

Submission to the Department of Justice and Equality Public Consultation on Hate Speech

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Introduction

Nasc, the Migrant and Refugee Rights Centre is a non-governmental organisation based in Cork. Nasc, the Irish word for 'link', empowers migrants to realise and fulfil their rights. Nasc works with migrants and refugees to advocate and lead for change within Ireland's immigration and protection systems, to ensure fairness, access to justice and the protection of human rights. Our goal is to realise the rights of all migrants and refugees within Irish society.

Nasc has almost two decades of experience supporting refugees, asylum seekers and ethnic minority communities in Ireland. Through our various projects including our free legal service, our migrant youth project and our education and employment project for refugee women, Nasc provides information, advice and support to over 1,300 people annually. Our policy and campaigning work are directly informed by our day-to-day experiences working with migrants, refugees, asylum seekers and ethnic minorities living in Ireland.

Over the past ten years, Nasc has coordinated anti-racism projects including a third party racism-reporting mechanisms. These mechanisms were designed by former Community Garda Sergeant Trevor Laffin and piloted by Nasc and other NGOs in Cork city working with ethnic minorities and migrants. In 2012 Nasc published 'Stop the Silence', a Snapshot of Racism in Cork which documented the development of the racism reporting mechanism and a 'snapshot' overview of peoples' perceptions of and experiences with racism and discrimination in Cork City and County based on a survey on racism and analysis from our racist reporting mechanism. In 2013 Nasc published 'In From the Margins: Roma in Ireland', a report addressing the structural discrimination faced by Roma in Ireland and including perspectives on racism and hate speech.

In 2016 because of the lack of any specific project funding, Nasc scaled back our work on third party racism-reporting. From the start of Nasc's racist reporting mechanism until the end of 2016, Nasc received a total of 204 reports of racist incidents, which included 107 individual cases and 97 institutional cases.

Nasc welcomes this opportunity to make a submission to the Department of Justice and Equality on the review of the Incitement to Hatred Act, 1989. This submission will outline Nasc's experience and address the specific questions highlighted in the consultation document.

Context

The Prohibition of Incitement to Hatred Act 1989 (hereinafter the Act) is the only legislation under which hostility on the grounds of race, colour, nationality, religion, ethnic or national origin, membership of the Traveller community, or sexual orientation is currently criminalised in Ireland. The legislation has attracted widespread criticism. The Law Reform Commission described the Act as “ineffective with only limited number of convictions secured under it.”¹

Taylor describes there being “‘an expectations gap’ and ‘a frustration gap’ between community aspirations from this legislation and the reality of its limited application and implementation to date.”² Nasc has called for the reform of the Act in multiple reports³ arguing that the Act is severely constrained and the requirement to prove the ‘intention’ to stir-up hatred is prohibitively difficult.

In Nasc’s Stop the Silence Report, of the 30.2% of respondents who were victims of a racist attack, 92.5% reported that they had experienced verbal attacks⁴. When disaggregated by ethnicity, the numbers increased for Black Africans. The report found that “verbal abuse or the expression of racist comments forms part of the lived experience of almost all of the black African respondents.”⁵

At the time of the publication of the ‘Stop the Silence’ report, Nasc had serious concerns about social media platforms becoming fora for hate speech given the inadequacy of the tools available for tacking hate speech and the lack of clarity on their obligations. Essentially, in Nasc’s experience, social media platforms were unaccountable for any content posted on their platforms. Social media platforms generally have immunity for user-generated content posted on their sites once access to unlawful content is disabled or blocked after the platform is made aware of the speech. However, the difficulty arises in trying to ascertain what constitutes unlawful speech in Ireland.

“Six cases involved racist comments online, this being a growing area of concern as it is a very difficult area to monitor and prosecute. In cases of online racism Nasc encountered a number of problems.”⁶

¹ Law Reform Commission (2016) Harmful Communications and Digital Safety

² Taylor, Seamus (2011) Responding to Racist Incidents And Racist Crimes in Ireland. Technical Report. The Equality Authority

³ Nasc, (2012), Stop the Silence: A snapshot of racism in Cork; Nasc (2013), In From the Margins – Roma in Ireland: Addressing the Structural Discrimination of the Roma Community in Ireland

⁴ Nasc (2012), Stop the Silence: A snapshot of racism in Cork, p17.

⁵ Ibid

⁶ Ibid

Internet hosting platforms are being derelict in their responsibility to ensure that they do not host hate speech. However, in the absence of clear legislation, private companies are not particularly well equipped to make determinations of what constitutes lawful speech.



Question 1. Are there other groups in society with shared identity characteristics, for example disability, gender identity, or others, who are vulnerable to having hatred stirred up against them and should be included in the list of protected characteristics?

Nasc believes that the list of characteristics should be expanded. The reports to our racism-reporting mechanism show that hate speech is often intersectional. Additional categories that should be considered for inclusion are: class, age, disability, gender identity/gender expression and transgender identity.

Question 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?

Yes, however Nasc believes that there are some difficulties with how the term is defined in the Act presently. ‘Hatred’ can be an inherently loaded term suggesting a subjective emotional response. Unfortunately, the failure by the legislature to define what the characteristics of ‘hatred’ are, has in our opinion, contributed to confusion and the under-utilisation of the Act. This is supported by Scheppe and Walsh in their 2008 report,

“This lack of firm guidance on the central ingredient of the offence is not helpful for gardai, prosecutors, judges and juries who are required to make decisions in the enforcement of the Act within their respective spheres.”⁷

Nasc acknowledges that there is an important but difficult balance to be struck between freedom of expression and other competing rights. Overly restrictive criminal sanctions can have a chilling effect on speech, such as satire or political speech. However, the recent increase in racist and anti-asylum seeker rhetoric, from the arson attacks on two proposed direct provision centres, the protests outside proposed emergency and direct provision centres, the Change.org petitions regarding an emergency centre in Carrickmacross as well as racist comments from a member of the Oireachtas and candidates for election, show that there has been a change in the political and media climate in Ireland. These developments have shown the inadequacies both in our criminal law provisions and in traditional and new media platforms to deal with hate speech. It is clear to us at Nasc, that there is currently an imbalance of rights.

Individuals and groups have the right to be protected against abuse and abusive speech which might otherwise cause them to feel unsafe in public spaces. In this regard, the Hate Track report notes the cost of cyber hate speech:

“Civil society is primarily concerned with the impact that racist and racialising speech has on those targeted, such as harm, exclusion, a chilling effect, but also material losses, as certain people who

⁷ Jennifer Scheppe and Dermot Walsh, (2008) Combating Racism and Xenophobia through the Criminal Law, NCCRI p. 60

could use the digital sphere to generate income, for example on YouTube or through their online writing, are now avoiding placing themselves in potentially harmful and traumatic situations.”⁸

Question 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 under for incitement to hatred online more effective? What, in your view, should those changes be?

Yes, action is urgently needed to address hate speech online. It is also important to have measures available outside of the criminal justice sphere and the State should explore other policy and regulatory measures. The State has yet to adopt a comprehensive policy on media and hate speech or cyber hate speech. The Hate Track report aptly sets out the importance of online spaces:

“Many of our most important public and civic spaces exist online and the capabilities deriving from social media platforms to shape public attitudes are immense.”⁹

We fully endorse the recommendations of the Irish Human Rights and Equality Commission in their submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland’s Combined 5th to 9th Report. The Commission recommend “that the State develop a comprehensive regulatory framework to combat prejudicial and discriminatory content and hate speech online.”¹⁰ The Commission also set out a framework under which there would be clear codes of practice for the takedown of harmful online content. The Commission go on to recommend that an independent statutory body should oversee and enforce compliance with the framework and should have the ability to impose sanctions.¹¹

Question 4 In your view, does the requirement that an offence must be intended or likely to stir up hatred make the legislation less effective?

Yes. The second limb of the Act states that it is an offence to distribute material “if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.”¹²

⁸ E. Siapera, E. Moreo, J. Zhou (2018) Hate Track: Tracking And Monitoring Racist Speech Online. November 2018. Dublin: DCU School of Communications, Institute for Future Media and Journalism (FuJo), Anti-Bullying Centre (ABC), and Insight Centre for Computer Analytics, School of Computing

⁹ Ibid

¹⁰ IHREC, (2019) Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland’s Combined 5th to 9th Report, https://www.ihrec.ie/app/uploads/2019/11/IHREC_CERD_UN_Submission_Oct_19.pdf

¹¹ Ibid

¹² Section 2(1), Prohibition of Incitement to Hatred Act, 1989

A correct application of this limb of the test should allow for a conviction in a case where intention cannot be proven but it is objectively clear that this material was likely to stir up hatred. Presently, it is unclear what standard applies to this test.

Question 5. If so, what changes would you suggest to this element of the 1989 Act (without broadening the scope of the Act beyond incitement)?

Section 2 of the Act could be amended to clearly set out that an objective test applies to the offence. Nasc suggests amending section 2 to:

2.—(1) It shall be an offence for a person—

(a) to publish or distribute written material,

(b) to use words, behave or display written material—

(i) in any place other than inside a private residence, or

(ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence,

or

(c) to distribute, show or play a recording of visual images or sounds,

if the written material, words, behaviour, visual images or sounds, as the case may be, are

(a) intended to stir up hatred; or,

(b) having regard to all the circumstances, a reasonable person would consider the material likely to stir up hatred.

