

Sent by email to: minister@justice.ie

Minister Helen McEntee, TD
Department of Justice
51 St Stephen's Green,
Dublin 2,
D02 HK52

30 November 2023

Re: Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill

Dear Minister McEntee,

As I'm sure you're aware, in February 2022, we published our [Legislative Observations](#) to the Oireachtas Joint Committee on Justice on the [General Scheme of the Criminal Justice \(Hate Crime\) Bill](#) ('the General Scheme'). In our submission, we welcomed the legislation but made a range of recommendations on the proposed offences of incitement to hatred and hate-aggravated offences, to better align the legislation with human rights and equality standards.

When the renamed [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) ('the Bill') was published, we conducted an analysis of the Bill to determine how our recommendations had been reflected. With the Bill now in Seanad Éireann, we consider that there are a number of substantive issues, set out below, which remain outstanding in the legislation and which should be addressed through amendments to the Bill. This submission should be read in conjunction with our legislative observations.

In accordance with our mandate, we will continue to analyse the Bill as it progresses through the legislative process.

The IHREC team and I are available to meet with you or your officials in order to discuss these outstanding issues.

Yours sincerely,



Sinéad Gibney
Chief Commissioner

Definition of hatred

We note that the definition of hatred in section 2 has changed from the definition included in the General Scheme.¹ Section 2 provides for a similar definition of hatred as provided for in section 1 of the *Prohibition of Incitement to Hatred Act 1989*. As there has been a low rate of prosecutions and convictions under the 1989 Act, we have concerns in respect of any provisions in this Bill that seek to mirror the provisions in the 1989 Act. Consideration should be given to the language used in the definition of ‘hatred’ for the practical application of the legislation and to ensure successful prosecutions are made when enacted. We consider that hatred should be defined in the Bill to avoid any risk of a jury equating hatred with something less significant than ill-will or hostility. We recommend that the definition of hatred should align with international standards so that it is clear, precise and accessible in terms of the conduct being addressed.² It is our view that the universally understood meaning of ‘hatred’ encompasses all of the adjectives used in the definition in the General Scheme and consideration should be given to reinstating the definition of ‘hatred’ included in the General Scheme into the legislation.

Definition of incitement

We welcome the inclusion of the offence of incitement to violence. We note that no definition of incitement has been included in the Bill. We recommend that a definition be included in the legislation to provide clarity on the offence. Guidance on the definition can be drawn from ECRI³ and the Rabat Plan of Action^{4, 5}

¹ The General Scheme defined hatred as “the 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”.

² International standards such as the European Commission against Racism and Intolerance (ECRI), the United Nations Rabat Plan of Action, and the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. See IHREC, [Submission on the General Scheme of the Criminal Justice \(Hate Crime\) Bill](#) (February 2022) pp. 28–30.

³ ‘incitement’ shall mean statements about groups of persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them: 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.

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

⁵ IHREC, [Submission on the General Scheme of the Criminal Justice \(Hate Crime\) Bill](#) (February 2022) pp. 30–32.

List of protected characteristics

We note that Section 3 includes two new grounds: descent and sex characteristics; along with the grounds that were included in the General Scheme. This list of grounds is not fully aligned with the Equality Acts, excluding the grounds of civil status, family status and age.⁶ We note that the review of the Equality Acts is ongoing, and we recommend that the list of protected characteristics and their definitions should be informed by the outcome and recommendations of the Government's Review of the Equality Acts.⁷ This may require amendment to this legislation if it is enacted before the Review concludes.

While we note concerns, raised by a number of Deputies and Senators in Oireachtas debates on the Bill, with the inclusion of the definition of gender, we find that the definition provided in section 3 covers all potential issues that could arise in the context of prosecuting a hate crime. We believe the concerns raised do not remove the justification for having a broad definition of gender in the Bill which encompasses all potential contexts in which hate crime may arise. In this regard, we are in agreement with your view that the definition is intended to be specific to the context of this legislation and it future proofs the legislation in terms of the evolving language in this area.⁸

The requirement that a likelihood of hatred will result from the incitement

We note that currently the requirement in the Bill is that there must be proof that a likelihood of hatred will result from the inciting conduct. We consider that this is not an effective or appropriate threshold standard for criminalisation. We are of the view that a criminal sanction should not depend on a likelihood of success, as long as there was an intention and a real risk that hatred would result. We recommend that the threshold should be a 'real risk' of hatred resulting from the conduct.⁹ A standard less than likelihood is consistent with international standards, such as the Rabat Plan of Action¹⁰ and ECRI¹¹. It may be preferable to retain the original formulation set

⁶ IHREC, [Submission on the General Scheme of the Criminal Justice \(Hate Crime\) Bill](#) (February 2022) pp. 32–34.

⁷ In our 2023 submission to the Review of the Equality Acts, we recommend the introduction of a socio-economic ground and a criminal conviction ground. We also recommend changes to the gender identity ground (to include explicit reference to, and define gender identity, gender expression, and sex characteristic) and family status ground (to be renamed the 'carer' ground). IHREC, [Submission on the Review of the Equality Acts](#) (2023).

⁸ [Seanad Second Stage Debate on the Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) (13 June 2023); [Seanad Second Stage Debate \(resumed\) on the Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) (21 June 2023).

⁹ IHREC, [Submission on the General Scheme of the Criminal Justice \(Hate Crime\) Bill](#) (February 2022) pp. 41–42.

¹⁰ United Nations, [Rabat Plan of Action](#), A/HRC/22/17/Add.4 (11 January 2013) para. 29(f).

¹¹ 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.

out in the General Scheme under subhead 7 of Head 3: “(7) A person may be found guilty of an offence under this section irrespective of; (a) whether or not the communication the subject of the offence was successful in inciting any other person to hatred” with the following additional text added, ‘... if it has been proven that the communication would give rise to a real risk of hatred on the part of a recipient’.

Defence relating to freedom of expression

We are cognisant of the need to balance the prohibition on hate speech against the right to freedom of expression.¹² We are of the view that the discourse defence created by the Bill is objective in nature as it is linked to what a ‘reasonable person’ thinks is necessary for the purposes of the discourse. We note the equivalent Scottish legislation, the *Hate Crime and Public Order (Scotland) Act 2021*, contains a provision stating: “in determining whether behaviour or communication was reasonable, particular regard must be had to the importance of the right to freedom of expression by virtue of Article 10 ECHR, including the general principle that the right applies to the expression of information or ideas that offend, shock or disturb.” We are of the view that it may be helpful to clarify in the Bill that the perspective of the reasonable person is one which recognises that the right to freedom of expression protects ideas that ‘shock, offend or disturb’. We also recommend that the right to freedom of expression under Article 10 ECHR should be explicitly referenced in the legislation.

¹² We have previously commented that 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 frontier. We have also highlighted that the right to 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. IHREC, [Submission on the General Scheme of the Criminal Justice \(Hate Crime\) Bill](#) (February 2022) pp. 8–10.

Penalties for the incitement offences

Section 7(5) provides that a person guilty on an offence of incitement to violence or hatred may be liable to a sentence of imprisonment not exceeding 5 years or both. Contrast this provision with the Article 3 of the Framework Decision which provides that incitement should be punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment. We recommend that consideration should be given to whether the penalties are proportionate to the legitimate aim of the legislation.¹³

Legal burdens of proof

We note that section 10(3) includes a presumption that in a prosecution for an offence under section 10 it shall be presumed an accused person was in possession of material likely to incite violence or hatred. We are of the view that this provision may be declared unconstitutional if it is interpreted as providing for a legal burden, as opposed to an evidential burden, that the accused must prove, on the balance of probabilities, that they did not intend to incite hatred. The Supreme Court has recently considered the issue of imposition of legal burdens in the important case of *C.W. v Minister for Justice, Ireland and the Attorney General*¹⁴ (in which we appeared as *amicus curiae*). In our submission, we noted that legislation which reverses the onus of proof interferes with a core procedural right protected by Article 38.1 of the Constitution.¹⁵ In the outcome of the case, the Supreme Court reinforced the view that to create a legal burden of proof, as opposed to an evidential burden, on the balance of probabilities is contrary to Article 38.1 of the Constitution.¹⁶

However, we note that section 10 could be interpreted as creating an evidential (as opposed to a legal) burden of proof. The lack of clarity on this provision is due in part to the provision not undergoing pre-legislative scrutiny. In this regard, we wish to highlight the potential constitutional issue that may arise with the provision and advise that due consideration must be given to

¹³ IHREC, [Submission on the General Scheme of the Criminal Justice \(Hate Crime\) Bill](#) (February 2022) p. 29.

¹⁴ The Supreme Court considered whether it is constitutionally permissible to impose a legal burden on an accused in a criminal trial, as opposed to an evidential burden only. See, [Joint Judgment of Mr. Justice O'Donnell, Chief Justice and Ms. Justice Iseult O'Malley](#) delivered 28 August 2023.

¹⁵ See, [submission made by the Commission to the Supreme Court in the case of C.W. v Minister for Justice, Ireland and the Attorney General](#) (March 2023).

¹⁶ See, [Joint Judgment of Mr. Justice O'Donnell, Chief Justice and Ms. Justice Iseult O'Malley](#) delivered 28 August 2023.

whether section 10(3) imposes a legal rather than an evidential burden of proof as the Bill progresses through the legislative process.

Search warrants

Section 15 of the Bill sets out very significant proposed powers of search, including the requirement of persons present during a search to provide the password of any computer which the searchers wish to examine or be subject to a Class A fine or imprisonment for up to 12 months for resisting to do so. We note that the wording of the Bill closely mirrors the search warrant power contained in the General Scheme of the *Garda Síochána (Powers) Bill 2021*.¹⁷ We previously set out our significant concerns as to the proportionality of the interference with rights permitted under Head 16 of the *Garda Síochána (Powers) Bill 2021* and we wish to reiterate these concerns our recommendations in the context of the proposed powers now set out under section 15 of the Bill.¹⁸

The question of whether or not it is constitutionally permissible to require persons to provide passwords, during a search, on pain of a Class A fine or imprisonment, requires detailed consideration from the State.¹⁹ In our commentary on the *Garda Síochána (Powers) Bill 2021*, we noted the coercive force behind the power to require persons to provide passwords or potentially commit a criminal offence for resisting to do so.²⁰

¹⁷ See Heads 15 to 22 of the [Garda Síochána \(Powers\) Bill 2021](#).

¹⁸ In our legislative observations on the *Garda Síochána (Powers) Bill*, we expressed concern on the proportionality of the rights interference as it provides for a person operating under warrant to have access to the sensitive personal information on a person's computer or phone and to inspect a person's private, social, and professional life for evidence of criminal wrongdoing. We recommended two safeguards in the authorisation of search warrants, at a very minimum: (a) that the judge issuing the warrant must authorise the exercise of the powers to demand a password or encryption key and access a computer where satisfied that it is reasonably necessary; and (b) that such a requirement may only be made of a person at the place being searched where it is reasonably believed that evidence relating to an offence is to be found on the computer. We further recommended that consideration be given to the approaches in other jurisdictions to the legality of compelling the communication of a password. We reiterate our recommendations in the context of this legislation. IHREC, [Submission on the General Scheme of the Garda Síochána \(Powers\) Bill](#) (April 2022), pp. 53–56.

¹⁹ With regards to section 15 of the Bill, we believe there are serious issues of proportionality that would arise in respect of the powers set out in the Bill under Article 40.5 (inviolability of the dwelling) and 40.3.2 (property rights) of the Constitution. While obstruction of a search may legitimately be criminalised, a refusal to provide a password should not, in our view, automatically amount to obstruction, as section 15 appears to require. The provisions of section 15 also potentially give rise to issues in respect of a disproportionate interference with the privilege against self-incrimination under Article 38.1 (right to silence) of the Constitution if evidence uncovered from the search of the computer is later used against the person who was forced to provide a password to it.

²⁰ We also raised concern that exercising a power to demand the provision of a password may infringe on the privilege against self-incrimination under the Constitution and Article 6 ECHR. IHREC, [Submission on the General Scheme of the Garda Síochána \(Powers\) Bill](#) (April 2022), pp. 54 -55.

In addition, the search warrant power in the Bill does not require the warrant-seeker to expressly set out in the warrant application that they intend to access such computers and why. We wish to draw attention to the recent decision of the Supreme Court in *DPP v Quirke*²¹ (in which we appeared as *amicus curiae*), wherein the Supreme Court strongly emphasised the enhanced protection to be afforded to persons whose electronic data is sought following the issuing of a search warrant. It is our view that the State should now reconsider the search warrant power in the Bill in light of *Quirke*, as the absence of such safeguards is a flaw.

Offences aggravated by hatred

We are of the view that additional offences, including sexual offences, could be included in the list of offences aggravated by hatred in Part 3.²² Consideration should also be given to whether hate offences committed against disabled people, including ‘mate crime’ are adequately addressed within the legislation. While these offences may be addressed under section 20, we are of the view that standalone offences should be included to ensure that the legislation adequately and appropriately addresses the most prevalent offences aggravated by hatred.

Review of the legislation

We note that the Bill does not provide a mechanism to review the adequacy and effectiveness of the legislation after a set period. We strongly believe there is a need to include a statutory requirement for an independent review of this legislation three years after commencement. This would allow an assessment of how the provisions of the legislation are operating in practice and to understand whether it is achieving its purpose in a way that is not disproportionately impacting on rights, such as the freedom of expression, and the rights of victims and defendants. The review report should be placed before the Houses of the Oireachtas to ensure adequate parliamentary scrutiny of the legislation.

This review should involve consultation with relevant stakeholders involved in the application of the legislation, such as legal practitioners, judges and An Garda Síochána. In addition, it should include a public consultation, consultation with relevant civil society organisations and affected

²¹ [DPP v Quirke](#) [2023] IESC 5.

²² The additional offences could include: threats to commit criminal damage (such as arson) under section 3 of the Criminal Damage Act 1991; burglary and aggravated burglary under sections 12 and 13 of the Criminal Justice (Theft and Fraud Offences Act) 2001; robbery and false imprisonment under sections 14 and 15 of the Non-Fatal Offences against the Person Act 1997. See IHREC, [Submission on the General Scheme of the Criminal Justice \(Hate Crime\) Bill](#) (February 2022) pp. 47–53.

persons (both victims and offenders). The review report should include data on the number of prosecutions, convictions, and length of sentences for the respective offences, as well as information on the training provided to the criminal justice actors responsible under the legislation.