

Submission on the General Scheme of the Criminal Justice (Hate Crime) Bill

Irish Human Rights and Equality Commission

February 2022



**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**
Irish Human Rights and Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the Irish Human Rights and Equality Commission Act 2014 (the '2014 Act'). The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to examine any legislative proposal and report its views on any implications for human rights or, equality.¹

The Commission welcomes the opportunity to provide the Joint Committee on Justice with its submission on the General Scheme of the *Criminal Justice (Hate Crime) Bill* (the 'General Scheme') which it hopes will assist the Committee in its pre-legislative scrutiny of the Bill. The Commission has previously raised a number of human rights and equality issues arising in connection with the legislative and policy responses to incitement to hatred and hate crime;² including in a submission to the Department of Justice's review of the *Prohibition of the Incitement to Hatred Act*.³ The Commission remains available to assist the Committee if further scrutiny of the General Scheme is required and on any specific issue that may arise.

This submission focusses on the following matters:

- Balancing the prohibition on discrimination and incitement to hatred with the right to freedom of expression;
- Addressing hate-motivated offences; and
- Policy measures to respond to hate crime and incitement to hatred.

The Commission considers the following human rights to be relevant:

¹ Section 10(2)(c) of the [Irish Human Rights and Equality Commission Act 2014](#).

² See most recent commentary: IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) pp. 39–51; IHREC: [Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland](#) (August 2020) pp. 23–25; IHREC, [Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee](#) (August 2021) pp. 11–12; 26–28; 69–76.

³ IHREC, [Review of the Prohibition of Incitement to Hatred Act 1989](#) (December 2019).

- the prohibition on incitement to hatred;
- the principle of equality and the prohibition on discrimination;
- the right to freedom of expression;
- the right to freedom of assembly and association;
- the right to respect for private life;
- the right to a fair trial; and
- the rights of persons with disabilities.

The Commission welcomes the legislative proposals to address incitement to hatred and hate crime. These legislative proposals are timely as Ireland is witnessing a growth in racist and far right organising in Ireland,⁴ which has seen an escalation in incidents of far-right rhetoric and racist hate crime.⁵ This context underscores the need for leadership across the State to address such movements and racist discourse, and ensure Ireland maintains its commitment to international human rights norms. Countering racism and hate speech is imperative to the building of acceptance of diversity and respect for the dignity of all persons.⁶

If you have a society where hate speech is prevalent, this potentially has a chilling effect on the rights of those targeted and wider society. Enacting this legislation is part of the State's positive obligation to ensure a favourable environment exists for freedom of expression and participation in public debate without fear.⁷ The relationship between

⁴ IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) pp. 3, 7, 34, 47 and 119; and Lucy Michael, [Reports of racism in Ireland](#) (Irish Network Against Racism 2021).

⁵ As noted by the Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#), CERD/C/IRL/CO/5-9 (23 January 2020) para. 21.

⁶ In its *Strategy Statement 2019–2021*, the Commission commits to playing a leadership role in combatting racism and promoting intercultural understanding. See IHREC, [Strategy Statement 2019–2021](#) (2019).

⁷ The European Court of Human Rights held that these positive obligations imply, among other things, that the States are required to establish an effective mechanism for the protection of authors and journalists in order to create a favourable environment for participation in public debate of all those concerned, enabling them to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter. See in *Dink v. Turkey* (App No 7124/09) 14 September 2010, §§ 106, 137.

prohibiting hate speech and enabling freedom of expression to flourish should be seen as compatible and complementary:

“and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other.”⁸

It is important to emphasise at this stage of the legislative process that this legislation is only one strand of the legislative and policy measures which the State is required to take to address and prevent the harm caused to victims and society by hate speech and hate crime.⁹ As hate speech has many different manifestations and not all types of offensive speech amount to incitement,¹⁰ there is a broader and more diverse range of measures and remedies available to States¹¹ beyond the criminal law approach to combat hate speech including civil and administrative measures, education, training and public condemnation of such speech.¹² While laws such as this Bill are a necessary and an important component in addressing hate speech and hate crime, legislation:

“should be complemented by a broad set of policy measures to bring about genuine changes in mindsets, perception and discourse.”¹³

⁸ United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation No. 35 Combatting racist hate speech](#), CERD/C/GC/35 (26 September 2013) para. 45. See also United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 3

⁹ See United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 35.

¹⁰ The United Nations Rabat Plan of Action sets out “[i]n terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others. See United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 20.

¹¹ For a more detailed discussion on strategies available to States to tackle hate speech and hate crime, see the section on [Non-legislative measures to combat hate crime and hate speech](#) in this submission.

¹² See discussion of non-criminal measures in: United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) paras. 48–49, 56–74; United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) paras. 35–49; United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation No. 35 Combatting racist hate speech](#), CERD/C/GC/35 (26 September 2013) paras. 30–44; European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 13; United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/74/486 (9 October 2019) paras. 24, 28.

¹³ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 76.

What is ultimately required is to address and counter the conditions conducive to the use of hate speech.¹⁴ As recognised by European and international bodies and instruments, the criminalisation and prohibition of expression should only be reserved for the most serious cases of hate speech.¹⁵

Incitement to hatred is a particularly severe form of hate speech that is internationally recognised to require a criminal law response.¹⁶ Incitement to hatred has a serious impact on both its victims and on society, alienating its targets to damage the community cohesion that is fundamental to a democratic society.¹⁷ The current legislative basis for addressing incitement to hatred is set out in the *Prohibition of Incitement to Hatred Act 1989*. The Commission has previously voiced concerns about the effectiveness of this legislation and its compliance with human rights and equality standards, as have international human rights and equality monitoring bodies.¹⁸ Of particular concern is the low rate of prosecutions and convictions under the Act, particularly for online incidents, which calls into question the effectiveness and accessibility of these sanctions.¹⁹

¹⁴ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 13.

¹⁵ United Nations Human Rights Committee, [General Comment No. 34 Article 19: Freedoms of opinion and expression](#), CCPR/C/GC/34 (12 September 2011) para. 52; United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) paras. 47, 79; United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 34; United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation No. 35 Combatting racist hate speech](#), CERD/C/GC/35 (26 September 2013) para. 12; European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 13.

¹⁶ For example, such recognition can be observed in the [EU 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](#).

¹⁷ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 4.

¹⁸ The European Commission against Racism and Intolerance (ECRI) has criticised the legislation's limited scope and has recommended the amendment of the criminal law to include a wider range of expression based offences; see European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 11. The United Nations Committee on the Elimination of Racial Discrimination recommended the State: "Strengthen its legislation on racist hate speech with a view to effectively combating racist hate speech in all forms of expression and means of communication"; see Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#), CERD/C/IRL/CO/5-9 (23 January 2020) para. 20(a).

¹⁹ IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) p. 40. ECRI and the Committee on the Elimination of Racial Discrimination have

The proposal to legislate for hate crime is welcome as there are no specific hate crime offences in Irish law at present and there is no law that requires a sentencing court to recognise and account for the 'hate' element of a crime that was motivated by prejudice. While sentencing practice allows for prejudice motivations to be taken into account by the sentencing court, the court is under no obligation to do so. Research has shown that, in practice, the hate element of a crime is prone to becoming invisible at various stages of the criminal justice process, from the reporting and investigation of the crime, through to prosecution and sentencing.²⁰ The invisibility of hate motivation in the criminal justice system is concerning as the impact of a hate crime extends beyond the individual victim and can affect the group the victim identifies with and wider society.²¹ Hate crimes serve to deny a victim and the group they identify with full participation in society, which can damage the fabric of society and fragment communities.²² The lack of legislation to address hate crime has been criticised by the European Commission against Racism and Intolerance ('ECRI')²³ and the United Nations Committee on the Elimination of Racial Discrimination.²⁴

The Commission notes that the Committee on Justice has held one pre-legislative scrutiny session on the Bill on 17 November 2021.²⁵ Given the significance of enacting this legislation for the rights of individuals and groups who may be the victim of

both stated that the *Prohibition of Incitement Hatred Act 1989* is particularly ineffective in tackling online hate speech; see European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 16; Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#), CERD/C/IRL/CO/5-9 (23 January 2020) para. 19.

²⁰ Amanda Haynes and Jennifer Schweppe, [Lifecycle of a Hate Crime: Country Report for Ireland](#) (ICCL 2017).

²¹ European Union Agency for Fundamental Rights, [Handbook on European non-discrimination law](#) (2018) p. 81.

²² ODIHR, [Hate Crimes Law: A Practical Guide](#) (2009) p. 17.

²³ ECRI recommended that the law should be "amended to provide that racist and other hate motivation constitutes an aggravating circumstance for all criminal offences and is taken into account in sentencing"; see European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 12.

²⁴ The Committee recommended that the State introduce and enforce legislative provisions that include racist motivation as an aggravating circumstance that will result in a penalty enhancement for crimes committed as a result of racial bias; see Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#), CERD/C/IRL/CO/5-9 (23 January 2020) para. 22(a).

²⁵ Joint Committee on Justice, [General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021: Discussion](#) (17 November 2021).

incitement to hatred and hate crime, the Commission recommends further Oireachtas engagement with key affected groups on the development of this legislation to ensure that the provisions of this Bill and its implementation are informed by their lived experiences.²⁶ Further engagement with stakeholders would provide the opportunity to examine and discuss other provisions within the Bill, such as the elements of the offence of incitement to hatred, which were not fully explored during the pre-legislative scrutiny session in November.

²⁶ The Commission provides further guidance on ensuring effective participation in the section "[Effective participation of affected groups in the legislative process](#)".

Relevant human rights and equality framework

Legislating for new incitement to hatred offences and creating new offences aggravated by prejudice engages a number of human rights and equality issues – protected by the *Irish Constitution*, the *European Convention on Human Rights* ('the ECHR'), the *Charter of Fundamental Rights of the European Union* ('the Charter') and international human rights law – which will have to be carefully considered in the drafting of the legislation. As the General Scheme is concerned in part with the regulation of forms of expression, it follows that the General Scheme will involve challenging questions in balancing, accommodating or reconciling these rights.

Prohibition on discrimination and on incitement to hatred

The right to equality under the law is guaranteed under the Constitution,²⁷ the Charter²⁸ and the ECHR²⁹. Article 1(a) of the *EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law* ('the Framework Decision') requires Member States to punish incitement to violence or hatred – including by public dissemination or distribution of tracts, pictures or other material – 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.³⁰

Article 20(2) of the *International Covenant on Civil and Political Rights* ('ICCPR') requires states to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Article 4 of the *United Nations Convention on the Elimination of Racial Discrimination* ('CERD') requires states to undertake to adopt immediate and positive measures designed to eradicate all

²⁷ Article 40.1 of the Constitution.

²⁸ Under EU law, Article 21 of the Charter sets out that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

²⁹ Article 14 of the ECHR provides that the rights and freedoms under the Convention "shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

³⁰ [EU 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.](#)

incitement to, or acts of, such discrimination including by declaring it an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.³¹ . While these human rights instruments expressly prohibit incitement to hatred on the grounds of racial, national, religious and ethnic origin, the underpinning principle of non-discrimination means they should be understood to prohibit incitement that targets any of the broader categories protected under international human rights law.³²

Also of relevance is Principle 12 of the Camden Principles,³³ prepared by the human rights organisation, Article 19, which provides that:

“[a]ll States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech).”³⁴

Freedom of expression

The right to freedom of expression is protected under the Constitution, EU and international law.³⁵ The right to freedom of expression includes the freedom to hold opinions and the freedom to seek, receive and impart information and ideas of all kinds, without interference by public authority and regardless of frontiers. The right to

³¹ Ireland has lodged a reservation/interpretative declaration under Article 4 such that “the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. The UN Committee on the Elimination of Racial Discrimination has continuously recommended withdrawal of Ireland’s reservation/interpretative declaration to Article 4 CERD. See Committee on the Elimination of Racial Discrimination, [Consideration of reports submitted by States parties under article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, Ireland](#), CERD/C/IRL/CO/3-4 (4 April 2011) para 17; Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#), CERD/C/IRL/CO/5-9 (23 January 2020) para. 10.

³² United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/74/486 (9 October 2019) para. 9.

³³ These Principles were prepared by ARTICLE 19 on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in international human rights law on freedom of expression and equality issues at meetings held in London on 11 December 2008 and 23-24 February 2009. The Principles represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognised by the community of nations.

³⁴ Article 19, [The Camden Principles on Freedom of Expression and Equality](#) (April 2009).

³⁵ Article 40.6.1^o.i of the Constitution, Article 11 of the Charter, Article 10(1) of the ECHR, Article 19(2) of the ICCPR, and Article 5 of the CERD.

freedom of expression underpins many other rights, including freedom of assembly and association, the exercise of the right to vote, and the right to participate in public affairs.³⁶ The European Court of Human Rights (the 'ECtHR') has found that the right:

"is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."³⁷

The right to freedom of expression is not absolute, and may be subject to a number of qualifying provisions under the Constitution,³⁸ the Charter³⁹, the ECHR⁴⁰ and the ICCPR.⁴¹ However, the Irish courts have held that any limitation on the right to freedom of expression must be proportionate.⁴² In order for an interference to be justified under Article 10 of the ECHR, the interference must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society.⁴³ The test of whether the interference complained of was 'necessary in a democratic society' requires the ECtHR to determine whether it corresponded to a 'pressing social need', whether it was proportionate to

³⁶ Dominika Bychawska-Siniarska, [Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Handbook for Legal Practitioners](#) (Council of Europe 2017) pp. 11–12.

³⁷ *Handyside v. the United Kingdom* (App No 5493/72) § 49; *Observer and Guardian v. the United Kingdom* (App No 13585/88) § 59.

³⁸ Article 40.6.1° of the Constitution states: "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."

³⁹ Article 52(1) of the Charter sets out: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

⁴⁰ Article 10(2) of the ECHR provides: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

⁴¹ Article 19(3) of the ICCPR provides: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals."

⁴² *Independent Newspapers Ltd v Anderson* [2006] IEHC 62.

⁴³ *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015 (extracts).

the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.⁴⁴

The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression ('the UN Special Rapporteur') has said that any restriction must comply with the three-part test of limitations to the right; which means that any restriction must be:

1. Provided by law, which is clear, unambiguous, precisely worded and accessible to everyone;
2. Proven by the State as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals; and
3. Proven by the State as the least restrictive and proportionate means to achieve the purported aim.⁴⁵

Balancing the prohibition on hate speech against freedom of expression

The need to protect against speech that is harmful to the dignity of the person must be weighed against the rights of other persons to express themselves, even where what they are saying is shocking or runs contrary to public opinion. There has been relatively limited consideration of this issue in the Irish context. However, judgements of the ECtHR may provide guidance in reconciling these rights. While the ECHR does not contain an explicit obligation for states to prohibit incitement to hatred, the ECtHR has adopted two approaches in determining the limits of freedom of expression in respect of incitement to hatred:

- i) in certain cases where the comments in question amount to hate speech and negate the fundamental values of the Convention, the Court has found that such speech may be excluded from protection of Article 10 by reason of Article 17 ECHR (prohibition of abuse of rights);

⁴⁴ *Gündüz v. Turkey*, no. 35071/97, ECHR 2003-XI, § 38.

⁴⁵ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 41.

- ii) in other cases, where the speech in question is hate speech but is not apt to destroy the fundamental values of the Convention, the Court has imposed restrictions on speech under Article 10(2) ECHR.⁴⁶

The ECtHR has held that Article 17 is only applicable on an exceptional basis and in extreme cases, and it should only be resorted to in cases involving Article 10 if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention.⁴⁷ The ECtHR has stated that expressions that seek to spread, incite or justify hatred based on intolerance do not enjoy the protection afforded by Article 10 of the Convention.⁴⁸ In determining whether statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance, the ECtHR has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups.⁴⁹ The ECtHR has recognised that groups which have a history of oppression or inequality, or which face deep-rooted prejudices, hostility and discrimination, or which are vulnerable for some other reason, may need heightened protection from insulting or discriminatory discourse.⁵⁰ The ECtHR has reiterated that:

“inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner.”⁵¹

The ECtHR has stressed that:

⁴⁶ The ECtHR factsheet on hate speech, updated on September 2020 provides a valuable summary of the key case-law on this issue: https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

⁴⁷ *Perinçek v. Switzerland*[GC], no. 27510/08, 15 October 2015, § 114.

⁴⁸ *E.S. v. Austria*, no. 38450/12, 25 October 2018, § 43.

⁴⁹ *Perinçek v. Switzerland*[GC], no. 27510/08, 15 October 2015, § 206.

⁵⁰ *Savva Terentyev v. Russia*, no. 10692/09, 28 August 2018, § 76.

⁵¹ *Vejdeland and others v. Sweden*, no. 1813/07, 9 February 2012, § 55.

“it is vitally important that criminal law provisions directed against expressions that stir up, promote or justify violence, hatred or intolerance clearly and precisely define the scope of relevant offences, and that those provisions be strictly construed in order to avoid a situation where the State’s discretion to prosecute for such offences becomes too broad and potentially subject to abuse through selective enforcement.”⁵²

The Human Rights Committee has stated that any measures taken by the State to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must comply with the requirements of Article 19(3) of the ICCPR in that the restriction on freedom of expression must be prescribed by law, necessary and proportionate.⁵³

The UN Rabat Plan of Action provides that:

“[t]his implies, among other things, that restrictions are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way; and are proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize.”⁵⁴

Only the most severe hate speech expressions should meet the threshold of incitement to hatred. The UN Rabat Plan of Action sets out a range of factors that should be considered when assessing the severity of a hate speech act and whether it constitutes incitement to hatred.⁵⁵

This six-part threshold test includes:

1. consideration of the context in which the speech took place;
2. the status of the speaker;

⁵² *Savva Terentyev v. Russia*, no. 10692/09, 28 August 2018, § 85.

⁵³ United Nations Human Rights Committee, [General Comment No. 34 Article 19: Freedoms of opinion and expression](#), CCPR/C/GC/34 (12 September 2011) paras. 50–52.

⁵⁴ United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 18.

⁵⁵ See United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 29.

3. the intent involved;
4. the content and form of the speech;
5. the extent of the speech act; and
6. the likelihood of the act imminently inciting others to hatred.

The UN Special Rapporteur has stated that only serious and extreme instances of incitement to hatred, which would cross the threshold test should be criminalised.⁵⁶

The United Nations Committee on the Elimination of Racial Discrimination has recommended that criminalisation of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, and the application of criminal sanctions should be governed by the principles of legality, proportionality and necessity.⁵⁷

ECRI sets out that hate speech reaches the threshold for criminal responsibility if it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination; and it occurs in a public context.⁵⁸ ECRI envisages:

“responsibility being imposed where there is an element of recklessness as to violence, intimidation, hostility or discrimination being a consequence of a particular use of hate speech and not just that this is intended.”⁵⁹

ECRI provides that in order to assess whether or not there is a risk of the relevant acts occurring account must be taken of the specific circumstances in which the hate speech is used; in particular, there is a need to consider:

⁵⁶ The Special Rapporteur has said that while States are required to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under article 20 (2) of the Covenant, there is no requirement to criminalise such expression. See United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 47.

⁵⁷ United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation No. 35 Combatting racist hate speech](#), CERD/C/GC/35 (26 September 2013) para. 12.

⁵⁸ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) pp. 9, 18, 58.

⁵⁹ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 58.

- (b) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked);
- (c) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders);
- (d) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination);
- (e) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate);
- (f) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a 'live' event); and
- (g) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination).⁶⁰

Addressing hate-motivated offences

There is no agreed understanding at UN, EU or Council of Europe levels as to how to define hate crime and what constitutes a hate crime.⁶¹ The Organisation for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights ('ODIHR') sets out that hate crimes are:

"criminal acts committed with a bias motive."⁶²

⁶⁰ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 18.

⁶¹ Jennifer Schweppe, 'What is a hate crime?' (2021) Cogent Social Science, p. 2.

⁶² ODIHR, [Hate Crimes Law: A Practical Guide](#) (2009) p. 16.

Bias motivation means that the perpetrator chose the target on the basis of their actual or perceived association with a group that shares a protected characteristic. There is no requirement or obligation on States to adopt hate crime legislation; however, there is a recognition that hate crime requires a criminal law response. There is no consistent approach to responding to hate crime; some states include a substantive offence motivated by prejudice while other states use penalty enhancements to increase the penalty for an offence when it is motivated by prejudice.⁶³

In terms of guidance under international human rights law in responding to hate crime, Article 4 of CERD requires States Parties to declare an offence punishable by law:

“all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.”

ECRI recommends that:

“racist and xenophobic acts are stringently punished through methods such as:

- i) defining common offences but with a racist or xenophobic nature as specific offences;
- ii) enabling the racist or xenophobic motives of the offender to be specifically taken into account”.⁶⁴

Article 4 of the Framework Decision sets out that:

“Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.”

⁶³ See discussion in ODIHR, [Hate Crimes Law: A Practical Guide](#) (2009).

⁶⁴ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No 1 on combatting racism, xenophobia, antisemitism and intolerance](#), adopted 4 October 1996 (1996) p. 4. See also European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination](#), adopted on 13 December 2002 and amended on 7 December 2017 (2018) p. 8.

The European Parliament resolution on strengthening the fight against racism, xenophobia and hate crime:

“calls for mechanisms to be put in place with a view to making hate crime visible in the EU, ensuring that bias-motivated offences are punishable, and as such are recorded properly and investigated effectively, that offenders are prosecuted and punished and that victims are offered proper assistance, protection and compensation, thus encouraging victims of hate crime and witnesses to report incidents.”⁶⁵

The ECtHR has found that State authorities have a duty to take all reasonable steps to uncover any possible discriminatory motives when investigating a violent act.⁶⁶ The obligation on authorities to investigate whether an act was motivated by bias is an obligation to use best endeavours; the authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination.⁶⁷ The ECtHR has held that treating violence and brutality arising from discriminatory attitudes on an equal footing with violence occurring in cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights and may constitute unjustified treatment irreconcilable with Article 14 of the ECHR.⁶⁸

⁶⁵ [European Parliament resolution of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime \(2013/2543\(RSP\)\)](#).

⁶⁶ *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016, § 113.

⁶⁷ *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII, § 160; *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016, § 113.

⁶⁸ *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII, § 160; *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016, § 113.

General observations on responding to hate speech and hate crime

Effective participation of affected groups in the legislative process

The enactment of this legislation will be critically important for Ireland's implementation of its obligations under human rights law to respond to incitement to hatred and hate crime. Accordingly, the Commission is of the view that in order to ensure that the legislative proposals under the General Scheme are adequate and appropriate to address the proposed offences there should be effective consultation and participation with groups impacted by the legislation.⁶⁹ In its report on Ireland in 2019, ECRI recommended that hate speech and hate crime legislation be enacted in consultation with civil society actors.⁷⁰ The Commission draws particular attention to the need for active engagement with persons with disabilities, particularly through Disabled Persons Organisations, in the decision-making processes.⁷¹ Furthermore, in terms of which groups to consult with, while the General Scheme lists characteristics protected under the legislation, the Commission recommends broader engagement including with groups not falling within those characteristics so as to understand the nature and effect of incitement to hatred and hate crime on these respective groups and consider whether these groups should also be protected under the legislation.

The principle of participation requires the active and informed participation of individuals in the development, implementation, monitoring and reviewing of legislative, executive and administrative decisions that concern them.⁷² Individuals and

⁶⁹ The right to participate in public life is recognised under Article 25 of the ICCPR, Article 5 (c) of the CERD, Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women, Articles 12 and 23 (1) of the Convention on the Rights of the Child, and Article 4 (3) and Article 33 (3) of the Convention on the Rights of Persons with Disabilities. See also United Nations Office of the High Commissioner for Human Rights, [Guidelines for States on the effective implementation of the right to participate in public affairs](#) (2018).

⁷⁰ European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 17.

⁷¹ As required under Article 4 (3) of the Convention on the Rights of Persons with Disabilities. See guidance in Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018).

⁷² United Nations Office of the High Commissioner for Human Rights, [Guidelines for States on the effective implementation of the right to participate in public affairs](#) (2018).

representative groups will understand the nature and type of offences faced by their respective groups, and this perspective should help ensure that the drafting process is more informed and transparent. The requirement of ensuring effective participation extends beyond the development of this legislation and includes ensuring affected groups are involved in the decision-making processes involving implementing, monitoring and reviewing this legislation; such as data collection, reporting and monitoring mechanisms, and supports for victims. Engagement with affected individuals and groups should be seen as a key support in ensuring that the public is aware of and educated on the provisions of this legislation; in particular the precise scope of the incitement to hatred offences and the substantive offences aggravated by prejudice.

The Commission recommends that the development, implementation, monitoring, evaluation and review of this legislation should be informed by the effective participation of affected individuals and groups.

Training for key actors

Adequate and appropriate training on incitement to hatred and hate crime for the judiciary, prosecutors, and police investigators is essential to the effective operation of this legislation.⁷³ Increased skills and knowledge on the proposed offences will improve the criminal justice response to these crimes. This is important as concerns have been raised on the extent of awareness within An Garda Síochána of what constitutes hate crime or a hate-related incident, how it should be recorded, and the importance of it being recorded.⁷⁴ This underlines the need for training on the indicators of hate crime for prosecutors and members of An Garda Síochána.⁷⁵ ECRI has recommended that all members of An Garda Síochána are thoroughly trained in identifying, recording and

⁷³ ODIHR, [Hate Crimes Law: A Practical Guide](#) (2009) pp. 11, 12; Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#), CERD/C/IRL/CO/5-9 (23 January 2020) para. 22. See also IHREC, [Review of the Prohibition of Incitement to Hatred Act 1989](#) (December 2019) p. 35.

⁷⁴ James Carr, 'Recording and Reporting Racist Hate Crime: Police and Civil Society Responses' and Amanda Haynes and Jennifer Schweppe, 'The disappearing of hate crime in the Irish criminal justice process', in Amanda Haynes et al. (eds.), *Critical Perspectives on Hate Crime* (2017).

⁷⁵ ODIHR, [Hate Crimes Law: A Practical Guide](#) (2009) p. 35.

investigating hate crime.⁷⁶ Training on these offences should emphasise the importance of prosecuting these offences; particularly as a substantive hate crime offence may pose challenges as it requires motive to be proved. This difficulty may mean that prosecutors may be reluctant to prosecute the aggravated offence and instead prosecute the ordinary offence.⁷⁷ Prosecutors should know the importance of prosecuting offences aggravated by prejudice, even if the offence is minor, as any offence aggravated by prejudice can undermine social cohesion and society as a whole.⁷⁸

As discussed in the following section, the Commission has concerns around the scope and understanding of the provisions setting out the offences of incitement to hatred within the General Scheme. While the Commission proposes a number of amendments to clarify the scope and meaning of incitement to hatred; the Commission emphasises the importance of judicial education and training on the various elements of the offence. As prosecutions are rarely taken under the *Prohibition of Incitement to Hatred Act 1989*, there is a lack of familiarity amongst the judiciary with the elements of the offence of incitement to hatred. The threshold for when an act of hate speech should be criminalised will have to be clear and precise for members of the judiciary for this legislation to be effective. Terms such as 'hatred' and 'hostility', which are integral to the offence, are not easily understood; so there will be a need for significant training for the judiciary on the precise meaning and scope of these terms in the context of the legislation.

The Commission recommends that members of An Garda Síochána should be equipped to understand, recognise, and thoroughly investigate all instances of incitement to hatred and hate crime through initial training at recruit stage and thereafter through dedicated ongoing training.

⁷⁶ European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 20.

⁷⁷ ODIHR, [Hate Crimes Law: A Practical Guide](#) (2009) p. 35.

⁷⁸ United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system](#) (2005) para. 15.

The Commission recommends that initial and ongoing training be provided to prosecutors and the judiciary on incitement to hatred and hate crime offences.

Monitoring and report mechanisms

The Commission welcomes the launch of An Garda Síochána's alternative hate crime reporting mechanism.⁷⁹ The Commission is of the view that it should be placed on a statutory footing and supplemented by a sustainably-funded third-party reporting mechanism.⁸⁰ ECRI strongly recommends setting up alternative mechanisms to encourage victims to report hate crime incidents, such as third-party reporting systems or dedicated telephone lines, in cooperation with relevant NGOs.⁸¹ ECRI recommends this practice as people can be more comfortable talking about a traumatic experience with members of their own communities. The Commission notes that a number of civil society organisations operate or have operated third party mechanisms to collect and report data on discriminatory crimes across various grounds.⁸² The Commission is of view that the State should facilitate the cooperation of civil society third-party reporting mechanisms and An Garda Síochána in improving the reporting of hate by setting up a framework of cooperation, including developing data sharing agreements.⁸³

⁷⁹ The reporting mechanism is available here: <https://www.garda.ie/en/crime/hate-crime/>. It was launched on 21 July 2021 - see Conor Hunt, New service launched for people to report hate crimes, *RTÉ news* (21 July 2021). Hate crime is defined as "any criminal offence which is perceived by the victim or any other person to, in whole or in part, be motivated by hostility or prejudice, based on actual or perceived age, disability, race, colour, nationality, ethnicity, religion, sexual orientation or gender"; see An Garda Síochána, [Diversity & Integration strategy 2019–2021](#).

⁸⁰ For example, INAR's iReport.ie.

⁸¹ European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 19.

⁸² INAR's iReport.ie, Transgender Equality Network Ireland's (TENI) Stop Transphobia and Discrimination (STAD), and the Gay and Lesbian Equality Network's (GLEN) stophatecrime.ie. See discussion in Amanda Haynes and Jennifer Scheppe, Lifecycle of a Hate Crime: Country Report for Ireland (ICCL 2017) pp. 19, 81–88.

⁸³ The EU Subgroup on methodologies for recording and collecting data on hate crime encourage Member States to set up frameworks of systematic and sustainable cooperation between law enforcement agencies, as well as other public authorities engaged in tackling hate crime, such as relevant civil society organisations. Examples of existing frameworks of cooperation include: Developing data sharing agreements. See EU High Level Group on combating racism, xenophobia and other forms of intolerance - Subgroup on methodologies for recording and collecting data on hate crime, [Improving the Recording of Hate Crime by Law Enforcement Authorities: Key Guiding Principles](#) (December 2017) p. 8.

There may be underreporting of crimes due to marginalised status of victim groups; in particular, persons with disabilities face barriers to reporting hate crime due to their potential isolation from support services and the community, their proximity to the perpetrator, the fear that their claim will not be taken seriously by authorities and the risk that law enforcement officers will not recognise the severity of this type of crime.⁸⁴ Victims of crime, who may be in a vulnerable position due to their migration status, should not be deterred from reporting crime for fear of prosecution in relation to immigration matters; migration status should not pose a barrier to the reporting and investigation of crime.⁸⁵ To facilitate the reporting of hate crimes by migrants and their participation in the criminal justice process without fear of their migration status being investigated by An Garda Síochána, the Commission is of the view that the State should establish an effective firewall separating the criminal justice system and immigration enforcement activities.⁸⁶ The Framework Decision provides that investigations and prosecutions of offences involving racism and xenophobia should not be dependent on reports or accusations made by victims, as they are particularly vulnerable and may be reluctant to initiate legal proceedings.⁸⁷

The Commission notes the State's poor record on collating and publishing hate crime data, despite its obligation to make public data on hate crime.⁸⁸ This deficiency in available data on hate crime as well as hate speech means that it is impossible to gain a full understanding of the levels of hate crime and hate speech which in turn impacts on developing and implementing legislative and policy measures to effectively respond to

⁸⁴ ODIHR, [Factsheet: Disability Hate Crime](#) (2016) p. 3.

⁸⁵ Article 1 of Directive 2012/29/EU (also known as the EU Victim's Directive) provides: 'The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.'

⁸⁶ Firewalls should clearly prohibit the sharing of personal data of, or other information about, persons suspected of being an undocumented migrant with immigration officials; see Recommendation 33 of ECRI, [General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination](#), adopted on 16 March 2016 (10 May 2016); United Nations Office of the High Commissioner for Human Rights, [Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations](#) (2018) pp. 26, 36.

⁸⁷ Article 8 and Recital 11 of the [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](#).

⁸⁸ For example, no official data on hate crime was reported to the ODIHR in 2015, 2016 or 2017. See ODIHR, [Hate crime report: Ireland](#). As a participating State in the Organization for Security and Co-operation in Europe, Ireland has made a commitment to "collect, maintain and make public reliable data on hate crimes, across the criminal justice system from the police to the courts".

the acts.⁸⁹ A lack of comprehensive and detailed disaggregated data results in policies and legislation being based on perceptions rather than informed by data collection and research.⁹⁰ The collection and publication of disaggregated data is essential to learn about the nature of these offences, the characteristics of victim groups, and the effectiveness of the criminal justice response in terms of prosecutions and sentencing.⁹¹

The UN Special Rapporteur has stated that:

“[s]ystematic disaggregated data collection and analysis, using human-rights-sensitive methodologies, enable a better understanding of problems in a given country, the creation of better-targeted policies and the possibility of evaluation.”⁹²

The Committee on the Elimination of Racial Discrimination has recommended that Ireland ensure that racist hate crime is properly recorded, including by providing clear guidelines on the recording of the crime, and collect disaggregated data on the crime.⁹³ The Committee has also placed an emphasis on systematic data collection in combatting hate speech;⁹⁴ and has recommended that states should have access to comprehensive statistical or other information on complaints, prosecutions and convictions relating to acts of racism and xenophobia.⁹⁵

ECRI has strongly recommended that an improved mechanism for collecting disaggregated data on hate crime, including hate speech, is established by the State.⁹⁶

⁸⁹ See European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 15.

⁹⁰ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 68.

⁹¹ See FRA, [Hate crime recording and data collection practice across the EU](#) (2018).

⁹² United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 68.

⁹³ Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#), CERD/C/IRL/CO/5-9 (23 January 2020) para. 22(b).

⁹⁴ United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation No. 35 Combatting racist hate speech](#), CERD/C/GC/35 (26 September 2013) para. 38.

⁹⁵ United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system](#) (2005) para. 3.

⁹⁶ European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 15.

ECRI recommends that data should be systematically recorded on the hate motive invoked at all stages of investigation, prosecution, conviction and sentencing; and this data should be made available to the public.⁹⁷ In regard to guidelines for the publication of disaggregated data, ODIHR provides that publication of disaggregated data could include demographics of victim and perpetrator, location of incident, and whether the crime was motivated by more than one bias.⁹⁸ If the offence was motivated by more than one, each bias motive should be recorded.⁹⁹ The same detailed categories for the reporting of data should be used for each level of the criminal justice process; the investigation, the prosecution and sentencing.¹⁰⁰

The European Parliament resolution on strengthening the fight against racism, xenophobia and hate crime:

“calls for the collection of broader, reliable data on hate crime, i.e. recording, as a minimum, the number of incidents reported by the public and recorded by the authorities, the number of convictions, the grounds on which offences were found to be discriminatory and the punishments imposed, as well as crime victimisation surveys on the nature and extent of unreported crimes, the experiences of crime victims with law enforcement, the reasons for non-reporting, and rights awareness among victims of hate crime”.¹⁰¹

The Commission notes the European Commission’s recent publication of the Guidance Note on the collection and use of equality data based on racial and ethnic origin.¹⁰²

⁹⁷ European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 15.

⁹⁸ ODIHR, [Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide](#) (2014) pp. 17–18.

⁹⁹ ODIHR, [Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide](#) (2014).

¹⁰⁰ ODIHR, [Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide](#) (2014) p. 43.

¹⁰¹ [European Parliament resolution of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime \(2013/2543\(RSP\)\)](#).

¹⁰² The Guidance Note has been published as an action under the European Anti-Racism Action Plan 2020–2025 to support Member State’s National Action Plans Against Racism. https://ec.europa.eu/info/sites/default/files/guidance_note_on_the_collection_and_use_of_equality_data_based_on_racial_or_ethnic_origin_final.pdf.

Victimisation survey data can enable police and policymakers to understand the hate crime reporting gap and develop measures to address it.¹⁰³

The Commission recommends the Department of Justice place An Garda Síochána's alternative hate crime reporting mechanism on a statutory basis through amendment to current legislation under development.¹⁰⁴ The Commission further recommends that the State support the continued operation of alternative third party hate crime reporting through the provision of sustainable core funding and the development of data sharing agreements between An Garda Síochána and relevant civil society organisations.

The Commission recommends that the State should establish an effective firewall separating the criminal justice system and immigration enforcement activities.

The Commission recommends that An Garda Síochána and the Courts Service record and publish accurate and reliable disaggregated data on hate crime and incitement to hatred on an annual basis informed by European Commission Guidance on equality data.¹⁰⁵

The Commission recommends the use of victimisation surveys, which include hate crime and incitement to hatred specific questions, and are supplemented by booster samples of groups traditionally underrepresented or excluded from standard national surveys.

The regulation of hate speech online

The internet plays a critical role as an enabler to the full and meaningful participation of marginalised groups in public and political life, offering a powerful opportunity for groups to transmit information, share knowledge and support and broadcast to wider audiences. However online spaces are far from inclusive and can serve as a platform for perpetuating misogyny, sexism, racist hate, disablist speech, and homophobic and

¹⁰³ ODIHR, [Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide](#) (2014) Section 3, pp. 33–40.

¹⁰⁴ For example the Policing, Security and Community Safety Bill.

¹⁰⁵ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/equality-data-collection_en.

transphobic speech.¹⁰⁶ In particular, individuals can be targeted on overlapping grounds of discrimination; which reinforces marginalisation and further restricts their access to public and political spaces. The internet has changed the context, nature and scope of hate speech; as individuals can be the target of online hate speech on a daily basis and individuals cannot walk away from online abuse; particularly in circumstances where a person's work or their participation in public life depends on them being online. Internationally, the majority of hate speech incidents occur online,¹⁰⁷ and there is evidence to suggest that this is the case in Ireland.¹⁰⁸ Incidents and discussion of online hate speech has increased since the start of the Covid-19 pandemic, as well as other major events such as the Black Lives Matter protests; as evidenced by research from the UK and the US.¹⁰⁹ Online hate speech has real world consequences as there is a correlation between online discussions around hate speech and reported incidents of hate crime.¹¹⁰ This underscores the need for leadership in addressing online hate speech by the State and internet intermediaries, as it is on internet platforms where hate speech spreads online.¹¹¹ The United Nations Special Rapporteur has stated that internet companies have seemingly been "spurred on by a business model that values attention and virality" without due regard for human rights standards in their products,

¹⁰⁶ See Eugenia Siapera, Elena Moreo and Jiang Zhou, [Hate Track: Tracking and Monitoring Racist Speech Online](#) (2018).

¹⁰⁷ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 4.

¹⁰⁸ INAR recorded 334 hate speech incidents in 2020, compared to 174 in 2019 and 282 of these occurred online. See Lucy Michael, [Reports of racism in Ireland](#) (Irish Network Against Racism, 2021) p. 20. See also IHREC and ESRI, [Hidden Versus Revealed Attitudes: A List Experiment on Support for Minorities in Ireland](#) (2020) – it examines societies' attitudes to minorities in Ireland and the extent to which people are concealing controversial opinions when afforded anonymity. Research co-funded by the Commission and the Irish Research Council has examined the nature and prevalence of racially loaded discourse across Ireland's digital sphere. The research identified a wide range of communities to be targeted by online racist speech in Ireland: anti-immigrant and anti-refugee discourses focusing on access to welfare and housing are common; discourses stereotyping, dehumanising, and denigrating Roma and Travellers were found to be 'pervasive'; and Islamophobic, anti-Black, and anti-Semitic racist discourse was also identified; see Eugenia Siapera, Elena Moreo and Jiang Zhou, [Hate Track: Tracking and Monitoring Racist Speech Online](#) (2018).

¹⁰⁹ Instances and discussions around online hate speech – relating to sexual orientation, gender and gender identity, and race and ethnicity – have increased 38% since the beginning of the pandemic in March 2020. Online discussions around violent threats increased by 22% since the start of the pandemic; see Brandwatch and Ditch the Label, [Uncovered: Online Hate Speech in the Covid Era](#) (2021).

¹¹⁰ Brandwatch and Ditch the Label, [Uncovered: Online Hate Speech in the Covid Era](#) (2021).

¹¹¹ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/74/486 (9 October 2019) para. 40.

services and policies.¹¹² The Special Rapporteur calls for the end of companies valuing shareholders over public interest, and recommends measures including the demonetisation of hate speech as part of the overall efforts of internet companies to address hate speech.¹¹³

As this General Scheme is progressing through the legislative process at a similar time as the *Online Safety and Media Regulation Bill*, which proposes to regulate harmful online content; the Commission is of the view that it is critical that the provisions under the two Bills are carefully aligned. This is to ensure there are no gaps in the implementation of legislation addressing hate speech and incitement to hatred online and offline. In this regard, the Commission has expressed concern that there is no specific reference to hate speech or incitement to violence and hatred in the definition of harmful online content under the General Scheme of the Online Safety and Media Regulation Bill.¹¹⁴ The Commission has recommended that the categories of harmful online content be amended to include online hate speech and content inciting violence or hatred. The Commission also recommended that terms relating to hate speech, such as racism, sexism, and ableism, should also be clearly defined under the *Online Safety and Media Regulation Bill*.

The Commission recommends that the provisions, in particular the definition of incitement to hatred, within the *Criminal Justice (Hate Crime) Bill* and the *Online Safety and Media Regulation Bill* be aligned.

Non-legislative measures to combat hate crime and hate speech

The Commission has emphasised the need for non-legislative measures, as well as legislative measures, to combat hate speech online and offline.¹¹⁵ As the guidance of

¹¹² United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/74/486 (9 October 2019) paras. 40–55.

¹¹³ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/74/486 (9 October 2019) paras. 54, 58(f); United Nations Office of the High Commissioner for Human Rights, [Governments and Internet companies fail to meet challenges of online hate](#) (press release, 21 October 2019).

¹¹⁴ IHREC, [Submission to the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht on the General Scheme of the Online Safety and Media Regulation Bill](#) (March 2021) pp. 24–26.

¹¹⁵ See IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th](#)

human rights and equality bodies has emphasised, criminal sanctions are only one component of the required response to hate speech.¹¹⁶ Significant reform to the policy and regulatory environment is particularly essential to address the circulation of hate speech in the digital public sphere, which is made all the more urgent as Ireland is the European host to many major global social media and technology companies.¹¹⁷

The range of policy and regulatory measures and frameworks necessary to combat hate crime and hate speech include media regulation and self-regulation; press codes and journalistic ethics; social media standards and take down procedures; codes of practice and sanctions for non-compliance; broadcasting standards; codes of conduct for public officials, election candidates and elected representatives; counter speech; education and awareness raising; promoting and advancing digital literacy for people of all ages; and support for victims.¹¹⁸ These measures should contribute to improving public awareness of the issues of hate crime and hate speech; and encourage the use of non-discriminatory rhetoric and discourse.

The Commission recommends that alongside the criminal sanctions for incitement to hatred under this legislation, civil and administrative measures should be utilised to tackle all forms of hate speech.

[Report](#) (October 2019) pp. 47–51; IHREC, [Review of the Prohibition of Incitement to Hatred Act 1989](#) (December 2019) pp. 7–19.

¹¹⁶ See United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012); United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation No. 35 Combatting racist hate speech](#), CERD/C/GC/35 (26 September 2013); European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016).

¹¹⁷ IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) p. 47.

¹¹⁸ IHREC, [Review of the Prohibition of Incitement to Hatred Act 1989](#) (December 2019) pp. 7–19. See also IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) pp. 39–51; IHREC, [Submission to the Committee on Housing, Local Government and Heritage on the General Scheme of the Electoral Reform Bill](#) (February 2021) pp. 2–4; IHREC, [Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee](#) (August 2021) pp. 26–28, 70–75.

Specific Observations on the General Scheme

Title of the Act (Head 1)

Head 1(1) sets out that the Act may be cited as the *Criminal Justice (Hate Crime) Act 2021*. The Commission is concerned that the title of the Act fails to refer to incitement to hatred; despite the Act providing for the creation of new incitement to hatred offences. The Commission considers that due to the importance of this legislation for addressing incitement to hatred and hate crime, it is essential that the title of the legislation adequately and appropriately reflects the provisions within the legislation. In particular, as the provisions of the legislation will be critical to the rights of affected groups it is important that the title be clear and accessible so as to enable the public's understanding of the scope of the Act.

The Commission recommends that Head 1(1) of the General Scheme be amended so that the title of the Act adequately and appropriately reflects the provisions within the legislation.

Interpretation (Head 2)

The Commission welcomes the inclusion of definitions of key terms within the legislation in line with international standards.¹¹⁹ Robust definitions of key terms are important in ensuring the effectiveness of the legislation, as difficulties around interpreting and understanding a provision can lead to enforcement issues.

Definition of hatred (Head 2)

Head 2 sets out that:

““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.”¹²⁰

This definition of hatred does not fully align with international standards, including:

¹¹⁹ The UN Rabat Plan of Action sets out that legislative framework on incitement to hatred should include robust definitions of key terms; see United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 21.

¹²⁰ Head 2 of the General Scheme.

- **United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression:** 'hatred' is a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group.¹²¹
- **United Nations Rabat Plan of Action:** 'hatred' refers to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.¹²²
- **ECRI:** 'hatred' shall mean a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group.¹²³

The Commission acknowledges that the prohibition of incitement to hatred involves difficult to define language of emotion such as hatred and hostility.¹²⁴ However, ECRI has stressed the importance of ensuring provisions are drafted in a clear and precise manner, as:

“[w]ithout such clarity and precision, there is likely an absence of legal certainty as to scope of the conduct that is prohibited.”¹²⁵

The terms 'harm' and 'unlawful discrimination', which are included in the definition of hatred, and referred to in a number of provisions under the General Scheme, are not defined either. This may be problematic for a court in determining whether an incident of hate speech would engender feelings of hatred to meet the standard of incitement to hatred.

The Commission also notes the problems with the definition of hatred and the requirement therein that it be of such a nature that as to give rise to the *likelihood* of harm or unlawful discrimination. This requirement appears to contradict section 7 of Head 3 of the General Scheme, which provides that it is not necessary to show that any

¹²¹ The definition was developed through consultations of experts and discussed at the OHCHR regional expert workshops on incitement; see United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 44.

¹²² United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) fn. 5.

¹²³ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 15.

¹²⁴ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/74/486 (9 October 2019) para. 12.

¹²⁵ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 59.

actual harm has occurred or *is likely* to occur as a result of the incitement. This is discussed further below.

The Commission recommends that consideration be given to ensuring that the definition of ‘hatred’ under Head 2 aligns with international standards and it is clear, precise and accessible in terms of what conduct is being regulated.

The Commission recommends that the term ‘harm’ and ‘unlawful discrimination’ are defined with more clarity.

Inclusion of additional definitions (Head 2)

The Commission is also of the view that further consideration should be given to including additional definitions under Head 2, to clarify terms used within the legislation. In particular, the Commission draws attention to the reference to hostility, under Head 8, in determining whether an offence was motivated by prejudice.¹²⁶ The meaning of hostility is vague and uncertain without any guide to its interpretation.

In considering the definition of key terms under the legislation, the Commission draws attention to the following definitions which have been developed through consultations of experts and discussed at the OHCHR regional expert workshops on incitement:

- “Advocacy” is explicit, intentional, public and active support and promotion of hatred towards the target group;
- “Incitement” refers to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups;
- “Discrimination” is understood as any distinction, exclusion or restriction made on the basis of race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, language, religion, political or other opinion, age, economic position, property, marital status, disability, or any other status that has the effect or purpose of impairing or nullifying the recognition, enjoyment or

¹²⁶ Head 8 – “2. Evidence of comments, written statements, gestures or other indications by the defendant of hostility toward a protected characteristic immediately before, during or after the event”.

exercise, on an equal footing, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of public life;

- “Hostility” is a manifestation of hatred beyond a mere state of mind. As highlighted by an expert at the regional workshops on the prohibition of incitement, this concept has received scant attention in jurisprudence and requires further deliberation;
- “Violence” is the use of physical force or power against another person, or against a group or community, which either results in, or has a high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation.¹²⁷

The UN Rabat Plan of Action sets out, pursuant to Article 12 of the ‘Camden Principles’, national legal systems should make it clear, either explicitly or through authoritative interpretation, that the terms:

- ‘hostility’ refers to intense and irrational emotions of opprobrium, enmity and detestation towards the target group;
- ‘advocacy’ is to be understood as requiring an intention to promote hatred publicly towards the target group;
- ‘incitement’ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.¹²⁸

In its General Policy Recommendation No. 15 on Combating Hate Speech, ECRI provides that:

- “hostility” shall mean a manifestation of hatred beyond a mere state of mind;
- “incitement” shall mean statements about groups of persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them.¹²⁹

¹²⁷ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 44.

¹²⁸ United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) fn. 5.

¹²⁹ European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 15.

The Commission recommends that robust definitions of key terms within the legislation – such as hostility and incitement – be included under Head 2.

Protected characteristic (Head 2)

Head 2 sets out that:

““protected characteristic” means race; colour; nationality; religion, ethnic or national origin; sexual orientation; gender; or disability.”

The Commission welcomes that the General Scheme expands on the list of grounds under the *Prohibition of Incitement to Hatred Act 1989* by including disability and gender (which includes gender expression or identity). However, the grounds are not fully aligned with the Equality Acts,¹³⁰ excluding the grounds of civil status, family status and age. It also excludes a number of grounds protected under the Charter, the ECHR and ICCPR, including language, political or other opinion, social origin, genetic features, property, birth or other status.¹³¹ The ECtHR has interpreted the scope of ‘other status’ under Article 14 ECHR to include age,¹³² parental status,¹³³ marital status,¹³⁴ immigration status,¹³⁵ and employment status.¹³⁶

The Department of Justice’s report on the public consultation, ‘Legislating for Hate Speech and Hate Crime in Ireland’, states the protected characteristics under the General Scheme are:

“those who are most prominently targeted.”¹³⁷

The report does provide:

¹³⁰ Equal Status Acts 2000–2018 and Employment Equality Acts 1998–2015.

¹³¹ Article 21 of the Charter, Article 13 of the ECHR, and Article 2 and Article 26 of ICCPR.

¹³² *Schwizgebel v. Switzerland*, no. 25762/07, ECHR 2010, § 85.

¹³³ *Weller v. Hungary*, no. 44399/05, 31 March 2009.

¹³⁴ *Şerife Yiğit v. Turkey* [GC], no. 3976/05, 2 November 2010.

¹³⁵ *Hode and Abdi v. the United Kingdom*, no. 22341/09, 6 November 2012, § 47.

¹³⁶ *Valkov and Others v. Bulgaria*, nos. 2033/04 and 8 others, 25 October 2011, § 115.

¹³⁷ Department of Justice, [Legislating for Hate Speech and Hate Crime in Ireland Report on the Public Consultation 2020](#) (2020) p. 40.

“[i]f evidence emerges that a particular characteristic which is not protected under the legislation requires such protection, this should be revisited in due course.”

However, there is no clarity about what evidence or data is required, and who is responsible for deciding that the grounds should be revisited. As already noted, there are deficiencies in Ireland’s collection and reporting of disaggregated data on hate speech and hate crime, which raises concern as to whether the available data adequately reflects the lived reality for individuals and groups who are the victims of hate crime and incitement. In this regard, the Commission highlights the importance of ensuring the effective participation of groups, including groups who do not identify with one or any of the protected characteristics, in the design and development of this legislation.

Crucially, the Commission notes that this legislation is being progressed at the same time as the Minister for Children, Equality, Disability, Integration and Youth is conducting a Review of the Equality Acts.¹³⁸ In particular, it will include a review of the current definitions of the protected grounds, including in relation to disability, as well as consideration of the introduction of a socio-economic ground and the amendment of the gender ground. It is vitally important that the outcome of this Review inform the design and implementation of this legislation, in terms of the list of protected characteristics and the definitions of the grounds.

The Commission recommends that the list of protected characteristics under Head 2 should include civil status, family status and age, in keeping with the current protected grounds under the Equality Acts.

The Commission recommends that the list of protected characteristics under Head 2 and the definition of the grounds be informed by the outcome and recommendations of the Government’s Review of the Equality Acts.

¹³⁸ Department of Children, Equality, Disability, Integration and Youth, [Minister O’Gorman announces review of the Equality Acts](#) (press release, 22 June 2021).

The Commission recommends that the Department of Justice sets out a clear process or mechanism for considering whether additional protected characteristics are to be added to the legislation.

Incitement to hatred (Part 1: Head 3)

Head 3(1)¹³⁹ and (3)¹⁴⁰ set out the new offences of incitement to hatred; with the repeal of the *Prohibition of the Incitement to Hatred Act 1989* under Head 10. In creating these new offences, there is a need to ensure that these provisions align with protections for the right to freedom of expression. Any interference with the right to freedom of expression must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. For a restriction to be prescribed by law it must comply with the principle of legal certainty; the law must be sufficiently clear and precise to enable a person to regulate their conduct and it must be accessible to the public.¹⁴¹ Individuals should be able to foresee the legal consequences of their action.

The Commission recommends that consideration be given as to whether the criminal offences under Head 3 are sufficiently clear and precise as to the scope of the conduct criminalised under the General Scheme.

The standard of recklessness (Head 3(1))

Head 3(1) provides that a person is guilty of an offence if they communicate to the public 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. A key issue to be examined in creating new incitement to hatred offences is whether recklessness is a sufficient standard to ground a conviction for incitement to hatred; or alternatively, is intent to incite required to be demonstrated. As restrictions on hate speech can have chilling

¹³⁹ Head 3(1) provides that “A person is guilty of an offence who – communicates to the public or a section of the public by any means, for the purpose of inciting, or being reckless as to whether such communication will incite, hatred against another person or group of people due to their real or perceived association with a protected characteristic.”

¹⁴⁰ Head 3(3) provides that “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.”

¹⁴¹ *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015 (extracts) § 131. See also United Nations Human Rights Committee, [General Comment No. 34 Article 19: Freedoms of opinion and expression](#), CCPR/C/GC/34 (12 September 2011) para. 25.

effects on freedom of expression, the Commission is of the opinion that specific attention should be paid to the standard required to ground a conviction under this proposed provision to ensure compliance with the standards on balancing the prohibition of hate speech with the right to freedom of expression.

However, the Commission acknowledges that there is a lack of definitional clarity on incitement to hatred, and in some respects there are contradictory statements of principle. There is a different standard of prohibition under CERD in comparison to ICCPR; Article 20 of ICCPR refers to 'advocacy' of incitement while CERD refers to communications which result in incitement. It would appear under CERD that a person may be criminally liable for communicating hateful speech irrespective of their intention. However, under the jurisprudence of United Nations Human Rights Committee¹⁴², and to some extent the ECtHR,¹⁴³ it appears to be necessary that the communicator be advocating incitement; i.e. they must intend to incite.¹⁴⁴

The UN Rabat Plan of Action states that Article 20 of the ICCPR anticipates intent, and that negligence or recklessness are not sufficient for an act to be an offence under Article 20.¹⁴⁵ This is because the article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. The human rights organisation, Article 19, have, in a 2010 report commissioned for the UN Office of the High Commissioner for Human Rights, also discussed the appropriate threshold for invoking Article 20 of the ICCPR:

¹⁴² The Human Rights Committee, in the *Faurisson* case expressed concern about the scope of the law being applied, which prohibited any questioning of the facts in respect of the Holocaust established by the Nuremberg Charter. Although the law was potentially problematical because it did not require intent, in the particular circumstances of the case, the intent of the speaker was present, and therefore the conviction was not a breach of the right to freedom of expression. This decision would suggest that the Human Rights Committee regards intent as required to meet the test of necessity under Article 19(3) of the ICCPR. See *Faurisson v France*, Communication No. 550/1993, CCPR/C/58/D/550/1993 (16 December 1996). See also Toby Mendel, [Study on International Standards Relating to Incitement to Genocide or Racial Hatred: For the UN Special Advisor on the Prevention of Genocide](#) (April 2006) p. 47.

¹⁴³ *Jersild v. Denmark*, no. 15890/89 (September 1994) para. 30.

¹⁴⁴ A detailed and helpful analysis of these complex issues can be found a report on '*Incitement to Racial Hatred*', commissioned on behalf of UN Special Advisor on the Prevention of Genocide, and authored by Toby Mendel; Toby Mendel, [Study on International Standards Relating to Incitement to Genocide or Racial Hatred: For the UN Special Advisor on the Prevention of Genocide](#) (April 2006) pp. 35–36.

¹⁴⁵ United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 29(c).

“It is worth noting that in a minority of European states, a threshold lower than intent, such as recklessness, is considered as sufficient to demonstrate incitement. For example, in Norway, the offence of incitement to hatred may be committed willingly or through gross negligence. ARTICLE 19 rejects this approach on the grounds that it does not meet article 20’s wording or its principles, particularly in relation to “advocacy,” which must be understood as intentional action. In order for the protection to be enforceable, in the absence of guilty plea, the courts can determine intent from various sources. The courts can look at questions such as how explicit was the language used or whether the language was direct without being explicit. They can and should consider the tone of the speech and the circumstances in which it was disseminated. Intent can be also determined from the scale and repetition of the communication (e.g. if the inciter repeated the communication over time or on several occasions, it might be more likely that there was an intent to incite the action). However, if the court can identify a legitimate objective (such as “historical research, the dissemination of news and information, and the public for the speech, other than to incite to discrimination, hostility or violence, then the speech should fall short of the threshold.”¹⁴⁶

¹⁴⁶ Article 19, [Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred Work in Progress](#), a study prepared for the regional expert meeting on article 20, Organized by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010, pp. 11–12.

Also of relevance is Article 1 of the Framework Decision, which expressly requires that:

“Each Member State shall take the measures necessary to ensure that the following **intentional** conduct is punishable:

(a) publicly inciting to violence or hatred 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.”¹⁴⁷

On the other hand with regard to whether recklessness is an appropriate standard, ECRI General Policy Recommendation No. 15 on Combating Hate Speech provides that:

“intent to incite the commission of acts of violence, intimidation, hostility or discrimination is not essential for this especially serious form of hate speech. Rather, it is considered also to be capable of being used where the commission of those acts can reasonably be expected to be the effect of using the hate speech concerned. Where this effect can reasonably be expected from a particular use of hate speech, it would thus be reckless for it to be used.”¹⁴⁸

ECRI has stated that this approach is consistent with the rulings of the ECtHR, which has upheld the compatibility with Article 10 of the ECHR of the imposition of criminal sanctions for remarks made where it should have been appreciated that these were likely to exacerbate an already explosive situation.¹⁴⁹

The above discussion illustrates that there is no definitive international consensus on whether recklessness is an appropriate standard to ground a conviction. However, as the weight of evidence suggests that compliance with international standards such as Article 20(2) of the ICCPR and the Framework Decision requires only intentional

¹⁴⁷ Article 1 of the [EU 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](#).

¹⁴⁸ ECRI state that “the element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used.” European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 18.

¹⁴⁹ ECRI refer to the ECtHR cases: *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997 and *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, 8 July 1999. See European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 19.

conduct be criminalised, it is important that there is further consideration of whether the inclusion of the standard of recklessness potentially risks criminalising conduct and speech, which is protected under Article 40.6 of the Constitution, Article 10 of the ECHR and Article 19(2) of the ICCPR.

The Commission acknowledges the complexities presented in setting a threshold for the offence of incitement to hatred so as to ensure the legislation is effective in practice. The requirement of intent sets out a high threshold which may impact on the number of arrests, prosecutions and convictions under this legislation. In light of the lack of prosecutions under the *Prohibition of Incitement to Hatred Act 1989*, the Commission recognises that the standard of recklessness may contribute to a more effective criminal justice response to incitement to hatred and greater protection for individuals and groups from incitement to hatred. However, that is not to say that, if the threshold for the offence is set as intent, any difficulties likely to arise in respect of proving intent in those cases serious enough to amount to incitement are insurmountable. In this regard, the Commission notes that, in terms of proving an incitement offence, if a communication is made publicly, which a court is satisfied reaches the severity required to amount to incitement to hatred, then it may be readily inferred from all the circumstances that the communicator intended to incite hatred. Prosecutions would also be assisted by the inclusion of the presumptions, in Head 3(6), that the person publishing or communicating the material knew what that material contained and understood what it meant. Furthermore, the Commission stresses the importance of education and training on responding to incitement to hatred for the relevant criminal justice actors; as well as training and education for the judiciary on the elements of incitement to hatred, including on establishing the intent underlying a crime. Greater knowledge of the provisions of the legislation and the importance of responding to incitement to hatred should contribute to more effective criminal justice responses to incitement to hatred.

The Commission recommends that the standard of recklessness in Head 3(1) is reviewed to consider whether it risks criminalising conduct and speech, which is protected under Article 40.6 of the Constitution, Article 10 of the ECHR and Article 19(2) of the ICCPR.

Penalties for the offences (Head 3(2) and (4))

Head 3(2)¹⁵⁰ and (4)¹⁵¹ set out the penalties for the offences of incitement to hatred. The ECtHR has found that an important factor to be taken into account when assessing the proportionality of an interference with freedom of expression is the nature and severity of the penalties imposed.¹⁵² The UN Special Rapporteur has stated that any imposition of sanctions by a court should be in strict conformity with the principle of proportionality.¹⁵³ Article 3(1) of the Framework Decision sets out that publicly inciting violence or hatred should be punished by effective, proportionate and dissuasive criminal penalties.¹⁵⁴ This conduct should be punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.¹⁵⁵

The Commissions recommends that consideration be given to whether the penalties under Head 3(2) and (4) are proportionate to the legitimate aim of the legislation.

Defences (Head 3(5)(c))

Under Head 3(5)(c),¹⁵⁶ where it provides a defence in the case of dissemination or distribution of material by an individual, it refers to the phrase 'to stir up hatred'. This is the only reference to this phrase in the General Scheme, and there is no definition of this term in the General Scheme. The phrase 'to stir up hatred' is used in the *Prohibition of Incitement to Hatred Act 1989*; however, due to difficulties in interpreting the

¹⁵⁰ Head 3(2) provides: "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 exceeding 12 months, or both, or on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years, or both."

¹⁵¹ Head 3(4) provides: "A person guilty of an offence under paragraph (3) shall be liable – on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years, or both."

¹⁵² *Vejdeland and others v. Sweden*, no. 1813/07, 9 February 2012, § 58.

¹⁵³ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 50(e).

¹⁵⁴ Article 3(1) of the [EU 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](#); European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination](#), adopted on 13 December 2002 and amended on 7 December 2017 (2018) p. 8.

¹⁵⁵ Article 3(2) of the [EU 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](#).

¹⁵⁶ Head 3(5)(c) provides: "In the case of dissemination or distribution of material by an individual, - that they were unaware and had no reason to suspect that the communication concerned was intended or likely, in all the circumstances including the manner in which they either obtained or disseminated it, to stir up hatred."

meaning of the phrase,¹⁵⁷ the Commission is of the view that this phrase should not be included in the legislation and should be amended to refer 'to incite hatred'.

The Commission recommends Head 5(3)(c) be amended to replace the reference 'to stir up hatred' with the phrase 'to incite hatred'.

Likelihood of harm resulting from incitement to hatred (Head 3(7)(b))

Head 3(7)(b) provides that a person may be found guilty of an offence under Head 3 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. In regards to whether it should be necessary to show a likelihood of harm resulting from the hate speech, the UN Rabat Plan of Action recommends that, as only the most severe forms of hate speech should be prohibited, some degree of harm resulting from the hate speech must be identified:

"... incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless some degree of risk of resulting harm must be identified.

It means the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action,

recognising that such causation should be rather direct."¹⁵⁸

ECRI, the UN Special Rapporteur, and the 'Camden Principles' all set out that incitement refers to statements about a group that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.¹⁵⁹ However, on the other hand in a report on 'Incitement to Racial Hatred', commissioned on behalf of UN Special Advisor on the Prevention of Genocide, and authored by Toby Mendel. Mendel characterises the approaches of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, as not requiring 'actual action' as result of hate

¹⁵⁷ See IHREC, [Review of the Prohibition of Incitement to Hatred Act 1989](#) (December 2019).

¹⁵⁸ United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 29(f).

¹⁵⁹ Principle 12.2; see Article 19, [The Camden Principles on Freedom of Expression and Equality](#) (April 2009); United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/67/357 (7 December 2012) para. 44; European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015 (21 March 2016) p. 15.

speech, rather the proscribed result is simply a state of mind in which hostility towards a target group is harboured, even though this is not accompanied by any urge to take action to manifest itself.¹⁶⁰

Therefore, as discussed elsewhere, there is a lack of consistency between the various international bodies as to the key requirements of the criminal offence of incitement to hatred; including with regard to whether the likelihood of harm is a necessary ingredient of the offence. There is also an element of inconsistency within the General Scheme with regard to proof of the publishing of material. Under Head 3(5)(a) and (b) it appears that the necessary proof that the inciting material which is being published or disseminated was 'intended or likely...to stir up hatred'. This appears to mean that the inciting material must be capable of and indeed, likely to result in harm or unlawful discrimination. This appears to contradict Head 3(7) which expressly provides that it is not necessary to show that harm or discrimination is likely to result from the communication.

There is also a lack of coherence under the General Scheme with regards to the requirement under Head 3(7) that it is not necessary to show that any actual harm has occurred or is likely to occur as a result of the incitement, which seems to contradict the definition of 'hatred' under Head 2 which sets out that hatred must be of a nature:

"likely to lead to harm or unlawful discrimination".¹⁶¹

This illustrates the need for consistency across the legislation to ensure the provisions are effective in criminalising incitement to hatred. Furthermore, the development of this provision needs to carefully balance the prohibition on incitement to hatred with the right to freedom of expression, and the Oireachtas needs to consider whether providing that an individual can be found guilty of incitement to hatred if their incitement did not lead to any actual harm or unlawful discrimination meets the threshold of legality, proportionality and necessity. There are several options available to address the contradictions between Head 2 and Head 3(7), including:

¹⁶⁰ Toby Mendel, [Study on International Standards Relating to Incitement to Genocide or Racial Hatred: For the UN Special Advisor on the Prevention of Genocide](#) (April 2006) p. 15.

¹⁶¹ Head 2 of the General Scheme.

- (a) Amending the definition of 'hatred' to provide that the incitement must be such as to give rise to the likelihood or alternatively, the serious/genuine risk of detestation, significant ill-will or hostility on the part of the person receiving the communication. This would remove the requirement that there be a likelihood of unlawful or harmful actions or consequences. As this would make the offence easier to prove due to the lower level of severity, the Commission do consider it important that the *mens rea* for the crime in these circumstances is intent.
- (b) Alternatively, amending the definition of 'hatred' to provide that incitement must lead to the serious risk/genuine risk of harm or unlawful discrimination, rather than be likely to lead to such harm or unlawful discrimination. This would reconcile the definition of hatred with the requirements under Head 3(7).
- (c) Alternatively, Head 3(7) could be removed so that it is required to demonstrate a likelihood of harm or unlawful discrimination resulting from the incitement.
- (d) If the General Scheme retains the requirement that the inciting communication be such as to lead to the likelihood of harm or unlawful discrimination, then these key terms must be defined with more clarity.

The Commission recommends that the Committee prioritise amending the General Scheme to remedy the contradiction between Head 2 and Head 3(7), in order to give the legislation internal coherence, meet minimum standards of certainty and foreseeability, and make it compatible with international standards.

Offences by bodies corporate (Head 3)

The Commission is concerned that the provisions providing for criminal liability of bodies corporate may not comply with international standards. For example, criminal liability under Head 3(3) is subject to certain defences under Head 3(5) including a defence for a body corporate that it was:

“unaware and had no reason to suspect that this particular content was intended or likely to incite hatred.”¹⁶²

This seems to suggest a standard of recklessness for the dissemination of inciting material by a body corporate; as, if there is any reason to suspect the content was intended or likely to incite hatred, then the defence under Head 3(5) cannot be availed of. This sets quite a low threshold for a finding of recklessness, which requires further consideration of whether a conviction should be grounded on this standard where no intention was present.

It is also problematic that under Head 3(6) there is a presumption that an individual or a body corporate ‘knew what that material contained’ and ‘understood what it meant’. This presumption of knowledge as well as the standard of criminal liability may have a chilling effect on free speech on social media platforms. There is reluctance amongst regulators and EU institutions to treat social media companies as publishers or to impose heightened monitoring obligations due to the risk it may have on free speech online. Instead monitoring reports of the European Commission on its ‘Code of Conduct on countering illegal hate speech online’ show broad compliance and effective voluntary strategies by the largest social media companies to limit hate speech on their platforms.¹⁶³ It should also be noted that the presumption of knowledge and the low recklessness threshold are in addition to other required safeguards in the General Scheme; the body corporate must have “in place reasonable and effective measures to prevent dissemination of communications inciting hatred generally” and must be “complying with those measures at the time”. If these conditions are satisfied, the value of criminalising failures to remove incidents of incitement to hatred where they may have missed due to negligence is to be questioned.

¹⁶² Head 3(5)(b) of the General Scheme.

¹⁶³ See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#theeucodeofconduct#.

The Commission is concerned with the compliance of these provisions with EU law, specifically the *E-Commerce Directive*¹⁶⁴ which provides that internet intermediaries are generally immune from liability in respect of illegal content hosted on their sites.¹⁶⁵ This Directive is due to be updated in the *Digital Services Act*; in the explanatory memorandum of the Draft Act, it states that:

“The proposed legislation will preserve the prohibition of general monitoring obligations of the e-Commerce Directive, which in itself is crucial to the required fair balance of fundamental rights in the online world. The new Regulation prohibits general monitoring obligations, as they could disproportionately limit users’ freedom of expression and freedom to receive information, and could burden service providers excessively and thus unduly interfere with their freedom to conduct a business. The prohibition also limits incentives for online surveillance and has positive implications for the protection of personal data and privacy.”¹⁶⁶

The Commission also notes that the report of the UN Special Rapporteur on online hate speech does not include any recommendations on criminalising online social media companies for the inadvertent publishing of hate.¹⁶⁷ Instead, the Special Rapporteur has made recommendations on fostering cooperation between States and these companies to prevent hate speech, and the need for companies to adhere to human rights standards and the definitions of key terms within the UN Rabat Plan of Act as part of their efforts to address hate speech.

The Commission recommends the Committee give further consideration to whether the criminalisation of a body corporate is compatible with international standards.

¹⁶⁴ [Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market \('Directive on electronic commerce'\)](#).

¹⁶⁵ Article 15 provides that Member States shall not impose a general obligation to monitor information they transmit or an obligation to seek out information about illegal activity.

¹⁶⁶ [Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services \(Digital Services Act\) and amending Directive 2000/31/EC: Explanatory Memorandum](#) (15 December 2020).

¹⁶⁷ United Nations General Assembly, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/74/486 (9 October 2019).

If bodies corporate are held liable under the legislation, the Commission recommends that Head 3(5) be amended to remove the reference to “likely to incite hatred”, to ensure that the General Scheme only addresses conduct that is intentional.

Head 3(8) provides jurisdiction for prosecuting offences committed online, in circumstances where the perpetrator or the victim are present in the State. It also covers offences, which involve material hosted on an information system in the State. The Commission considers that the meaning of ‘hosted’ requires further clarity, and should be defined under Head 2 of the General Scheme. It is unclear whether information systems of large internet intermediaries, which have Ireland as a base of operations, are ‘hosted’ in the State and therefore these internet intermediaries may not be addressed under this General Scheme.

The Commission recommends that Head 2 be amended to include a definition of ‘hosted’.

The Commission recommends that consideration be given to whether prosecutions for offences using an information system where the offence involves material hosted on an information system in the State adequately provides for prosecutions of internet intermediaries, which have Ireland as a significant centre of their activities.

Inclusion of additional expression-based offences (Part 1)

The Commission is of the view that the reform of the law on incitement to hatred provides an opportunity to consider the criminalisation of other severe forms of hate speech within Irish law so as to bring Ireland in line with international standards. In particular, the Commission is of the opinion that the proposed legislation should provide for the offences of incitement to ‘hostility’ and incitement to ‘violence’ in addition to incitement to hatred. This is in line with Article 20(2) of the ICCPR which requires States to prohibit by law:

“any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁶⁸

Broadening the list of expression-based offences has been a specific recommendation of ECRI; who has recommended that Irish criminal law include the offences:

- public incitement to violence and to discrimination and defamation against a person or group on grounds of their race, colour, language, religion, citizenship, or national or ethnic origin;
- the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a group of persons on grounds of their race, colour, language, religion, nationality or national or ethnic origin;
- the creation or leadership of a group which promotes racism, support for such a group and participation in its activities.¹⁶⁹

Guidance can also be taken from the Committee on the Elimination of Racial Discrimination, who has recommended that the States Parties declare and effectively sanction as offences punishable by law:

- (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;
- (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;
- (c) Threats or incitement to violence against persons or groups on the grounds in (b) above;
- (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination; and

¹⁶⁸ Article 20(2) of the ICCPR.

¹⁶⁹ As required under ECRI's General Policy No. 7 on national legislation to combat racism and racial discrimination; see European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 12.

- (e) Participation in organizations and activities which promote and incite racial discrimination.¹⁷⁰

The Commission recommends that Part 1 of the General Scheme be amended to include additional severe forms of hate speech, including the offences of incitement to hostility and incitement to violence.

Hate Crime (Part 2: Heads 4–8)

Selection of offences aggravated by prejudice (Heads 4–6)

Heads 4, 5 and 6 contain a series of proposed amendments to existing laws, namely the *Non-Fatal Offences Against the Person Act 1997*,¹⁷¹ the *Criminal Damage Act 1991*¹⁷² and the *Criminal Justice (Public Order) Act 1994*¹⁷³. Each amendment creates a new form of an existing offence under these Acts where the offence was aggravated by prejudice. While the Commission welcomes the introduction of these substantive offences aggravated by prejudice, the Commission is uncertain why these particular offences were included in the General Scheme in the absence of any rationale or data in the Explanatory Notes of the General Scheme or in any communication from the Government. The Commission notes that the Department of Justice’s planned public consultation on hate crime to inform the development of hate crime legislation did not happen.¹⁷⁴ The Commission considers that if there is disaggregated data available to

¹⁷⁰ United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation No. 35 Combatting racist hate speech](#), CERD/C/GC/35 (26 September 2013) para. 13.

¹⁷¹ Head 4 proposes to amend the *Non-Fatal Offences Against the Person Act 1997* by inserting seven new sections, including: Section 2A – assault aggravated by prejudice; Section 3A – assault causing harm, aggravated by prejudice; Section 4A – causing serious harm, aggravated by prejudice; Section 5A – threats to kill or cause serious harm, aggravated by prejudice; Section 9A – coercion aggravated by prejudice; Section 10A – harassment aggravated by prejudice; Section 13A – endangerment aggravated by prejudice.

¹⁷² Head 5 proposes to amend the *Criminal Damage Act 1991* by inserting a new Section 2A – damaging property, aggravated by prejudice.

¹⁷³ Head 6 proposes to amend the *Criminal Justice (Public Order) Act 1994* by inserting four new sections, including: Section 6A – threatening, abusive or insulting behaviour in a public place, aggravated by prejudice; Section 7A – distribution or display in a public place of material which is threatening, abusive, insulting or obscene, aggravated by prejudice; Section 11A – entering building, etc. with intent to commit an offence, aggravated by prejudice; Section 18A – assault with intent to cause bodily harm or commit an indictable offence, aggravated by prejudice.

¹⁷⁴ When announcing a call for submissions for the review of the *Prohibition of Incitement to Hatred Act 1989*, the Department of Justice stated that a public consultation will be held at a later date to inform the development Department of Justice, [Review of the Prohibition of Incitement to Hatred Act 1989: Public Consultation](#) (October 2019).

show the types of hate crime offences recorded by An Garda Síochána, this should be made publically available to ensure transparency in the design of the legislation.

The Commission is of the opinion that there appear to be some omissions in the list of aggravated offences. For example, while criminal damage, contrary to section 2 of the *Criminal Damage Act 1991* is covered, it would seem appropriate that threats to commit criminal damage (such as arson) under section 3 of the 1991 Act would also be covered. While the offence of entering a building to commit an offence under section 11 of the *Criminal Justice (Public Order) Act 1994* is covered, the similar and arguably more serious offences of burglary and aggravated burglary under sections 12 and 13 of the *Criminal Justice (Theft and Fraud Offences Act) 2001* are not also covered. The offence of false imprisonment contrary to section 15 of the *Non-Fatal Offences against the Person Act 1997* might well occur at the same time as such offences, or along with an assault offence of the type characteristic of a hate crime. Robbery contrary to section 14 of the *Non-Fatal Offences against the Person Act 1997* may also warrant an express aggravating provision; where an assault hate crime takes place spontaneously, for example perpetrated by a group targeting a passer-by, it may be linked with an opportunistic robbery.

The Commission is of the view that further consideration be given to including the above offences and other additional offences, such as sexual offences, within the legislation. While sexual offences is a broad group of offences, the Commission considers that there should be a focus on any nexus between an offence and the hate motivation. Consultation with affected groups in the designation of existing offences as offences aggravated by prejudice is critical in ensuring that the legislation adequately and appropriately addresses the most prevalent offences aggravated by prejudice. While Head 7 does provide that where an existing criminal offence is aggravated by prejudice, this will be considered by the court in determining the appropriate sentence; the Commission is concerned that this is not sufficient for offences, which are particularly prevalent against individuals or groups due to their actual or perceived protected characteristic. The Commission is of the view that unless there is a specific aggravated form of an existing offence there may be a reluctance or lack of incentive on behalf on members of An Garda Síochána and prosecutors to

gather or present evidence of prejudicial motivation for the offence and instead the focus will be on charging or prosecuting the basic offence.

The Commission recommends that consideration be given to whether there are other offences where individuals are the victim of harm which should be included in this legislation.

Motivated by prejudice on the part of the perpetrator against a protected characteristic (Heads 4–7)

Heads 4–7 provide that an offence will be aggravated by prejudice if it is motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021. The Commission is concerned that the protection under these provisions differ from that under Head 3(1) which criminalises hatred against another person or group of people due to their real or perceived association with a protected characteristic. The provisions under Head 4–7 would appear to exclude victims of offences who are targeted due to their perceived association with a protected characteristic. This could potentially exclude crimes perpetrated against human rights defenders and civil society groups who through their work in support of a protected group or groups may also be targeted.¹⁷⁵

The Commission recommends that Heads 4–7 be amended to provide that an offence will be aggravated by prejudice if it is motivated by prejudice on the part of the perpetrator against person or group of people due to their real or perceived association a protected characteristic.

Determining whether an offence is motivated by prejudice (Head 8)

The Commission welcomes the inclusion under Head 8 of a list of indicators, based on ODIHR’s list of bias indicators, to help judges and juries in assessing whether a particular offence was motivated by prejudice. However, the Commission is concerned

¹⁷⁵ The ECtHR has held that “the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence ... concerns not only acts of violence based on a victim’s actual or perceived personal status or characteristics but also acts of violence based on a victim’s actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic”; *Škorjanec v. Croatia*, Application no. 25536/14, 26 March 2017, § 56.

that these factors seem to address one-off incidents rather than circumstances where an offence or offences is repeated or take place over an extended period of time. This may be particularly the case for persons with disabilities who, due to a physical, mental, intellectual or sensory impairment, may have limited or no awareness that they are a victim of a crime. Therefore, a key concern in developing this legislation is examining how to balance the rights of persons with differing capacities in the context of hate crime.

People with disabilities are frequently the targets of hate crime;¹⁷⁶ however, disability hate crime:

“remains widely hidden and misunderstood.”¹⁷⁷

Disability hate crime is unique in comparison to other types of hate crime, as it can be committed repeatedly over periods of weeks, months and years and be perpetrated by persons who are close to the victims such as family, carers, friends and neighbours.¹⁷⁸ ‘Mate Crime’ is a particular feature of hate crime, as offenders befriend persons with disabilities so as to exploit and take advantage of them. While these offences may not be motivated solely by prejudice but rather by opportunism and ease of exploitation; the Commission notes Head 8 sets out that in determining motivation by prejudice, it is not necessary to show that prejudice was the only or principle motivation for the offence.

Hate crime infringes on the right of persons with disabilities to live independently and their full inclusion and participation in the community,¹⁷⁹ as ongoing experiences of abuse, hostility and discrimination will undoubtedly impact disabled people’s inclusion within the community by restricting opportunities to participate in daily life and avail of

¹⁷⁶ 50% of persons with disabilities report experiences of harassment and cyber harassment, compared with 37% of persons without a disability. 17% of persons with a disability experience physical violence in comparison with 8% of persons without disabilities. See FRA, [Crime, Safety and Victims’ Rights](#) (2021) pp. 40, 56–57. See also European Disability Forum, [EDF Recommendations on EU initiatives on hate speech and hate crime](#) (April 2021) p. 3.

¹⁷⁷ ODIHR, [Factsheet: Disability Hate Crime](#) (2016) p. 2.

¹⁷⁸ European Network on Independent Living, [Disability Hate Crime: A guide for disabled people’s organisations, law enforcement agencies, national human rights institutions, media and other stakeholders](#) (2014) p. 13.

¹⁷⁹ Article 19 of the United Nations Convention on Persons with Disabilities.

community based services.¹⁸⁰ States are obligated to protect persons with disabilities from hate crime; Article 16 of the United Nations Convention on the Rights of Persons with Disabilities provides that:

“States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.”¹⁸¹

Failing to adequately and effectively address disability hate crime within this legislation may contribute to further marginalisation of disabled persons in society.

There is a need to ensure that there are no obstacles to investigating or prosecuting disability hate crime; particularly with evidence from the UK of the low level of prosecutions for disability hate crimes.¹⁸² The underreporting and low level of prosecution of disability hate crime is due in part to assumptions made by the police, prosecutors and the judiciary that perpetrators are motivated by an individual’s perceived vulnerability rather than their impairment.¹⁸³ This notion of perceived vulnerability has been rejected by many disabled victims of crime, who regard the offence as being motivated by a deeper prejudice, hostility or hatred.¹⁸⁴ Criminal justice frameworks or strategies which portray persons with disabilities as vulnerable and in need of protection and care rather than engagement with the criminal justice system serve to obstruct the vindication of the equal right to access to justice and results in

¹⁸⁰ European Network on Independent Living, [Disability Hate Crime: A guide for disabled people’s organisations, law enforcement agencies, national human rights institutions, media and other stakeholders](#) (2014) p. 15.

¹⁸¹ Article 16 of the United Nations Convention on the Rights of Persons with Disabilities.

¹⁸² It is a low level of prosecutions relative both to the number of disabled people in the community, and the extent to which they are targeted for criminal conduct. See Law Commission, [Hate crime laws: A consultation paper](#) (September 2020) pp. 158, 160–161. See also Mark A. Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (October 2017) p. 171.

¹⁸³ Alan Roulstone and Hannah Mason Bish, *Disability, Hate Crime and Violence* (Routledge, 2013); Kay Goodall, Abenaa Owusu-Bempah and Mark A. Walters, *Hate Crime and the Legal Process – Practitioner Guide* (ICCL, 2018) pp. 10–11; Edward Hall, *A critical geography of disability hate crime* (2019) 51 Area 249, p. 252.

¹⁸⁴ Law Commission, [Hate crime laws: A consultation paper](#) (September 2020) p. 360.

further marginalisation and exclusion from society.¹⁸⁵ Persons with disabilities are not inherently vulnerable, rather physical barriers and societal attitudes can result in situational vulnerability for persons with disabilities.¹⁸⁶ Selectively targeting a disabled person because they can be considered 'vulnerable' or an 'easy target' is an expression of bias; and therefore can be considered a hate crime.¹⁸⁷ Failing to recognise within the criminal justice system that there are offences perpetrated against persons with disabilities which are motivated by prejudice can create a culture of impunity for perpetrators and may lead to repeat victimisation.¹⁸⁸

While not all forms of exploitative or hate-motivated conduct may reach the level of criminal conduct, the Commission considers that some potential crimes against disabled persons may be captured by the existing proposed aggravated offences in the General Scheme. The Commission is of the view that other offences that are particular features of disability hate crime could also be added to the legislation; for example, the financial exploitation of disabled persons could potentially be dealt with by creating an aggravated by prejudice form of the offence under the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

In identifying indicators of disability hate crime, the Commission takes note of factsheets prepared by ODIHR on specific forms of hate crime,¹⁸⁹ including disability hate crime, which set out a number of specific questions to identify a bias against people with disabilities, including:

- Do the victims or witnesses perceive the incident as motivated by bias against people with disabilities?
- Was the attack accompanied by insults and accusations targeting people with disabilities?

¹⁸⁵ United Nations Office of the High Commissioner for Human Rights, [International Principles and Guidelines on Access to Justice for Persons with Disabilities](#) (August 2020); European Disability Forum, [EDF Recommendations on EU initiatives on hate speech and hate crime](#) (April 2021) pp. 11–12.

¹⁸⁶ Crown Prosecution Service, [Public statement on prosecuting disability hate crime and other crimes against disabled people](#) (2017) pp. 4–5; Claire Edwards and Nicola Maxwell, [Towards Safe\(r\)Space: Disability and everyday spaces of un/safety and hostility in Ireland](#) (UCC, 2019) pp. 40–41; Law Commission, [Hate crime laws: A consultation paper](#) (September 2020) p. 177.

¹⁸⁷ ODIHR, [Factsheet: Disability Hate Crime](#) (2016) p. 3.

¹⁸⁸ FRA, [Equal protection for all victims of hate crime: The case of people with disabilities](#) (2015) p. 3.

¹⁸⁹ See https://www.osce.org/odihr/hate_crime_factsheets.

- Did the incidents escalate in severity and frequency?
- Did the perpetrator target a victim's disability aids, such as canes or hearing aids?
- Did the perpetrator use excessive violence?
- What was the nature of the attack? Was the victim subjected to cruelty, humiliation or degrading treatment related to their disability?
- Was the perpetrator known to the victim? Disability hate crimes are often perpetrated by "friends," caregivers, acquaintances or neighbours of the victim.
- Where did the attack occur? Disability hate crimes may take place in care institutions and be carried out by staff.
- Did the attack also involve theft by people close to the victim, such as caregivers or family members? This can include the theft of welfare benefits and other forms of exploitation, such as unpaid work.
- Were multiple perpetrators involved in the incident?
- Is there any other clear motive? The lack of other motives is also a reason to consider bias motivation.¹⁹⁰

The Commission emphasises the importance of raising awareness amongst the public, affected groups, the Garda Síochána, prosecutors and the judiciary of the forms of hate crime and how to recognise hate crime.

The Commission recommends that further consideration be given to whether the General Scheme adequately addresses disability hate crime including 'Mate Crime'.

The Commission recommends that the enactment of this legislation be accompanied by the publication of guidance on the specific bias indicators for each form of hate crime against a protected characteristic.

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

Head 9 sets out that it is an offence if a person publicly condones, denies or grossly trivialises any act falling within the definition of a "genocide" in Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. This

¹⁹⁰ ODIHR, [Factsheet: Disability Hate Crime](#) (2016) p. 3.

transposes the requirement under Article 1(c) of the Framework Decision.¹⁹¹ However, Article 1(c) also requires Member States to punish publicly condoning, denying or grossly trivialising crimes against humanity and war crimes as defined under the Statute of the International Criminal Court. There is no explanation in the General Scheme's Explanatory Note for Head 9 for the omission of these offences or why genocide is being treated as distinct from these crimes. In this regard, ECRI has recommended that Irish law should punish the public denial, trivialisation, justification or condoning of crimes of genocide, crimes against humanity or war crimes.¹⁹²

The Commission is concerned that the scope of the provision under Head 9 is wider than the requirements under Article 1(c); as Article 1(c) requires the offence of condoning, denying or grossly trivialising to be:

“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.”¹⁹³

There is no such qualifying condition under Head 9, which may have implications for the right to freedom of expression and whether this restriction is proportionate. The Committee on the Elimination of Racial Discrimination recommends that public denials

¹⁹¹ Article 1(c) punishes publicly condoning, denying or grossly trivialising crimes of genocide as defined in Articles 6 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; see [EU 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](#). While the EU Council Framework refers to penalising publicly condoning, denying or grossly trivialising crimes of genocide as defined under Article 6 of the Statute of the International Criminal Court, the definition of genocide under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide is the exact same as the definition of genocide under Article 6 of the Statute of the International Criminal Court.

¹⁹² European Commission against Racism and Intolerance, [ECRI report on Ireland \(fifth monitoring cycle\)](#), adopted on 2 April 2019 (June 2019) p. 12. ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination specifically sets out that the law should penalise the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes; European Commission against Racism and Intolerance, [ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination](#), adopted on 13 December 2002 and amended on 7 December 2017 (2018) p. 8.

¹⁹³ Article 1(c) of the [EU 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](#).

or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial violence or hatred.¹⁹⁴ The 'Camden Principles' provide that States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined under Article 20(2) of the ICCPR.¹⁹⁵

The Commission recommends that Head 9 be amended to include the offences of publicly condoning, denying or grossly trivialising crimes against humanity and war crimes.

The Commission recommends that further consideration be given to the scope of the provision under Head 9 to ensure it does not disproportionately restrict or limit the right to freedom of expression.

¹⁹⁴ United Nations Committee on the Elimination of Racial Discrimination, [General Recommendation No. 35 Combatting racist hate speech](#), CERD/C/GC/35 (26 September 2013) para. 14.

¹⁹⁵ Principle 12.2; see Article 19, [The Camden Principles on Freedom of Expression and Equality](#) (April 2009).



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