which the speech is said to cause harm, e.g.

      7.2.1. By *persuading* listeners to commit a crime;

      7.2.2. By *inciting* listeners to commit a crime (where the mechanism of incitement largely bypasses the listeners' deliberative capacities);

      7.2.3. By *shocking* a listener into attacking the speaker;

      7.2.4. By *unconsciously conditioning* listeners to think less of the targets of the speech, sometimes leading to lawless action against them or sometimes leading to systematically discounting the targets' views in political discussions.

   7.3. The type of *harm* that is said to be caused, e.g.

      7.3.1. A false statement may damage a person's reputation;

[3] McGonagle (2013). Dr McGonagle recently re-iterated many of these points at a seminar in Dublin on 28 November 2019 organised by the Irish Human Rights and Equality Commission. See: https://www.lawsociety.ie/gazette/Top-Stories/zone-in-on-hate-speech-tipping-point-says-academic/ (last accessed 7 December 2019).
[4] Tushnet (2018) pp. 17-18.

7.3.2. A political speech that a ban on marijuana for medicinal purposes is unjustified might cause a listener to violate that law;

7.3.3. An emotionally effective advertisement might lead to some consumers purchasing a product without fully appreciating its health risks;

7.3.4. An insult made face-to-face or over social media might lead the target to strike back physically.

II.3 Unpacking the "harm" of hate speech

8. It is important to be alive to all of the different variables noted by McGonagle and Tushnet when crafting policy and legislation in this area. It is a mistake to conceive of "hate speech" as a monolithic type of speech or problem that can be addressed by any one particular policy response or criminal prohibition. As will be outlined in more detail below it, it is now well recognised in international policy in this area that a multiplicity of strategies is required, with criminal sanction to be a limited measure of last resort.

9. In light of these reflections, one can see the danger in continuing to frame policy by reference to a catch-all term like "hate speech". For example, it led the Consultation Paper to associate all of the following long list of harms with what it calls "hate speech":

9.1. Hate speech "facilitates" hate crime.

9.2. Hate speech "can" lead to hate crime.

9.3. "In itself" hate speech "can cause" "great distress" or "injury".

9.4. Hate speech "validates prejudice".

9.5. Hate speech "can" be used by individuals or groups "to organise and campaign for their cause" or "raise funds" to "perpetuate and escalate the hateful climate they wish to promote."

9.6. Hate speech has a "ripple effect which spreads far beyond the individual victim"

9.7. Hate speech "can, if not dealt with, lead to a more divided society where entire communities feel unsafe."

9.8. Hate speech "impacts on the cohesion and fabric of our shared community."

10. Faced with this list of harms, it must first be asked if the invocation of the criminal law would be a proportionate and an effective strategy to address each of these harms. Even if it would, it must next be considered whether all of these harms could be addressed by way of any one criminal offence. In particular, the question arises whether this could reasonably be done through some revised version of the offence of "incitement to hatred" provided for under the 1989 Act. For example, it is already an inchoate common law offence to incite or aid and abet or conspire with another person to commit a crime. Thus, provided there is adequate legislation for "hate crime" in the first place (which is not the focus of this consultation) there would not appear to be any particular "hate speech" law required to address the harms at para. 8.1 and 8.2.

11. By contrast, if a special hate speech law was introduced with a view to preventing any speech that "can" cause the six other listed harms, then it is very easy to see that it would need to be extremely broad and thus would very likely catch all kinds of (high-value) political speech, artistic expression and other forms of speech and expression which liberal democracies should not restrict, never mind criminalise. This is because these six other harms identified by the Consultation Paper (perhaps with the exception of speech alleged to cause another person an actual "injury"[5]) are either very subjective or very vague or are the kinds of harms which can arise from time to time as an inevitable aspect of robust and passionate political, social, cultural, moral, religious, artistic and philosophical expression and disagreement in a pluralistic liberal democracy. Pluralist societies will of necessity involve groups living side by side who may find each other's beliefs, preferences, lifestyles, modes of expression etc. to be unethical, mistaken, offensive, insulting, without redeeming social value etc.

12. Achieving a level of mutual tolerance and basic level of civic respect among such groups is of course a legitimate ideal for a liberal democracy, and certain forms of extreme speech or conduct may threaten that ideal; but many other types of more moderately sounding or worded political speech may threaten it also and perhaps do so even more effectively and fundamentally. The inability of bans on hate/extreme speech to reach such other forms of expression (without becoming illegitimately over-broad) is a well-

[5] It is not entirely clear what scenario the Consultation Paper has in mind here. However, it is suggested below that so far as any particular act of threatening and abusive speech is targeted at and causes injury to another individual that can and should be addressed by analogy to the law of assault rather than incitement to hatred.

rehearsed argument against the usefulness and efficacy generally speaking of any content-based criminalisation of speech.[6] To put in simply, hate speech is caught on the horns of the following dilemma: either a ban is legitimate but relatively ineffective (because it is narrowly drafted and limited to very extreme and crude forms of expression which by definition are unlikely to have much or any persuasive appeal in most societies beyond people who already share the speaker's ideology) or it is potentially effective but illegitimate (because it captures and therefore creates the potential criminalisation of many paradigmatic instances of political expression). We call this the "legitimacy v effectiveness dilemma" for ease of reference.

II.4 Public discourse vs. inter-personal communications

13. A common criticism of the 1989 Act is that it does not appear to have provided an effective instrument for the prosecution of incidents of abuse and harassment directly targeted at and suffered by specific individuals because of a particular identity characteristic.[7] For example, in a press release dated 27 September 2019 and entitled "*ICCL calls for urgent review of Incitement to Hatred Act*", the ICCL stated:

> *"ICCL is saddened but unsurprised to learn that Fiona Ryan and Jonathan Mathis, a mixed-race couple from Co. Meath, feel Gardaí are not taking their fears seriously after they were subjected to a vitriolic white supremacist campaign of abuse online. This corresponds to evidence, anecdotal and otherwise, which ICCL has heard over many years.*
>
> *Online harassment and harmful communications are a significant problem, which mirror various forms of structural exclusions present offline. Despite early predictions that online communications would provide safe spaces, we are instead seeing that the sorts of harassing behaviour meted out offline are actually being amplified online. Racist stereotyping, abuse and death threats can spread like wildfire with an easy series of posts and shares.*
>
> *While proponents of hateful speech frequently invoke their right to freedom of expression, there are in fact very clear limits to this right when it impinges on the rights of others. Indeed, hate speech of this nature can have chilling effects*

[6] For versions of this particular argument against criminalising hate speech see: Heinze (2016) pp. 145-153 and 210; Post (2009) pp. 134-136; Strossen (2012) p. 383; and Strossen (2018) pp. 141-146.
[7] See comments of barristers and Gardai quoted in Haynes and Schweppe (2017) pp. 53-57.

on expression by suppressing a person's ability to speak due to hateful backlash.

In this case, the rights of Fiona Ryan and Jonathan Mathis to enjoy a private and family life, and to equality of treatment, are clearly impacted. Their right to freedom of expression is also curtailed because they are unlikely to feel empowered to express their identity as a mixed-race couple in the future.

ICCL has long been concerned that the Prohibition on the Incitement to Hatred Act of 1989 is not fit for purpose in our changed society or in the online sphere. We look forward to contributing to the public consultation on a review of this Act, and call for the review to be brought forward as a matter of urgency."

14. With respect, this commentary appears to conflate two very different issues.[8] Rightly or wrongly, the 1989 Act is not constructed to and was never intended to criminalise the sort of targeted and, in that sense, personalised racist abuse highlighted and rightly condemned by the ICCL's press release. Rather, the 1989 Act is concerned only with speech or materials which are "*threatening, abusive or insulting*" and which are intended or likely to "*stir up*" hatred against "*a group of persons in the State or elsewhere*" on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation. It is notable that it is not a necessary element of any offence under the 1989 Act that any particular or identifiable individual is actually threatened, abused or insulted on account of their race, colour, nationality etc. This is because the legislation is not concerned with such attacks on individuals *per se* but has the broader social and political goal of restricting speech intended or likely to stir up hatred towards particular groups within society.

15. For this reason, adjustments to the language of the 1989 Act would be an inappropriate legislative response to the kind of threatening abuse suffered by Ms Ryan and Mr Mathis.

[8] Indeed, this passage has elements of a certain rhetorical move that Heinze has described as follows: "*Personal injury caused by hate speech, such as infliction of psychological harm, arises in those sorts of immediate, interpersonal contexts, as distinguished from the ordinarily general character of public discourse. The problem with countless prohibitionist writings [i.e. advocates of bans on hate speech] is that they start with those empirically demonstrable harms of immediate, interpersonal situations, which the more studious oppositionists [i.e. opponents of hate speech bans] like Post or Weinstein have never questioned, but then extrapolate straightforwardly from them to a purely rhetorical empiricism, lacking any empirical references, about equivalent harms putatively caused by hatred expression within public discourse*." Heinze (2016) p. 126.

Equally, though for different reasons, section 10 of the Non-Fatal Offences against the Person Act 1997 and section 6 of the Criminal Justice (Public Order) Act 1994 also do not provide adequate protection for the victims of this kind of abusive conduct.

16. A far better course of action, therefore, would be to craft stand-alone legislation that would be very specifically and very narrowly tailored to the kinds of threatening and abusive conduct at issue in the cases highlighted by the ICCL press release. In this regards Tom Daly, writing in the Irish Criminal Law Journal, has cogently argued that:

> *"hate speech, in the form of face-to-face verbal abuse and malicious communications motivated by hatred is certainly a deplorably quotidian reality in Irish society. The publication of hate speech on the internet is also of concern. It is therefore submitted that enacting specific legislation to address such acts could do much more to safeguard minorities from hatred than enacting stringent incitement to hatred legislation, and would have the advantage of being more compatible with a strong right to freedom of expression.*
>
> *…*
>
> *Legislation could be enacted allowing such acts targeting members of groups enumerated in the 1989 Act to be dealt with as an offence against the person. Such a measure would be more compatible with freedom of expression than incitement to hatred legislation, given that street abuse has low value under any conception of free speech and that the nexus between the expression and the harm caused is much stronger than that in incitement cases. As Sadurski asserts, "[t]argeted vilifying remarks in face-to-face, personalized situations are better analogized to assaults than to communicative statements, and should be treated as such by the law".*
>
> *With regard to the specific matter of offensive private communications, the current legislation in place—the Post Office (Amendment) Act 1908 and s.10 of the Non-Fatal Offences Against the Person Act 1994 —appears inadequate, relating to the sending of offensive or false messages by telephone, or the harassment of another "by any means" including the telephone. While these provisions could be usefully applied to some instances of communication*

targeting minorities, it appears that specific legislation is needed to provide adequate protection from such communication. Using the UK's Malicious Communications Act 1988 as a model, legislation to combat offensive private communications related to hatred could prohibit the sending, by any means including by letter, telephone or computer, of: (a) a message which is threatening, abusive, insulting or intimidating; (b) a threat to commit a serious criminal offence (which would be defined in the legislation) against the recipient; or (c) any other article which is, in whole or part, of a grossly offensive or threatening nature, where the sender's purpose, or one of his purposes, in sending it is that it should cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated, and where he or she is motivated by the recipient's race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.

Though clearly covering a wider range of expression than the 1989 Act, such a law would be permissible given that it would cover solely private communications, and would be based on a more satisfactory nexus between expression and harm. Legislation of this type would also fulfil Art.4 of the Additional Protocol to the Council of Europe's Convention on Cybercrime, which is not subject to reservation or limitation."[9] (references omitted).

17. The distinction between the type of inter-personal "hate speech" which these proposals from Daly are designed to tackle and the type of public discourse "hate speech" addressed by the 1989 Act is a very significant one and has been widely recognised in the literature on this subject.[10]

18. Daly refers in the passage above to the UK's Malicious Communications Act 1988. He was writing in 2007 when Twitter (founded in 2006) was still relatively in its infancy. However, it is clear from English case law that the 1988 Act applies to messages broadcast by way of tweets.

[9] Daly (2007). Ireland has signed but has not ratified the Council of Europe's Convention on Cybercrime. Ireland has neither signed nor ratified the Council of Europe's "Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems".
[10] See Weinstein (2010) pp. 35-37; Strossen (2018) pp. 59-66; and Heinze (2016) pp. 28-29 and 125-129. See also the references cited on this point in Brown (2015) at p. 317.

19. The offence of sending malicious communications is set out in section 1(1) of the Malicious Communications Act 1988 as follows:

> *"(1) Any person who sends to another person—*
>
> *(a) a letter, electronic communication or article of any description which conveys—*
>
> *(i) a message which is indecent or grossly offensive;*
>
> *(ii) a threat; or*
>
> *(iii) information which is false and known or believed to be false by the sender; or*
>
> *(b) any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature,*
>
> *is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated."*

20. Unlike the offence of harassment, which requires a "course of conduct" and cannot be established through a standalone communication, a person can in theory commit an offence of sending malicious communications through a single tweet or message. An offence is committed as soon as the communication is sent and it does not even have to be received by the intended person (see section 1(3) of the 1988 Act). Equally there is no need for the communications network to be public and it therefore includes private message. (The UK have separate statutory provisions dealing with communications sent over a public network: see section 127 of the Communications Act 2003.[11])

[11] Section 127 of the Communications act 2003 provides, *inter alia*, as follows:
"*(1) A person is guilty of an offence if he—*
(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
(b) causes any such message or matter to be so sent.
(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—
(a) sends by means of a public electronic communications network, a message that he knows to be false,
(b) causes such a message to be sent; or
(c) persistently makes use of a public electronic communications network."

21. The offence is focused on the malicious intent of the sender, rather than the impact on the recipient. It must be proven that the sender had an intention to cause anxiety or distress to the recipient or to any other person to whom the sender intends it be communicated.

22. The threshold for establishing that a communication is "grossly offensive" is high due to the potential impact on freedom of expression under Article 10 of the European Convention on Human Rights. In *DPP v Collins* [2006] UKHL 40 (which concerned a a phone message containing racist language left on the voice mail of a Member of Parliament) it was held that it was a question of fact whether a message was "grossly offensive", and that what was grossly offensive had to be judged by considering the reaction of reasonable persons and "*the standards of an open and just multiracial society, and that the words had to be judged taking account of their context and all relevant circumstances*".

23. **For the avoidance of doubt:** in the remainder of this submission "hate speech" shall be used only to refer to "public discourse" hate speech (i.e. the type envisaged by the 1989 Act). It will not refer to what it has been argued above is the very different category of assault-like cases of inter-personal communications involving threatening, abusive or insulting language targeted by one person against another.

III. REVIEW OF THE 1989 ACT – FOUR TOPICS

24. It is helpful to break down the discussion of possible reforms of the 1989 Act and the five questions raised in the Consultation Paper by reference to the following four topics. These are set out in the following table.

The difference in the purposes of the offences under section 127 of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 was addressed by the House of Lords in DPP v Collins [2006] UKHL 40 as follows: "*... the object of section 127(1)(a) and its predecessor sections is not to protect people against receipt of unsolicited messages which they may find seriously objectionable. That object is addressed in section 1 of the Malicious Communications Act 1988, which does not require that messages shall, to be proscribed, have been sent by post, or telephone, or public electronic communications network. The purpose of the legislation which culminates in section 127(1)(a) was to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society. A letter dropped through the letterbox may be grossly offensive, obscene, indecent or menacing, and may well be covered by section 1 of the 1988 Act, but it does not fall within the legislation now under consideration.*" (per Bingham LJ).

	Topic	Consultation Paper question
Why?	Why is incitement to hatred criminalised and what is the purpose of such legislation and what are the countervailing principles and purposes which delimit its proper scope?	Not raised as a specific issue or question in Consultation Paper (but see discussion of the Act more generally at pages 2 and 3 of the Consultation Paper).
What?	What type of speech or conduct should be criminalised under the 1989 Act? This has four further aspects: (a) What type of speech is the law concerned with? (b) What type of harmful effect is the law concerned with? (c) What type of causal mechanism/mental state does the law require linking the speech and the effect? (d) What defences are available?	"2. Do you think the term "hatred" is the correct term to use in the Act? If not what should it be replaced with? Would there be implications for freedom of expression?" "4. In your view, does the requirement that an offence must be intended or likely to stir up hatred make the legislation less effective?" "5. If so, what changes would you suggest to this element of the 1989 Act (without broadening the scope of the Act beyond incitement)?"
Who?	What groups or characteristics should be covered by the	"1. Are there other groups in society with shared identity characteristics, for example disability, gender identity, or others, who are

	prohibition on incitement to hatred under the 1989 Act?	vulnerable to having hatred stirred up against them and should be included in the list of protected characteristics?"
How?	How can the prohibition best be enforced in respect of incitement to hatred occurring on-line?	"3. Bearing in mind that the Act is designed only to deal with hate speech which is sufficiently serious to be dealt with as a criminal matter (rather than by other measures), do you think the wording of the Act should be changed to make prosecutions … for incitement to hatred online more effective? What, in your view, should those changes be?"

25. The ordering of these four topics is significant. It is only when the purpose of incitement to hatred legislation is clarified that it makes sense to ask what it should prohibit (and what it should not prohibit), which characteristics/groups it should extend to and then how such prohibitions can be effectively enforced against material occurring in different media or contexts, including in particular on-line.

26. The first topic ("the Why?") has been discussed to some extent already in the previous section. As already, emphasised it is important to have clarity on what harms the 1989 Act is intended to address (and what harms it is not intended to address). For the reasons already given, it would be a mistake to think that the 1989 Act is able or intended to criminalise anything falling under the label of "hate speech" or to think that it can or even should address all of the possible harms associated with "hate speech".

27. While recognising its importance, this submission does not address that fourth topic. The question of what technical changes should be made to the legislation so as to respond to the particular and unique challenges for effective investigation and prosecution of any offences under the 1989 Act which happen to be committed via on-line "speech" raise specialised issues of both criminal law and technology.

28. Before addressing the other two topics of "the What" and "the Who", however, it is useful briefly to consider some aspects of international law that are relevant for any discussion

of the 1989 Act. In doing so, further light will be thrown on the question of what is the proper purpose of legislation such as the 1989 Act.

IV. INTERNATIONAL LEGAL CONTEXT

IV.1 Freedom of expression in international law

29. As a matter of international law, the right of every individual to freedom of expression is a foundational and paradigmatic human right.

30. Freedom of expression is guaranteed under Article 19 of the Universal Declaration on Human Rights (UDHR), and more or less in similar terms under article 19 of the International Covenant on Civil and Political Rights (ICCPR) as follows:

> *"Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."*

31. Freedom of expression is also protected in regional human rights treaties, at Article 10 of the European Convention on Human Rights (ECHR), at Article 13 of the American Convention on Human Rights and at Article 9 of the African Charter on Human and Peoples' Rights.

32. As Dr Agnes Callamard (the then Executive Director of the human rights NGO ARTICLE 19) noted in a 2008 conference paper:

> *"… the importance of freedom of expression has been emphasized on numerous occasions by international courts and bodies alike.*
>
> *As early as 1946, at its very first session, in the UN General Assembly adopted Resolution 59(I) which states: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."*

This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said: "The right to freedom of expression is of paramount importance in any democratic society." [12]

The European Court of Human Rights has recognised the vital role of freedom of expression as an underpinning of democracy: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."[13] *"*

33. All of these international treaties recognise that freedom of expression is not absolute. As a matter of European Convention law, however, any restriction of the right must pass a three-part test as follows:[14]

    33.1. First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and "*formulated with sufficient precision to enable the citizen to regulate his conduct*."[15]

    33.2. Second, the interference must pursue a legitimate aim. The list of aims set out in the various international treaties is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression.

    33.3. Third, the restriction must be necessary to secure one of those aims. The word "*necessary*" means that there must be a "*pressing social need*" for the restriction. The reasons given by the State to justify the restriction must be "*relevant and sufficient*" and the restriction must be proportionate to the aim pursued. [16]

34. In speaking of freedom of expression, the European Court of Human Rights has recently summarised the general principles in its jurisprudence as follows:

    "68. Freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of

[12] Tae-Hoon Park v. Republic of Korea, 20 October 1998, Communication No. 628/1995, para. 10.3.
[13] Handyside v. United Kingdom, 7 December 1976, Application No. 5493/72, para. 49.
[14] See Callamard (2008).
[15] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49.
[16] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40.

> *the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" ... Although freedom of expression may be subject to exceptions, they "must be narrowly interpreted" and "the necessity for any restrictions must be convincingly established" ... Furthermore, the Court stresses that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on the debate of questions of public interest ..."*[17] (emphasis added).

35. The need to have restrictions on freedom of expression "*narrowly interpreted*" and "*convincingly established*" has particular significance for any proposal to expand the scope of the offences under the 1989 Act. Moreover, this approach has a long-standing pedigree in other international contexts (Callamard 2008; and McGonagle 2001), for example:

36. In 1997, the Committee of Ministers of the Council of Europe adopted a Recommendation on "Hate Speech", laying down a number of basic principles to be followed by Council of Europe Member States. While affirming the duty of States to take steps to prohibit the advocacy of hatred, including on grounds of religion, the Recommendation warns that "hate speech laws" should not be used to suppress freedom of expression. Principle 3 states that:

> *"... [t]he governments of the member states should ensure that in the legal framework referred to in Principle 2 interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria."* (emphasis added)

37. The Explanatory Memorandum further warns of the need for "legal protection against arbitrary interferences [with freedom of expression] and adequate safeguards against abuse".

[17] Tuskia v Gerogia, 11 October 2018, Application No. 14237/07, para. 68.

38. In a Joint Statement on Racism and the Media on 27 February 2001 the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, stated that:

> *"Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate standards against abuse, including the right of access to an independent court or tribunal".* (emphasis added)

IV.2 Duty to prohibit certain speech under international law

39. The term "hate speech" is neither enshrined nor defined in international law. However, various international instruments contain provisions dealing with expression that would typically be considered as falling within the category of "hate speech". The most important are the following:

40. Article III of the Convention on the Prevention and Punishment of the Crime of Genocide provides that "direct and public incitement to commit genocide … shall be punishable". This is given effect in Irish law by means of the Genocide Act 1973 (which criminalises an act of genocide as defined in Article II of the Convention) coupled with the common law offence of incitement to commit a criminal offence.

41. Article 20 of the UN Covenant on Civil and Political Rights provides as follows:

> *"1. Any propaganda for war shall be prohibited by law.*
>
> *2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."*

42. Byrne and Binchy record that the 1989 Act, when first introduced as a Bill in 1988, was designed to achieve two goals: "*to enable Ireland to ratify the United Nations Covenant*

on Civil and Political Rights and to deal with the periodic problem of the preparation in Ireland of racist material for publication or distribution outside the State."[18]

43. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) contains a more detailed requirement to enact and implement laws to punish hate speech in so far as it relates to race (or colour, descent, or national or ethnic origin). It provides as follows (emphasis added):

> *"4. States Parties condemn all propaganda and all organizations 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 and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:*
>
> *(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*
>
> *(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;*
>
> *(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."*

44. Article 5 of ICERD refers, *inter alia*, to "*The right to freedom of thought, conscience and religion*" and "*The right to freedom of opinion and expression*",

[18] Byrne and Binchy (1989) p. 167.

45. Ireland signed ICERD in 1968 and ratified it in 2000. However, Ireland lodged a reservation/interpretative declaration in respect of Article 4 of ICERD in the following terms:

> *"Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in sub-paragraphs (a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention. Ireland therefore considers that through such measures, the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. These rights are laid down in Articles 19 and 20 of the Universal Declaration of Human Rights; they were reaffirmed by the General Assembly of the United Nations when it adopted Articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in Article 5 (d)(viii) and (ix) of the present Convention."*

46. ICERD is widely regarded as an "outlier" among other international human rights treaties that contain provisions governing the relationship between freedom of expression and hate speech, insofar as Article 4 of ICERD creates more far reaching obligations for States parties than comparable provisions in other treaties (McGonagle 2013; Callamard 2008; Hare 2010). On the other hand, it can also be viewed as narrower in the sense that it applies only to racial hate speech and not to "national" or "religious" hatred as referenced in Article 20 of ICCPR nor to any of the other grounds covered by the 1989 Act.

47. The Council of Europe's European Commission against Racism and Intolerance (ECRI) has recommended the amendment of the criminal law in Ireland to include a wider range of expression-based offences relating to racism and genocide that would largely appear to track the requirements of Article 4 of the ICERD.[19]

48. The foregoing would tend to suggest that it would be a mistake for any reform of the 1989 Act to conflate the ground of race (and related grounds) with other characteristics.

[19] ECRI (2019) p. 12.

It appears that the position in respect of race-based "hate speech" is *sui generis* as a matter of international law.

IV.3 Recent guidance from Office of the UN High Commissioner for Human Rights

49. To conclude this section it is relevant to consider some of the key recommendations and guidance provided in a document published by the Office of the UN High Commissioner for Human Rights (OHCHR) called the "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" ("the Rabat Plan"). The Rabat Plan set out the conclusions and recommendations from four regional expert workshops organized by OHCHR in 2011 and adopted by experts at the meeting in Rabat, Morocco, on 5 October 2012.

50. There are a number of important statements in the Rabat Plan which are of relevance for any review of the 1989 Act, including the following:

> *"18. Article 20 of the Covenant requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception. Such threshold must take into account the provisions of article 19 of the Covenant. Indeed the three-part test (legality, proportionality and necessity) for restrictions also applies to cases involving incitement to hatred, in that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. This implies, among other things, that restrictions are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way; and are proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize.*
>
> *…*
>
> *Recommendations*
>
> *20. In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence;*

expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.

21. Bearing in mind the interrelationship between articles 19 and 20 of the International Covenant on Civil and Political Rights, States should ensure that their domestic legal framework on incitement to hatred is guided by express reference to article 20, paragraph 2, of the Covenant ("…advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence…"), and should consider including robust definitions of key terms such as hatred, discrimination, violence, hostility, among others. ...

…

29. It was suggested that a high threshold be sought for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 of the International Covenant on Civil and Political Rights. In order to establish the severity as the underlying consideration of the thresholds, incitement to hatred must refer to the most severe and deeply felt form of opprobrium. To assess the severity of the hatred, possible elements may include the cruelty or intent of the statement or harm advocated, the frequency, quantity and extent of the communication. In this regard, a six-part threshold test was proposed for expressions considered as criminal offences:

(a) Context: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(b) Speaker: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;

(c) Intent: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

(d) Content and form: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(e) Extent of the speech act: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

(f) Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

...

(emphasis added)

V. TOPIC 2 – WHAT ACTS/SPEECH SHOULD 1989 ACT CRIMINALISE?

51. In this section, the Submission engages with various questions and issues relating to concrete amendments to the scope of the offence created by the 1989 Act.

V.1 Preliminary point

52. As a preliminary point, however, it is important to recognise that the question of how broadly or now narrowly "hate speech" laws should be drafted, or whether there should be any such laws at all, involves a debate which cannot be framed in the typical categories seen in Irish political discourse, e.g. economic left vs. economic right, social conservative vs. social liberal, religious vs. secular etc. Rather the primary ground of the disagreement takes place within liberalism itself and, in particular, among academics and theorists who for the most part share a socially liberal / secular worldview and would probably agree on many or most matters of public or social controversy in Ireland in recent times.[20] So, for example, two prominent opponents of "hate speech" bans are Ronald Dworkin[21] and Nadine Strossen.[22]

53. It is important to make this preliminary point because it is apparent that among the strongest opponents of hate speech bans are legal scholars who nonetheless vehemently reject the views which these bans are supposed to suppress.[23] They oppose these bans for a wide variety of reasons involving both arguments of political principle and empirical arguments from consequences, including the following:

    53.1. The ineffectiveness of hate speech laws in reducing the kind of harms which they are supposed to address and/or the absence of any compelling evidence

[20] See for example: Baker (1989), Heinze (2016), Dworkin (2009), Garton Ash (2016), Post (2017) and Weinstein (2016).

[21] At the time of his death in 2013 Dworkin was a Professor of Law and Philosophy at New York University and Professor of Jurisprudence at University College London. He had taught previously at Yale Law School and the University of Oxford. According to Shapiro (2000) he was the second most-cited American legal scholar of the twentieth century. His public advocacy in favour of legalised abortion, euthanasia, same-sex marriage and affirmative action are well known.

[22] Strossen is Professor of Constitutional Law at New York Law School. She is described on the flyleaf for Strossen (2018) as "the first woman national President of the American Civil Liberties Union, where she served from 1991 to 2008."

[23] By the very same logic, the concerns expressed the Iona Institute regarding expansion of the scope of the 1989 Act do not in any way entail support or agreement on its part for any of the expressions which an advocate for a hate speech ban may consider to be objectionable or harmful.

that they are necessary to reduce such harms or are even useful for reducing such harms.[24]

53.2. The chilling effect of such laws on free expression, in particular free expression on the part of minorities or persons espousing controversial, unpopular or offensive points of view.[25]

53.3. The inherent ambiguities and vagueness in the language and thresholds set by such laws and the related inherent risk of their misuse. Strossen refers in this regard to the "intractable drafting problems" which arise in hate speech legislation.[26]

53.4. The various counter-productive effect of such laws, for example: making free speech "martyrs" out of extremists prosecuted under any ban; driving problematic views underground and out of public forums where they cannot be addressed by counter-speech measures; and creating a culture of taking offense rather than robust debate and effective counter-speech.[27] Examples of this culture abound in reported cases of persons losing their jobs or being excluded from university courses or other facilities on the grounds of having

[24] Colliver (1992); McGonagle (2001); Garton Ash (2016) pp. 219-221; Strossen (2018) Chapter 7.

[25] This was discussed in the dissent of the three-judge minority in the Supreme Court of Canada in R v Keegstra [1990] 3 SCR 697 which commented: "*Even where investigations are not initiated or prosecutions pursued, the vagueness and subjectivity inherent in s. 319(2) of the Criminal Code give ground for concern that the chilling effect of the law may be substantial. The more vague the language of the prohibition, the greater the danger that right-minded citizens may curtail the range of their expression against the possibility that they may run afoul of the law. The danger here is not so much that the legislation will deter those bent on promoting hatred --- in so far as it does so (and of this I remain skeptical) it is arguably not overbroad. The danger is rather that the legislation may have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of a fear of the criminal process. Given the vagueness of the prohibition of expression in s. 319(2) , one may ask how speakers are to know when their speech may be seen as encroaching on the forbidden area. The reaction is predictable. The combination of overbreadth and criminalization may well lead people desirous of avoiding even the slightest brush with the criminal law to protect themselves in the best way they can -- by confining their expression to non-controversial matters. Novelists may steer clear of controversial characterizations of ethnic characteristics, such as Shakespeare's portrayal of Shylock in The Merchant of Venice. Scientists may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups. Given the serious consequences of criminal prosecution, it is not entirely speculative to suppose that even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade may be tempered. These matters go to the heart of the traditional justifications for protecting freedom of expression*."

[26] Strossen (2018) Chapter 4.

[27] See Garton Ash (2016) p. 223. It is important to remember the point made earlier that "hate speech" is here being distinguished from other forms of targeted interpersonal communication better regulated by analogy to laws against assault or breach of public order. Criticism of a culture of taking offence would not, of course, apply to cases where a person is a victim of, e.g., threatening and abusive language which is personally targeted at the person with a malicious intent

expressed views that others may find insulting or upsetting (and notwithstanding that no malicious intent is proven or even alleged[28]).

53.5. The legitimacy v effectiveness dilemma[29] (already described above in section II.3)

53.6. Principled objections based on principles of political morality in a liberal democratic society, including the scope and foundational importance of freedom of expression.

54. In his book "Free Speech: Ten Principles for a Connected World" (one of The Economist's Books of the Year in 2016) Timothy Garton Ash contends that in mature democracies, having the rule of law, diverse media and a developed civil society, "*there is a compelling case that the advantages of hate speech laws, as they have actually worked over the last half century, are outweighed by the disadvantages, including their unintended consequences.*"[30]

55. The various authors referred to in the citations above, and others who make similar points, point to many examples from mature democracies, such as Canada and England, where hate speech laws have led to very illiberal and unreasonable outcomes such as arrests, attempted prosecutions and in some cases even successful convictions of people for acts of expression that, however erroneous, offensive, insulting or distasteful one might consider them, should not be criminalised.[31]

56. For this reason it is important that any proposed change in the 1989 Act that would expand its scope or reach should be accompanied by concrete case studies so as to make clear exactly how it is intended such cases should fare under the revised Act, i.e. whether they should be caught by its prohibition or not. Application of proposed reforms to real life examples in this way would ensure that any debate over proposed amendments avoids

[28] A particularly egregious example of the interference in a university student's right to freedom of expression was addressed and remedied by the English Court of Appeal earlier this year: *Ngole v University of Sheffield* [2019] EWCA Civ 1127.
[29] For example: Heinze (2016) pp. 145-153 and 210; Post (2009) pp. 134-136; Strossen (2012) p. 383; and Strossen (2018) pp. 141-146.
[30] Garton Ash (2016) p. 219.
[31] Strossen (2018) gives a list of 16 examples at pp. 27-29 and 5 more examples at pp. 95-99 in addition to the many others throughout her book.

the exchange of what may become merely academic abstractions and instead is grounded in the very practical issue of what the intention and likely effect of the changes will be.

V.2 Hate speech offences in England and Wales

57. It appears from its drafting that the 1989 Act owes much to the legislation which was then in force in England and Wales. It is therefore useful to consider the legislative history of such offences in English law.[32]

58. The offence of "incitement to racial hatred" was first created by section 6(1) of the Race Relations Act 1965 in the following terms:

> *"6. (1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins –*
>
> *he publishes or distributes written matter which is threatening, abusive or insulting; or*
>
> *he uses in any public place or at any public meeting words which are threatening, abusive or insulting,*
>
> *being matters or words likely to stir up hatred against that section on grounds of by colour, race, or ethnic or national origins."*

59. This offence was subsequently re-cast in Part 3 of the Public Order Act 1986 which provides at section 18, inter alia, that:

> *"(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—*
>
> *(a)he intends thereby to stir up racial hatred, or*
>
> *(b)having regard to all the circumstances racial hatred is likely to be stirred up thereby.*
>
> *…*

[32] See generally: Leigh (2009), pp. 381-387; Hare (2009) p. 294; Williams (2009) p. 92.

(5)A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting."

60. In 2006, a new Part 3 entitled "Hatred against persons on religious grounds" was added to the Public Order Act 1986 by the passage of the Racial and Religious Hatred Act 2006. It is interesting to note that in adding this new ground alongside race the British Parliament chose to create a new offence with different elements and specific defences. In other words, there was a recognition that attempts to apply "hate speech" restrictions to different groups/characteristics may create different risks for freedom of expression or unintended consequences depending on the group/characteristic in question.

61. In 2008 the Criminal Justice and Immigration Act 2008 amended Part 3A of the Public Order act by expanding it to include hatred "on grounds of sexual orientation".

62. The key differences between the treatment of race, religion and sexual orientation in the 1986 Act are as follows.

63. In the case of the offence of stirring up hatred on grounds of religion or sexual orientation the words or behaviour must be "threatening"; whereas in the case of racial hatred the word or behaviour can be "threatening, abusive or insulting".

64. When the offence of hatred on grounds of religion was created in 2006 the following new defence was added by the House of Lords as section 29J:

"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."

65. When the offence of hatred on grounds of sexual orientation was created in 2008 the following additional defence was added to Part 3A as section 29JA:

"29JA Protection of freedom of expression (sexual orientation)

In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred."

66. A further defence was added as subsection (2) to section 29JA in Part 3 A by the Marriage (Same Sex Couples) Act 2013 as follows

"(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred."

67. It should be noted that the Criminal Justice and Public Order Act 1994 created a new public order offence (added as section 4A to the Public Order Act 1986) known as "Intentional harassment, alarm or distress". Section 4A(1) of the 1986 Act provides that

"(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress."

68. Section 5 of the Public Order Act 1986 also provides for a similar offence without the same requirement for intention. As enacted it provided that:

"(1)A person is guilty of an offence if he—

(a) uses threatening or abusive words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby."

69. Following a public campaign, including support from figures such as Rowan Atkinson, section 5 was amended in 2013 by the removal of the words "or abusive" thus narrowing the scope of the offence to "threatening words or behaviour" only. It is submitted that section 5 of the Public Order Act 1986 remains problematic and open to misuse in so far as it seeks to impose a criminal sanction for the effects of speech without any reference to the intention of the speaker. Garton Ash (2016) gives a summary of some of the more prominent cases:

> *" ... in Britain the 1986 Public Order Act has too often been misused to punish the merely offensive. "Thus, for example, an elderly evangelical Christian street preacher called Harry Hammond was convicted for brandishing a handmade sign which, with the words 'Jesus is Lord' in each corner, declared 'Stop Immorality, Stop Homosexuality, Stop Lesbianism'[33]. A student was arrested and spent a night in jail for saying to a policeman, 'Excuse me, do you realise your horse is gay?' (A police spokesman said 'he made homophobic comments that were deemed offensive to people passing by'.) A 16-year-old schoolboy was issued a court summons for holding up a placard outside the Church of London headquarters saying 'Scientology is not a religion, it is a dangerous cult'. All were locked up on the grounds that their words were 'threatening, abusive or insulting', under section 5 of the Public Order Act, which allows a constable to arrest someone without warrant if 'he engages in offensive conduct which a constable warns him to stop'. After widespread criticism and a campaign for reform, the word 'insulting' was removed in 2013, but the rest remained— as did the provision that the offending words had only to be uttered within sight or hearing of a person 'likely to be caused harassment, alarm or distress'."*

70. There are many other examples that provide pause for thought in how sections 4A and 5 of the Public Order Act 1986 can operate in practice. It appears there has been a particular problem with the application of such laws inappropriately by both police and magistrate courts against "street preachers". The Guardian reported as follows on one case earlier this year:

[33] For academic criticism of this judgment of the Divisional (High) Court as a "profoundly unsatisfactory judgment that is inconsistent with the [European] Convention *jurisprudence recognizing the protection for expression of shocking ideas given by Article 10*" see Leigh (2009) pp. 388-391 and Geddis (2004).

"A Christian street preacher who had his Bible confiscated as he was handcuffed by police has been awarded £2,500 for wrongful arrest.

A video of Oluwole Ilesanmi pleading with a police officer to "not take my Bible away" has been viewed millions of times since his arrest in February.

Ilesanmi was detained outside Southgate tube station in Enfield, north London, by Metropolitan police officers after he was accused of Islamophobia by a passerby.

The Christian admitted describing Islam as an "aberration" but said he was simply expressing his opinion rather than preaching hate against Muslims.

Footage of the arrest showed Ilesanmi, 64, being told by an officer that he was "causing problems, disturbing people's days" and that "no one wants to hear that. They want you to go away."

The video shows a police officer snatching a Bible from Ilesanmi's hand, as the preacher says: "No, no, no, no, no. Don't take my Bible away." One of the officers then says: "You should've thought about that before being racist."

Ilesanmi was led away to a police car and driven three and a half miles away to a bus stop where he was de-arrested.

Ilesanmi said on Sunday he had been awarded £2,500 for wrongful arrest for his humiliating and distressing treatment. He told the Mail on Sunday: "I believe God loves everyone, including Muslims, but I have the right to say I that I don't agree with Islam – we are living in a Christian country, after all.

"I was upset when they took away my Bible. They just threw it in the police car. They would never have done that if it had been the Koran. Whatever happened to freedom of speech?"

Ilesanmi will on Tuesday hand a petition to the Home Office asking for greater protection for street preachers. The campaign, which is being supported by the group Christian Concern, has been signed more than 38,000 times.

A Scotland Yard spokewoman said: "The MPS has reached a settlement with a man arising from an incident on 23 February near to Southgate

Underground station. It would not be appropriate to discuss further details of this."

Supt Neil Billany, of the force, said: "The Met respects and upholds the rights of all individuals to practice freedom of speech, and this includes street preachers of all religions and backgrounds.

"However, if the language someone uses is perceived as being a potential hate crime, it is only right that we investigate."

"That is the role of the police, even if a decision is subsequently made that their actions are not criminal. In this case, it was deemed appropriate to remove the man from the area.""

71. Other relevant British legislation in relation to the area of "hate speech" include:

    71.1. Sections 4 the Public Order Act 1986;

    71.2. Section 1 of the Protection from Harassment Act 1997;

    71.3. Section 16 of the Offences Against the Person Act 1861 (offence of threat to kill);

    71.4. Section 1 of Malicious Communications Act 1988;

    71.5. Section 127 of Communications Act 2003.

V.3 What type of speech should be covered by the 1989 Act?

72. It is submitted that consideration should be given to amending the reference in the 1989 Act to "threatening, abusive or insulting" material or words so that it refers only to "threatening". In line the evolution of English law in this area, it is submitted that such a change would be appropriate <u>if</u>

    72.1. the 1989 Act continues to define the offence in such a way that intention to stir up hatred is not a necessary ingredient; and/or

    72.2. the groups/characteristics referred to in the Act are expanded (see discussion in section VI below).

V.4 What type of effect is required?

73. Given the ambiguity inherent in hate speech laws, it is submitted that the use of the term "hatred" should be retained. If any change is to be introduced, it should be with a view to giving further clarity on the meaning of "stir up" and "hatred" so as to emphasise that a close causal connection is required between the speech and its effects and the extreme nature of the effect (i.e. "hatred") that is required before criminalisation of public discourse becomes appropriate. While there are likely to be inherent problems of vagueness and subjective in any language used to criminalise speech-content by reference to certain qualitative standards, there is at least the benefit of some jurisprudence in Canadian and English law regarding the meaning of "hatred" in this context – though for reasons outlined below this case law may have little practical benefit in terms of addressing the inherent chilling effect of laws criminalising hate speech.

74. In *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467 the Supreme Court of Canada concluded that the vagueness of section 14(1)(b) of Saskatchewan's Human Rights Code resulted in it "*unconstitutionally prohibiting freedom of expression*". Under section 14(1)(b) any expression that "*exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground*" was prohibited. The Court effectively rewrote section 14 of the Human Rights Code by severing the words "*ridicules, belittles or otherwise affronts the dignity of*" so that it would now require that the violating expression, "*exposes or tends to expose to hatred any person or class of persons on the basis of a prohibited ground*."

75. The Supreme Court defined "hatred" or "hatred and contempt" as:

> *"being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects … Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However, for the reasons discussed above, offensive ideas are not sufficient to ground a justification for infringing*

on freedom of expression. While such expression may inspire feelings of disdain or superiority, it does not expose the targeted group to hatred."

76. It has been fairly argued that even after this attempted definition of "hatred" the parameters of the concept (and any law based on it) remain vague and unclear. Could any speaker, protestor, satirist, editor, police officer, prosecutor etc. predict with any reasonable certainty whether a particular expression will be deemed as derogatory, ridiculing, belittling, affronting dignity, repugnant, hurtful, disdainful, and offensive to a group or minority but NOT as exposing that group to hatred? Can the criminal law be safely and fairly enforced on the basis of such subjective and finely drawn distinctions? Is not the much more likely consequence of such hair-splitting that people will self-censor from expressing any controversial or unpopular views and ideas for fear of being held to have fallen on the wrong side of the line?

V.6 What type of mental state is required?

77. The UN's Rabat Plan is very clear on the question of the mens rea required for a criminal offence of hate speech. It is submitted its expert guidance should be followed in this regard. To recap the Rabat Plan states:

"Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material."

78. Moreover, because of the inherently subjective nature of key aspects of the offences under the 1989 Act, it is important that the offence is grounded in the mental state of the accused before criminal liability is imposed. An undue or exclusive focus on the effects of the speech in question – without regard to the speaker's intention – could create unjust and unpredictable outcomes in this regard, particularly in light of the subjective nature of the key concepts involved. Strossen (2018) provides the following vivid example of the problems that arise for any hate speech law that is premised only on how expression is perceived and not on the intention of the speaker:

"The confounding problem of deciding what should count as "hate speech" was also illustrated by a situation at Harvard University, when some students

hung Confederate flags from their dormitory windows, which prompted other students to protest by hanging swastikas from their dormitory windows. Of course, the swastika is deeply identified with Hitler's anti-Semitic and other egregiously hateful ideas, not to mention genocide. However, the Harvard students who hung the swastika were trying to convey the opposite message, condemning the racism that the Confederate flag connoted to them by equating it with the swastika. So should these swastika displays count as "hate speech"—or as anti—"hate speech"?

Then, in a separate protest against the discriminatory message that the Confederate flags conveyed to them, other Harvard students engaged in another form of counterspeech: they publicly burned a Confederate flag. To the many Americans who revere the Confederate flag as a symbol of their Southern heritage and a tribute to their ancestors who were killed in the Civil War, burning this cherished symbol constitutes "hate speech." Yet the students who set the fire sincerely believed that they were engaging in anti—"hate speech."'[34]

79. Care should be taken to learn from the difficulties that were created by the unduly broad terms of hate speech provisions in section 13 of the Canadian Human Rights Act 1977 (which did not require intention). These were repealed with effect from 2014.

V.7 What defences should there be?

80. One of the inherent dangers in content-based criminal prohibitions of speech/expression is that they could be used to criminalise or otherwise inhibit (by way of the so called "chilling effect") expression merely because it is unpopular or a minority view or deemed by influential and powerful groups within society to be "offensive" or "insulting". One way to ameliorate the adverse impact of such laws is to include defence provisions in an effort to put beyond doubt that certain categories of speech cannot be punished under the law in question. Such provisions are found in both the Canadian Criminal Code relating to hate speech and in the relevant British legislation. By contrast, the 1989 Act is deficient in this regard. It is submitted that a defence provision should be added as a matter of good practice even if no other changes are made to the Act. However, if the scope of the

[34] Strossen (2018) p. 78.

offences under the 1989 Act are expanded in any way then it would be absolutely imperative to include detailed defence provisions so as to minimise the interference with freedom of expression and to mitigate the chilling effect that can arise from the ambiguity and vagueness inherent in expression-based restrictions on speech.[35]

81. Article 319 of the Canadian Criminal Code creates the offences of "public incitement of hatred" and "wilful promotion of hatred". In particular, Article 319(2) provides that "*Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty*" of an offence. Article 319(3) provides that no person shall be convicted of the offence of wilful promotion of hatred:

> *"(a) if he establishes that the statements communicated were true;*
>
> *(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;*
>
> *(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or*
>
> *(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada."*

82. The defences introduced in the equivalent English legislation in 2006 and 2008 have already been outlined above. It is important to note that they relate only to the "hate speech" laws in Parts 3 and 3A of the Public Order Act 1986. The various provisions of English law dealing with "hate crimes" (or treating hate speech as a form of "public order offence") do not have equivalent saver clauses. Indeed, many and perhaps most of the UK cases where hate legislation appears to have disproportionately interfered with

[35] It is notable that Goodall (2007) at p. 108, though a critic of other aspects of the Racial and Religious Hatred Act 2006, recognised that it was "probably better" for its defence provisions to be included and that they were "perhaps … necessary in this complex area of law". Equally, it is interesting to note the very strong and express support by the leader in the Guardian on 31 January 2006 for the defences added to the English incitement to religious hatred legislation during its passage through parliament. See: https://www.theguardian.com/politics/2006/jan/31/immigrationpolicy.religion (last accessed 11 December 2019)

freedom of expression and/or religion arise in the context of the public order / "hate crime" laws rather than the hate speech laws in Parts 3 and 3A of the 1986 Act. This has led Peter Edge, Professor of Law at Oxford Brookes University, to conclude that:

> *"There is an argument, made particularly pressing by the position of the ethno-religions, for considering whether inciting hatred against racial practices should have similar savings to those for religious and sexual orientation practices. There is also an argument for considering whether speech which would fall within a saving clause in relation to hate speech should be excluded from the context which may be used to find a hate crime."*[36]

VI. TOPIC 3 – WHAT CHARACTERISTICS/GROUPS SHOULD 1989 ACT REFER TO?

83. The question of what characteristics should be relevant to the commission of a hate speech offence is a difficult one to answer at the level of abstract principle. Much of the literature recognises that the particular historical or cultural context may be relevant in this regard.

84. Moreover, the difficulties in singling out some persons or groups of persons as having protection under the law rather than others is an invidious task and can create certain conceptual and practical difficulties.[37]

85. The UK's law commission is currently reviewing the adequacy of protection offered by UK hate crime legislation with a report due in early 2020. As part of its terms of references it has been asked to consider if the protected characteristics should be extended to include, *inter alia*, "*hatred of older people*". It seems hard to identify in such

[36] Edge (2018) p. 289.

[37] See examples in Garton-Ash (2016) pp. 221-229. Heinze (2009) who argues that "*hate speech bans pose a dilemma intolerable for human rights law: either they promote discrimination by unfairly limiting the protected categories and individuals; or, if they were to include all similarly situated categories and individuals, they would represent more than just minimal limits on free speech*." He concludes that "*sexual minorities should generally enjoy all guarantees within human rights law, but should not seek refuge in bans that may serve more to betray fundamental principles of human rights law than to promote them. … Hate speech bans have no place within longstanding, stable, and prosperous democracies which have ample means at their disposal to protect sexual minorities and other vulnerable groups from hate crime and discrimination, without having to impose inevitably arbitrary limits on speech*."

proposals any coherent limiting principle for what characteristics should and should not be included.[38] Garton Ash (2016) has spoken of the "taboo ratchet" by which

86. "ever more characteristics must be added to the list of those protected from hate speech … If we were to put together all characteristics on the basis of which people may feel themselves to be insulted and all the taboos of all the cultures in the world, and then rule them all off-limits, there would be precious left that we could talk about."[39]English law recognises only the grounds of race, religion and sexual orientation in its incitement to hatred law. Canadian law speaks instead of "any identifiable group".

87. Sometimes it is suggested that "hate speech" laws should be framed by reference to minority groups. However, the paradoxical results which can arise from this have been noted by many commentators. Strossen, for example, has argued:

> *"One person's hate speech is another person's deeply held religious belief. It could also be someone's deeply held political belief, but religious beliefs are the most interesting example because they are as central to some people's sense of identity as ethnicity, gender, and sexual orientation are to other people's sense of identity. Some people's deeply held religious beliefs, which define who they are and dictate how they have to live their lives, condemn homosexuality as evil, as a sin, and impose a responsibility on believers to try to save others from eternal damnation by letting them know that it's a sin. When they do so, straightforwardly and forcefully in what they believe to be a positive spirit, they are accused of hate speech*
>
> *I so strongly disagree with members of the Christian right on so many civil liberties issues, but I also believe there is an enormous amount of ignorant, negative, discriminatory prejudice against and stereotypes about members of the Christian right, fundamentalist Christians, who are, after all, a minority in the United States as a whole. So under standard understandings of which groups should be considered vulnerable minorities meriting protection against*

[38] See https://www.lawcom.gov.uk/project/hate-crime/ (last accessed 12 December 2019).
[39] In the context of rising obesity levels Garton Ash illustrates the difficulty in determining a principled position on where the "taboo ratchet" should stop : "*No reasonable person will doubt that fat people may suffer real hurt and serious loss of self-esteem from constant, derisory comments on their weight. This can be just as bade for the person concerned as being called 'queer' or 'Yid' or 'chocolate bar' (one of the racist insults logged by a British school).*"

hate speech, they are a classic example. There have been cases arising in high schools with hate speech codes in which Christian kids have been disciplined for wearing T-Shirts that quote a Bible verse that condemns homosexuality as a sin.19 And yet it's not considered to be hate speech to denounce their deeply held religious belief in this Biblical message and, moreover, to expel them for expressing it."[40]

88. If the characteristics mentioned in the 1989 Act are to be expanded then it will be important to recognise that the potential risk of undesirable and unintended and potentially unconstitutional or convention-incompatible interference with political and religious speech (particularly unpopular speech that certain people may find offensive) may also be increased. This would need to be guarded against by tight legislative drafting and/or the addition of defences. That was the legislative strategy adopted in the United Kingdom. As outlined in section V above, when new group characteristics were recognised the elements of the offence were narrowed and new defences were added. The Guardian newspaper opposed the 2006 expansion of the law on incitement to racial hatred so as to include religious hatred. In its leader on 31 January 2006 it praised the amendments which had been made in the House of Lords (which ended up as the section 29J defence outlined above) and stated:[41]

"The government's original bill - its third attempt to outlaw religious hatred since 2001 - was far too sweeping. Like its failed predecessors, it mixed up too many things. It conflated threatening behaviour and material, from which religious people deserve protection, with insult and abuse of religious belief, which is a necessary part of an open society. It mixed up race, which can never be a rational basis for insult or abuse, with religion, which sometimes can. And above all it failed to distinguish properly between the believer, who should not suffer for what he or she is, and the belief, which others must be entitled to attack, question and ridicule, even to the extent of causing offence to believers."

[40] Strossen (2012) p. 395.
[41] See: https://www.theguardian.com/politics/2006/jan/31/immigrationpolicy.religion (last accessed 11 December 2019).

89. It is submitted that the same logic of distinguishing between the religious person and their viewpoint/beliefs should equally apply to the advocates of the various secular political and moral causes which are the subject of debate in Ireland today.

VII. CONCLUSION: CONCRETE PROPOSALS AND SUGGESTIONS

90. The Consultation Paper indicated submissions which go beyond "*general commentary*" and make "*concrete proposals and suggestions*" would be "*especially helpful*". In that spirit, the following proposals are offered:

90.1. Among the principles guiding any review of the 1989 Act should be included the following five principles:

90.1.1. The effective enjoyment and legal protection of freedom of expression, in particular political and religious expression, is a bedrock of constitutional democracy. The risks posed to this fundamental human and constitutional rights by any criminalisation of speech should be frankly recognised in any analysis of possible amendments. The risks are even greater for persons holding and espousing unpopular, minority or "offensive" political or religious views. They are precisely the persons and views that the right to freedom of expression in a liberal democracy is designed to protect from censorship and criminalisation by a disapproving majority. They are thus the persons and views that are most at risk from hate speech laws that are drafted in terms that are vague or too broad.

90.1.2. Criminal prohibition should be reserved for the most extreme forms of speech and where the causal link to the harm of another is clear.

90.1.3. Incitement of hatred legislation should not be stretched or expanded to deal with the problem of abusive and discriminatory targeting of specific individuals. That is a serious problem in its own right. To cite such types of targeted abuse in the context of discussion of incitement to hatred legislation is misleading and unhelpful. It obscures the distinctive issues that arise in criminalising incitement to hatred, both in terms of the harms that such legislation is aiming to prevent and

the harms that such legislation can create if not very carefully delimited.

90.1.4. In identifying "the tipping point" at which robust debate, contestation or criticism transforms into a type of hate speech requiring criminal sanction, it is essential to take all factors into account and to differentiate between the various types of expression on the spectrum of hate speech having regard to, inter alia, the intent of the speaker, the intensity of the expression, the severity of its impact, and the context of expression.

90.1.5. In particular, the six-fold analysis proposed by the UN's Rabat Plan guidelines should be applied.

90.2. The problem of malicious targeting of specific individuals with threatening, abusive or insulting messages based on a particular characteristic, whether in person or on-line, should be recognised as a form of assault and harassment and should be addressed by stand-alone legislation framed in those terms. This should be dealt with as a matter of urgency as part of the proposed development of new hate crime legislation. The failure to tackle this problem with appropriate legislation should not be allowed to distort a principled analysis of the 1989 Act or used as an excuse to expand the scope of that Act to the detriment of robust public discourse and each individual's right to freedom of expression. Consideration should be given to equivalent English legislation, including section 1 of the Malicious Communications Act 1988 and section 127 of Communications Act 2003. [Response to Consultation Papers Question 3]

90.3. The term "hatred" should be retained and alternatives should not be added. The additional requirement that the words or materials used be "threatening, abusive or insulting" should either be retained or further narrowed. [Response to Consultation Papers Question 2]

90.4. The necessity for intent to stir up hatred should be retained. The alternative ground of "likely to stir up" should be removed. Alternatively, if it is retained then considerations should be given to removing the reference to "abusive or

insulting" words and to adding specific defences along the lines provided for in Canadian and English law. [Response to Consultation Paper Questions 4 and 5]

90.5. Amendment of the groups/characteristics referred to in the 1989 Act should be carefully considered in light of the dilemma which any such list of characteristics creates in the context of hate speech laws in particular. If the list is expanded (or a Canadian model is adopted where no specific characteristics are named) then consideration must be given to amendments in line with the English legislative history, i.e. to the tightening up of the offence and/or the creation of express defences in order to mitigate the risk of unintended criminalisation of speech that should not be restricted. [Response to Consultation Paper Question 1]

90.6. In light of the experience in many other jurisdictions of inappropriate police investigations, criminal prosecutions and even convictions occurring under hate speech legislation as a result of the vagueness and subjective inherent in laws of this kind, it is submitted that advocates for any expansion of the 1989 Act should be asked to consider the impact of their proposed amendments on concrete and real-life case studies. In particular, they should be asked to state clearly whether or not any amendments proposed by them would or would not have as either their intention or their effect the outlawing of the speech or behaviour in certain real-life examples. (Such as some of those listed in this paper).

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