



Coalition Against Hate Crime Second Stage Briefing Note for Senators on the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022

8 June 2023

Introduction: why we need legislation

1. Hate Crimes are message crimes: they tell members of minority communities they are not safe. A single action goes beyond the individual person targeted, hurting entire communities and society as a whole. They have a ripple effect and for this reason, hate crime hurts us all. The same applies to incitement to violence or hatred, which is among the most extreme forms of hate speech and heavily impacts the lives of targeted communities. It's essential we introduce effective legislation to send an even clearer message: nobody should be targeted because of who they are.
2. The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 aims at:
 - a. reviewing existing provisions on extreme hate speech which date back to 1989¹;
 - b. introducing hate crime legislation for the first time.
3. The Coalition has been calling for this legislation for many years. The clarity it aims to provide to victims of hate crimes, offenders and criminal justice actors is long overdue. Ireland has been unable to address hate crime through the criminal justice system for way too long: research by the Irish Council for Civil Liberties has shown that in the absence of legislation, the element of hate – which makes a crime a hate crime – is not addressed in a consistent way and often disappears as a case goes through the criminal process². Legislation will make the invisible visible and recognise the additional harm caused by a crime that targets a person's inherent identity, sending a clear message that such behaviour will not be tolerated in our society.

Legislation is key but we need to get it right: Coalition's concerns and suggested changes

4. Legislation is key to tackle hate crime and extreme hate speech, but we need to get it right. While supporting the general aim of the Bill, at previous legislative stages the Coalition has expressed key concerns that have, so far, for the most part not been addressed. We note with disappointment that only a minimal number of the extensive list of suggested changes we put forward as the legislation went through the Dáil ³ – which found consensus among 23 organisations representing communities impacted by hate crime and hate speech - have been taken on board.
5. Grounded in that comprehensive submission, this briefing highlights a series of key concerns and changes we would like to see in the Bill:

¹ Prohibition of Incitement to Hatred Act 1989

² Amanda Haynes and Jennifer Schweppe, Lifecycle of a Hate Crime: Country Report for Ireland (ICCL 2017)

³ Coalition Against Hate Crime Ireland, [Suggested amendments to the Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022 as prepared for Dáil Committee Stage](#).

- A. **“Hatred” is currently used throughout the Bill, which is not best practice. We recommend stepping away from this approach to make the legislation clearer and more suitable for its purpose (including by introducing new definitions).** “Hatred” is currently used throughout the Bill both in relation to incitement to hatred (extreme hate speech) and hate offences (hate crime). This approach ignores the fact that there is a key difference in how “hatred” and “hate” are used in legislation internationally. “Hatred” is used commonly with respect to incitement to hatred offences, where it is important to have a high threshold for criminality to ensure restrictions on speech do not contravene the right to freedom of expression. The term “hate” is commonly used for hate crime offences and defined in legislation using a combination of terms that are inclusive of the forms of hate which are most often directed at people with protected characteristics included in legislation such as bias, prejudice, hostility, contempt.

→ We recommend limiting the use of the word “hatred” to Part 2 and substituting all references to hatred in Part 3 with “hate”.

While we support the use of “hatred” for extreme hate speech offences, the current definition in the Bill needs to be changed. This currently reads: *“hatred” means hatred against a person or a group of persons in the State or elsewhere on account of their protected characteristics or any one of those characteristics.* While understanding that the current definition is drawn from the *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law*, for the purposes of domestic criminal justice legislation a clearer, more precise definition that will assist in interpreting the scope of the incitement offences in Part 2 should be added. When looking at criminal hate speech, the European Commission against Racism and Intolerance (ECRI) has stressed the importance of drafting provisions in a clear and precise manner. This is necessary to ensure legal certainty regarding the scope of conduct that is prohibited, particularly considering the possible interference with the right to freedom of expression⁴. The UN Rabat Plan of Action⁵ sets out that the domestic legislative framework on incitement to hatred should include robust definitions of key terms and that in this regard, legislation can draw from definitions provided in the Camden Principles on Freedom of Expression and Equality⁶, also used in the UN Rabat Action Plan, adapted by ECRI and approved by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression.⁷

→ The Coalition recommends introducing a new definition of hatred grounded in these international human rights standards: *“hatred” means a state of mind characterised as intense and irrational emotions of enmity or detestation against a person or a group of persons in the State or elsewhere on account of their membership or presumed membership of a group defined by reference to protected characteristics, or any one of those characteristics*”. We note that the UN Human Rights Committee voiced concerns around the current definition of “hatred” in its latest Irish review⁸.

→ We recommend that the following new definition of “hate” is included in the Bill: *“Hate” includes bias, prejudice, contempt, hostility and bigotry.*

⁴ ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015.

⁵ A/HRC/22/17/Add.4

⁶ Article 19, Camden Principles on Freedom of Expression and Equality, 2009.

⁷ A/67/357.

⁸ CCPR/C/IRL/CO/5

This definition, drawn from the recommendations of the Northern Ireland Independent Review of Hate Crime legislation⁹, is inclusive of the forms of hate which are most often directed at people with the protected characteristics defined in the Bill. It also reflects the Oireachtas Joint Justice Committee recommendation on the inclusion of “contempt” as well as the need to include “bias” and “hostility”. This is also in line with the approach undertaken in the draft Council of Europe Committee of Ministers recommendation on hate crime which defines “hate” as including bias motivation, bias, prejudice or contempt¹⁰.

- B. The perception of the offender is a key element that cannot be overlooked, including when designing definitions of protected characteristics.** The Bill expands the list of protected characteristics already included in the 1989 Act by including gender, disability, descent and sex characteristics. This change is strongly favoured by the Coalition. This legislation addresses crimes that are motivated by and demonstrate the offender’s hatred towards protected characteristics, whether actual or presumed. It’s irrelevant whether the victims possess those characteristics. For example, an offender may commit a homophobic hate crime regardless of whether the victim is part of the LGBTI+ community or not, if the offender perceives the victim to be part of that community. These laws seek to protect everyone from crimes committed out of hatred towards protected categories.

→ As victims of hate crime are regularly misidentified by offenders and to ensure internal coherence, the Coalition recommends including direct reference to membership or presumed membership of a protected group in Section 20 (sentencing).

It is essential that definitions of protected characteristics are fit for the purpose of this bill. When we are defining gender for the purposes of this legislation, it is necessary that we use an accurate definition of gender that is fit for purpose. The definition of gender in the Bill must recognise that offenders target people not only based on hatred for binary gender identities like woman, or man, but also that they target people for having non-conforming gender identities like non-binary. Hate crime legislation is concerned with the offending behaviour, and the perception of the offender, not the victims’ legal status or actual membership of a protected group.

→ The Coalition recommends that the definition of each protected characteristic is fit for the legislation’s purpose. The Coalition suggests improvements for a number of protected characteristics (see sexual orientation, sex characteristics), including for the definition of “gender” to explicitly refer to non-binary identities.

- C. The defences for literary, artistic, political, scientific, religious or academic discourse are open to misuse by public figures without consequence. These defences should be replaced with an amended general defence of freedom of expression that would reference the Constitution and the European Convention on Human Rights, ensuring the space for democratic debate and the free flow of ideas for all under the Bill.** Given the risk of misinterpretation and misuse by influential people with public platforms, who should not be subject to a lower standard when it comes to incitement to hatred, the certain “discourses” defences should be removed. We consider that the defences in Section 7(3) as currently

⁹ Department of Justice, Recommendations of the Northern Ireland Independent Review of Hate Crime legislation.

¹⁰ COUNCIL OF EUROPE COMMITTEE OF EXPERTS ON HATE CRIME (PC/ADI-CH), Draft Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member States on Combating Hate Crime, 26 May 2023.

worded are open to misinterpretation and risk providing a shield to those who seek to incite violence or hatred from a public platform. As addressed by ECRI, “politicians, religious and community leaders and others in public life have a particularly important responsibility in this regard because of their capacity to exercise influence over a wide audience”.¹¹ If the Freedom of Expression provision is properly worded, explicitly referencing the Irish Constitution and the European Convention on Human Rights, we see no reason for additional defences for these discourses. Our concerns in relation to the defences were taken on board by the Joint Justice Committee.

- ➔ The Coalition recommends removing the defence for particular discourses, replacing it with an amended freedom of expression defence, which explicitly refers to the right to freedom of expression contained in the Constitution of Ireland and the European Convention of Human Rights, including the general principle that the right applies to the expression of information or ideas that offend, shock or disturb. A similar defence is contained in the equivalent Scottish legislation.

D. The offence of preparing or possessing material likely to incite to violence or hatred may not meet the required threshold for criminal behaviour and may constitute a disproportionate interference with the right to private life – Only extreme forms of hate speech should be addressed through criminal law. In setting criteria to identify what falls within this category, international standards are clear that the public context of the speech is a key requirement for an incitement offence. In its recommendation on hate speech ECRI clarifies that *“the relevant factors for a particular use of hate speech to reach the threshold for criminal responsibility are where such use both amounts to its more serious character - namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination - and the use concerned occurs in a public context.”*¹² This offence lacks the public dimension. We note that this offence is not required by the 2008 Framework Decision, nor it is referenced by ECRI or in the recent Council of Europe Committee of Ministers Recommendation on Combatting Hate Speech. This offence is also problematic as it significantly lowers the threshold for conviction from the original 1989 Act by removing the requirement that the hateful material is threatening, abusing or insulting. In addition, the threshold for conviction has been lowered because a person no longer has to intend to commit the offence, but rather can be just ‘reckless’ as to whether an offence may be committed. In addition, this section reverses the burden of proof creating a presumption that a person in possession of material that would constitute an offence has committed the offence where it is reasonable to assume that the material was not intended for personal use.

- ➔ The Coalition questions the proportionality of the preparation and possession offence, and while consensus was not reached among coalition members calling for its deletion, we recommend clarifying the need for a clear and serious intention to communicate to the public, removing the element of recklessness for this section and removing section 10 (3) to apply the ordinary standard of proof in criminal proceedings.

E. Lack of consideration of alternative forms of sentencing – Section 20 on aggravated sentencing has been designed in a way that suggests that in the presence of a “hatred”

¹¹ ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015.

¹² ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015.

element the sentence can only be increased within the parameters of a particular sentence type (e.g., a greater fine or longer custodial sentence). This does not take the benefits of alternative forms of sentencing into account, particularly for those offences for which the maximum penalty is 12 months or less. Alternative forms of sentencing have generally been completely absent in any written or oral addressal by the Minister for Justice, despite recognition that hate crime is a societal issue. The official line of communication – reflected in the approach undertaken in the bill – is rather focused on “tough sentences”. The Coalition is in support of community sentencing where appropriate and restorative justice. We note the wider need for sentencing approaches to be proportionate.

- ➔ The Coalition recommends replacing the reference to a “greater sentence” with “an aggravated sentence” in Section 20, as well as the consideration of alternative sentencing options and restorative justice measures.

We also note that the Council of Europe draft recommendation on hate crime encourages States to frame legislation in a matter that considers deprivation of liberty as a measure of last resort, consider restorative justice where possible and ensure that the extent to which a sentence is enhanced or aggravated should be proportionate to the maximum sentence imposed for the original offence.

- F. The Bill lacks a requirement for comprehensive review of the legislation** – As this legislation brings a set of changes in the criminal justice system, introducing the first ever provisions on hate crime, it is key to monitor its functioning. The addition of a statutory review requirement in the Bill would allow an assessment of its efficacy and operation, with a particular emphasis on ensuring that all relevant stakeholders – including human rights organisations and impacted communities – are involved.

- ➔ The Coalition recommends the introduction of a statutory requirement for a comprehensive review of the legislation, to be started no later than 5 years after its commencement.

The Minister for Justice previously justified this gap to the existence of a requirement for post-enactment report 12 months following enactment, however we believe this will simply not be enough to make a full assessment of the functioning of the legislation. Including a requirement for a statutory review in five years provides enough time for cases to go through the Courts and for any difficulties in interpretation of key terms or other obstacles to effective implementation to be identified. Some criminal trials are currently being scheduled for 2025. Our call for the inclusion of a statutory review was taken on board by the Joint Oireachtas Justice Committee. The Council of Europe draft recommendation on hate crime also specifically refers to the need for legislation to be kept under review.

The need for a comprehensive approach in tackling hate: our call for an Action Plan Against Hate

6. Hate crimes and extreme hate speech have deep roots in our society: the work to eradicate attitudes and behaviour will not be done with legislation alone. This bill should be regarded as one essential tool in a wider toolbox, especially considering the limitations of addressing prejudice through criminal law. That’s why, united in our diversity, coalition members are strong in calling for an Action Plan Against Hate. This approach would entail communities,

criminal justice actors, educators, victim support providers, representatives of different departments and all relevant actors to sit at the same table to come up with a clear set of actions that can be monitored and must be budgeted. This plan should include measures aimed at challenging the beliefs and attitudes underlying such crimes such as education and awareness raising; improved monitoring, reporting, and data gathering; and improved victim support. Proper implementation measures to ensure the legislation is effective should also be in place and a widespread public awareness campaign should be undertaken when the Bill becomes law.

7. The newly published draft recommendation of the Council of Europe Committee of Ministers on hate crime – the first of its kind – expressly calls on member states, including Ireland, to adopt a holistic and multifaceted approach in combating and preventing hate crime. This requires public institutions to engage with one another, as well as civil society and impacted communities for the purpose of understanding, responding to, combating, and preventing hate crime. The recommendation reads as follow: *Member States should develop, adopt and implement a comprehensive strategy which includes a system-wide, gender-sensitive, and trauma-informed approach to combating hate crime through an action plan, with particular focus on aspects such as prevention, monitoring, awareness-raising, and training, as well as on supporting and protecting victims of hate crime.*¹³
8. Additionally, the importance of supporting measures and a more comprehensive approach has been recognised by the sister recommendation on combating hate speech¹⁴ and at the EU level by the European Commission in their report on the Implementation of the Framework Decision, which identifies a set of suggested practices to strengthen the implementation of the Framework Decision itself.¹⁵
9. To date, we have no information on existing plans to develop a comprehensive strategy to tackle hate crime and incidents and hate speech to implement and complement the Bill, nor a clear commitment to adopt a more comprehensive approach. We believe Senators should insist on such a commitment from government as this legislation goes through the Seanad.

Further information and enquiries: the Coalition Against Hate Crime remains available to provide further information. We will liaise with updated suggested language for amendments addressing Coalition’s concerns and recommendations – including those outlined in this short briefing - ahead of Committee Stage. For enquiries: Luna Lara Liboni (Chair of the Coalition Against Hate Crime Ireland), luna.liboni@iccl.ie.

The **Coalition Against Hate Crime Ireland** is made of 23 civil society organisations representing communities commonly targeted by hate crime and hate speech in Ireland: Age Action Ireland, Belong To, Doras, Dublin LGBTQ+ Pride, Immigrant Council of Ireland, Inclusion Ireland, Independent Living Movement Ireland, Intersex Ireland, International Council of International Students, 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 Women’s Council, National Youth Council of Ireland, Outhouse LGBTQ+ Centre, Pavee Point Traveller & Roma Centre, Sports Against Racism Ireland, Transgender Equality Network Ireland (TENI).

¹³ COUNCIL OF EUROPE COMMITTEE OF EXPERTS ON HATE CRIME (PC/ADI-CH), Draft Recommendation CM/Rec(20XX) XX of the Committee of Ministers to member States on Combating Hate Crime, 26 May 2023.

¹⁴ Recommendation CM/Rec(2022)16^[1] of the Committee of Ministers to member States on combating hate speech (Adopted by the Committee of Ministers on 20 May 2022 at the 132nd Session of the Committee of Ministers).

¹⁵ 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.