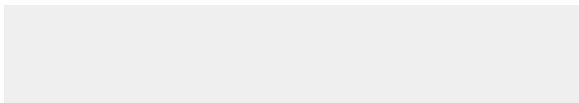
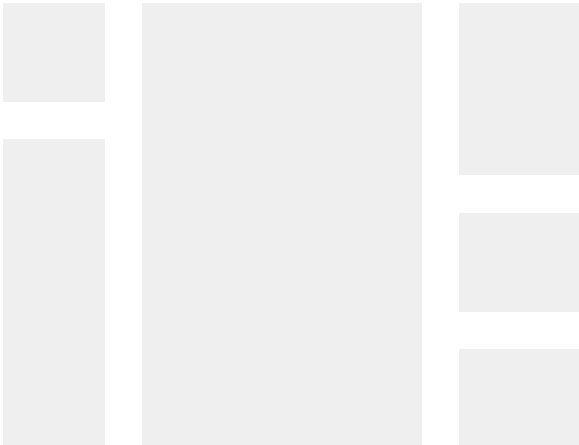


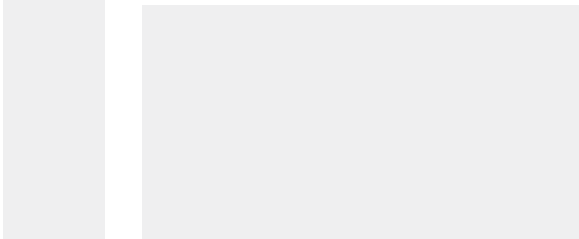
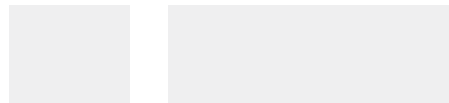
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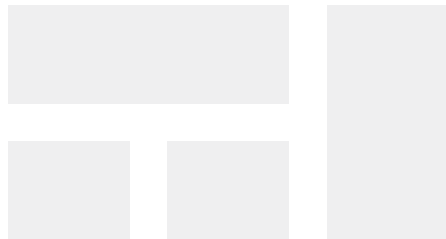
**Legislating Hate: The Growing Need for  
Specific Protection Against Hate Crimes and  
Hate Speech**



**Katie Fowler**



**February 2022**



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# LEGISLATING HATE: THE GROWING NEED FOR SPECIFIC PROTECTION AGAINST HATE CRIMES AND HATE SPEECH IN IRELAND

*Katie Fowler<sup>1</sup>*

## **Abstract:**

This paper addresses the need for stronger and more robust protection against hate crimes and hate speech. The modern age of the internet and social media has facilitated the exponential growth of such incidents and has provided an avenue for hateful and dangerous ideas to be rapidly spread with seemingly little consequences. However, it is also important to respect and vindicate the fundamental right to freedom of speech. Therefore, this paper has attempted to strike a balance between highlighting the need for effective legislation which provides protection to the victims of hate crimes and hate speech while also upholding one of the most fundamental human rights. In addressing the legislative provisions which may be used to combat hate crimes and hate speech, this paper has discussed the existing Prohibition of Incitement to Hatred Act 1989 and the proposed Criminal Justice (Hate Crime) Bill 2020. Furthermore, reference has been made to case law of the European Court of Human Rights which has dealt with the conflict between punishing hate speech and upholding the right to free speech. Finally, this paper has outlined the role that social media companies play in combatting the spreading and publishing of hateful ideas and rhetoric on their platforms. The overall aim of this paper has been to highlight the discrepancies in the current legislative provisions that deal with hate crimes and hate speech and to offer suggestions which may result in stronger protection for victims in the future.

**Key words:** hate crimes, hate speech, social media, freedom of expression, discrimination

## A. INTRODUCTION

Throughout history there has always been incidents of hate crime and hate speech being directed at those who are considered members of a minority group. The scope of these acts can range from a seemingly harmless once off incident or it may escalate into much more serious crimes and unimaginable atrocities such as slavery, segregation and even genocide. In recent decades, many jurisdictions have attempted to enact legislative provisions to combat hate crimes, to varying degrees of success. This Working Paper will focus in particular on the current and proposed Irish legislation which aims to tackle incidents of hate crime and hate speech. With the dawn of the technological age and the exponential increase in the use of the internet and social media platforms, it is submitted that discrepancies in the existing legislative provisions have come to light. It is suggested that the pace at which the internet and social networking sites have become part of our lives cannot be matched by the legal system which must be updated in order to regulate such activity. This is potentially one of many factors which has contributed to the internet being used to

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spread and publish hateful ideas and rhetoric about a particular person or group and why there is an urgent need for new and improved protection.

Due to these modern developments, this Working Paper will endeavour to highlight the pressing need for stronger and more robust hate crime legislation in order to vindicate the fundamental human rights of the victims. For those who are the targeted victims of a hate crime or an incident of hate speech, their fundamental right to non-discrimination is very often breached. Additionally, the right to a good reputation amongst others is also compromised. As a result, it is clear that the commission of hate crimes and the publication of hate speech can be considered a human rights issue and therefore warrants an appropriately serious response.

While there is no strict legal definition of a hate crime, Wellman has suggested that they may be defined as 'an offense in which the criminal selects the victim at least in part because of an animus toward members of the group to which the victim belongs.'<sup>2</sup> Similarly, Craig and Waldo comment that 'hate crimes are based primarily upon the victim's membership in a demographic group.'<sup>3</sup>

The increasing rate of hate crimes and hate speech not only in Ireland, but worldwide has been described as an 'epidemic.'<sup>4</sup> It is submitted that, unfortunately, this harrowing observation is an accurate one. It is suggested that virtually every user of social media has witnessed some form of hateful comment or even the spreading of dangerous rhetoric on the internet and networking sites. In the age of social media, many users believe that they can post whatever they desire, with seemingly little consequences for their actions. One aim of this Working Paper is to highlight that this attitude is not compatible with the values of a modern, civil society and therefore measures must exist through which hate crimes and hate speech on the internet can be adequately regulated and punished. It is the ease at which hate crimes can be committed and hate speech can be published in today's society which served as a motivating factor in choosing the topic for this Working Paper. Recently, there have been several prominent examples of this problem which have received widespread attention.

One of the most recent examples of the increase in hate crimes worldwide has been the violence targeted at members of the Asian community. Since the beginning of the Covid-19 pandemic, particularly in the United States, members of the Asian community have been the victims of horrific hate crimes. The sobering statistics indicate that incidents of hate crimes committed against those of Asian ethnicity increased by 107%.<sup>5</sup> In the United States, the violent and wide-spread nature of the crimes lead to the passing of the Covid-19 Hate Crimes Act which states that 'there were nearly 3,800 reported cases of anti-Asian discrimination and incidents related to Covid-19 between March 2020 and February 2021.'<sup>6</sup> It is submitted that these violent acts were committed on the basis of ignorance and prejudice towards those of Asian ethnicity in response to the Covid-19 Pandemic. Such harmful rhetoric was even published online by the former President of the United States, Donald Trump. A study concluded that the comments of Donald Trump which linked the Covid-19 virus to Asian countries, particularly China, 'likely perpetuated racist attitudes and parallels the anti-Asian

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<sup>2</sup> Christopher Heath Wellman, 'A Defense of Stiffer Penalties for Hate Crimes' (Spring 2006) 21(2) *Hypatia* 62-80.

<sup>3</sup> Kellina M Craig and Craig R Waldo, "'So, What's a Hate Crime Anyway?'" Young Adults' Perceptions of Hate Crimes, Victims, and Perpetrators' (Apr 1996) 20(2) *Law and Human Behavior* 113-129.

<sup>4</sup> James B. Jacobs and Kimberly A. Potter, 'Hate Crimes: A Critical Perspective' (1997) 22 *Crime and Justice* 1-50.

<sup>5</sup> Anh Do, 'Hate Crimes Against Asians Jumped 107% in California in an Epidemic of Hate', *The Los Angeles Times*, 30<sup>th</sup> June 2021 <<https://www.latimes.com/california/story/2021-06-30/california-attorney-general-hate-crimes>> accessed 24 February 2022.

<sup>6</sup> Covid-19 Hate Crimes Act 34 USC 10101, Public Law 117-13, Sec 2(2).

hate crimes that have occurred since.<sup>7</sup> It is submitted that if one of the most influential figures in the world believes he can publish such offensive and dangerous speech online, it sends a message to millions of others that they can too.

Closer to home, there have been many reported incidents of hate speech directed at professional football players. In recent months the Football Association of Ireland has spoken out after a number of players received online threats due to their religious beliefs, nationality and race. The association acknowledged the unfortunate reality that 'such behaviour now is all too common on social media.'<sup>8</sup> A similar situation was witnessed following England's defeat in the Euro 2020 final when three players, Marcus Rashford, Jadon Sancho and Bukayo Saka were subject to torrents of racist abuse online after they missed crucial penalties. Police in the United Kingdom received more than 600 reports of online abuse aimed at the players and have made eleven arrests to date.<sup>9</sup> These incidents highlight the need for stricter regulation of hate speech online. It must be remembered that the targets of this abuse are human beings whose rights are being violated. The attitudes of those who post hate speech online was summarised by Chief Constable Mark Roberts who stated that 'there are people out there who believe they can hide behind a social media profile and get away with posting such abhorrent comments.'<sup>10</sup> It is suggested that unless attitudes such as these are altered rapidly and that incidents are not punished appropriately, the publication of hate speech online will continue to spiral.

These are just a small selection of examples which demonstrate that hate crimes are becoming more widespread and easier to commit. However, the issue is not as straightforward as it might appear and there are other factors to be considered such as the fundamental right to freedom of expression. Therefore, this Working Paper will aim to firstly outline the Irish legislative provisions relating to hate crime and how the current mechanism is not sufficient in dealing with the issue of hate crimes and hate speech. The newly proposed Hate Crime bills will be discussed and it will be noted whether these are suitable and workable alternatives which will provide adequate protection to the victims of a hate crime. Secondly, this paper will highlight another important consideration which is the need to vindicate the fundamental human right to freedom of expression. The strong protections afforded to this right at both a national and regional level will be noted as well as the legal provisions which allow for the right to be limited and curtailed in certain circumstances. A brief discussion will be had on the concept of the balancing of rights followed by examples of caselaw from the European Court of Human Rights which will attempt to demonstrate how the Courts have dealt with balancing the rights of non-discrimination and the right to freedom of expression in the context of hate speech. Finally, specific attention will be paid to incidents of online hate speech and the role that social media has played in facilitating the spreading of hate speech and hateful ideologies.

Overall, the primary objective of this Working Paper is to highlight the need for stronger and more robust protection against hate crimes and hate speech. It is submitted that through legislating hate, the fundamental human rights of every member of society will not only be respected but protected.

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<sup>7</sup> Mishal Reja, 'Trump's 'Chinese Virus' Tweet Helped Lead to Rise in Racist Anti-Asian Twitter Content: Study', ABC News, 18<sup>th</sup> March 2021 <<https://abcnews.go.com/Health/trumps-chinese-virus-tweet-helped-lead-rise-racist/story?id=76530148>> accessed 24 February 2022.

<sup>8</sup> Stephen Barry, 'FAI Condemns Online Abuse of James McClean As Family Opens Up About Daily Threats', *Irish Examiner*, 15<sup>th</sup> February 2021 <<https://www.irishexaminer.com/sport/soccer/arid-40227500.html>> accessed 24 February 2022.

<sup>9</sup> James Briggs, 'British Police Arrest 11 People for Online Racist Abuse Following Euro 2020 Final', CNN, 5<sup>th</sup> August 2021 <<https://edition.cnn.com/2021/08/05/football/hate-crime-arrests-euro-2020-final-spt-intl/index.html>> accessed 24 February 2022.

<sup>10</sup> Ibid.

## B. A CRITICAL DISCUSSION OF THE CURRENT AND PROPOSED LEGISLATIVE PROVISIONS RELATING TO HATE CRIMES AND HATE SPEECH

### 1. Analysis of the 1989 Prohibition of Incitement to Hatred Act

The Irish Human Rights and Equality Commission has acknowledged that the only legislative provision on the Irish Statute books which makes reference to hate crimes and hate speech is the Prohibition of Incitement to Hatred Act 1989 (the 1989 Act).<sup>11</sup> The primary objective of this Act is to 'prohibit incitement to hatred on account of race, religion, nationality or sexual orientation.'<sup>12</sup> However, this particular piece of legislation has been the subject of strong criticism in recent years. Many have questioned its effectiveness, with Perry stating that 'Ireland stands virtually alone in its silence with respect to protecting vulnerable communities from the harms of this particular form of violence.'<sup>13</sup> Additionally, it has been commented that 'the Irish legal system is largely incapable of punishing hate crimes adequately.'<sup>14</sup> If Ireland is to address the serious issue of hate crimes in an effective and meaningful way it is evident that these criticisms must be addressed.

This section will aim to give an analysis of the 1989 Prohibition of Incitement to Hatred Act and to address some of the criticisms it has faced such as the lack of prosecutions it has secured, as well as the limited range of minority groups which are afforded protection under the Act. Additionally, it will be considered whether recent legislative developments concerning hate crimes such as the proposed Criminal Justice (Hate Crime) Bill 2020 and the published general scheme of the Criminal Justice (Hate Crime) Bill 2021 have sufficiently addressed these downfalls. Finally, it will be concluded whether either of these new proposals should be signed into law and if they are better equipped to regulate and punish hate crime in Irish society.

In today's modern and ever-changing society, it is almost inevitable that certain elements of a thirty year old provision will have become outdated over the passage of time. This very issue was highlighted a decade ago where it was stated by the United Nations that Ireland's commitment to reviewing the 1989 Act had 'stalled.'<sup>15</sup> It is therefore suggested that the more time that elapses without any review or amendment being made to the 1989 Act, the less impactful it becomes. One point of discussion that has surrounded the Act in recent years is its relevance in a modern, technological society. In particular, it has been asked whether section three of the Act, which concerns the broadcast of 'threatening, abusive or insulting visual images or sounds'<sup>16</sup> is equipped to deal with modern methods of communication such as social media.<sup>17</sup> This issue was

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<sup>11</sup> Irish Human Rights and Equality Commission, *Review of the Prohibition of Incitement to Hatred Act 1989* (December 2019) <<https://www.ihrec.ie/app/uploads/2019/12/Review-of-the-Prohibition-of-Incitement-to-Hatred-Act-1989.pdf>> accessed 24 February 2022.

<sup>12</sup> Prohibition of Incitement to Hatred Act 1989.

<sup>13</sup> Professor Barbara Perry, Associate Dean, Faculty of Social Science and Humanities, University of Ontario Institute of Technology January 2014 in Jennifer Schweppe, Amanda Haynes and James Carr, 'A Life Free From Fear, Legislating for Hate Crime in Ireland: An NGO Perspective', University of Limerick, August 2014.

<sup>14</sup> Jennifer Schweppe, Amanda Haynes and James Carr, 'A Life Free From Fear, Legislating for Hate Crime in Ireland: An NGO Perspective', University of Limerick, August 2014 <[https://ulir.ul.ie/bitstream/handle/10344/4485/Schweppe\\_2014\\_crime.pdf?sequence=1](https://ulir.ul.ie/bitstream/handle/10344/4485/Schweppe_2014_crime.pdf?sequence=1)> accessed 24 February 2022.

<sup>15</sup> The United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Committee on the Elimination of Racial Discrimination Seventy-eighth session, 14 February – 11 March 2011, CERD/C/IRL/CO/3-4.

<sup>16</sup> Prohibition of Incitement to Hatred Act 1989.

<sup>17</sup> Department of Justice and Equality, *Review of the Prohibition of Incitement to Hatred Act 1989 Public Consultation* (October 2019)

also addressed in the 2016 Law Reform Commission report on Harmful Communications and Digital Safety which stated that within the 1989 Act there are 'gaps that require reform, notably where new forms of communication have been used in harmful ways which could not have been anticipated previously.'<sup>18</sup> The recent attempts to fill some of these identified gaps will be discussed in this section while the regulation of hate crimes and hate speech on the internet will be discussed in greater detail in the final part of this paper.

This particular section will focus on what have been identified as two of the heaviest criticisms leveraged at the 1989 Act: the lack of convictions for the commission of hate crimes and the publication of hate speech that have been secured under the Act, and the narrow scope of the definition which offers protection to only a limited number of recognised groups.

## **2. Criticisms of the 1989 Act: The Difficulty in Securing Convictions and the High Threshold of Proof to be Met**

One of the most persistent criticisms that has been aimed at the 1989 Act is its ineffectiveness in securing convictions for hate crimes. The Irish Human Rights and Equality Commission (IHREC) has noted that in the last twenty years there have been just five convictions from forty-four prosecutions secured under the 1989 Act.<sup>19</sup> IHREC has also referred to the 'apparent reluctance of the Director of Public Prosecutions to prosecute or grant leave to prosecute complaints made under the 1989 Act.'<sup>20</sup> One example of where the DPP sought to have the hateful element of a crime recognised was in the case of *DPP v Jones and Derwin*.<sup>21</sup> This case involved racist statements being aimed at two Chinese men, one of whom was ultimately murdered. The DPP subsequently challenged the lenient sentences imposed. Schweppe summarises that 'the Court was asked to consider that the sentences were unduly lenient on the basis of the need to condemn racially motivated attacks.'<sup>22</sup> On appeal, the Court upheld the validity of the original sentences. It can therefore be concluded that although there is the possibility of a hateful motivation being taken into account during sentencing, the Court is under no obligation to increase the sentence on this basis.<sup>23</sup> This particular issue has been explicitly addressed by the recently proposed Criminal Justice (Hate Crime) Bill 2020. The Bill which provides for the hateful motivation of the offender to be considered as an element of the offence and for the sentencing to reflect this motivation will be discussed later in further detail.

The unwillingness of the Irish legislative system to address the hateful element of crimes is evidenced in several cases. Schweppe references the case of *DPP v O'Driscoll and Moore* which involved racist statements being uttered both during the commission of an assault as well as after the event in the presence of Gardaí.<sup>24</sup> Schweppe appears critical of the Courts handling of this case by noting that they 'did not take the opportunity to declare the hate motivation an aggravating factor in sentencing, despite the clear evidence presented in the case that the offence was motivated by hate.'<sup>25</sup> One interpretation of this unwillingness to raise the

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<[http://www.justice.ie/en/JELR/A\\_Review\\_of\\_the\\_Prohibition\\_of\\_Incitement\\_to\\_Hatred\\_Act\\_1989.pdf/Files/A\\_Review\\_of\\_the\\_Prohibition\\_of\\_Incitement\\_to\\_Hatred\\_Act\\_1989.pdf](http://www.justice.ie/en/JELR/A_Review_of_the_Prohibition_of_Incitement_to_Hatred_Act_1989.pdf/Files/A_Review_of_the_Prohibition_of_Incitement_to_Hatred_Act_1989.pdf)> accessed 24 February 2022.

<sup>18</sup> Law Reform Commission, *Report on Harmful Communications and Digital Safety* (2016) 1.

<sup>19</sup> IHREC (n.11).

<sup>20</sup> Ibid.

<sup>21</sup> Unreported, Court of Criminal Appeal, 1 November 2004, Hardiman J (ex tempore).

<sup>22</sup> Jennifer Schweppe, 'Defining Characteristics and Politicising Victims: A Legal Perspective' (2012) 10 *Journal of Hate Studies* 173.

<sup>23</sup> Schweppe (n.13).

<sup>24</sup> Schweppe (n.22).

<sup>25</sup> Schweppe (n.13)

motivating factor of hate when sentencing offences is that even those responsible for upholding the law are aware that it is futile to pursue an action under the 1989 Act.

The track record of convictions secured under the Prohibition of Incitement to Hatred Act does very little to instill confidence in the provision and the redress that it may offer to the victims of a hate crime. In fact, the first conviction secured under the Act was later overturned as the Judge ruled that the words directed at a Gambian national were ‘appalling, but ... did not warrant a conviction under the Act.’<sup>26</sup> A further incident which demonstrates the lack of protection that the 1989 Act affords to minorities against hateful statements is the failure of the Gardaí to press charges against two men who made derogatory and prejudicial comments about members of the Travelling Community.<sup>27</sup> These two incidents are just the tip of the iceberg when it comes to how hate crimes are handled under the Irish legal system. From just two examples it is evidenced that any victim of a hate crime in this jurisdiction faces an uphill battle when attempting to have the motivation of hate or prejudice taken into account in the assessment of the crime, that is if charges are even pursued in the first place. This bleak reality is summarised by Perry who states that the lack of an effective legal mechanism to tackle hate crimes gives the members of Irish society ‘permission to hate.’<sup>28</sup>

A public consultation of the 1989 Prohibition of Incitement to Hatred Act which was undertaken in October 2019 identified a further weakness associated with the Act. It was noted that the high threshold of ‘likely to stir up hatred’<sup>29</sup> which must be reached in order for an offence to be committed under the Act is a very difficult hurdle to overcome.<sup>30</sup> In response, it was suggested that the requirement should be amended to include recklessness.<sup>31</sup> It is suggested that this could be a positive change and may lead to more convictions for hate crimes being secured. The lower standard of recklessness is easier to attain, and therefore, may prevent those who have committed a hate crime avoiding liability on a technicality. The need to amend the burden of proof required to commit a hate crime is reflected in the general scheme of the Criminal Justice (Hate Crime) Bill 2021. Part one of the 2021 Bill stipulates that:

*[A] person is guilty of an offence who – communicates to the public or a section of the public by any means, for the purpose of inciting or being reckless as to whether such communication will incite, hatred against another person or group of people due to their real or perceived association with a protected characteristic.<sup>32</sup>*

The next part of this section will discuss the 2021 Bill in greater detail, but it is submitted this provision is a welcome indication so that the 2021 Bill is better equipped to deal with the serious issue of hate crimes than the existing 1989 Act. The inclusion of recklessness as a lower standard of proof has the potential to result in a higher number of convictions for hate crimes being secured.

It is evident that the difficulty in securing a conviction under the 1989 Act can be classified as one of the Act’s most significant pitfalls. It must be asked what victim would be willing to come forward and take action

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<sup>26</sup> ‘Bus Driver Has Incitement to Hatred Conviction Quashed’, *RTÉ News*, 12<sup>th</sup> March 2001 <<https://www.rte.ie/news/2001/0312/13266-incitement/>> accessed 24 February 2022.

<sup>27</sup> ‘Councillors won’t face any charges’, *Donegal Live*, 2<sup>nd</sup> September 2013 <[Councillors won’t face any charges - DonegalLive.ie](https://www.donegalive.ie/news/councillors-wont-face-any-charges)> accessed 24 February 2022.

<sup>28</sup> Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge, 2001) chapter 7.

<sup>29</sup> Prohibition of Incitement to Hatred Act 1989, Section 2(1).

<sup>30</sup> DJE Review (n.17).

<sup>31</sup> *Ibid.*

<sup>32</sup> General Scheme Criminal Justice (Hate Crime) Bill 2021, Head 3(1).



against an offender when there is such a poor, or virtually non-existent precedent to be followed? This seemingly insurmountable hurdle is due in fact to the high threshold of proof required to be proven under the 1989 Act. Additionally, the problem of the limited scope of protection contained in the Act will be discussed further in this section.

Although it may seem like the discourse surrounding hate crime legislation in Ireland is overwhelmingly negative, there has been a glimmer of hope in recent years with the proposal of the Criminal Justice (Hate Crime) Bill 2020 in the Seanad and the publication of the general scheme of the Criminal Justice (Hate Crime) Bill 2021 by the Minister for Justice. These Bills have attempted to address the main points of concern of the 1989 Act by expanding the definition of categories which are granted protection and introducing concrete legislative provisions which will allow the hateful motivation or prejudice of the perpetrator to be taken into account when charging and sentencing an offence.

### 3. A Discussion of the Newly Proposed Criminal Justice (Hate Crime) Bills 2020 and 2021

From the criticisms outlined above, it is therefore clear that a reform of the law in relation to hate crimes is urgently needed. The ineffectiveness of the 1989 Act has resulted in victims of hate crimes losing confidence in the system and in receiving any real justice for the wrong that has been done to them. This is a serious issue which must be addressed and rectified as soon as possible. It is suggested that these reasons were amongst the motivating factors in proposing the Criminal Justice (Hate Crime) Bill 2020 and later, publishing the general scheme of the 2021 Bill.

The overall objective of the Criminal Justice (Hate Crime) Bill 2020 is to:

*... make provision for hate crime; the imposition of a heavier penalty on an offender whose commission of a relevant offence is accompanied by hate crime against an individual based on said individual's asylum or refugee status, race, colour, religion, nationality, ethnicity, disability, sexual orientation, transgender identity, sex characteristics, age or perceived age.*<sup>33</sup>

During the debates in the Seanad, Senator Fiona O'Loughlin commented that 'Ireland stands alone among European nations in not having introduced statutory protections from hate crime.'<sup>34</sup> This is clearly not the position we want to find ourselves in and highlights the urgent need for such legislation.

Schweppe acknowledges the two methods in which legislation can be utilised to punish hate crimes.<sup>35</sup> Firstly, mechanisms which provide for existing offences to be classified as aggravated when committed with a hateful motivation, furthermore, sentencing guidelines can allow for a sentence to be increased where it was shown that an offence was committed on the basis of hatred or prejudice.<sup>36</sup>

The recently proposed Criminal Justice (Hate Crime) Bill 2020 provides much more robust guidance on categorising an offence as aggravated than the 1989 Act and the consequences that this label will have. Section 2 of the 2020 Bill explicitly states that:

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<sup>33</sup> Criminal Justice (Hate Crime) Bill 2020, Preamble.

<sup>34</sup> Seanad Éireann debate, Tuesday 17<sup>th</sup> November 2020, Vol.272, No.7 <<https://www.oireachtas.ie/en/debates/debate/seanad/2020-11-17/24/>> accessed 24 February 2022.

<sup>35</sup> DJE Review (n.17).

<sup>36</sup> Ibid.

*... an offence is aggravated by hate crime against a relevant individual if –*

- (a) At the time of committing the offence, or immediately before or after doing so, a person displays racism, homophobia, xenophobia, anti-religious prejudice or disability hate crime towards a relevant individual, or*
- (b) The offence is motivated (wholly or partly) by racist, homophobic, xenophobic, anti-religious prejudice or disability hate crime towards a relevant individual.<sup>37</sup>*

Furthermore, section 3 of the Act provides that:

*... where it was proven or demonstrated to the satisfaction of the Court, that a motivating factor for the commission of a relevant offence was aggravated by hate crime against a relevant individual, the Court shall on conviction –*

- (a) State that the offence was aggravated by hate crime against a relevant individual*
- (b) Record that said conviction was aggravated by hate crime against a said individual, and*
- (c) Take said aggravation into account when determining sentence.<sup>38</sup>*

If and when enacted, these express mandates have the potential to provide a much stronger level of protection to the victims of a hate crime. It is suggested that the requirement to display prejudice in the course of committing an offence is a much lower threshold to reach than proving incitement to hatred. Therefore, a probable consequence of the updated provisions is that many more convictions will be secured under the 2020 Bill. Additionally, there will be an increase in circumstances in which an offence is categorised as a hate crime. By stipulating that the hateful motivation of the offender is to be considered in sentencing it sends a clear message that this type of crime will not be tolerated and that if it is committed, it will be appropriately punished.

Senator Lisa Chambers has commented that these provisions are important as the victims of the crime 'know the harm and hurt done against them has been recognised by the courts, the law of the land and society and has been condemned in the strongest way.'<sup>39</sup> Therefore, it is noted that the 2020 Bill is much more equipped in dealing with the hateful motivation of an offender and with the punishment of hate crimes than the 1989 Act. Its potential enactment will play a vital role in bringing Ireland in line with other European countries on this issue as well as vindicating the fundamental human right of non-discrimination by offering protection to a wide-range of minority groups.

Following on from the debate of the 2020 Bill in the Seanad, the Minister for Justice published the General Scheme of the Criminal Justice (Hate Crime) Bill 2021 in April of this year. Although introduced within a very short time of each other, the two Bills are not identical. There are several important differences between the 2020 and 2021 Bills to be considered. This includes the definition of protected categories under the two Bills and the provisions that provide for an increase in sentencing if the offence is found to be committed due to hateful motivation or prejudice.

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<sup>37</sup> Criminal Justice (Hate Crime) Bill 2020, Section 2.

<sup>38</sup> Ibid, Section 3.

<sup>39</sup> Seanad Éireann (n.34).

#### 4. The Scope of Protected Categories under the Newly Proposed Bills

One of the most significant differences between the 1989 Act and the two recently proposed Bills is the expansion of categories that are afforded protection. The initial 1989 Act provides for just four recognised groups of 'race, religion, nationality and sexual orientation.'<sup>40</sup> This has been greatly expanded under the 2020 Bill which recognises the protected categories of 'asylum or refugee status, race, colour, religion, nationality, ethnicity, disability, sexual orientation, transgender identity, sex characteristics, age or perceived age.'<sup>41</sup> Meanwhile the 2021 Bill makes provision for protection based on 'race, colour, nationality, religion, ethnic or national origin, sexual orientation, gender or disability.'<sup>42</sup> The expansion of categories included in the 2020 Bill is clearly a welcome development as it provides protection to a much broader range of people and members of a minority group. It is suggested that the widening of the categories which were recognised under the Act was a vitally needed amendment. In just protecting four groups, the 1989 Act could be considered extremely outdated and therefore, not fit for purpose in today's modern society. As neither of the proposed Bills have yet been finalised or enacted it cannot be said what the concluded definition of protected categories will be. However, it is suggested that any of the proposals will be an improvement on the current definition under the 1989 Act.

The limited scope of protection afforded to minority groups under the 1989 Act has also been the subject of international criticism. In particular, it has been noted that the 'persistent refusal to recognise Travellers as an ethnic group'<sup>43</sup> was a point of concern. While the 2020 Bill makes provision for 'ethnicity' which may extend to members of the Travelling community, it has been suggested that the definition should include an explicit reference to the Travelling community.<sup>44</sup> This would ensure that members of this community are afforded adequate protection under the Bill and would prevent them being excluded on the basis of vague or unclear terminology. The need for this explicit protection was recognised under the definition of protected categories under the 2021 Bill where it is expressly noted that members of the Travelling community are afforded protection under the category of ethnicity.<sup>45</sup>

However, despite the welcome expansion of protected categories under the 2020 and 2021 Bills it is suggested that there should also be a provision which would cover those categories that may slip through the cracks or have difficulty fitting the mould of a particular group. The need for such a provision is evidenced in the English case of Sophie Lancaster. Sophie Lancaster 'was a young woman who was murdered for being different ... she and her boyfriend were creative, artistic people who dressed in their own unique way.'<sup>46</sup> While the attack against Sophie and her boyfriend was clearly motivated by her difference, there could be no conviction for a hate crime because Sophie did not fall into any of the recognised protected categories of the UK legislation.<sup>47</sup> It is therefore suggested that in order to prevent such a situation arising again and to ensure that anyone who commits an offence that is motivated by any hatred or prejudice can be convicted

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<sup>40</sup> Prohibition of Incitement to Hatred Act 1989.

<sup>41</sup> Criminal Justice (Hate Crime) Bill 2020.

<sup>42</sup> General Scheme Criminal Justice (Hate Crime) Bill 2021, Head 2.

<sup>43</sup> CEDAW Committee (n.15).

<sup>44</sup> Schweppe (n.13).

<sup>45</sup> Criminal Justice (Hate Crime) Bill 2021 (n.41).

<sup>46</sup> The Sophie Lancaster Foundation Homepage <<https://www.sophielancasterfoundation.com/>> accessed 24 February 2022.

<sup>47</sup> Schweppe (n.13).

of a hate crime, a broad provision that can be applied to situations which fall outside the recognised categories should be included in the legislative definition.

## 5. Conclusion

Overall, it is clear that the existing legislative framework in Ireland is not equipped to adequately deal with the issue of hate crimes. The 1989 Act has been the subject of debate and discussion and has faced strong criticism in recent years as the incidence rate of hate crimes has increased. It is submitted that much of this criticism has been warranted. In particular, it is noted that the lack of convictions that have been secured under the 1989 Act is a worrying fact. One suggestion for the low number of convictions is the high threshold to be met in order to prove an offence under the Act. Furthermore, it is possible that many minority groups in today's society do not come under the umbrella of protection afforded by the 1989 Act. With such few convictions it is not difficult to see how this Act could be considered ineffective. The victims of a hate crime will be unwilling to pursue action under this Act when there is such little chance of success. It is therefore clear that amendments are needed which will address this problem and instil confidence in the victims that crimes of this nature will not be tolerated in Irish society and that if they do occur, they will be sufficiently punished.

Additionally, the 1989 Act provides protection to only a very limited number of categories. While at the time of enactment this might have been considered adequate, the definition is not workable in today's modern society. It is therefore essential that the categories which are afforded protection under any hate crime legislation are amended and extended to a much more varied cohort. In doing so, many more people who are the victims of an offence simply because of prejudice against them will be protected. It is therefore concluded that the Prohibition of Incitement to Hatred Act can no longer be considered fit for purpose and that 'a clear strong statement needs to be made by the legislature ensuring that any crime which is committed out of a hate motivation is punished more severely.'<sup>48</sup>

Several of these criticisms have been addressed by the proposed Criminal Justice (Hate Crime) Bill 2020 and the published general scheme of the Criminal Justice (Hate Crime) Bill 2021. It is submitted that the enactment of these Bills would be a significant step forward and would send a strong message that hate crimes will not be accepted in this country. The Bills have greatly expanded the categories and groups which are afforded protection and the list can be said to reflect the modern and diverse make-up of Irish society today. Additionally, the 2020 Bill provides enhanced mechanisms for the punishment and sentencing of hate crimes. In legislating for aggravated offences and explicitly stating that any hateful motivation or prejudice will be considered in the sentencing, the Bill lowers the threshold to be met in proving an offence. By doing so, this may lead to more convictions being secured where a hate crime has been committed.

It is therefore concluded that the Criminal Justice (Hate Crime) Bills 2020 and 2021 have the potential to bring much needed change to the way hate crimes are regulated and punished in this jurisdiction. The 1989 Act has not provided adequate protection to minority groups and is not effective at securing convictions for hate crimes. The Irish legislative framework in relation to hate crimes should be updated as a matter of urgency in order to demonstrate that Ireland has no place for hate crimes and that any offenders will receive a just punishment. As discussion and debate surrounding the newly proposed hate crime legislation is so current and topical it is difficult to say with certainty what the final outcome will entail. However, it can be concluded that either the Criminal Justice (Hate Crime) Bill of 2020 or 2021 will be a significant improvement on the

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<sup>48</sup> Ibid.

Prohibition of Incitement to Hatred Act 1989. The main reasons for this are the inclusion of the standard of recklessness, the provision for aggravated offences and sentencing and the expansion of the definition of protected categories.

## C. STRIKING AN EFFECTIVE BALANCE BETWEEN PROHIBITING HATE SPEECH AND VINDICATING THE FUNDAMENTAL RIGHT TO FREEDOM OF EXPRESSION

### 1. The Importance of Free Speech in a Democratic Society

It is widely acknowledged that the right to freedom of expression is of fundamental importance in a democratic society. Sorabjee notes that the right is 'necessary for the attainment of truth, for individual fulfilment and for successful functioning of democracy.'<sup>49</sup> The Irish Human Rights and Equality Commission has defined the right to freedom of expression as 'a fundamental human right [and an] indispensable condition'<sup>50</sup> of a person's identity. Its importance is also evidenced through Forde and Leonard's comment that the right to freedom of expression is enshrined in practically every national constitution as well as regional and international human rights covenants.<sup>51</sup> While the overall scope of the right to freedom of expression is extremely far-reaching and can be applicable in a multitude of scenarios, this essay will primarily focus on assessing the right to freedom of expression in the context of prohibiting hate speech.

While lacking an explicit legal definition, Cassim describes hate speech as 'the use of abusive, racist and disparaging comments, words or phrases directed against particular groups of people.'<sup>52</sup> Additionally, Rose notes that the range of actions that may arise from the expression of hate speech vary from 'simple bullying, to racist epithets, all the way to incitement to violence and even genocide.'<sup>53</sup> It is clear that such behaviour can have a serious negative impact on the lives and rights of others and is in direct conflict with the well-established principle of non-discrimination. Fisher states that the primary objective of the person who is expressing hateful speech is to send a message to the victim that they, or the minority group that they are a part of, are inferior.<sup>54</sup> Those who decide to target others with hate speech believe that they are superior to these minority groups. This hostile attitude can create feelings of fear and tension in a society and it must be demonstrated that it will not be accepted. Similarly, Karovska-Andonovska stipulates that 'hate speech indicates intolerance and a lack of culture of respect for diversity.'<sup>55</sup>

This section of the paper will therefore explore the protection afforded to the right of freedom of expression under the Irish constitution as well as the European Convention on Human Rights (ECHR). Additionally, it will be outlined whether the right to freedom of expression may be curtailed when that speech is classified as hateful. Furthermore, the distinction between hate speech that warrants a criminal response and that which may be more appropriately addressed through other procedures will be discussed. Finally, caselaw from the

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<sup>49</sup> Soli K. Sorabjee, 'Freedom of Expression' (1993) 19 *Commonwealth Law Bulletin* 1712.

<sup>50</sup> IHREC (n.11).

<sup>51</sup> Michael Forde and David Leonard, *Constitutional Law in Ireland* (Bloomsbury Professional, 3<sup>rd</sup> ed, 2013) [19.01].

<sup>52</sup> Fawzia Cassim, 'Regulating Hate Speech and Freedom of Expression on the Internet: Promoting Tolerance and Diversity' (2015) 28(3) *South African Journal of Criminal Justice* 303.

<sup>53</sup> Hadley Rose, 'Speak no Evil, Hear no Evil, Do no Evil: How Rationales for the Criminalization of Hate Speech Apply in Transitional Contexts' (2015) 22(2) *Willamette Journal of International Law and Dispute Resolution* 313-342.

<sup>54</sup> Asaf Fisher, 'Regulating Hate Speech' (2006) 8 *University of Technology, Sydney Law Review* 21.

<sup>55</sup> Biljana Karovska-Andonovska, 'Creating Standards against Hate Speech through the Case-Law of the European Court of Human Rights' (2016) 8 *Balkan Social Science Review* 7.

European Court of Human Rights will be referenced in order to demonstrate how the balance between the right to freedom of expression and the prohibition on hate speech has been dealt with before the Courts.

The right to freedom of expression is explicitly provided for in the Irish Constitution under Article 40.6.1 which stipulates that 'The State guarantees liberty for the exercise of the following rights, subject to public order and morality: The right of citizens to express freely their convictions and opinions.'<sup>56</sup> Furthermore, the right is protected under the ECHR. Article 10.1 of the Convention outlines that 'everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'<sup>57</sup>

However, despite these strong mandates, the right to freedom of expression cannot be considered absolute and may be subject to curtailment or restriction if certain criteria are met. One justification for this is put forward by Rose who suggests that the right to freedom of expression cannot be relied upon to the detriment of the human rights of others.<sup>58</sup> There is not one singular approach to be followed when considering restricting a person's right to free expression and Riordan suggests that European legislators are more likely to impose restrictions on the expression of hateful speech or rhetoric than those in jurisdictions such as The United States.<sup>59</sup> The issue of restricting the fundamental right to free speech is far from straight forward. Buyse comments that 'few issues are as contested as the limits of the freedom of expression.'<sup>60</sup> In particular, the ECHR provides for a broad range of circumstances in which the right of free speech may be limited, including by:

*... formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for the preventing of the disclosure of information received in confidence or for maintaining the authority or impartiality of the judiciary.'*<sup>61</sup>

It is submitted that this qualification is equally as important as the right itself as without it there would inevitably be an increase in the spreading and publication of harmful, hateful and even dangerous statements and ideologies. It is acknowledged that such categories of speech have no place in a civil and democratic society as they have a serious 'impact on the cohesion and fabric of our shared community.'<sup>62</sup> It is therefore submitted that the right to freedom of expression should not be absolute as it would give people an unrestricted right to publish content that may be harmful or dangerous to others.

A further example which provides for the regulation of the right to freedom of expression can also be found in the International Convention on the Elimination of all Forms of Racial Discrimination. In particular, Article 4 stipulates that States party to the Convention are obliged to:

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<sup>56</sup> Bunreacht na hÉireann, Article 40.6.1.

<sup>57</sup> European Convention on Human Rights, Article 10.1.

<sup>58</sup> Rose (n.53).

<sup>59</sup> Patrick Riordan, 'Freedom of Expression, No Matter What?' (Summer 2016) 105(418) *An Irish Quarterly Review: Freedom of Speech How Far Can You Go?* 159-168

<sup>60</sup> Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech' (April 2014) 63 *International and Comparative Law Quarterly* 491-503.

<sup>61</sup> European Convention on Human Rights, Article 10.2

<sup>62</sup> DJE Review (n.17).

... 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.<sup>63</sup>

Furthermore, the International Covenant on Civil and Political Rights makes reference to restrictions for the purpose of respecting the 'rights or reputations of others [and] for the protection of national security or of public order, or of public health or morals.'<sup>64</sup>

It is submitted that the inclusion of provisions allowing the right to free speech to be limited in certain circumstances was a deliberate and well-intended step by the drafters of such conventions. In making explicit reference to such situations in national, regional and international conventions the drafters appear to suggest that the right to freedom of expression is not superior to a person's right to dignity and non-discrimination.

Therefore, it is important to strike an effective balance between the right to freedom of expression and the prohibition of hate speech and to give effect to both. The Irish Human Rights and Equality Commission has commented that instead of viewing these as two separate and distinct objectives, the relationship between them should be 'complimentary.'<sup>65</sup> This reiterates the idea that having both an environment in which people are free to express their thoughts and ideas as well as one where citizens feel safe and respected is a fundamental element of a civil and democratic society.

## 2. A Discussion of the Hierarchy of Rights and the Concept of Balance

When discussing the concept of balancing two competing rights it is important to acknowledge the hierarchy of rights and the difference between those rights that are categorised as absolute and those that are not. It is not within the scope of this paper to give a detailed analysis on the hierarchy of rights which has been the subject of much debate and discussion by international lawyers. Instead, this section will briefly acknowledge the difficulties that arise when it comes to balancing two competing rights and the concept of categorising certain human rights as 'absolute.'

Klein comments that establishing a hierarchy of rights has the result of declaring certain rights superior to others.<sup>66</sup> Several commentators appear to be critical of such an approach and have noted the difficulties that may arise from the formation of a concrete hierarchy of rights. Klein comments that 'the promotion of more human rights to a higher rank runs the risk that it might become nearly impossible to solve a conflict between competing rights in a convincing manner.'<sup>67</sup> Similarly, Tahvanainen notes that there is no strong indication that a hierarchy of human rights has been established and that due to the ever-changing legal landscape there is no basis for forming such a hierarchy of rights.<sup>68</sup>

It is therefore suggested that in comparing the right to freedom of expression and the right to non-discrimination, it would be difficult to reach a solid conclusion on the basis of a hierarchy of rights. Therefore,

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<sup>63</sup> International Convention on the Elimination of all Forms of Racial Discrimination, Article 4(a).

<sup>64</sup> International Covenant on Civil and Political Rights, Article 19(3).

<sup>65</sup> IHREC (n.11).

<sup>66</sup> Eckart Klein, 'Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy' (2008) 41 *Israel Law Review* 477.

<sup>67</sup> Ibid.

<sup>68</sup> Annika Tahvanainen, 'Hierarchy of Norms in International and Human Rights Law' (2006) 24 *Nordisk Tidsskrift for Menneskerettigheter* 191.

an argument that one right is superior to the other may not succeed. Perhaps a more effective way of addressing the conflict is through the practice of balancing rights. Çali appears to favour this approach and comments that it may be preferable to the hierarchy of rights as 'it not only recognises the importance of human rights but also proposes to reconcile them with other important concerns with the aid of the principle of proportionality.'<sup>69</sup> In following this method it is not stating that one right is superior to the other. It merely attempts to find a workable and effective balance between the two and to vindicate both rights as much as possible.

One example of the conflict which may arise between the competing rights of freedom of expression and the right to a good reputation and the need to find a 'middle ground' was acknowledged in the case of *Reynolds v Times Newspapers*.<sup>70</sup> This case concerned a defamation action brought by the former Taoiseach of Ireland, Albert Reynolds against the Times Newspaper. In the judgment of the House of Lords it was commented that both the right to free expression and the right to a good reputation are fundamental.<sup>71</sup> Although this case refers to political speech, it is contended that the reputation of a person targeted with hate speech will inevitably be adversely affected. The often-public nature of hate speech may lead to the victim feeling humiliated, singled-out and fearful for their safety. It is therefore contended that in certain circumstances it may be necessary to curtail the right to free expression in order to vindicate a person's right to a good reputation and to uphold the principal of non-discrimination. Despite the fact that this case was not heard in the Irish jurisdiction, it is probable that the same conclusion in respect of both rights being fundamental would have been reached in the Irish courts.

One legislative provision in the Irish context which provides for the regulation of the right to free speech is the Prohibition of Incitement to Hatred Act 1989. Section two of this Act makes it an offence to 'publish or distribute written material,<sup>72</sup> to use words, behave or display written material,<sup>73</sup> which may be considered 'threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.'<sup>74</sup> Schweppe and Walsh have commented that this section constitutes a 'substantial intrusion by the criminal law into freedom of expression.'<sup>75</sup> Despite this mechanism, it is important that it is considered in light of the effectiveness of the Act in reality. As discussed in section B of this paper, it is clear that there are significant problems with applying provisions of the 1989 Act in practice and therefore, it provides little comfort to those seeking to rely on it.<sup>76</sup> It is possible that any potential hate crime bill will provide stronger guidance on restricting the right to freedom of expression where hate speech is publicised.

It is therefore clear that the right to freedom of expression is a fundamental human right and is firmly cemented as one of the most important values in a democratic society. With reference to the examples outlined above the right is given protection in both the Irish Constitution and in the European human rights system. However, with these protections also comes qualifications and each legislative instrument also makes provision for situations in which the right can be restricted or curtailed. This brings perhaps the main

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<sup>69</sup> Basak Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (Feb 2007) 29(1) *Human Rights Quarterly* 251-270.

<sup>70</sup> *Reynolds v. Times Newspapers Ltd and Others* [1999] UKHL 45.

<sup>71</sup> *Ibid.* Lord Nicholls of Birkenhead.

<sup>72</sup> Prohibition of Incitement to Hatred Act 1989, section 2(1)(a).

<sup>73</sup> *Ibid.*, s.2(1)(b).

<sup>74</sup> *Ibid.*, s.2(1).

<sup>75</sup> Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 57.

<sup>76</sup> *Ibid.*



point of contention to light. How does the legislature strike an effective and fair balance between validating the right to free expression and restricting it when the situation requires? This difficult question does not have a straightforward answer. The following section of this paper will attempt to demonstrate which classifications of speech and expression can be justifiably restricted. Furthermore, examples of caselaw which has dealt with this issue and attempted to find an acceptable ground between these two competing rights will be discussed in order to ascertain the approach that has been taken by the Courts.

Another important concept that should be discussed in respect of competing and balancing rights is that of absolute and non-absolute rights. As previously noted, the right to freedom of expression cannot be said to be an absolute right as it may be limited or curtailed in certain circumstances. However, Klein acknowledges that simply because a right may be limited, it does not render it inferior to others and that the need for the right to be balanced with another may still occur.<sup>77</sup> Borowski appears to be critical of the concept of absolute rights and instead seems to favour the use of a proportionality assessment in balancing or restricting certain rights.<sup>78</sup> He notes the important role that proportionality plays when it comes to limiting a fundamental right and comments that 'proportionality analysis is widely regarded as a crucial factor in the protection of human rights ... this applies first and foremost to rights with a written limiting clause.'<sup>79</sup>

It is evident that certain situations may arise in which the right to freedom of expression can come into conflict with other rights such as the right to non-discrimination and the right to a good reputation. Although this Working Paper is not the place for a detailed discussion on concepts such as the hierarchy of rights and absolute rights it has been suggested that the hierarchy of rights cannot be used to classify one right as superior to another. Similarly, it has been noted that simply because a right is not absolute does not mean that it can be considered as less important. It is therefore submitted that one of the most appropriate ways to deal with competing rights is to conduct a proportionality assessment which will ensure that both rights are vindicated as much as possible.

### 3. The Use of Criminal Law in Regulating the Right to Freedom of Expression

It is clear that the issue of regulating hate speech does not have a 'one size fits all' solution. Due to differing cultures, views and values throughout global society it is likely that certain types of speech may be tolerated in one jurisdiction, but not in another.<sup>80</sup> Additionally, the legislative provisions regulating hate speech may vary throughout different jurisdictions. It is not difficult to appreciate that the punishment inflicted on the publisher of hate speech should be proportionate to the statements they have made. This view is echoed by the Irish Human Rights and Equality Commission who have commented that the criminal law is not the correct avenue to pursue in every instance of hate speech occurring.<sup>81</sup> Similarly, the Report on Harmful Communications and Digital Safety comments that the use of criminal law should be reserved for only the 'most serious harm.'<sup>82</sup> This particular section will focus on the threshold that must be met in order for hate speech to be considered criminal and the advantages and disadvantages of taking such serious action. Additional remedies that may be applied in order to tackle hate speech will be discussed in this paper at a later stage.

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<sup>77</sup> Klein (n.66).

<sup>78</sup> Martin Borowski, 'Absolute Rights and Proportionality' (2013) 56 *German Yearbook of International Law* 385.

<sup>79</sup> Ibid.

<sup>80</sup> Cassim (n.52).

<sup>81</sup> IHREC (n.11).

<sup>82</sup> LRC (n.18) 5.

There are both advantages and dis-advantages associated with applying criminal sanctions on a person's speech. On the one hand it may seem like a drastic curtailment of a fundamental human right. However, on the other, the unfortunate reality is that there exists such serious instances of hate speech which warrant a sufficiently serious response. Knechtle acknowledges this distinction by commenting that there are those of the opinion that the right to freedom of expression comes before the protection of a particular group and there are those who believe in restricting the right in order to ensure the protection of such groups.<sup>83</sup>

One argument for the latter is put forward by Forde and Leonard who note that it may be justifiable to restrict a person's right to freedom of expression in the context of hate speech as 'expression of that nature is entirely inconsistent with ... equal participation in democracy, and of upholding human dignity.'<sup>84</sup>

Therefore, it is suggested that the criminalisation of the most serious forms of hate speech is consistent with the principles of a modern, civil society which vindicates each citizen's right to non-discrimination. Schweppe acknowledges the weight that a criminal conviction carries and the fact that it sticks with the offender throughout their lives, additionally, it is stated that a conviction for hate would be an even heavier cross to carry than a regular criminal conviction.<sup>85</sup> In criminally punishing the most extreme instances of hate speech society at large is notified that such actions will not be tolerated.<sup>86</sup>

However, the criminal law cannot be applied in every situation and in each instance of hate speech it must be assessed whether it is the appropriate remedy to pursue. Buyse notes that there is a danger that may come with providing a public platform from which to broadcast hateful rhetoric to a wide audience.<sup>87</sup> The final section of this Working Paper will discuss alternative methods to the criminal law which may be used to regulate hate speech, particularly in the online sphere.

Furthermore, where it has been ascertained that the right to free expression can be restricted, this restriction must not be arbitrary or unreasonable. This approach can be seen in the case of *Erbakan v Turkey*<sup>88</sup> in which it was held that the restrictions imposed on the Applicant had 'not been reasonably proportionate to the legitimate aim pursued, regard being had to the interest of a democratic society.'<sup>89</sup> Furthermore, it must be considered whether the restriction imposed on the right to freedom of expression is 'necessary in a democratic society.'<sup>90</sup> This particular point has been discussed in several cases before the European Court of Human Rights.

The case of *Le Pen v France*<sup>91</sup> concerned the Applicant publishing anti-Muslim statements on a number of occasions in the *Le Monde* newspaper. He was subsequently fined and claimed that this constituted a violation of his right to freedom of expression. In its decision the Court held that the statements made by the

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<sup>83</sup> John C. Knechtle, 'Holocaust Denial and the Concept of Dignity in the European Union' (2008) 36 *Florida State University Law Review* 41.

<sup>84</sup> Forde and Leonard (n.51) [19.05].

<sup>85</sup> Schweppe (n.13).

<sup>86</sup> *Ibid.*

<sup>87</sup> Buyse (n.60).

<sup>88</sup> *Erbakan v Turkey*, ECtHR, Application no. 59405/00.

<sup>89</sup> *Ibid.*

<sup>90</sup> European Convention on Human Rights, Article 10(2).

<sup>91</sup> *Le Pen v France*, ECtHR, Application no. 18788/09.

Applicant were likely to 'give rise to feelings of rejection and hostility.'<sup>92</sup> Therefore, the infringement on the 'applicant's enjoyment of his right to freedom of expression had been necessary in a democratic society.'<sup>93</sup>

While it is not within the scope of this paper to provide a detailed discussion on which categories of hate speech are sufficiently serious to warrant a criminal sanction, some conclusions can be made. Firstly, it is important to reiterate the need to strike a balance between the right to free expression and the right to be free from discrimination. Therefore, it is suggested that criminal sanctions should be applied to only the gravest forms of hateful expression. In doing so, it prevents the right to free expression from being arbitrarily and unfairly restricted, while also providing for prosecution and punishment where necessary. Furthermore, in each case the level of infringement must be assessed and the Court must determine whether it has been legitimate, proportionate and necessary. Once again this allows the two rights to be balanced against each other and is perhaps the most effective way to strike a fair balance. It is therefore submitted that while legislative provisions which allow for the expression of hateful ideologies to be criminally punished are necessary in the most extreme circumstances, they should be utilised 'as a measure of last resort.'<sup>94</sup>

#### **4. An Analysis of the Caselaw of the European Court of Human Rights relating to the Right to Free Expression and Hate Speech**

As previously mentioned, Article 10 ECHR provides for the right to freedom of expression while also outlining circumstances in which the right may be limited. The European Court of Human Rights has dealt with various cases concerning the limitation of this right where hate speech has been publicised or broadcast. In this particular paragraph, examples of how the Court has dealt with the competing rights of freedom of expression and the right to non-discrimination will be discussed.

Buyse has compared the approach of the Court to the issue of limiting the right to freedom of expression as a 'house divided.'<sup>95</sup> On the one hand the Court has demonstrated its steadfast commitment to upholding the right to free expression while on the other it has been willing to curtail the right in accordance with the Convention. Ultimately, there can be no solid conclusion taken from the Court's rulings on limiting the right to freedom of expression which can often lack consistency.<sup>96</sup> Oetheimer echoes this sentiment by noting that the Court decides to tackle this issue on a 'case by case basis to avoid being constrained in its reasoning.'<sup>97</sup>

In the pivotal case of *Handyside v The United Kingdom*<sup>98</sup> the Court made several strong statements in order to reiterate the importance of the right to freedom of expression. One of the most important points to arise from the decision is that the right to freedom of expression is 'applicable not only to information or ideas that are favourably received or regarded as inoffensive ... but also to those that offend, shock or disturb the State or any sector of the population.'<sup>99</sup> This therefore means that speech which may not be positive, kind or popular is given equal protection under Article 10 ECHR. In making this clarification the Court demonstrated

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Schweppe (n.13).

<sup>95</sup> Buyse (n.60).

<sup>96</sup> Ibid.

<sup>97</sup> Mario Oetheimer, 'Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law' (2009) 17 *Cardozo Journal of International & Comparative Law* 427.

<sup>98</sup> *Handyside v The United Kingdom*, ECtHR, Application no. 5493/72.

<sup>99</sup> Ibid, 49.

that the right to free expression will not lightly be discarded merely because a portion of the population may not agree with the statements made.

Another important case that has come before the European Court of Human Rights concerning the restriction of freedom of expression is that of *Jersild v Denmark*.<sup>100</sup> This case concerned the production of a documentary, in which racist statements and attitudes were broadcast. The applicant was subsequently convicted of aiding and abetting the broadcast of racist statements and claimed that this constituted a violation of his Article 10 rights. In its judgment, the Court found that while there had been a breach of the applicant's Article 10 rights, such racist statements were 'more than insulting to members of the targeted groups and did not enjoy the protection of Article 10.'<sup>101</sup> It was concluded that the Applicant who was responsible for producing the documentary did not have the intention of spreading such racist sentiment but proposed to 'expose, analyse and explain this particular group.'<sup>102</sup>

Additionally, the Court has also acknowledged the possibility of restricting the right in certain circumstances. The case of *Erbakan v Turkey*<sup>103</sup> involved the Applicant being sentenced to one year in prison after he gave a public speech in which he was charged with inciting hatred. While overall the Court held that his right to free expression under Article 10 had been violated, it was also commented that expressions which can be classified as hateful and insulting to others does not fall within the ambit of protection afforded by Article 10.<sup>104</sup>

There are also several examples of where the Court has been willing to uphold restrictions imposed on a person's right to free expression in light of declarations of hateful or offensive rhetoric. In addition to Article 10, Keane notes that when dealing with hate speech the Court has also applied Article 17 ECHR as a method of lawfully restricting the right to free expression.<sup>105</sup> Article 17 stipulates that:

*... nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*<sup>106</sup>

This therefore means that the right to freedom of expression under Article 10 cannot be relied upon if to do so would infringe on the rights and protections provided for in the Convention, the overall aim of which is to uphold the human rights and dignity of all persons. This approach was followed in the case of *Seurot v France*.<sup>107</sup> In this instance a teacher was convicted after publishing and spreading racist remarks and attitudes in a school newspaper. The Court ruled that the Applicant's rights under Article 10 had not been infringed as his comments had been so contrary to the core values of the Convention and therefore, did not trigger the protection of Article 10. Similar reasoning was applied by the Court in the case of *Pavel Ivanov v Russia*.<sup>108</sup> Here, the Applicant was convicted of public incitement to hatred after publishing anti-Jewish sentiments in

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<sup>100</sup> *Jersild v Denmark*, ECtHR, Application no. 15890/89.

<sup>101</sup> *Ibid*, 35.

<sup>102</sup> *Ibid*, 33.

<sup>103</sup> *Erbakan v Turkey*, ECtHR, Application no. 59405/00.

<sup>104</sup> *Ibid*, 57.

<sup>105</sup> David Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25 *Netherlands Quarterly of Human Rights* 641.

<sup>106</sup> European Convention on Human Rights, Article 17.

<sup>107</sup> *Seurot v France*, ECtHR, Application no. 57383/00.

<sup>108</sup> *Pavel Ivanov v Russia*, ECtHR, Application no. 35002/04.

his newspaper. In its judgment, the Court explicitly stated that ‘speech which is incompatible with the values proclaimed and guaranteed by the Convention would be removed from the protection of Article 10 by virtue of Article 17.’<sup>109</sup> It is therefore suggested that although the Court acknowledges and upholds the right to freedom of expression, it appears that its foremost objective is ensuring the protection of human rights and giving effect to the principle of non-discrimination.

One criticism which the Court has faced when it comes to its use of Article 17 is the fact that the Article does not provide for the competing rights to be balanced and for this reason it has been suggested that such cases should be considered under Article 10.<sup>110</sup> It is the weighing of these two rights which sets Article 10 apart from Article 17. When a case is assessed under the former the Court will ‘assess whether the free speech limitation was necessary in a democratic society and whether it was proportionate to the legitimate aim pursued.’<sup>111</sup> It is therefore suggested that the removal of the proportionality assessment under Article 17 renders it suitable for only the very worst and most extreme instances of hate speech. To use Article 17 in every case could potentially infringe on the right to freedom of expression in a disproportionate manner.

The Court has also demonstrated a willingness to uphold restrictions on the right to freedom of expression where it finds that it is necessary in a democratic society to do so. This is illustrated in the case of *Vedjeland and Others v Sweden*<sup>112</sup> which concerned the Applicants publishing homophobic leaflets in a school. Although the Court did find that the Applicant’s Article 10 rights had been infringed, they ultimately concluded that that the interference was justified under Article 10(2) as it was ‘necessary in a democratic society for the protection of the reputation and rights of others.’<sup>113</sup>

Recent judgments of the European Court of Human Rights suggest that the balance may have shifted from the protection of the right to free expression to preventing the occurrence of violence that can naturally arise from the spreading of hateful ideologies.<sup>114</sup> However, Keane states that ‘the recent debate over freedom of expression in Europe is understandably confused.’<sup>115</sup> With the exponential growth of technology and social media and the increased opportunities that this provides to spread hateful rhetoric to a large audience it is uncertain how such cases will be adjudicated in the future. One can only hope that the Court can find the ability to uphold both its core values of non-discrimination and free expression and to provide an avenue in which these two fundamental rights are vindicated. This ideal scenario is echoed by Karovska-Andonovska who states that the strong stance the Court has taken against any form of racist or hateful expression is clear, but that it is also imperative that there never comes a time where ‘the fact that freedom of expression is a basic human right is forgotten.’<sup>116</sup>

## 5. Conclusion

In conclusion, there will always be difficulties and controversies that arise when it comes to restricting or curtailing the right to freedom of expression. The strong protections afforded to the right in national, regional and international legal instruments has cemented it as one of the most important elements of a modern,

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<sup>109</sup> Ibid, 1.

<sup>110</sup> Buyse (n.60).

<sup>111</sup> Oetheimer (n.97).

<sup>112</sup> *Vedjeland and Others v Sweden*, ECtHR, Application no. 1813/07.

<sup>113</sup> Ibid, 59.

<sup>114</sup> Rose (n.53).

<sup>115</sup> Keane (n.105).

<sup>116</sup> Karovska-Andonovska (n.55).

democratic society. However, it has been demonstrated that each of these instruments have also made provision for limiting the right where circumstances warrant it. The right is not absolute and therefore it may come into conflict with other fundamental rights. In the context of hate speech, an absolute right to free expression cannot be viewed as compatible with a person's right to reputation, dignity and non-discrimination.

It is suggested that the solution is to find an acceptable and workable balance between these competing rights. One way in which this may be done is imposing criminal sanctions only on the most serious forms of hate speech and imposing limitations on the right to free expression only where it is absolutely necessary. Of course, this is not as simple as it may appear as what is considered acceptable in one branch of society may not be in another. Furthermore, it is important to ensure that any infringement of the right to freedom of expression is proportionate and does not arbitrarily restrict the right.

The European Court of Human Rights has delivered several important judgments in situations where the spreading of hateful statements and ideologies has been restricted. It has been demonstrated that the Court considers the right to free expression to be a cornerstone of democracy and has extended the protection of Article 10 to speech that may be insulting to particular groups in society. However, the Court has also not shied away from upholding restrictions where it has been necessary to do so. While relying on Article 10(2) and Article 17 ECHR, the Court has made clear that its ultimate aim is upholding the founding principles of the Court and Convention which is 'securing the universal and effective recognition and observance of [human rights].'<sup>117</sup>

To conclude, it is suggested that in order to vindicate both the fundamental rights of freedom of expression and the right to non-discrimination, the European Court of Human Rights should endeavour to decide cases on the basis of Article 10(2) as opposed to Article 17. By ensuring that the rights are adequately assessed and balanced the Court will demonstrate its commitment to finding a workable middle ground between these two fundamental human rights.

## **D. THE REGULATION OF ONLINE HATE SPEECH**

### **1. Conclusion**

As mentioned in the previous section, not every instance of hate speech will warrant a criminal punishment. In fact, it has been noted that this particular avenue should only be pursued in the most extreme circumstances. However, this does not mean that other forms of hate speech should not be subject to any regulation or punishment, particularly in the age of social media where people have the ability to post hateful messages and comments with seemingly little consequences. In this section of the paper, the need for regulation of hate speech which does not meet the threshold for criminalisation will be considered. Particular focus will be placed on the need to monitor the online sphere and social media sites which provide a platform for hateful ideas and rhetoric to spread. It will be discussed whether social media companies can be held responsible for the messages published on their sites and what action may potentially be taken against them. Finally, additional mechanisms such as correction orders, fact checking, take down orders and the possible establishment of the position of a Digital Safety Officer will be considered. The overall aim of this section is to demonstrate the need for stronger protection for the fundamental rights of internet users. In recent years

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<sup>117</sup> European Convention on Human Rights, Preamble.

the exponential growth of the internet and technology and the increased use of social media has provided new and previously unthought of ways to publish hateful speech and dangerous ideologies. It is submitted that legislative provisions have struggled to keep up with this dramatic change. Therefore, the need for additional measures which can be adapted and updated more easily to reflect the needs of modern society is perhaps more urgent than ever.

## **2. How the Exponential Growth of the Internet and Social Media has Increased the Need for Monitoring and Regulation of Online Hate Speech**

It goes without saying that the use of the internet and social media has skyrocketed in recent years. The exponential development of technology has been extremely beneficial for many aspects of our lives. However, with these benefits there has also been certain disadvantages. Of particular reference to this Working Paper, social media sites have provided an avenue for hateful ideas and dangerous rhetoric to be publicised to a large, far-reaching audience in a matter of seconds. Additionally, there appears to be little consequences for those who do publish such messages. As a relatively modern and rapidly changing concept, the internet and social media sites can be considered to outpace the legislative provisions that aim to regulate them. This is evidenced by the simple fact that today, 'the majority of hate speech incidents occur online.'<sup>118</sup> It is therefore submitted that additional measures such as takedown orders and correction orders must become the norm in dealing with hate speech as it is likely that a significant portion of incidents will not fit the high threshold for criminalisation.

The Irish Human Rights and Equality Commission has commented on the serious nature of online hate speech by stating that it 'has an immediate impact and an enhanced reach as well as the potential to shape politics and the public debate offline.'<sup>119</sup> It is suggested that this is one of the most significant differences between hate speech directed at someone in-person and that published online. The latter has the potential to be published to a large number of people and even passed on to others across the world with the click of a button. These disadvantages were also noted by the European Court of Human Rights in the case of *Delfi AS v Estonia*.<sup>120</sup> This case concerned the publication of anonymous comments on an internet news site. In its judgment the Court acknowledged the benefits of the internet but also acknowledged that 'alongside these benefits certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech ... can be disseminated like never before, worldwide, in a matter of seconds and sometimes remain persistently available online.'<sup>121</sup> These worries were also echoed in the 2016 Report on Harmful Communications and Digital Safety where it was stated that the 'features of the online and digital environment mean that even a single communication has the capacity to interfere seriously with a person's peace and privacy ... particularly as internet communications are also difficult to erase completely.'<sup>122</sup> It is therefore evident that hate speech online can have even more serious consequences for the victim than the more traditional forms. Cassim has commented that those who have been affected by online hate speech may have some of their fundamental human rights including the right to privacy and human dignity impeded.<sup>123</sup> This illustrates the need for robust and effective measures to monitor and regulate incidents of online hate speech.

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<sup>118</sup> IHREC (n.11).

<sup>119</sup> Ibid.

<sup>120</sup> *Delfi AS v Estonia*, ECtHR, Application No. 64569/09.

<sup>121</sup> Ibid at 110.

<sup>122</sup> LRC (n.18) 25.

<sup>123</sup> Cassim (n.52).

It is clearly evident that the internet and social media platforms have provided an environment in which hate speech can grow and spread to wide audiences. Furthermore, the vast landscape of the online world poses another question: who should be held responsible for the dissemination of online hate speech? Is it the person who clicks upload or the giant multi-national companies that allow the statement to be published? This section of the paper will discuss the potential solutions to these problems and will aim to illustrate the need for stronger protections against online hate speech.

### 3. The Policies of Prominent Social Media Companies in Respect of Hate Speech and Whether These Companies can be Held Responsible for the Posts of Their Users

There are a variety of methods which may be utilised to regulate online hate speech which does not fall into the category of a criminal offence. Some of the most common civil mechanisms which can be used online include take down orders, fact checking and correction orders. These practices may be enforced by a Digital Safety Officer or a similar regulatory role, the formation of which has been recommended by the Law Reform Commission.<sup>124</sup> Such a position would be responsible for 'general oversight and monitoring ... [of] an efficient and effective take down system so that harmful communications can be removed as quickly as possible.'<sup>125</sup> While many social media companies advertise that they have robust policies for dealing with reported incidents of hate speech online, the effectiveness of these practices in reality must be considered.

The globally recognised social media company, Facebook defines hate speech as:

*... a direct attack against people – rather than concepts or institutions – on the basis of what we call protected characteristics: race, ethnicity, national origin, disability, religious affiliation, caste, sexual orientation, sex, gender identity, and serious disease. We define attacks as violent or dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal, cursing and calls for exclusion or segregation.*<sup>126</sup>

The company has stated that they are committed to removing hate speech from their platforms when it is brought to their attention and that they have taken down 'around 66,000 posts reported as hate speech per week.'<sup>127</sup> In outlining their procedure for removing reported hateful posts the company outlines that it takes several factors into consideration including context and intent.<sup>128</sup> Similarly, in its Hateful Conduct Policy, Twitter outlines that:

*... you may not promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability or serious disease.*<sup>129</sup>

<sup>124</sup> LRC (n.18) 2.

<sup>125</sup> Ibid.

<sup>126</sup> Facebook Community Standards, 12. *Hate Speech* <[https://www.facebook.com/communitystandards/hate\\_speech](https://www.facebook.com/communitystandards/hate_speech)> accessed 24 February 2022.

<sup>127</sup> Richard Allan, 'Hard Questions: Who Should Decide What is Hate Speech in an Online Global Community?' 27<sup>th</sup> June 2017 <<https://about.fb.com/news/2017/06/hard-questions-hate-speech/>> accessed 24 February 2022.

<sup>128</sup> Ibid.

<sup>129</sup> Twitter, *Hateful Conduct Policy* <<https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>> accessed 24 February 2022.



However, despite the existence of these policies the removal of hate speech from social media sites is not straightforward as once again, the right to freedom of expression must be respected. It is submitted that the balancing of the right to freedom of expression and the right to non-discrimination and a good reputation becomes even more difficult in the online context due to the sheer volume of users and posts to be monitored. Additionally, as it is such a modern concept, it is largely uncharted territory for any legal system. Diab echoes this sentiment by commenting that it is unclear what is the most appropriate method to be used in restricting the right to freedom of expression on the internet.<sup>130</sup> Wilson and Land also acknowledge the mammoth task that is regulating online hate speech by noting that the scale of the problem is so large, the solution has to incorporate 'algorithmic processes and tens of thousands of human content moderators.'<sup>131</sup>

A central question in the debate concerning social media companies and the regulation of hate speech has been whether a company can be held responsible for the hateful content posted by its users. In 2000, the European Parliament published the Electronic Commerce Directive. Article 15 of this Directive stipulates that there is 'no general obligation to monitor' by stating that 'member states shall not impose a general obligation on providers ... to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.'<sup>132</sup> Initially, this would appear to indicate that internet service providers and social media companies cannot be compelled to monitor the content on their sites. However, it is suggested that this Directive came into force at a time when the internet was not as widely used or as easily accessible. It is therefore submitted that more than twenty years later, this Directive could be considered outdated.

There have been several cases brought before the Courts which have attempted to hold social companies accountable for the content they allow to be published. One such example is the case of *Eva Glawischnig-Piesczek v Facebook Ireland Ltd*.<sup>133</sup> This case involved an action brought against Facebook Ireland due to insulting and disrespectful comments being published on the site about the Applicant. Following a request from the Applicant to remove the comments from the social media site, an Austrian Court granted an injunction obliging Facebook to delete the comments.<sup>134</sup> In the opinion of Advocate General Szpunar it was suggested that the Electronic Commerce Directive 'does not preclude a host provider operating a social media network platform from being ordered, in the context of an injunction to seek and identify ... the information equivalent to that characterised as illegal by a Court that has issued that injunction.'<sup>135</sup> This appears to go a step further than simply stating that the content complained of must be removed. The comments of Advocate General Szpunar suggest that there may also be an obligation on social media companies to locate and remove content which is deemed to be similar to that which has been prohibited. This broad approach has been subject to criticism with it being noted that it may infringe on the right to freedom of expression as it may result in speech which is not explicitly classified as hate speech being

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<sup>130</sup> Robert Diab, 'Search Engines and Global Takedown Orders: *Google v Equustek* and the Future of Free Speech Online' (2019) 56 *Osgoode Hall Law Journal* 231.

<sup>131</sup> Richard Ashby Wilson and Molly K Land, 'Hate Speech on Social Media: Content Moderation in Context' (2021) 52 *Connecticut Law Review* 1029.

<sup>132</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') Article 15 (1).

<sup>133</sup> *Eva Glawischnig-Piesczek v Facebook Ireland Ltd*, Case C-18/18, (Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria), Delivered on 4 June 2019).

<sup>134</sup> *Ibid*, 13-17.

<sup>135</sup> *Ibid*, 75.

removed from the relevant platforms.<sup>136</sup> Furthermore, organisations which campaign for the right to free expression have voiced their concerns about the wide scope of the ruling stating that ‘compelling social media platforms like Facebook to automatically remove posts regardless of their context will infringe our right to free speech and restrict the information we see online.’<sup>137</sup>

This case has evidenced that once again, the most significant concern appears to be striking an effective balance when attempting to limit a person’s right to freedom of expression. It is submitted that in the age of social media where hateful and harmful posts are uploaded everyday there needs to be protocols in place to monitor and regulate this speech. However, it is also vital that these measures are not arbitrary, excessive or overbearing. Any attempt to limit the right to free speech should be thoroughly assessed and carried out in a proportionate manner. Hence, it is submitted that while the vast majority of social media posts will not warrant a criminal response, they may potentially be restricted by methods such as take down orders, correction orders or fact checking warnings.

It is widely accepted that the internet and social media platforms have become a staple feature of modern life. However, the dangers associated with this cannot be ignored. If we continue on our current trajectory it is possible that social media platforms will be largely unregulated and become a breeding ground for hate. This is why it is urgent that civil mechanisms are introduced and supported by the large social media companies. As noted by Cassim, it is a co-ordinated approach amongst all relevant parties which is ‘necessary to curb hate speech on the internet and to promote tolerance and respect for diversity.’<sup>138</sup>

#### **4. The Creation of the Role of Digital Safety Officer and Establishment of an Approved Agency to Monitor and Regulate Incidents of Hate Speech Online**

One potential method which could be adopted in this jurisdiction to assist in regulating and monitoring hate speech on social media is the creation of the role of Digital Safety Officer or a similar approved agency. Such an approach was introduced in New Zealand under the Harmful Digital Communications Act 2015 with the formation of the organisation, Netsafe. Section 8 of the Harmful Digital Communications Act makes provision for the creation of an approved agency which has the power to:

- *receive and assess complaints about harm caused to individuals by digital communications*
- *to investigate complaints*
- *to use advice, negotiation, mediation and persuasion to resolve complaints*
- *to establish and maintain relationships with domestic and foreign service providers, online content hosts and agencies*
- *to provide education and advice on policies for online safety and conduct on the internet*<sup>139</sup>

It is suggested that the creation of such an agency in this jurisdiction would prove beneficial not only in regulating hate speech online but also respecting the right to freedom of expression. In providing for a civil

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<sup>136</sup> *Glawischnig-Piesczek v Facebook Ireland Ltd*, Global Freedom of Expression Columbia University <<https://globalfreedomofexpression.columbia.edu/cases/glawischnig-piesczek-v-facebook-ireland-limited/>> accessed 24 February 2022.

<sup>137</sup> ‘CJEU Judgment in Facebook Ireland Case is threat to online free speech’, Article 19 <<https://www.article19.org/resources/cjeu-judgment-in-facebook-ireland-case-is-threat-to-online-free-speech/>> accessed 24 February 2022.

<sup>138</sup> Cassim (n.52).

<sup>139</sup> Harmful Digital Communications Act 2015, Section 8(1).

complaints procedure and non-criminal methods to deal with incidents of online hate speech there is a more effective and proportionate balance struck between vindicating both the right to non-discrimination and the right to freedom of expression. Furthermore, it would be extremely beneficial to victims of hate speech to have an established organisation to make a report to as many victims may be unwilling to make a complaint to the police and may feel more comfortable confiding in an organisation who has experience in the area. The need for the establishment of a Digital Safety Officer in Ireland has been acknowledged by many children's charities who have stated that 'a digital or online safety commissioner is urgently required to both regulate the online space, make it a safer place for our children and young people, and coordinate an effective education programme for children and parents.'<sup>140</sup> It is therefore concluded that the creation of a dedicated organisation which would be tasked with regulating hate speech online, providing for complaints to be made and overall, ensuring that the internet is a safe place for all users would prove to be very beneficial in this jurisdiction.

## 5. Recent Legislative Developments concerning Enhancing the Protection of Internet Users within the European Union

The European Union has recently acknowledged the need to update the Electronic Commerce Directive so that it provides sufficient protection to the more modern forms of communication and technology that could not have been envisioned at the time of its enactment. In proposing the Digital Services Act, the European Commission has commented that in the twenty years since the Electronic Commerce Directive:

*... new and innovative information society (digital) services have emerged, changing the daily lives of Union citizens and shaping and transforming how they communicate, connect, consume and do business. Those services have contributed deeply to societal and economic transformations in the Union and across the world. At the same time, the use of those services has also become the source of new risks and challenges.*<sup>141</sup>

The newly proposed Digital Services Act will aim to 'establish a powerful transparency and a clear accountability framework for online platforms.'<sup>142</sup> With the enactment of this provision, it is hoped that there will be stronger, more robust and more transparent protection afforded to users of the internet and social media sites within the European Union. It is submitted that this Act will go a long way in bringing the legislative provisions in line and up to date with the modern online landscape. It has been noted throughout this paper that the evolution and increased use of social media sites has contributed to the publishing of hateful content online. This is expressly recognised in the Digital Services Act which aims to provide an effective solution. It is outlined that 'by setting out clear due-diligence obligations for certain intermediary services, including notice and action procedures for illegal content ... the proposal seeks to improve user's safety online across the entire Union and improve the protection of their fundamental rights.'<sup>143</sup>

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<sup>140</sup> 'Ireland is playing 'catch up' when it comes to child safety online, says experts', *Irish Examiner*, 11<sup>th</sup> February 2020 <<https://www.irishexaminer.com/news/arid-30981057.html>> accessed 24 February 2022.

<sup>141</sup> Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15.12.2020, Explanatory memorandum 1.

<sup>142</sup> European Commission, 'The Digital Services Act: ensuring a safe and accountable online environment' <[https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)> accessed 24 February 2022.

<sup>143</sup> *Irish Examiner* (n.140).

## 6. Conclusion

This section of the paper has commented on the role that the internet and social media sites have played in providing a platform for the publication and spreading of hate speech. It has been noted that the rapid growth of the internet and the continual change that is occurring in the online sphere has made it extremely difficult for any legal or protective mechanism to stay up to date. Social media has undoubtedly brought many advantages to our lives. However, it has also provided many with a platform to publish any thought or comment that pops into their head, with no consideration for the consequences. This is one of the most significant reasons why there is a need for stronger monitoring and regulation of social networking platforms and why the companies themselves must step up and demonstrate that hate speech will not be tolerated on their platforms. It is also suggested that the calls for the establishment of a dedicated organisation to monitor hate speech online should be addressed. In providing for civil procedures to regulate incidents of hate crime online it ensures that both the right to freedom of expression and the right to non-discrimination are respected. It is important that there exists sufficient non-criminal methods that can be utilised when tackling hate speech so that the response is not considered disproportionate or arbitrary. There are positive indications that in the not-too-distant future measures will be implemented to assist in the monitoring and regulating of hate speech online. In particular, the enactment of the EU's Digital Services Act will be a significant step in offering stronger and more effective protection to Union citizens. It is hoped that Member States will fully embrace the Act in order to fulfil the objective of vindicating the fundamental human rights of human citizens which have been compromised due to the lack of regulation of the internet and social media platforms.

## E. CONCLUSION

As the current proposals, discussions and debates surrounding the regulation of hate crimes and hate speech in this jurisdiction are so current and topical, it is difficult to predict with certainty what the finalised measures will look like. However, what has been well established is that the current legislative protections in respect of regulating and punishing hate crimes are not sufficient and must be addressed in order to offer adequate protection to the victims of such incidents. It has been outlined that the 1989 Prohibition of Incitement to Hatred Act is outdated and not equipped to deal with hate crimes. Some of the most persistent criticisms which have been levied against the 1989 Act have been discussed including the lack of convictions for hate crimes that have been secured, the difficulty that the high threshold of intent to incite hatred poses to securing convictions, and the narrow scope of the definition of protected categories which leaves many vulnerable and protected groups outside the ambit of protection. While the analysis of the 1989 Act has been quite disheartening, the more positive recent developments and proposals have also been considered. In particular, reference has been made to the proposed Bills of the Dáil and the Seanad, the Criminal Justice (Hate Crime) Bill 2021 and 2020, respectively. These Bills have attempted to address some of the pitfalls of the 1989 Act, most notably, broadening the definition of protected categories, including the threshold of recklessness and providing for aggravated offences and sentencing guidelines where a crime was found to be motivated by hatred or prejudice. While either of these Bills are yet to be finalised or enacted, it can be said that either one would be a vast improvement on the 1989 Act and would greatly enhance the regulation and punishment of hate crimes. In introducing such robust hate crime legislation, it would send a clear message that hate has no place in Irish society and that any such crimes or offences will be sufficiently punished. One can look forward with anticipation for this day to become a reality.

While this Working Paper has aimed to highlight the need for stronger and more effective protection against hate crimes and hate speech, it has also acknowledged the need to respect other fundamental rights, in particular, the right to freedom of expression. The importance of the right to freedom of expression cannot be understated and it is vital that when regulating incidents of hate speech that this right is given the weight it deserves. The strong protection afforded to the right on both the national level under the Constitution and the regional level under the European Convention of Human Rights has been discussed. However, while the right is undoubtedly afforded strong protection it also cannot be considered to be absolute and circumstances exist in which it can be lawfully curtailed or restricted. While it is not within the scope of this paper to provide a detailed discussion on the concept of balancing rights, it has been acknowledged that when attempting to strike an effective balance between two competing rights, any restriction must be proportionate and necessary. An overview of relevant cases before the European Court of Human Rights has been provided in order to demonstrate how the Courts have attempted to find an appropriate balance between the right to freedom of expression and the right to non-discrimination. Overall, it is evident that the right to freedom of expression cannot and should not be easily restricted. It is important that when assessing the right in the context of hateful speech that criminal sanctions are only pursued in the most extreme circumstances. Furthermore, any limitation placed on the right must not be unfair or unreasonable. If these approaches are taken, it will ensure that the scales do not tip too favourably in one direction, allowing both the fundamental rights of freedom of expression and of non-discrimination to be respected.

Finally, this paper has considered the problems that the internet and social networking sites have posed in facilitating the widespread publication of hate speech. This disadvantageous aspect of the technological age has been highlighted with particular attention being given to hate speech published online. Once again, in order to give effect to the right to freedom of expression it has been acknowledged that there must exist civil mechanisms through which hate speech online can be monitored, regulated and punished. As this area is largely uncharted territory in many legal systems it is unclear what impact such measures will have on large, multi-national social media companies. However, as they have published their commitment to addressing the issue of online hate speech, it is submitted that due to the influence and power they possess, they must play a larger role in bringing about an end to online hate speech. Adopted from New Zealand, another suggestion that has been discussed has been the creation of an online safety commissioner or a similar agency which will be tasked with regulating the online sphere and combatting incidents of hate speech. With the development of the internet, technology and social media likely to continue in an upward trajectory it is suggested that time is of the essence in introducing appropriate mechanisms for dealing with hate speech online. The recently introduced EU Digital Services Act is a hopeful indication that in the years to come the internet will be appropriately regulated and become a safe space, free of hateful speech.

Overall, the primary aim of this Working Paper has been to draw attention to the discrepancies of the current legal provisions in legislating for hate crimes and hate speech and to highlight the need for stronger and more robust protection. It is submitted that in this modern age of acceptance and diversity, there is no place for hate in our society. In taking measures to combat and punish hate crimes and hate speech a precedent can be established that such actions will not be tolerated. The introduction of more effective mechanisms to tackle these serious issues will help to send the clear message to the victims: we stand with you.