

ICCL Submission to the Oireachtas on the Criminal Justice (Hate Crime) Bill 2021

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Executive Summary

The absence of hate crime law in Ireland has been identified by national and international human rights bodies as a distinct gap in our legal framework. ICCL has long campaigned with the Coalition against Hate Crime for the introduction of legislation on hate crime and we therefore welcome this legislative process. However, we consider hate crime and criminal hate speech as two distinct categories of offence that would benefit from being addressed in two separate pieces of legislation.

We note that the consultation carried out by the Department of Justice in advance of this Bill focused primarily on the issue of hate speech rather than hate crime. As such, we consider that there is still a gap in research and consultation that would allow for more informed and transparent decision making on how to best respond to the problem of hate crime in Ireland. We call on government to carry out further research and consultations with relevant stakeholders before this legislation on hate crime progresses.

Protecting freedom of expression is vital to ensure a flourishing environment for debate and for counter speech. We urge government to make clear that this legislation is one pillar of a suite of measures necessary to combat hate crime and hate speech. Other forms of hate speech, which might cause deep offence for example but do not reach a criminal threshold, should be combated by other means, including education, monitoring, alternative remedies and an enabling environment for powerful counter- speech.

Efforts to combat hate crime must include better data collection, reporting mechanisms, support for victims, education and public sector training, and a national awareness campaign highlighting its harms and aimed at prevention.

Part 1- Incitement to Hatred

On Head 2, we consider that the definition of 'hatred' should be aligned more closely with international standards. We consider that the list of protected characteristics could benefit from a clear rationale for inclusion and exclusion of each characteristic and we call for the inclusion of sex characteristics in the current list.

On Head 3(1), we note that the offence of incitement to hatred must be drafted in a way that fully respects the right to freedom of expression, which entails the right to shock, disturb and offend. We call for a closer aligning of the offence with international standards, in particular standards that call for an explicit connection between incitement and a particular act of discrimination, hostility and violence. Clarity and precision are vital to ensure that all persons understand where the threshold is between criminal and non-criminal speech and behaviour.

On Head 3(2), we note that sentencing must be proportionate, highlighting that community sentencing options should be available and supporting restorative justice options. The same applies for Head 3(4).

On Head 3(3), we note that the offence of publishing, disseminating, broadcasting or displaying material constituting incitement to hatred as it may apply to a corporate body is not clear and we call for clear alignment with other national and European legislative processes seeking to regulate online content to prevent harm, while protecting the right to freedom of expression.

On Head 3(5), while recognising the need for robust defences, we consider this section may be problematic given the experiences of victims of extreme hate speech. We highlight the option of providing for a defence reflecting the equivalent Scottish legislation that explicitly references the need to consider the right to freedom of expression under the European Convention on Human Rights.

Part 2 – Hate Crime

On Heads 4-6, we welcome the provision for aggravated offences and analyse each new element of the offence. We call for an explanation of the rationale used to decide what offences were included in this Bill. We question whether the use of 'prejudice' in conjunction with the motivation test will allow for successful prosecutions and suggest 'bias' and/or 'hostility' could be added here to reflect international standards. We do not oppose the choice to use the motivation test. We welcome the provision for alternative verdicts to ensure the non-aggravated form of the offence can still be prosecuted where the hate motivation is not proven. We call for consistency in the Bill in the references to protected characteristics and repeat our call for clear rationale for inclusion and exclusion of protected characteristics.

On Head 7, we welcome the statutory basis for considering bias motive as an aggravating factor in sentencing, noting that community sentencing and not longer custodial sentences may be more effective in combating recidivism. We question the standard of proof that will be applied to a bias motive in this context and we question whether recording this motive will be appropriate and practical in all circumstances.

On Head 8, we question whether this Bill is the appropriate place for bias indicators and recommend that they are included in separate policy guidance.

On Head 9, we urge government to align this Head with the relevant EU Framework Decision that requires a prohibition of incitement to genocide, war crimes and crimes against humanity. The current wording entirely omits the element of incitement.

We conclude with a list of recommendations.

Introduction

1. The Irish Council for Civil Liberties (ICCL) welcomes the opportunity to make a submission on the Criminal Justice (Hate Crime) Bill 2021. As members of the Coalition Against Hate Crime Ireland (CAHC)¹, this submission should be read in conjunction with the joint submission provided by the Coalition on the Bill. It makes additional points from ICCL's perspective and echoes some key points from that submission.
2. The absence of hate crime law in Ireland has been identified by national and international human rights bodies as a distinct gap in our legal framework.² Creating a particular category of offence for crimes of this nature recognises the additional harm caused to individuals and their communities when hate crimes are committed. As such, ICCL welcomes efforts to legislate for hate crime in Ireland.
3. However, we consider hate crime and criminal hate speech as two distinct categories of offence that would benefit from being addressed in two separate pieces of legislation to avoid confusion. Hate crimes are aggravated

¹ The Coalition Against Hate Crime Ireland is comprised of 18 civil society organisations, one academic research group and one academic researcher. The members are: Age Action Ireland, BeLonG To, Doras, Dr. Lucy Michael (academic researcher), European Centre for the Study of Hate – University of Limerick, Immigrant Council of Ireland, Inclusion Ireland, Independent Living Movement Ireland, Irish Council for Civil Liberties, Irish Network Against Racism, Irish Traveller Movement, LGBT Ireland, LGBT Travellers, Nasc – Migrant and Refugee Rights Centre, National LGBT Federation, National Traveller Women's Forum, National Youth Council of Ireland, Pavee Point Traveller and Roma Centre, Sports Against Racism Ireland and Transgender Equality Network Ireland. More info available at: <https://inar.ie/our-work/policy-and-advocacy/coalition-against-hate-crime-ireland/>.

² See e.g. the Committee on the Elimination of Racial Discrimination, Concluding Observations on Ireland CERD/C/IRL/CO/34, 2 April 2011, accessible here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD

forms of existing offences while criminal hate speech is an offence of itself. We note that the consultation carried out by the Department of Justice on the reform of the Prohibition of Incitement to Hatred Act 1989 had unclear terms of reference and focused primarily on the issue of hate speech rather than hate crime. As such, we consider that there is still a gap in research and consultation that would allow for more informed and transparent decision making on how to best respond to the problem of hate crime in Ireland. We call on government to carry out further research and consultations with relevant stakeholders (in particular affected communities) before this legislation on hate crime progresses.

(a) Hate speech and human rights

4. ICCL is concerned that incidents of hate speech are on the rise in Ireland and across the world and, in some cases, take the form of racialised political strategies.³ Online or offline, some forms of extreme hate speech can have a chilling effect on the rights to freedom of expression and political participation where individuals or groups self-censor for fear of harassment, hateful responses or incitement to hatred and violence. The use of extreme forms of hate speech can create an atmosphere of hatred and can be used to incite violence, hostility and discrimination. In its most extreme form, hate speech can form part of a strategy to commit genocide.
5. ICCL welcomes the acknowledgment by government that the Prohibition of Incitement to Hatred Act 1989 is in need of reform to ensure our laws meet Ireland's obligations under international and regional human rights law and

³ See e.g. ECRI's 5th Report on Ireland, paras 27-32. Available at: <https://rm.coe.int/fifth-report-on-ire-land/168094c575>.

standards, including article 20 of the International Covenant on Civil and Political Rights (ICCPR)⁴ and the UN Convention on the Elimination of Racial Discrimination (CERD)⁵. We consider the EU Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (the EU Framework Decision) an important guiding source for legislation on hate speech⁶. We note and draw on the Council of Europe Commission against Racism and Intolerance (ECRI) General Policy Recommendations 15 and 7, as well as its 2019 fifth report on Ireland⁷.

6. At the same time, ICCL urges government to ensure that legislation seeking to criminalise any form of speech is drafted in a way that ensures full respect for the right to freedom of expression.⁸ The right to freedom of expression is protected under the Irish Constitution, the European Convention on Human Rights (ECHR), the EU Charter on Fundamental Rights and Freedom (EU Charter) and the ICCPR. In our view, only extreme forms of hate speech that might lead to acts of hostility, discrimination or violence should be criminalised. All restrictions must be prescribed by law, necessary in a

4 ICCPR, Article 20 provides: "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

5 Article 4 of CERD requires states to "condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination".

6 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law 2008/913/JHA

7 ECRI, ECRI report on Ireland (fifth monitoring cycle), adopted on 2 April 2019, published on 4 June 2019. Available at: <https://rm.coe.int/fifth-report-on-ireland/168094c575>

8 ICCL attaches fundamental importance to freedom of expression in our democratic society. From our establishment in 1976, ICCL has consistently campaigned for Irish law to respect and protect the right to freedom of expression, including a long-running campaign to repeal censorship of political speech under Section 31 of the Broadcasting Act, and more recent campaigns in defence of artistic expression and in favour of repeal of the constitutional criminalisation of blasphemy.

democratic society and proportionate to a legitimate aim. As such this legislation must be drafted with the utmost care to ensure that only the most extreme forms of speech that can lead to serious harm are criminalised.

7. We also urge government to make clear that this legislation is one pillar of a suite of measures necessary to combat hate crime and speech. Other forms of hate speech, which might cause deep offence for example but do not reach a criminal threshold, should be combated by other means, including education, monitoring, alternative remedies and an enabling environment for powerful counter-speech. International bodies have stressed that counter speech is vital, especially by public figures; education and training of public actors including police must be implemented; and awareness campaigns and effective reporting mechanisms must all play a part in responding to both hate crime and hate speech⁹.

(b) Hate Crime

8. ICCL welcomes the commitment by government to introduce laws that recognise the additional harmful effect of hate motivation in a criminal act. It is widely recognised that the impact of hate crime can be far greater than that of crimes committed without a bias motive, particularly on individual victims and those immediately associated with them. Hate crimes are signal crimes: they send a message of rejection to those targeted and their communities. These crimes have a wider impact on society; if left unaddressed, they can alienate targeted communities from the state, particularly law enforcement and the criminal justice system. They can escalate and set communities against each other. Therefore, hate crimes can

⁹ See eg CERD and ECRI.

be considered a threat to the principles of equality and non-discrimination, as well as social cohesion¹⁰.

9. As with the provisions on hate speech, we call on government to ground this legislation in international law and standards. For example, we note that ECRI has called for Irish law to provide that “racist and other hate motivation constitutes an aggravating circumstance for all criminal offences and is taken into account in sentencing”, together with several other complementary actions¹¹. CERD has recommended that Ireland should “introduce and enforce legislative provisions that include racist motivation as an aggravating circumstance that will result in a penalty enhancement in crimes committed as a result of racial bias”.¹² The EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law¹³, provides a valuable guidance document. Finally, we highlight the view from the European Court of Human Rights, which has found that the state has a duty to, among others, “take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events”¹⁴.

10 OSCE, Understanding the Needs of Hate Crime Victims, 2020. Available at :<https://www.osce.org/files/f/documents/0/5/463011.pdf>.

11 ECRI, ECRI report on Ireland (fifth monitoring cycle), adopted on 2 April 2019, published on 4 June 2019, para 8. Available at: <https://rm.coe.int/fifth-report-on-ireland/168094c575>.

12 Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined fifth to ninth reports to Ireland, adopted by the Committee at its 100th session (25 November – 13 December 2019), CERD/C/IRL/CO/5-9. Available at: https://tbinternet.ohchr.org/Trea-ties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf

13 REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, /* COM/2014/027 final */. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>.

14 Nachova And Others V. Bulgaria (Applications nos. 43577/98 and 43579/98), judgment 6 July 2005, para 158. For a more comprehensive view of the ECtHR case law on hate crime, see European Union Agency for Fundamental Rights, Unmasking bias motives in crimes: selected cases of the Euro-pean Court of Human Rights, 2018. Available at: https://fra.europa.eu/sites/default/files/fra_up-loads/fra-2018-unmasking-bias-motives-paper_en.pdf.

10. As with hate speech, it is of vital importance that this legislation is seen as only one part of a multi-faceted and comprehensive response to hate crime. We call on government to put proper implementation measures in place and for these measures to be developed in strong collaboration with civil society organisations, affected communities and other key stakeholders. We strongly encourage government to carry out further consultations with affected groups and other key stakeholders on the experience of hate crime in Ireland. These responses should go hand in hand with proactive promotion of respect for diversity and prevention of hate crime.
11. ICCL notes the importance of training and education of all stakeholders involved in the criminal justice system to tackle hate crime, including police¹⁵. The authorities should consider nominating experts knowledgeable about the needs of hate crime victims¹⁶. We urge the government to implement ECRI recommendations to establish an improved mechanism for collecting disaggregated data on hate crime, including hate speech. Data should be systematically recorded on the hate motive invoked at all stages of investigation, prosecution, conviction and sentencing and be made available to the public¹⁷. In addition, alternative mechanisms should be set up to encourage victims to report hate crime incidents, such as third-party reporting systems or dedicated telephone lines, in cooperation with civil society¹⁸.

15 See e.g. Council of Europe, Policing Hate Crimes against LGBTI Persons: Training for a Professional Police Response, 2017. Available at: <https://rm.coe.int/prems-030717-gbr-2575-hate-crimes-against-lgbti-web-a4/1680723b1d>.

16 See e.g. good practices in France and UK as highlighted in OSCE, Hate Crime Victims in the Criminal Justice System - A Practical Guide, 2020, p. 146. Available at: <https://www.osce.org/files/f/documents/c/5/447028.pdf>. Other good practices can be found in Bayer & Bard, Hate speech and hate crime in the EU and the evaluation of online content regulation approaches, Study requested by the LIBE Committee of the European Parliament, 2020, p.109-111. Available at: https://www.europarl.europa.eu/Reg-Data/etudes/STUD/2020/655135/IPOL_STU%282020%29655135_EN.pdf.

17 ECRI, ECRI report on Ireland (fifth monitoring cycle), adopted on 2 April 2019, published on 4 June 2019, para 26. Available at: <https://rm.coe.int/fifth-report-on-ireland/168094c575>.

18 Ibid, para 46.

12. We also believe that understanding the needs of victims is critical to correctly respond to hate crimes and counter their damaging impact. These include including personal safety and security, practical help, emotional and psychological support, confidentiality and trust, information and advice, help in navigating criminal justice, respectful and dignified treatment, victim-centred approach¹⁹.

(c) General Principles

13. ICCL considers that the use of criminal law should always be as a last resort and it is fundamental that within this process, consistency in the way hate crime is understood and addressed by the Irish criminal justice process is ensured.

14. We support the general principles outlined by the Coalition against Hate Crime that should underpin this Bill. A focus on these principles will serve to mitigate potential infringements of a range of rights, including the right to freedom of expression and the right to a fair trial; and will ensure that general rule of law principles that require foreseeability and clarity are respected. We reiterate these principles here for ease of reference:

- i. Provisions must be drafted in a clear and precise manner to ensure that all legal persons understand where the threshold is between criminal and non-criminal speech and behaviour.
- ii. Government must provide a clear rationale and decision making framework for the inclusion and exclusion of groups included under 'protected characteristics'.
- iii. This legislation should be consistent with other relevant national and European legislation including the proposed Digital Services

¹⁹ OSCE, Understanding the Needs of Hate Crime Victims, 2020.

Act and the Online Safety and Media Regulation Bill, all of which should be compliant with human rights law; as well as the Victims Rights Directive.

- iv. The law must not disproportionately interfere with other rights such as the right to freedom of expression, fair trial and procedural rights.
- v. The law should include a requirement for a comprehensive review of the legislation, such as within 3 years, as well as consultative monitoring of its implementation.

Heads 1 & 2: Short title and Interpretation

(a) Head 1 Preliminary and general Short title and commencement

15. This Bill addresses both incitement to hatred and hate crime. ICCL considers these issues should be addressed in separate legislation. Alternatively, the title of the Bill should include reference to incitement to hatred to properly reflect the contents.

(b) Head 2 Interpretation

16. Hatred is defined under head 2 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.”

17. ICCL considers that this definition of hatred does not clearly fit in with the offence created by Head 3(1), as examined further below.

18. We are concerned that hatred itself may not be the appropriate term to refer to in this context, given that the ordinary meaning of hatred is an emotion alone, rather than an emotion attached to a potential act of harm. This is reflected in the definition of hatred adopted by the Council of Europe Commission against Racism and Intolerance and endorsed by the UN Special

Rapporteur on the promotion and protection of the right to freedom of opinion and expression²⁰, as follows:

“‘hatred’ shall mean a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”²¹

19. We recommend revisiting this definition with reference to international standards, accompanied by a clear rationale for the basis or sources of the definition.

20. Protected Characteristic is defined as meaning “race; colour; nationality; religion, ethnic or national origin; sexual orientation; gender; or disability.”

21. ICCL considers that a clear rationale should be given by government for the inclusion and exclusion of protected characteristics in this legislation. We would encourage in particular the inclusion of sex characteristics, which is notably absent. We also note other characteristics such as age, homelessness, socio- economic status, refugee status, language, and sex workers have been referred to as potential additions to a list of protected characteristics by other stakeholders such as IHREC, the Law Society of Ireland and members of the Coalition Against Hate Crime. We note ECRI’s recommendation that hate based on ‘citizenship’ and ‘language’ should also

20 A/67/357. Available at: <https://documents-dds-ny.un.org/doc/UN-DOC/GEN/N12/501/25/pdf/N1250125.pdf?OpenElement>

21 ECRI, ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8

December 2015, referencing Principle 12.1 of the Camden Principles on Freedom of Expression and Equality. Available at: www.article19.org/data/files/medialibrary/1214/Camden-Principles-ENGLISH-web.pdf and <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>.

be included in Irish legislation and we note the EU Framework's reference to 'descent'.²²

22. Given the absence of effective data gathering mechanisms in Ireland, we would question Government's rationale for including certain protected characteristics over others. Clarity on this decision-making process would be welcomed.

²² Framework Decision 2008/913/JHA

Part I – Incitement to Hatred

23. Head 3 of the Bill states:

“(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 characteristic. ”

24. ICCL considers that only the most extreme forms of hate speech should be criminalised, given the strong protections in Irish law and under human rights law for freedom of expression and the fact that such limitations on speech must remain exceptional.

25. The offence of incitement to hatred must be defined in a narrow, clear and precise manner to ensure that any infringement on freedom of expression is as minimal as possible to prevent serious harm, noting that the ECtHR has made clear that freedom of expression includes the right to shock, offend or disturb²³. This is because defining what is offensive is highly subjective and because democracy requires that the space for new ideas that may shock, offend or disturb must be protected. Any infringement on the right to freedom of expression must be provided for by law, and must also be necessary and proportionate to the legitimate aim of protecting the rights and freedoms of others.

²³ European Court of Human Rights, *Handyside v UK*,)Application no. 5493/72) available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57499%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57499%22]})

26. We consider that the offence created by Head 3(1) is too broad and ill-defined. The two references to “real or perceived association with a protected characteristic” in both the definition of hatred and in s.1 is unnecessarily repetitive. This must be resolved.

27. The absence of a definition of either ‘harm’ or ‘unlawful discrimination’ means the precise parameters of the offence are unclear. This wording is not in line with international recommendations on criminalising incitement to hatred. For example, ECRI has stated that in order to reach the threshold of criminality, hate speech should be connected to an intention or reasonable expectation that acts of violence, intimidation, hostility or discrimination will result from the speech and the speech should be in a public context:

“Bearing in mind the six-point threshold test in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and being convinced that criminal prohibitions are necessary in circumstances where hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it.”²⁴

²⁴ ECRI, ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8

December 2015, para 173. Available at: <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>.

28. The test in the Rabat Plan of Action²⁵ requires that each of the six parts of a threshold test needs to be fulfilled in order for a statement to amount to a criminal offence: context, speaker, intent, content and form, reach, and likelihood of harm.²⁶ ICCL recommends this six part test is clearly defined in policy guidance accompanying this legislation for use by An Garda Síochána, prosecutors and the judiciary.

29. ICCL calls on Government to ensure that any offence criminalising speech reaches a very high threshold, in line with international human rights principles on freedom of expression and in line with a range of UN Human Rights experts²⁷. The wording must be clear and precise so that individuals can reasonably foresee what behaviour now constitutes a criminal offence. In particular, ICCL considers the connection between incitement to hatred and an act of discrimination, hostility or violence that is likely to occur as a result of that incitement must be made much clearer.

(a) Penalties attaching to the offence

30. The penalties which attach to an offence under Head 3 are outlined in subsection 2:

“Head 3 (2) A person guilty of an offence under paragraph 1 shall be liable –
(a) on summary conviction, to a class A fine or imprisonment for a term not

²⁵ A/HRC/22/17/Add.4, appendix, available at https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

²⁶ For a helpful summary of key points of the test see: https://www.ohchr.org/Documents/Issues/Opinion/Articles19-20/ThresholdTestTranslations/Rabat_threshold_test.pdf

²⁷ The report of the UN Office of the High Commissioner for Human Rights containing the Rabat Plan of Action was adopted by the three UN Special Rapporteurs and the UN High Commissioner for Human Rights in 2013, as well as a range of global experts. See <https://www.ohchr.org/en/newsevents/pages/therabatplanofaction.aspx> See also UN Special Rapporteur on freedom of expression 2019 report A/74/486 to the UN General Assembly, available at <https://undocs.org/A/74/486>

exceeding 12 months, or both, or on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years, or both.”

31. ICCL urges government to ensure that penalties for incitement to hatred are proportionate and that options are available to the sentencing judge to consider community sentencing and restorative justice options. The same considerations apply to Head 3(4) in relation to penalties for dissemination of hatred.

(b) Dissemination of hatred

32. Head 3(3) of the Bill states: “Subject to paragraph (5), a person is guilty of an offence who - publishes or otherwise disseminates, broadcasts or displays to the public, or a section of the public, images, recordings or any other representations of a communication the subject of paragraph (1) above.”

33. ICCL would question whether the intention of the legislature is to create an offence of the knowing facilitation of the dissemination of incitement to hatred by a corporate body.

31. S.3 appears to create an offence of dissemination, broadcasting or displaying to the public that would apply to an individual but it is not clear whether the decision to disseminate must be made by a company or facilitated by the company for it to be held liable under this section. For example, if a company deliberately disseminated material that constituted incitement to hatred when choosing what adverts to display and disseminate, it is likely they could be held liable because they are choosing the content to disseminate. However, if a company facilitates the dissemination of material

constituting incitement to hatred without a deliberate decision to disseminate it- would they be held liable under this section?

32. Alternatively, if a company knowingly amplified problematic content (for example through particular algorithms) that was then disseminated by others as a result of that amplification for profit, could they be held liable under this section? ICCL considers that this is a vital point, given that there is evidence that companies have done precisely this.²⁸

33. ICCL urges government to ensure that this legislation is consistent with other national and European legislation seeking to regulate online content. This includes aligning with efforts to regulate online content under the Online Safety and Media Regulation Bill and efforts to pass a European Digital Services Act.²⁹ We also note that Ireland is yet to ratify the Council of Europe Convention on Cybercrime³⁰. We call on Government not to pre-empt the outcomes of these consultations and negotiations by passing a law that may not conform to the ultimate outcomes of parallel processes. The question must be asked as to whether this legislation is the right place to progress the regulation of online content in general.

34. Finally, in relation to Head 3(4) ICCL would reiterate its submission above that any penalty attaching to the offence be proportionate and appropriate.

(c) Defences

²⁸ See eg https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499?mod=hp_lead_pos5

²⁹ For a helpful overview of efforts at the European level to regulate online content see <https://edri.org/our-work/e-commerce-review-1-pandoras-box/>

³⁰ <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=185>

35. Head 3(5) sets out defences to an offence under Head 3(3), stating that an accused must prove:

“(a) the material concerned consisted solely of

- a reasonable and genuine contribution to literary, artistic, political,
- an utterance made under Oireachtas privilege,
- fair and accurate reporting of court proceedings,
- material which has a certificate from the authorising body, in the case of a film or book,

or

- a communication necessary for any other lawful purpose, including law enforcement of the investigation or prosecution of an offence under this Act

36. ICCL believes that having statutory defences available to allegations of Incitement to Hatred is an important means of protecting the right to freedom of expression and avoiding prosecutions of those who intend no harm by sharing examples of incitement to hatred to educate, inform, debate or report incidences. The introduction of the element of ‘recklessness’ to the offence in this legislation widens the possibility of those that intend no harm being subject to prosecution and therefore strong defences are necessary. We consider that the requirement that the DPP must consent to prosecutions goes some way towards protecting against unfair prosecutions.

37. However, we consider that the current defences outlined in s.5 are potentially too broad and may provide a shield to those who do wish to cause harm but do it in the context of ‘academic or political discourse’. We echo the submission by the Coalition against Hate Crime which highlights

the high incidences of anti-Traveller and anti-Roma discourse in the political sphere, as well as the targeting of migrants in the academic sphere.

38. We consider that the term “genuine” is a subjective term, especially in relation to artistic contributions. Who should decide that art is genuine or not genuine? We would question what authorising bodies for books and films the Bill is referring to. We also recommend the removal of “other lawful purpose” given its potentially broad application.

39. ICCL would highlight the defence outlined in the equivalent legislation in Scotland³¹ as a positive example of a defence which explicitly takes into account the need to have regard to the right to freedom of expression protected by the ECHR, providing that:

“4(4) It is a defence for a person charged with an offence under this section (stirring up hatred) to show that the behaviour or the communication of the material was, in the particular circumstances, reasonable.

4(5) For the purposes of subsection (4), in determining whether behaviour or communication was reasonable, particular regard must be had to the importance of the right to freedom of expression by virtue of Article 10 of the European Convention on Human Rights, including the general principle that the right applies to the expression of information or ideas that offend, shock or disturb.”

31 See the Hate Crime and Public Order (Scotland) Act 2021, available at <https://www.legislation.gov.uk/asp/2021/14/contents>

40. We urge government to consider including a defence that is similar to that in the equivalent Scottish legislation outlined above.

(d) Corporate bodies

41. ICCL considers that a defence for a body corporate along the lines of that contained in Head 3(5)(b) is reasonable.

(e) Presumption of knowledge

42. Head 3(6) of the Bill states: "In proceedings for an offence under paragraphs (1) or (3) of this section, it shall be presumed that: - a person publishing or communicating material under paragraphs (1) or (3) knew what that material contained - understood what it meant, and - where posted on a public forum, knew it would be public speech unless that person can show, on the balance of probabilities, that this was not the case.

43. ICCL is deeply concerned by this provision given the fact that it proposes to reverse the standard burden of proof in a criminal prosecution. Other than in an extremely narrow set of exceptional circumstances such as when proving that certain goods were the proceeds of crime following an individual's conviction for theft, the burden of proof in criminal cases rests on the prosecution. This is the framework that protects one of the most fundamental features of our criminal justice system – the presumption of innocence.

44. ICCL considers that this provision should be removed in relation to the offences of both Head 3(1) and Head 3(3). It should be for the prosecutor to prove beyond reasonable doubt that "a person publishing or communicating material under paragraphs (1) or (3) knew what that material contained - understood what it meant, and - where posted on a public forum, knew it

would be public speech.” Reversing the burden of proof in this context weakens fair trial safeguards that are firmly grounded in the Constitution and human rights law. We have seen no convincing argument as to why this may be necessary and we urge government to remove Head 3(6) in its entirety.

(f) Effect of incitement

45. Head 3(7)(a) states that “a person may be found guilty of an offence under this section irrespective of whether or not the communication the subject of the offence was successful in inciting any other person to hatred.”

46. International bodies have made clear that incitement to hatred is an inchoate crime, which means the harm does not actually have to be caused for a successful prosecution³². Clarity on whether or not a person had to successfully incite any other person to hatred was missing in the Prohibition of Incitement to Hatred Act 1989. Head 3(7)(a) brings clarity to the issue and ICCL welcomes this clarification.

47. Head 3(7)(b) states that “a person may be found guilty of an offence under this section irrespective of whether or not any actual instance of harm or unlawful discrimination is shown to have occurred, or to have been likely to occur, as a result. ICCL agrees that no actual instance of harm or unlawful discrimination must occur given that this is an inchoate offence. However, we would question whether the wording “or to have been likely to occur” in 7(b) conflicts with the definition of hatred above, which requires that ‘instances of harm or unlawful discrimination’ must be likely to occur. We consider the prosecution should have to prove that had a susceptible listener been

³² See eg Rabat Plan of Action at A/HRC/22/17/Add.4, appendix, available at https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

present or exposed to the incitement to hatred, then such acts would have been likely to occur. If the prosecution does not have to prove this limb of the offence then a person may be convicted for being reckless as to whether incitement to the emotion of hatred may occur, without having to link that emotion to the threshold that would require an act of harm or unlawful discrimination to be likely to occur as a result of such incitement.

48. We highlight the sixth part of the six-part test provided by the Rabat Plan of Action which states there must be some degree of risk of harm for speech to reach the criminal threshold:

“Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.”³³

49. ICCL therefore recommends the removal of the clause “or to have been likely to occur” in Head 3(7)(b).

(g) Jurisdiction

50. Head 3(8) of the Bill states “In a prosecution for an offence under paragraph 3 where the offence was committed using an information system, and -

³³ See eg Rabat Plan of Action at A/HRC/22/17/Add.4, appendix, available at https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

whether or not the offence involves material hosted on an information system in the State; the person was physically present in the State when the offence occurred, - whether or not the person was physically present in the State when the offence occurred, the offence involves material hosted on an information system in the State, or - whether or not the person was physically present in the State any person to whom the material the subject of the offence was disseminated was physically present in the State, that offence may be prosecuted as an offence taking place within the State.”

51. ICCL considers that “information system” in this provision needs to be defined.³⁴ We would also question whether it is the intention of the legislature to prevent victims of an offence under s.3 from taking a case in this jurisdiction where the material is posted by or aimed at a person in another state, or the material is hosted on an information system in another state. This provision appears to exclude this eventuality and we would welcome further clarity on this point.

(h) Consent of the Director

52. ICCL welcomes the requirement in Head 3(9) for the consent of the Director to take a prosecution under this section.

³⁴ See article 2 of EU Directive 2013/40/EU for a potential definition: <https://eur-lex.europa.eu/le-gal-content/EN/TXT/HTML/?uri=CELEX:32013L0040&rid=5>

Part II – Hate Crime

(a) Heads 4-6 of the Bill

53. Head 4, 5 and 6 the Bill introduce twelve new aggravated forms of existing offences, amending three existing pieces of legislation: the Non-Fatal Offences Against the Person Act 1997, the Criminal Damage Act 1991 and the Criminal Justice (Public Order) Act 1994. These are:

- Assault aggravated by prejudice
- Assault causing harm, aggravated by prejudice
- Causing serious harm, aggravated by prejudice
- Threats to kill or cause serious harm, aggravated by prejudice
- Coercion aggravated by prejudice
- Harassment aggravated by prejudice
- Endangerment aggravated by prejudice
- Damaging property, aggravated by prejudice
- Threatening, abusive or insulting behaviour in a public place, aggravated by prejudice
- Distribution or display in a public place of material which is threatening, abusive, insulting or obscene, aggravated by prejudice
- Entering building, etc. with intent to commit an offence, aggravated by prejudice
- Assault with intent to cause bodily harm or commit an indictable offence, aggravated by prejudice.

54. We urge the government to clarify the criteria used to include and exclude offences in this list. We particularly note that this is an aspect of hate crime legislation in which specific consultations with affected groups and communities, as well as with other relevant stakeholders, would have been

vital in contributing to a more transparent determination process that corresponded directly to the offences actually experienced as hate crimes by affected groups.

55. As stressed in the Coalition Against Hate Crime joint submission, the type of crimes committed against different groups and communities can vary significantly. It is of key importance that the list of aggravated offences has a clear link with the protected characteristics and includes the offences which are most commonly committed against the individuals, groups and communities identified or associated with the protected characteristics listed under Head 2. If the list of protected characteristics is expanded, it follows that an assessment on the relevance and pertinence of existing aggravated offences should be conducted.

56. We stress the importance of introducing sentencing principles and sentencing guidelines, as required under the Judicial Council Act 2019³⁵, to ensure transparency and proportionality, as well as the availability of community sentencing where appropriate. ICCL also supports the option of restorative justice, in line with the Criminal Justice (Victims of Crime) Act 2017³⁶. This point applies equally to Head 7.

57. The elements of each aggravated offence introduced by the Bill are identical. We will analyse the elements introduced for “assault motivated by

³⁵ Available at: <http://www.irishstatutebook.ie/eli/2019/act/33/enacted/en/html>.

³⁶ Available at: <http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html>.

prejudice”, and this analysis should be considered to apply to the elements of each of the twelve offences listed in the Bill.

(b) Assault aggravated by prejudice

58. Assault aggravated by prejudice is defined as follows:

“In this Act, assault aggravated by prejudice means an assault (within the meaning of Section 2 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic as defined by section 2 of the Hate Crime Act 2021.

A person guilty of assault aggravated by prejudice shall be liable on summary conviction to a [Class C fine] or to imprisonment for a term not exceeding 9 months or to both.

A person prosecuted for assault aggravated by prejudice may, if the evidence does not warrant a conviction for assault aggravated by prejudice but warrants a conviction for assault under section 2, be found guilty of assault under that section.”

“Aggravated by prejudice”

59. Hate crime legislation in other jurisdictions tends to either use more than one term when referring to bias motivation, and or to define the terms used³⁷.

This Bill does neither. Government should clarify the criteria that led to the sole use of the term “prejudice”, which is currently not defined in the interpretation section. In order to reasonably expand its scope, and therefore

³⁷ See e.g. Chalmers and Fiona Leverick, A Comparative Analysis of Hate Crime Legislation – A Report to the Hate Crime Legislation Review, University of Glasgow, July 2017, Chapter 7. Available at: <https://eprints.gla.ac.uk/147020/1/147020.pdf>

effectiveness from the perspective of securing a conviction, the legislation could be amended to include the terms 'bias' and/or 'hostility' in addition to 'prejudice' as motivation for an aggravated offence.

"Motivated by prejudice"

60. The choice of the legal test to be incorporated in the Irish legislation should be made carefully, taking into account the different existing models (see e.g. the motivation test, a combination of the motivation and demonstration test and the discriminatory selection approach) and the different implications and rationale behind each model³⁸. The legal test currently included in the Bill is motivation. ICCL does not oppose the use of the motivation test - noting that this is the test used in many other jurisdictions with some exceptions (see e.g. England and Wales). However, we recognise that used in conjunction with the sole term "prejudice", the test is comparatively quite narrow. ICCL does not consider that the test should be significantly expanded as we believe the threshold for conviction of a hate crime should remain high given the potential effect on an offender of having such a record. However, including terms such as "bias" and/or "hostility" in the legislation, as addressed above, may widen the scope of the offences to the extent required to establish a reasonable prospect of a successful prosecution.

61. We would restate the request by the Coalition against Hate Crime for Government to clarify the rationale behind the adoption of the elements of aggravated offences, including the choice of test. It is important for all

38 See e.g. the analysis in Jennifer Schweppe, Amanda Haynes and Jamer Carr, *A Life Free From Fear – Legislating for Hate Crime in Ireland: An NGO Perspective*, 2014, p. 30-34. Available at: https://ulir.ul.ie/bitstream/handle/10344/4485/Schweppe_2014_crime.pdf?sequence=1.

stakeholders to understand what factors and values have informed this choice.

62. We again note that more research and specific consultations should have taken place on hate crime in Ireland in order to inform the choice of such a key element of hate crime legislation. We note that in its report on its consultation on hate speech, the Department of Justice said, “proving a hate motive can be difficult. [...] Without a clear way to deal with this difficulty, it is unlikely that any new legislation to deal with hate crimes would be successful.”³⁹

“Against a protected characteristic”

63. The current wording contained in each aggravated offence regarding protected characteristics is inconsistent with the wording in Head 3, which includes a reference to “... hatred against another person or group of people due to their real or perceived association with a protected characteristic.” It is important that aggravated offences include offences motivated by prejudice due to their actual or perceived membership or association with a protected characteristic. With the other members of the Coalition Against Hate Crime, we have expressed concern as to whether the wording ‘against a particular characteristic’ currently in the Bill will be interpreted in the same manner, calling for consistency in approach and encouraging clarity in ensuring prejudice on the basis of both actual and perceived membership or association with a protected characteristic is included in all aggravated offences.

³⁹ Department of Justice, *Legislating for Hate Speech and Hate Crime in Ireland - Report on the Public Consultations 2020*, p. 8. Available at: https://www.justice.ie/en/JELR/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf/Files/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf

64. We also note that as individuals and groups might be targeted on the basis of more than one characteristic, the legislation should ensure that prosecutors can identify more than one protected characteristic without making it more difficult to secure a successful conviction. An intersectional approach should be adopted at all stages, including reporting, training and in the elaboration of guidelines for prosecutors, Judges, Gardaí and other relevant stakeholders.

Penalties

65. By definition, commission of an aggravated offence carries a penalty that is higher than the commission of the ordinary offence. ICCL calls on Government to ensure that in the determination of penalties for the new aggravated offences, the principle of proportionality is respected.

Alternative Verdict

66. ICCL strongly welcomes the inclusion in the Bill of a provision for an alternative verdict. This element will allow the prosecution of a suspect on the basis of the ordinary form of the offence if the aggravating 'hate element' of the offence has not been proven, constituting a "safety net" for victims to ensure justice is done.

67. Head 8 provides that "in determining motivation by prejudice for the purposes of this Act, it shall not be necessary to show that prejudice was the only, or the principal motivation for the offence." We welcome this provision given that it is important that prejudice does not have to be the sole motivation for a hate crime. However, we strongly recommend that this provision is incorporated into each of the twelve aggravated offences by

adding “motivated in whole or in part by prejudice” to each amendment. This will ensure clarity in interpretation for all stakeholders. Alternatively, this provision could be included as a new, separate head of the Bill.

(c) Head 7: Prejudice as an aggravating factor in sentencing

68. ICCL welcome the fact that this Head makes the motive of prejudice an aggravating factor for consideration in sentencing for a wider range of offences. We also welcome the fact that the prejudice motive does not have to be the sole motive. However, we consider the wording of Head 7 contains some problematic elements.

69. First, Head 7 refers to a “Schedule 1” which will contain the list of offences for which this provision will apply. As far as we are aware, Schedule 1 is not public so it is impossible to comment on the contents of this Schedule. However, we call on Government to ensure that the criteria and rationale to include or exclude offences under Schedule 1 are clear. We would also ask for clarification as to why it should not be open to sentencing judges to consider a prejudice motivation as an aggravating factor for all crimes, noting that this is the most prevalent type of hate crime law in OSCE States’ criminal codes⁴⁰.

70. ICCL notes with concern that the current wording of “take account of evidence presented to the court” might cause confusion in terms of what standard of proof is required for evidence presented to the court to be taken into account at the sentencing stage. We consider that any evidence to be

⁴⁰ OSCE, Hate Crime Victims in the Criminal Justice System - A Practical Guide, 2020, p. 146. Available at: <https://www.osce.org/files/f/documents/c/5/447028.pdf>.

considered as an aggravating factor in sentencing should meet ordinary criminal standards and be proved beyond reasonable doubt.

71. We consider that the provision that “the fact that the offence concerned was thus aggravated by prejudice shall be reflected clearly in the record of the proceedings” is problematic. We would question how this would be translated in practice, especially at the District Court level where no official record is made of Court proceedings. In addition, if it is not made clear that evidence of prejudice motivation must be proven beyond reasonable doubt before it can be taken into account, we consider that a record of same should not be kept.

72. ICCL stresses that any addition to a sentence where a prejudice or bias motivation has been proven should not necessarily manifest as a longer custodial sentence. Sentences must be proportionate to the crime and there will be instances where community sentencing or education or training programmes may be far more effective in reducing recidivism.

73. We recommend that alternative sanctions and restorative justice solutions are made clearly available to sentencing judges as a method of reflecting the aggravating factor of bias motivation.⁴¹ Restorative justice opportunities should be made available, ensuring that there is real consent on both the victim and offender’s part and that facilitators are properly trained⁴². This

⁴¹ See e.g. Tyler Bishop, Arielle Andrews, Sam Becker, Lauren Martin, Benjy Mercer-Golden, Mariel Pérez-Santiago, Tiarra Rogers, Kai Wiggins, Shirin Sinnar & Michael German, Exploring Alternative Approaches to Hate Crimes, Stanford Law School Law and Policy Lab, June 2021. Available at: https://www-cdn.law.stanford.edu/wp-content/uploads/2021/06/Alternative-to-Hate-Crimes-Re-port_v09-final.pdf.

⁴² On The Importance Of Training Of Facilitators In Restorative Justice For Hate Crime, see also Mark A. Walkers, Repairing The Harms Of Hate Crime: Towards A Restorative Justice Approach?, 171st International Senior Seminar Visiting Experts’ Papers,

approach seeks to reduce the use of incarceration as a punishment, while seeking to repair the harm caused to victims and communities, as well as holding perpetrators accountable. This would be in line with the Department of Justice Action Plan 2021 objective to “develop options for an appropriate mechanism and process to create awareness and availability of restorative justice at all stages of the criminal justice system with consistency of service ensuring quality in training and practice.”⁴³ This analysis applies to all offences created under the Bill.

(d) Head 8 – Determining whether an offence was motivated by prejudice

74. ICCL notes with surprise the inclusion of bias indicators in the legislation, as these are usually used as an investigative tool⁴⁴ found in policy guidance, separate to legislation. This approach allows for flexibility in ensuring that bias indicators respond to any change in the nature of hate crimes. We therefore recommend that provision for bias indicators are removed from this legislation and put in a separate policy or guidance document, that is made available to the public, Gardaí, prosecutors and the Judiciary.

75. ICCL considers that the inclusion of bias indicators should relate to evidence on the ground. Together with the other members of the Coalition Against Hate Crime, we have highlighted how individuals, groups and communities experience hate crime in different ways. A list of bias indicators should relate

Resource Material Series No. 108, P. 72. Available:
https://www.unafei.or.jp/publications/pdf/RS_No108/No108_10_VE_Walters.pdf.

43 Department of Justice, Justice Plan 2021, available at: http://www.justice.ie/en/JELR/Department_of_Justice_Action_Plan_2021.pdf/Files/Department_of_Justice_Action_Plan_2021.pdf.

44 OSCE, Using Bias Indicators: A Practical Tool for Police, 2019. Available at:
https://www.osce.org/files/f/documents/8/9/419897_0.pdf.

to specific experiences of victims. We again strongly recommend further consultations with relevant stakeholders to evaluate the creation of distinct sets of indicators that are directly related to the experiences of the different groups and communities targeted by hate crime.

76. We strongly welcome the provision that clarifies that “in determining motivation by prejudice for the purposes of this Act, it shall not be necessary to show that prejudice was the only, or the principal motivation for the offence.” However, as addressed above, we recommend that for clarity purposes this is included in each amendment creating aggravated offences and aggravated sentencing or in a separate head of the Bill.

(e) Head 9 – Denial or gross trivialisation of crimes of genocide

77. Head 9 introduces a new offence of denial or gross trivialisation of crimes of genocide. As provided for in the General Scheme explanatory note, this offence has been created to “fulfill the requirement to make genocide denial a criminal offence under EU Council framework decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law”⁴⁵. However, we note that the provision aimed at transposing the decision is not in line with the EU Council Framework Decision which requires Member States to take measures to ensure the following conduct is punishable:

“publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8

⁴⁵ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0913&from=en>.

of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;"

78. The element of incitement to violence or hatred against a member of a protected group or a group is notably absent from Head 9, substantially changing the nature of the offence.

79. We note that in its last country-specific report on Ireland, ECRI recommended that Irish criminal law be amended to include the offences of "public denial, trivialisation, justification or condoning of crimes of genocide, crimes against humanity or war crimes"⁴⁶. However, given the lack of consistency in European and international standards and concerns regarding the protection of freedom of expression, we recommend that the legislation should reflect the requirements of the EU framework and Article 3(c) of the Genocide Convention⁴⁷ which requires states to punish direct and public incitement to genocide⁴⁸, as opposed to ECRI's recommendation, which appears to recommend the prohibition of speech without a corresponding need to incite an act.

⁴⁶ ECRI, ECRI report on Ireland (fifth monitoring cycle), adopted on 2 April 2019, published on 4 June 2019, p. 12. Available at: <https://rm.coe.int/fifth-report-on-ireland/168094c575>.

⁴⁷ Available at: <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>

⁴⁸ See also Article 19, "Hate Speech" Explained - A Toolkit, 2015, p. 68-70. Available at: <https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf>.

80. We note that the current legislation does not address crimes against humanity and war crimes but genocide only, while both ECRI and the EU Council Framework Decision cover the three. We call for reference to war crimes and crimes against humanity to be included in this provision if it is to be changed to refer only to an incitement offence.

81. If this provision is changed to an incitement offence, as we strongly urge, we suggest moving it to Part 1 – Incitement to hatred.

Recommendations

General

- (1) Government should commit to a national action plan to combat hate crime and hate speech beyond the criminal law. This should include education, effective monitoring and reporting mechanisms, an enabling environment for counter-speech, training of public actors including police, and national awareness campaigns.
- (2) Government should ensure that disaggregated data collection mechanisms are in place to ensure a targeted response to the issue of hate crime and hate speech and a range of supports must be put in place for victims.
- (3) Legislation should be grounded in international law and standards.
- (4) Implementation measures should be developed in strong collaboration with civil society organisations, affected communities and other key stakeholders.
- (5) Provisions must be drafted in a clear and precise manner to ensure that all legal persons understand where the threshold is between criminal and non-criminal speech and behaviour.
- (6) Government must provide a clear rationale and decision making framework for the inclusion and exclusion of groups included under 'protected characteristics'. ICCL recommends the inclusion of sex characteristics.

- (7) This legislation should be consistent with other relevant national and European legislation including the proposed Digital Services Act and the Online Safety and Media Regulation Bill, all of which should be compliant with human rights law; as well as the Victims Rights Directive.
- (8) The law must not disproportionately interfere with other rights such as the right to freedom of expression, fair trial and procedural rights.
- (9) The law should include a requirement for a comprehensive review of the legislation, such as within 3 years, as well as consultative monitoring of its implementation.
- (10) Incitement to hatred and hate crime should be addressed in separate legislation; alternatively, the title of the Bill should include reference to incitement to hatred to properly reflect the contents.
- (11) The definition of “hatred” should be revisited with reference to international standards, accompanied by a clear rationale for the basis or sources of the definition.

Incitement to Hatred (Head 3)

- (12) Legislation seeking to criminalise any form of speech should be drafted in a way that ensures full respect for the right to freedom of expression and only the most extreme forms of speech that can lead to serious harm should be criminalised.
- (13) The offence created by Head 3(1) must be defined in a narrow, clear and precise manner to ensure that any infringement on freedom of expression is as minimal as possible to prevent serious harm. The connection between

incitement to hatred and an act of discrimination, hostility or violence that is likely to occur as a result of that incitement must be made much clearer.

(14) The Rabat Plan of Action six-parts test should be clearly defined in policy guidance accompanying this legislation for use by An Garda Síochána, prosecutors and the judiciary.

(15) Penalties for incitement to hatred should be proportionate and community sentencing and restorative justice options should be made available.

(16) The scope of the publishing, dissemination, broadcasting and disseminating offence should be clarified, especially with regards to corporate bodies. This legislation should be consistent with other national and European legislation seeking to regulate online content.

(17) We urge the government to consider including a defence that references the right to freedom of expression.

(18) The “presumption of knowledge” provision in Head 3(6) – which reverses the burden of proof - should be removed.

(19) The clause “or to have been likely to occur” in Head 3(7)(b) should be removed.

(20) “Information system” should be defined in Head 3(8), and the scope of the provisions on jurisdiction should be clarified.

Hate Crime (Head 4-9)

(21) The criteria used to include and exclude offences in this list of aggravated offences should be clarified.

- (22) The list of aggravated offences should have a clear link with the protected characteristics and include the offences which are most commonly committed against the individuals, groups and communities identified or associated with the protected characteristics in the Bill. If the list of protected characteristics is expanded, an assessment on the relevance and pertinence of existing aggravated offences should be conducted.
- (23) The rationale behind the adoption of the elements of aggravated offences, including the choice of the legal test, should be clarified. The Government should clarify the criteria that led to the sole use of the term “prejudice”, which is currently not defined in the interpretation section, and evaluate including ‘bias’ and/or ‘hostility’.
- (24) We call for consistency in approach and encourage clarity in ensuring prejudice on the basis of both actual and perceived membership or association with a protected characteristic is included in all aggravated offences.
- (25) An intersectional approach should be adopted at all stages, including reporting, training and in the elaboration of guidelines for prosecutors, Judges, Gardaí and other relevant stakeholders.
- (26) In the determination of penalties for the new aggravated offences, the principle of proportionality should be respected. Sentencing principles and guidelines should be introduced and community sentencing and option of restorative justice should be made available.

- (27) Schedule 1, as referenced in Head 7, containing the list of offences for which prejudice is an aggravating factor in sentencing, should be made public. We call on Government to ensure that the criteria and rationale to include or exclude offences under Schedule 1 are clear.
- (28) Any evidence to be considered as an aggravating factor in sentencing should meet ordinary criminal standards and be proved beyond reasonable doubt.
- (29) Alternative sanctions and restorative justice solutions should be made clearly available to sentencing judges as a method of reflecting the aggravating factor of bias motivation.
- (30) The provision which provides that prejudice does not have to be the sole motivation for a hate crime (Head 8) should be incorporated into each of the twelve aggravated offences or in a separate head for clarity.
- (31) Provision for bias indicators should be removed from this legislation and put in a separate policy or guidance document, that is made available to the public, Gardaí, prosecutors and the Judiciary. We encourage further consultations with relevant stakeholders to evaluate the creation of distinct sets of indicators that are directly related to the experiences of the different groups and communities targeted by hate crime.
- (32) Head 9 should be amended to reflect the requirements of the EU Council framework decision 2008/913/JHA, which requires states to punish direct and public incitement to genocide, war crimes and crimes against humanity.

(33) If the provision under head 9 is changed to an incitement offence, as we strongly urge, it should be moved to Part 1 – Incitement to hatred.

About ICCL

The Irish Council for Civil Liberties (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped decriminalise homosexuality and legalise divorce, and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights. ICCL is the coordinating organisation of the Coalition Against Hate Crime Ireland (CAHC).