



UCD Centre for Constitutional Studies
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A Guide to the referendum on the 37th Amendment to the Constitution

What is the referendum about?

On 26 October 2018, voters will be asked to approve or reject the Thirty-seventh Amendment of the Constitution (Repeal of Offence of Publication or Utterance of Blasphemous Matter) Bill 2018, which proposes to delete the offence of blasphemy from the Constitution.

What is the current constitutional text?

Article 40. 6. 1 (i) is the section of the Constitution that deals directly with freedom of expression. It is a relatively lengthy section that deals with a number of matters, including blasphemy. The full text is:

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

“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 blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.”

What does the constitutional reference to “blasphemous ... matter” mean?

The language used suggests that the law must make it possible for a blasphemous publication or statement to be punished.

At the moment, this is done by the Defamation Act 2009. This could be amended by the Oireachtas without a referendum. However, if the Oireachtas did amend the 2009 Act, the Constitution would still require that it be legally possible to punish blasphemy as a criminal offence.

It is unusual for the Constitution to directly refer to a specific offence or punishment. Criminal or civil penalties are generally created or amended by the Oireachtas. Blasphemy, sedition and indecency are the only offences that are referred to in the Constitution.

How has the Irish law on blasphemy operated?

Following the introduction of the Constitution in 1937, there was some doubt as to what counted as blasphemy under Irish law. Did it relate to the Roman Catholic Church only? Did it relate to the Church of Ireland only, which had been the established church up to 1871? To Christianity generally? Or to any religion? And how was it committed and punished?

Blasphemy was originally developed by English courts. Under English law, it was linked to the position of the monarch as head of the Church of England. For that reason, blasphemy was generally understood to refer to attacks on the Christian religion. It was suggested in one English court decision in 1979 that it might be expanded to protect the religious beliefs and feelings of non-Christians to acknowledge the greater diversity of society. A later decision in 1991 found that it did not apply to Islam.

In Ireland the Defamation Act 1961 laid down the penalty for composing, printing or publishing any blasphemous libel. However, the offence could only be prosecuted with the permission of a High Court judge.

In *Corway v Independent Newspapers* [1999] 4 IR 484, a private individual applied to the High Court for permission to bring a prosecution for blasphemous libel. The application related to a newspaper cartoon about the 1995 referendum on divorce.

The courts refused the application. The Supreme Court considered what blasphemy might mean. The Court pointed out that the 1961 provided “no statutory definition of blasphemy ... [and] assume[d] that the crime exists without defining it.” The Court pointed out that there was uncertainty over which religion or religions were protected from blasphemy. There was also uncertainty over how a person might commit blasphemy, and of how an offence of blasphemy might interact with the Constitution’s protection of freedom of expression and freedom of conscience. The Court concluded that the offence existed but that there was significant uncertainty over what it involved.

The Defamation Act 2009 removed some of this uncertainty. A person may be guilty of blasphemy only if they:

- Publish or utter “grossly abusive or insulting” matter on “matters held sacred by any religion”;
- Their action causes outrage among a substantial number of members of that religion; **and**
- They intended to cause that outrage.

Each of these tests has to be met for a person to be convicted.

It is a defence if it can be proved that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the publication or utterance being prosecuted.

While the offence applies to any religion, the Act states that this does not include “an organisation or cult” that uses “oppressive psychological manipulation” or whose main aim is to make a profit.

The maximum penalty for publishing or uttering blasphemous matter is a fine of €25,000. There is no longer any possibility of being imprisoned for committing blasphemy (except for non-payment of the fine.)

It was suggested that the purpose of the 2009 law was to comply with the obligation in Article 40. 6. 1 (i) rather than to encourage prosecutions for blasphemy. When the proposal for the offence was introduced in 2009, the Minister for Justice stated that it was intended that it would be difficult to prosecute. Only the Director of Public Prosecutions can bring a blasphemy case to trial; private prosecutions are not allowed.

What will change if the referendum is passed?

If the amendment is passed, the Constitution will not include any specific references to blasphemy.

It would be open to the Oireachtas to amend or repeal the offence of blasphemy in the Defamation Act 2009 if it so chooses.

If the Oireachtas did not repeal the offence, an argument could be made that the continued existence of an offence of blasphemy would be unconstitutional as a breach of freedom of expression. It is not certain that this argument would be successful.

What will not change if the referendum is passed?

The remainder of Article 40. 6. 1 (i) will stay the same if the referendum is passed.

If the amendment is passed is likely that there will be no change to how freedom of expression is dealt with by the courts.

The references to “seditious and indecent matter” will remain in the Constitution. This means that the law must continue to make available the possibility that seditious or indecent publications or statements can be punished.

At present, seditious and indecent matter are dealt with through various legislation, including the Offences Against the State Acts, 1939 to 1998, the Criminal Law Act, 1976, the Censorship of Films Acts, 1923 to 1992, the Censorship of Publications Acts, 1929 to 1967 and the Video Recordings Acts, 1989 and 1992.

Aside from blasphemy, there is also at present a separate offence of inciting hatred against a group of persons in the State or elsewhere on account of their religion (among other reasons) (section 2 of the Prohibition of Incitement to Hatred Act, 1989.) It does not seem that this offence will be affected by the outcome of the referendum, one way or the other.