

Third Study Commission Questionnaire 2022

1. Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.

Freedom of expression is protected in Ireland primarily by [the Constitution of Ireland 1937](#), and specifically, [Article 40.6.1^o](#), which states, *inter alia*, as follows:

“The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-:

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

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

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

There have been a number of seminal cases which have engaged and discussed the protections provided for by Article 40.6.1^o, including, *inter alia*, the following cases:

- [Murphy v. Independent Radio and Television Commission \[1999\] 1 IR 12](#): In this case, Barrington J. explained the provision in the following terms:

“Article 40.6.1^o.i ... is concerned with the public activities of the citizen in a democratic society. That is why ... the framers of the Constitution grouped the right to freedom of expression, the right to free assembly and the right to form

associations and unions in the one subsection. All three rights relate to the practical running of a democratic society”¹

- [Mahon v. Post Publications \[2007\] IESC 15](#): In this case, Fennelly J. commented that the Constitution clearly protected both the right to communicate information and the right to express convictions and opinions.
- [The Irish Times v. Ireland \[1998\] 1 IR 359](#): In this case, Barrington J. again commented on the nature of Article 40.6.1^o and made specific reference to the European Convention on Human Rights (discussed below):

“It therefore appears to me that the right of the citizens “to express freely their convictions and opinions” guaranteed by Article 40 of the Constitution is a right to communicate facts as well as a right to comment on them. It appears to me also that when the European Convention on Human Rights states that the right to freedom of expression is to include “freedom ... to receive and impart information” it is merely making explicit something which is already implicit in Article 40.6.1^o of our Constitution.”²

Since the enactment of the [European Convention on Human Rights Act 2003](#), the Irish courts have been required to have regard to the State’s obligations under [the European Convention on Human Rights](#). Article 10 of the Convention concerns freedom of expression and states as follows:

“1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

¹ [Murphy v. Independent Radio and Television Commission \[1999\] 1 IR 12 at pg 24.](#)

² [The Irish Times v. Ireland \[1998\] 1 IR 359](#) at pg 405.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such 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 preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”³

Finally, there are a number of non-binding charters and agreements that the state is party to that provide for a right to freedom of expression, including, *inter alia*, [Article 18 and 19 of the United Nations International Covenant on Civil and Political Rights](#) and [Article 11 of the EU Charter of Fundamental Rights](#).

2. Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.

There are a number of pieces of legislation which criminalise certain forms of offensive speech in Ireland. A non-exhaustive list is set out below:

1. [The Post Office \(Amendment\) Act 1951 \(as amended\)](#);

[Section 13 of the Post Office Amendment Act 1951](#) (as amended) (“1951 Act”) makes it an offence to send grossly offensive, indecent, obscene or menacing messages by phone to another person, or for the purpose of causing annoyance, inconvenience or needless anxiety to another person sends a telephone message knowing it to be false or persistently makes telephone calls to another person without reasonable excuse.

³ [Article 10 of the European Convention on Human Rights](#).

2. [The Prohibition of Incitement to Hatred Act 1989](#);

Under the Prohibition of Incitement to Hatred Act 1989 (“1989 Act”), it is an offence to publish or distribute written material; publicly use words, behave or display written material; distribute, show or play a recording that is ‘threatening, abusive or insulting and intended or likely to stir up hatred’. The word hatred is defined as “hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation”.⁴ The act also prohibits broadcasts that are likely to stir up hatred and the preparation and possession of material likely to do so.

3. [The Video Recordings Act 1989](#);

[Section 3\(1\)\(a\) of the Video Recordings Act](#) permits the censorship of video recordings if the viewing of it

“(i) would be likely to cause persons to commit crimes, whether by inciting or encouraging them to do so or by indicating or suggesting ways of doing so or of avoiding detection, or

(ii) would be likely to stir up hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation, or

(iii) would tend, by reason of the inclusion in it of obscene or indecent matter, to deprave or corrupt persons who might view it.”⁵

⁴ [Section 1 the Prohibition of Incitement to Hatred Act 1989](#)

⁵ [Section 3\(1\)\(a\) of the Video Recordings Act](#)

4. [The Criminal Justice \(Public Order\) Act 1994](#) (“1994 Act”);

Section 6 of the 1994 Act makes it an offence to “use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned”⁶. However, such an offence can only occur in a “public place”, which is defined by s.3 as being “a highway, public area, premises or place where the public have access to.”⁷

5. [The General Scheme Criminal Justice \(Hate Crime\) Bill 2021](#)⁸

The Irish Government has recently published legislation to strengthen the current laws governing hate speech. [The General Scheme Criminal Justice \(Hate Crime\) Bill 2021](#) has completed pre-legislative scrutiny and a report has issued in relation to same⁹. The interpretation section of the General Scheme of the Criminal Justice (Hate Crime) Bill 2021 defines hatred as follows:

““hatred” means detestation, significant ill will or hostility, of a magnitude likely to lead to harm or unlawful discrimination against a person or group of people due to their association with a protected characteristic.”¹⁰

Furthermore, part 1 of the General Scheme concerns “Incitement to Hatred” and defines an offence under the Bill as follows:

“(1) 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

⁶ [Section 6 of the Criminal Justice \(Public Order\) Act 1994.](#)

⁷ [Section 3 of the Criminal Justice \(Public Order\) Act 1994.](#)

⁸ This legislation is yet to be enacted, as of 1 July 2022.

⁹ [Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021](#)

¹⁰ [Head 2 of the General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021.](#)

characteristic.”¹¹

The Government announced on 13 July that it is proposing to amend the Bill as published to change the intentional element of hate crimes to a demonstration test rather than a motivation test; to apply the Incitement of Hatred Act to online content and to create aggravated offences when certain existing offences are motivated by prejudice against a particular characteristic.

It is anticipated that the amended Bill will be published in September and is expected to be enacted in 2023.

3. Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture of what the legislation is like?

As well as the legislation cited at question 2 above, which criminalizes, in some form or another, certain offensive utterances, there are also specific pieces of legislation that restrict freedom of expression. A non-exhaustive list is set out below:-¹²:

- [The Official Secrets Act 1963](#) (“1963 Act”):

Part II of the 1963 Act makes it a criminal offence for a person to “communicate any official information to any other person unless he is duly authorised to do so or does so in the course of and in accordance with his duties as the holder of a public office or when it is his duty in the interest of the State to communicate it”.¹³

Part III of the 1963 Act prohibits communicating itemised military and Garda information, and any other matter whatsoever which would or might be prejudicial to the safety or preservation of the State”.¹⁴

¹¹ [Head 3 of the General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021.](#)

¹² It should be noted that prosecutions under the majority of the offences cited in this section are rare.

¹³ [Part II of the Official Secrets Act 1963.](#)

¹⁴ [Part III of the Official Secrets Act 1963.](#)

- [The Offences Against the State Act 1939](#) (“1939 Act”):

Under Part II of the 1939 Act it is an offence to “set up in type, print, publish, send through the post, distribute, sell, or offer for sale any document which is or contains or includes ... an incriminating ... a treasonable ... or a seditious document”.¹⁵

- [The Offences Against the State \(Amendment\) Act 1972](#) (“1972 Act”):

[Section 4 of the 1972 Act](#) prohibits statements and meetings that “interfere with the administration of justice”.¹⁶

- [The Wireless Telegraphy Act 1926](#):

Similar to the Video Recordings Act 1989, cited above, s.11 of the Wireless Telegraphy Act 1926 prohibits broadcasting any “message or communication subversive of public order.”¹⁷

o Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions

Generally, no group of citizens enjoy “special protection” to the right to freedom of expression, due to their gender, sexual preference, religion, race, as is evident from Article 40.6.1^o of the Constitution of Ireland, which does not attempt to differentiate between citizens. However, elected politicians, who would fall into the “other conditions” category, do enjoy special protection of their freedom of expression. This is provided for by Article 15.13 of the Constitution of Ireland, which states as follows:

¹⁵ [Part II of the Offences Against the State Act 1939](#)

¹⁶ [Section 4 of the Offences Against the State \(Amendment\) Act 1972.](#)

¹⁷ [Section 11\(1\) of the Wireless Telegraphy Act 1926.](#)

“The members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, **and shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.**”
[emphasis added].¹⁸

o Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics

Religion:

Originally, Article 40.6.1^o of the Constitution of Ireland exempted blasphemy from the protections of free speech, stating “the publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law”. Furthermore, [s.36 of the Defamation Act 2009](#) made this constitutional requirement an offence. However, a referendum was held in 2018 in which 65% of citizens voted in favour of removing blasphemy as an offence from the Constitution. This resulted in the enactment of the [Blasphemy \(Abolition of Offences and Related Matters\) Act 2019](#) which removed all blasphemy related offences from the statute book.

Politics:

Section 5 of the Prohibition of Incitement to Hatred Act 1989 Act allows for the reporting of certain information, notwithstanding it’s content and specifically, exempts reporting from both the Irish Parliament and the Irish Courts, stating as follows:

“Sections 2, 3 and 4 do not apply to—

¹⁸ [Article 15.13 of the Constitution of Ireland 1937](#).

(a) a fair and accurate report of proceedings in either House of the Oireachtas or a committee of the Oireachtas or of either such House or an official report or publication of the Oireachtas or either such House or such a committee, or

(b) a fair and accurate report of proceedings publicly heard before a court, or a tribunal exercising functions or powers of a judicial nature, where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful.”¹⁹

Furthermore, as previously stated, statements made by politicians within the houses of parliament are privileged and therefore enjoy a special protection.

4. If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?

None of the provisions in the various pieces of legislation cited contain references to a balancing test or judicial discretion with regard to an offence that may in theory restrict freedom of expression. As per Article 40.6.1^o, the right to freedom of expression is subject to the public order and morality of the State, and therefore can be restricted. However, it is always open to a person charged with one of the above offences to argue that such an offence is repugnant to the Constitution.

• Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category

See above answer.

¹⁹ [Section 5 the Prohibition of Incitement to Hatred Act 1989](#)

• In cases where the freedom of speech and the restrictions are to be weighed against each other –

o Are there then guidelines on how the balancing should be done?

See above answer

o If Yes, which of the two parameters weighs heaviest, a) the protection of free speech or b) the category that is protected by the legislation? And does this differ from category to category?

See above.

o And how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?

See above.

5. Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?

o If it gives cause for doubt, how is it expressed? Does it **deter** the citizen from making statements? Or does it **deter** citizens from suing?

Please note several articles relating to the Incitement of Hatred 1989 which are critical of the effectiveness of the Act. It is noted that successful prosecutions pursuant to the 1989 Act are rare. Amending legislation, referred to above, is awaited in this area.

- Conor Gallagher, '[Court Service reveals five convictions for hate crime since 1989](#)' The Irish Times (Dublin, 19 June 2017).
- Coalition Against Hate Crime (Ireland), "[Alternative Report on Hate Crime and Related Issues](#)", (2019).
- Kane, "[Legislating for Hate Crime in Ireland](#)", (2021) 31(4) I.C.L.J 89.

6. Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases?

Please see above and note the fact that new legislation is expected in this area.