

COALITION AGAINST HATE CRIME IRELAND

Submission to the Oireachtas
Joint Committee on Justice on the
General Scheme of the Criminal
Justice (Hate Crime) Bill 2021

August 2021



Executive Summary

This joint Coalition Against Hate Crime Ireland (CAHC) submission examines the General Scheme of the Criminal Justice (Hate Crime) Bill 2021. The CAHC has campaigned for the review of the Prohibition of Incitement to Hatred Act 1989 and hate crime legislation for several years, and we therefore welcome the Bill.

We call on the government to ensure that this legislation is only one part of a multi-faceted and comprehensive response to the two distinct but interconnected issues of hate crime and hate speech (online and offline). Robust policy commitments must be made, and proper implementation measures must be taken to ensure this legislation is effective, developed in strong collaboration with civil society organisations, affected communities and other stakeholders.

Hate crime and hate speech are two distinct problems and the legal and policy response should reflect this difference. In the framework of the preparation of this Bill, consultations only took place on incitement to hatred. The Coalition notes that specific and separate consultations on hate crime are necessary to ensure a transparent and informed process of decision making on key choices in the Bill, such as decisions on aggravated offences, protected characteristics, and the legal test. We call on government to carry out further consultations with affected groups and other stakeholders on the experience of hate crime in Ireland.

This submission contains a list of key general principles, which consider the potential impact of this legislation on a range of rights, including the right to freedom of expression and the right to a fair trial, as well as the need to ensure general rule of law principles are respected.

With regard to Part 1 of the Bill (Incitement to Hatred), we consider that while there is an argument for the inclusion of incitement to hatred and hate crime offences in the same legislation, it may be better from a clarity perspective if these distinct types of offences were separated. We also consider that the title of the Bill should include a reference to incitement to hatred.

The Coalition considers that the definition of "hatred" should reflect international standards and that there is a need for a clearer framework and rationale for the inclusion or exclusion of protected characteristics in the list of "protected

characteristics”.

We identify some problematic elements of the new offences created under Part 1, including the fact that it is not clear what precise type of speech the incitement to hatred offence is criminalising, or what sources government drew on in choosing the language and definitions used for this offence. We call on the government to ensure that any offence criminalising speech must reach a sufficient threshold, in line with international human rights principles on freedom of expression.

We also seek more clarity on the scope of the dissemination offence, especially in relation to body corporates. We are critical of different elements of the new defences, calling on Government to ensure that these are not so overly broad as to permit dissemination of incitement to hatred in inappropriate circumstances.

The Coalition urges the government to ensure that this legislation synergises with and complements other national and European legislative processes seeking to regulate online content.

We are strongly of the view that an individual suspect’s right to presumption of innocence and the ordinary burden of proof in criminal matters (beyond reasonable doubt) should be protected.

We welcome the clarification that an offence can be committed where no person has been incited to hatred or where no actual instance of harm or unlawful discrimination has occurred.

In relation to Part 2 of the Bill (Hate Crime), the Coalition welcomes the creation of aggravated offences which recognise the additional harm caused to victims of such crimes. We call on government to clarify the criteria used to include or exclude offences in the list of aggravated offences, and we consider that such list should include the offences which are most commonly committed against the protected individuals, groups and communities identified with the protected characteristics.

The Coalition calls on government to clarify the justification for exclusively using the term “prejudice”, without definition, and suggests that legislation could be amended to include the terms ‘bias’ and ‘hostility’. We ask for an explanation of why the motivation test has been chosen, noting the different views of coalition members on this aspect of the Bill.

We also call for consistency in approach to protected characteristics within the Bill and encourage clarity in ensuring prejudice on the basis of both *actual* and *perceived* membership or association with a protected characteristic is included in aggravated offences. We note that the legislation should ensure that prosecutors can identify more than one protected characteristic when seeking a conviction to allow for an intersectional approach, and we welcome the provision on alternative verdicts. While we welcome the creation of enhanced sentencing and the provision that in order for a prejudice motive to constitute an aggravating factor it does not have to be the sole factor, we note that as far as we are aware, the list of offences under Schedule 1 is not public. We call on government to ensure that the rationale for including or excluding offences in Schedule 1 is made clear, while also questioning whether the option of considering bias motive as an aggravating factor for all offences should be available.

In relation to proof of bias motivation in this context, we consider that any evidence to be taken into account of a bias motive should meet ordinary criminal standards and be proved beyond reasonable doubt. We also seek clarification on the methods envisaged for recording the bias motive and question whether this will always be appropriate and/or possible.

We note the outstanding need for sentencing principles and sentencing guidelines in Ireland to ensure transparency and proportionality, as well as the availability of community sentencing where appropriate. The Coalition supports the option of restorative justice in hate crime cases.

The Coalition considers that it is very unusual to include bias indicators in legislation, and we suggest that such a list would be more appropriate in separate guidance or policy documents that can assist gardaí and prosecutors but will not limit them.

We welcome the clarification that in determining motivation by prejudice, it shall not be necessary to show that prejudice was the only, or the principal motivation for the offence. However, we consider that this provision should be included in a way that makes it more visible within the Bill, suggesting that it could either be included in each amendment creating each aggravated offence or in a separate Head.

The Coalition notes that the new offence of denial or gross trivialisation of crimes of

genocide does not seem in line with EU standards, as it lacks the fundamental element of incitement to violence or hatred against a member of a protected group or a group, it lacks the act of “condoning” and there is no reference to war crimes or crimes against humanity or the Statute of the ICC. We recommend that the Irish legislation should reflect the requirements of the relevant EU Framework Decision.

In Annex 1, several members of the Coalition address the impact of hate crime and extreme hate speech on the stakeholders they represent and/or work with and why hate crime legislation is so important for different groups and communities.

Introduction

1. The Coalition Against Hate Crime Ireland is comprised of 18 civil society organisations, one academic research group and one academic researcher.

The members are:

- Age Action Ireland
- BeLonG To
- Doras
- Dr. Lucy Michael (academic researcher)
- European Centre for the Study of Hate, University of Limerick
- Immigrant Council of Ireland
- Inclusion Ireland
- Independent Living Movement Ireland
- Irish Council for Civil Liberties (ICCL)
- Irish Network Against Racism (INAR)
- Irish Traveller Movement (ITM)
- LGBT Ireland
- LGBT Travellers
- Nasc – Migrant and Refugee Rights Centre
- National LGBT Federation
- National Traveller Women's Forum
- National Youth Council of Ireland (NYCI)
- Pavee Point Traveller & Roma Centre
- Sports Against Racism Ireland (SARI)
- Transgender Equality Network Ireland (TENI)

2. The purpose of the Coalition is to promote meaningful reform of law, policy and practice as it relates to hate crime in Ireland including, but not limited to, hate crime legislation; improving data collection in the reporting and recording of hate crime and hate incidents; education; training and awareness raising activities; hate speech; cyber hate crime; supporting victims of hate crime and ensuring effective implementation of the Victims' Directive. Thus, the remit of the Coalition goes beyond hate crime, but incorporates a multifaceted and multi-layered approach to addressing identity-based hate or hostility as it manifests in an Irish context, State responses to same, and impacts on individuals'

access to justice.

3. The Coalition includes organisations representing commonly targeted groups, as well as academics and researchers concerned with cross-community experiences of, and responses to, hate crime. In this context, the Coalition has the capacity to explore shared and intersectional experiences of hate crime, and to act as a unified voice in the Irish context.
4. A number of organisations within the Coalition will be making individual submissions, in addition to endorsing this joint submission.
5. The Coalition against Hate Crime has been campaigning for the review of the Prohibition of Incitement to Hatred Act 1989¹ and the introduction of hate crime legislation for a number of years. We regard the absence of such legislation as a significant gap in Irish law. We therefore welcome this Bill and look forward to continued engagement on the issue of extreme hate speech and hate crime.
6. We call on Government to ensure that this legislation is one part of a multi-faceted and comprehensive response to the two distinct but interconnected issues of hate crime and hate speech. Robust policy commitments must be made and should include a national action plan against hate speech and hate crime in particular in online spaces, awareness campaigns, education and training for public sector actors, including An Garda Síochána and the DPP. Policy responses should be designed as an instrument to tackle all forms of hate speech, including those which do not reach the threshold of criminality. We consider it is vital to recognise that some of the groups that experience hate crime are also subject to over policing and care must be taken in drafting to ensure that the groups that most require the protection this legislation affords should not be disproportionately targeted as suspects. We also underline the importance of ensuring that it is open to prosecutors to pursue an intersectional approach where individuals are targeted because of more than

¹ Available at: <http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/print#sec6>.

one protected characteristic. Policies should recognise that where people are deprived of or are subject to restrictions on their liberty in places such as psychiatric wards or congregated settings, this can put certain groups at particular risk.

7. Proper implementation measures to ensure this legislation is effective must be in place. This includes ensuring there is a proper firewall for individual reporting to gardaí so that individuals can be assured that their immigration status will not be investigated by An Garda Síochána if they report a hate crime or cooperate in an investigation²; the government must educate the population about the new law and a widespread public awareness campaign should be taken when the Bill becomes law.
8. These measures should be developed in strong collaboration with civil society organisations, affected communities and other stakeholders.
9. The Coalition welcomed the government consultation in 2019 on hate speech and the resulting report published in December 2020³. However, we would like to highlight the fact that this consultation did not specifically address hate crime and the hate speech consultation documents contained an explicit commitment to carry out a specific separate consultation on hate crime, which never happened⁴. Hate crime and hate speech are two distinct problems and the legal and policy response should reflect this difference. Some members of the Coalition consider that incitement to hatred and hate crime should be legislated for in two separate pieces of legislation, though we recognise that the same protected groups may be subject to both categories of offence.

² For example, deportation measures could be put on hold during an investigation.

³ Available at:

http://www.justice.ie/en/JELR/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf/Files/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf.

⁴ Review of the Prohibition of Incitement to Hatred Act 1989 Public Consultation, October 2019. Available at: http://www.justice.ie/en/JELR/A_Review_of_the_Prohibition_of_Incitement_to_Hatred_Act_1989.pdf/Files/A_Review_of_the_Prohibition_of_Incitement_to_Hatred_Act_1989.pdf.

10. In light of previous commitments and the ongoing legislative process, we call on government to carry out further consultations with affected groups and other stakeholders on the experience of hate crime in Ireland. We believe this is vital to ensure the law responds to needs on the ground, including when deciding on the list of aggravated offences and the list of protected characteristics.

General Principles

11. This Bill amends the Prohibition of Incitement to Hatred Act 1989 and creates new offences in Irish criminal law. Given the potential impact on other rights, including the right to freedom of expression and the right to a fair trial, as well as the need to ensure general rule of law principles are respected, the Coalition considers that the following principles should underpin this legislation:

1. Provisions must be drafted in a clear and precise manner to ensure that all legal persons understand where the threshold is between criminal and non-criminal speech and behaviour.
2. Government must provide a clear rationale and decision making framework for the inclusion and exclusion of 'protected characteristics'.
3. This legislation should be consistent with other relevant national and European legislation including the proposed Digital Services Act⁵ and the Online Safety and Media Regulation Bill⁶, all of which should be compliant with human rights law; as well as the Victims' Rights Directive⁷.
4. The law must not disproportionately interfere with other rights such as the right to freedom of expression, fair trial and procedural rights.
5. The law should include a requirement for a comprehensive review of the legislation, such as within 3 years, as well as consultative monitoring of its implementation.

⁵ Available at: <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

⁶ Available at: <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/>.

⁷ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029>.

Analysis of the General Scheme of the Criminal Justice (Hate Crime) Bill 2021

Head 1 Preliminary and general (short title and commencement)

12. The Criminal Justice (Hate Crime) Bill performs two functions. First, it reforms the existing law on incitement to hatred. Second, it creates new categories of offences that can be considered hate crimes as well as a general provision on aggravated sentencing. The Coalition considers that while there is an argument for the inclusion of incitement to hatred and hate crime offences in the same legislation, it may be better from a clarity perspective if these distinct type of offences were separated. If they remain in the same Bill, the distinction between the types of offences should be made more clear in the Bill itself. We also consider that the Title of the Bill should reflect both of these functions by including reference to incitement to hatred.

Head 2 Interpretation

Provide that:

In this Act—

“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.

13. The Coalition considers that the definition of hatred in this legislation should meet international standards, including as outlined by the European Commission against Racism and Intolerance (ECRI)⁸ and by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression⁹.

⁸ ECRI, ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015. Available at: <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>.

⁹ A/67/357. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/PDF/N1250125.pdf?OpenElement>.

14. The interpretation section provides that:

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

“ethnicity” includes membership of the Traveller community

“religion” includes the absence of religious belief

“gender” includes gender expression or identity

“disability” has the same meaning it has in the Equal Status Act 2000

We note both the term ‘ethnic origin’ and ‘ethnicity’ are used here and we recommend the use of one term.

15. As noted above, the Coalition considers that the list of protected characteristics could be expanded. Various stakeholders have referred to a number of other protected characteristics that could be included, such as sex characteristics, age, homelessness, socio-economic status, refugee status, residence status, citizenship and sex workers. The reference to “gender” could contain an explicit reference to non-binary identities.

16. The Coalition calls on government to provide a clear framework and rationale for the inclusion or exclusion of protected characteristics in this list.

Part 1 – Incitement to Hatred

Head 3

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

17. International standards are clear that only extreme forms of hate speech can

be criminalised. The offence of incitement to hatred can be considered an extreme form of speech where the definition is sufficiently narrow, clear and precise. The offence in Head 3, S.1 appears to have some problematic elements. First, inserting the definition of hatred as per the interpretation section we have two references to “real or perceived association with a protected characteristic”. Second, it is not clear what precise type of speech this offence is criminalising, given that there is no definition of harm or unlawful discrimination. ECRI has made clear that *“the relevant factors for a particular use of hate speech to reach the threshold for criminal responsibility are where such use both amounts to its more serious character - namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination - and the use concerned occurs in a public context”*¹⁰.

18. The Coalition calls on government to ensure that any offence criminalising speech must reach a sufficient threshold, in line with international human rights principles on freedom of expression. The wording must be clear and precise so that individuals can reasonably foresee what behaviour now constitutes a criminal offence. Precision and clarity are vital to ensure the law is operable.

19. We note the addition of ‘recklessness’ that broadens the test of intention beyond the Prohibition of Incitement to Hatred Act 1989. The Coalition notes that this reflects the standard in many other criminal offences and does not object to it.

20. The Bill needs to be amended to ensure internal clarity and consistency. We are unclear why certain terms have been defined and others not defined. We would welcome clarity on this point.

21. The Coalition is unconvinced that the wording of s.3 makes the knowing facilitation of the dissemination of incitement to hatred, as defined by law, by a corporate body a criminal offence.

¹⁰ ECRI, ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015, para 173. Available at: <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>.

Head 3(3) provides:

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

For example, if an individual disseminates material constituting incitement to hatred, at what point is the company held liable for dissemination? If it is the intention of the legislature to create a criminal offence of dissemination by a corporation, consideration should be given to clearer and more precise wording. We note that this legislation must be consistent with other national and European legislation seeking to regulate online content, including the Online Safety and Media Regulation Bill and the European Digital Services Act.

22. Head 3(5)(a) provides:

in a prosecution for an offence under paragraph (3), it shall be a defence to prove that –

(a) the material concerned consisted solely of

- a reasonable and genuine contribution to literary, artistic, political, scientific, or academic discourse,*
- an utterance made under Oireachtas privilege,*
- fair and accurate reporting of court proceedings,*
- material which has a certificate from the authorising body, in the case of a film or book, or*
- a communication necessary for any other lawful purpose, including law enforcement or the investigation or prosecution of an offence under this Act*

23. The Coalition notes that defences in the Prohibition of Incitement to Hatred Act 1989 were more limited. We call on Government to ensure that the defences provided for in this legislation are not so overly broad as to permit dissemination of incitement to hatred in inappropriate circumstances. The Coalition considers the legislature should revisit the references to:

- political discourse, noting that often anti-Traveller, anti-migrant and anti-Roma incitement to hatred happens in the political sphere;
- academic discourse, noting that migrants have often been the subject of incitement to hatred masked as academic discussion;
- clarity around what “genuine” means, noting that this appears to be a highly subjective term, especially in relation to artistic contributions.
- “material which has a certificate from the authorising body, in the case of a film or book”, noting that there is currently no authorising body for books in Ireland and the body for film authorisation is concerned with appropriate age categories.
- “other lawful purpose” seems vague given that “law enforcement or the investigation or prosecution of an offence under this Act” is far more precise, and arguably more comprehensive.

24. We consider adding a defence that will ensure ‘fair and accurate reporting for education or information purposes’ may be appropriate.

25. Head 3(5)(b) provides:

- (b) in the case of dissemination of material by a body corporate,*
- *the body has in place reasonable and effective measures to prevent dissemination of communications inciting hatred generally,*
 - *was complying with those measures at the time, and*
 - *was unaware and had no reason to suspect that this particular content was intended or likely to incite hatred,*

The Coalition urges government to ensure that this legislation synergises with and/or complements other legislation seeking to regulate online content.

26. Head 3(6) provides that:

- (6) In proceedings for an offence under paragraphs (1) or (3) of this section, it shall be presumed that:*
- *a person publishing or communicating material under paragraphs (1) or (3) knew what that material contained*
 - *understood what it meant, and*
 - *where posted on a public forum, knew it would be public speech unless that person can show, on the balance of probabilities, that this was*

not the case.

The Coalition is strongly of the view that an individual suspect's right to presumption of innocence and the ordinary burden of proof in criminal matters (beyond reasonable doubt) should be protected.

27. Head 3(7) provides:

(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, and,
(b) 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.

28. The Coalition welcomes the clarification that an offence can be committed where no person has been incited to hatred or where no actual instance of harm or unlawful discrimination has occurred.

29. The Coalition has no further comments on this head.

Part 2 – Hate Crime

Head 4 - Head 6

General principles and considerations applicable to Head 4 to 6 of the General Scheme introducing new aggravated offences

30. It is widely recognised that the impact of hate crime can be greater than that of crimes committed without a bias motive, especially in relation to the effects on targeted individuals and their communities¹¹. The Coalition Against Hate Crime welcomes the creation of new aggravated forms of existing offences, as these recognise the additional harm caused by the "hate" element of the crime. As highlighted by OSCE, part of the importance of hate crime legislation is the symbolic value – for victims and society at large - of labeling the offence, and

¹¹ On the impact of hate crime, see OSCE/ODIHR, Understanding the Needs of Hate Crime Victims, September 2020, p. 11-15. Available at: <https://www.osce.org/files/f/documents/0/5/463011.pdf>.

explicitly condemning the bias motive. In addition, with aggravated offences patterns relating to the commission of such crimes have greater visibility and data on hate crime is easier to collect, which can then better inform the legal and policy responses required to combat such crimes¹².

31. The Criminal Justice (Hate Crime) Bill introduces twelve new aggravated offences, amending the Non-Fatal Offences Against the Person Act 1997¹³, the Criminal Damage Act 1991¹⁴ and the Criminal Justice (Public Order) Act 1994¹⁵. These are:

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

32. The Coalition considers that the rationale on what offences to create as aggravated offences were chosen should be clarified. A number of crimes such as sexual crimes have been excluded. We call on government to clarify the criteria used to include or exclude offences in the list of aggravated offences. We consider a proper consultation on what type of hate crime is experienced in

¹² OSCE – Hate Crime Laws: A Practical Guide, p. 35. Available at:

<https://www.osce.org/files/f/documents/3/e/36426.pdf>.

¹³ Available at: <http://www.irishstatutebook.ie/eli/1997/act/26/enacted/en/html>.

¹⁴ Available at: <http://www.irishstatutebook.ie/eli/1991/act/31/enacted/en/html>.

¹⁵ Available at:

<http://www.irishstatutebook.ie/eli/1994/act/2/enacted/en/html>.

Ireland would have assisted with a more transparent process of determination.

33. The Coalition also considers that the list of aggravated offences should have some identifiable link to the range of protected characteristics identified under Head 2 (Interpretation). The list of aggravated offences should include the offences which are most commonly committed against the protected individuals, groups and communities identified with the protected characteristics. We note that the type of crime committed against different groups and communities can vary significantly (see Annex 1).

34. We note the outstanding need for sentencing principles and sentencing guidelines, as required under the Judicial Council Act 2019¹⁶, to ensure transparency and proportionality, as well as the availability of community sentencing where appropriate. The Coalition also supports the option of restorative justice, in line with the Criminal Justice (Victims of Crime) Act 2017¹⁷. This point applies equally to Head 7.

35. The elements of each new aggravated offence created by this Bill (Head 4 to 6) are identical. They include:

- a. Aggravated by prejudice
- b. Motivated by prejudice
- c. Prejudice must be against a protected characteristic
- d. Provision for an alternative verdict

Given these elements are the same in each new aggravated offence, we will analyse the elements introduced for 'assault motivated by prejudice' and this analysis should be considered to apply to each of the twelve offences listed in the Bill.

Head 4 provides that:

*The Non-Fatal Offences Against the Person Act 1997 is amended:
After section 2, to insert a new section 2A as follows:*

Assault aggravated by prejudice

¹⁶ Available at: <http://www.irishstatutebook.ie/eli/2019/act/33/enacted/en/html>.

¹⁷ Available at: <http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html>.

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

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

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

i. *"Aggravated by prejudice"*

The Coalition notes that hate crime legislation in other jurisdictions tends to either use more than one term when referring to bias motivation, and/or to define the terms used. The Coalition considers that government should make clear the justification for exclusively using the term "prejudice", without definition. In order to expand the scope, and therefore effectiveness from a conviction perspective, the legislation could be amended to include the terms 'bias' and 'hostility' in addition to 'prejudice' as motivation for an aggravated offence.

ii. *"Motivated by prejudice"*

The Coalition considers that more research and a wide consultation should have taken place on hate crime in Ireland in order to inform the legal test. Looking to other jurisdictions, a number of different tests have been proposed by various stakeholders such as the motivation test, a combination of the motivation and demonstration test and the discriminatory selection approach. The Coalition considers that the choice of legal test should be informed and based on an evaluation of the implications for all stakeholders involved, including victims, affected communities, offenders and society as a whole.

This choice should also be informed by what government considers to be effective legislation. While different members of the Coalition have different views on the appropriateness of the motivation test, we call for a clearer explanation of why this test has been chosen by government and what factors and values, relevant to the Irish context, have underpinned that choice.

iii. *“Against a protected characteristic”*

The current phrasing *“against a protected characteristic”* contained in all new aggravated offences may be considered to be inconsistent with the wording in Head 3 (creating the offence of incitement to hatred), which reads:

“... hatred against another person or group of people due to their real or perceived association with a protected characteristic.”

It is vital that aggravated offences include offences motivated by prejudice (or whatever wording and test is in the final Act) because of either actual or perceived membership or association with a protected characteristic. The Coalition is concerned as to whether the wording ‘against a particular characteristic’ currently in the Bill will be interpreted in the same manner.

We call for consistency in approach to protected characteristics and encourage clarity in ensuring prejudice on the basis of both *actual* and *perceived* membership or association with a protected characteristic is included in aggravated offences.

We note that individuals and groups may be targeted based on multiple protected characteristics. The legislation should ensure that prosecutors can identify more than one protected characteristic when seeking a conviction. Intersectionality should also be taken into account in accompanying guidelines for all stakeholders involved in hate crime cases (including prosecutors and gardaí) and an intersectional approach should be adopted at every opportunity, including reporting.

iv. Alternative verdict

We welcome the provision for an alternative verdict, which ensures that prosecutors may choose to prosecute a suspect on the basis of the ordinary form of the offence if the aggravation aspect of the offence has not been proven.

36. As addressed further below, Head 8 (Determining whether an offence was motivated by prejudice) provides that *“in determining motivation by prejudice for the purposes of this Act, it shall not be necessary to show that prejudice was the only, or the principal motivation for the offence.”* This provision ensures that the motivation of prejudice does not have to be the sole motivation of the offender. The Coalition welcomes this provision. However, we consider that in terms of structure, this provision is buried under Head 8. In order to ensure clarity in the interpretation of each aggravated offence, we suggest adding *“motivated in whole or in part by prejudice”* into the wording of each aggravated offence.

37. Alternatively, this point could be included in a separate Head of Bill, rather than combined with other points.

Head 7 – General provision where a scheduled offence is aggravated by prejudice

38. Head 7 provides:

In a prosecution for any offence listed in Schedule 1 of this Act, the court shall, in determining the appropriate sentence, take account of evidence presented to the court during the trial which may indicate to the court that the motive of the perpetrator in committing the offence consisted in whole or in part of prejudice on the part of the perpetrator against a protected characteristic within the meaning of this Act.

Where the court determines in accordance with this provision that the perpetrator was so motivated, the court shall treat this as an aggravating factor in determining the appropriate sentence, and the fact that the offence concerned was thus aggravated by prejudice shall be reflected clearly in the record of the proceedings.

39. The Coalition welcomes the creation of a general provision on enhanced

sentencing for other offences where bias motive is present. We welcome the provision that in order for a prejudice motive to constitute an aggravating factor it does not have to be the sole factor: *“the motive of the perpetrator in committing the offence consisted in whole or in part of prejudice”*.

40. We note that Head 7 refers to a Schedule 1 which will contain the offences where bias motive can be considered an aggravating factor in sentencing. Schedule 1 is not published, as far as we are aware, and it is therefore impossible to comment on the inclusion or exclusion of offences.

41. We would, however, again call on government to ensure that the rationale for including or excluding offences in Schedule 1 is made clear. We would also question whether the option of considering bias motive as an aggravating factor for all offences should be available.

42. The Coalition notes that the wording of Head 7 may cause confusion in terms of what standard of proof is required for evidence “presented to the court” to be taken into account in sentencing. We consider that any evidence to be taken into account of a bias motive should meet ordinary criminal standards and be proved beyond reasonable doubt.

43. Head 7 also provides that *“where the court determines in accordance with this provision that the perpetrator was so motivated [...] the fact that the offence concerned was thus aggravated by prejudice shall be reflected clearly in the record of the proceedings”*. The Coalition would welcome clarification as to how this motive can be reflected in the record of proceedings, especially at the District Court level, where no official record is made of Court proceedings. We would also question the fairness of such motive going on an offender’s record in any circumstance where the evidence of bias motive has not been proven beyond reasonable doubt.

Head 8 – Determining whether an offence was motivated by prejudice

44. The Coalition notes that it is very unusual to include bias indicators in legislation, as these are usually used as an investigation tool¹⁸. Individuals, groups and

¹⁸ OSCE, Using Bias Indicators: A Practical Tool for Police, 2019. Available at:

communities experience hate crime in different ways (see Annex 1), and this should be taken into account when outlining bias indicators. Different bias indicators might be more appropriate for different groups and they may change over time. Thus, including a list of indicators in legislation may not be appropriate. We suggest that a list of bias indicators would be more appropriate in separate guidance or policy documents that can assist gardaí and prosecutors but will not limit them.

45. We welcome the provision that clarifies that *"in determining motivation by prejudice for the purposes of this Act, it shall not be necessary to show that prejudice was the only, or the principal motivation for the offence."* However, as noted above for the purposes of clarity, we consider that this provision should either be included in each amendment creating each aggravated offence or in a separate Head.

Head 9 – Denial or gross trivialisation of crimes of genocide

46. Head 9 provides:

A person commits an offence who 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 (the Genocide Convention).

A person guilty of an offence under this section shall be liable on summary conviction to a [Class C fine] or imprisonment for a term not exceeding twelve months, or both.

47. This provision introduces a new offence of denial or gross trivialisation of crimes of genocide. The note provided in the General Scheme for Head 9 states that *"the requirement to make genocide denial a criminal offence is a requirement under EU Council framework decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law"*¹⁹. However, the provision aimed at transposing the decision is not in line with the EU Framework which requires Member States to take measures to ensure the

https://www.osce.org/files/f/documents/8/9/419897_0.pdf.

¹⁹ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0913&from=en>.

following conduct is punishable:

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

The key element of incitement to violence or hatred against a member of a protected group or a group is not present in this provision, substantially changing the nature of the offence. We also note that the act of “condoning” was not included, and no reference to the Statute of the ICC was included.

48. We note that in its last country-specific report on Ireland, ECRI recommends that Irish criminal law is amended to include the offences of “public denial, trivialisation, justification or condoning of crimes of genocide, crimes against humanity or war crimes”²⁰. However, given concerns that these offences may be overly broad in light of the need to protect freedom of expression and the disparate approach across different jurisdictions, the Coalition recommends that the Irish legislation should reflect the requirements of the EU Framework, thus in fact expanding the offence of incitement to hatred, rather than creating separate offences.

49. In any event, the legislation does not address crimes against humanity and war crimes but genocide only, while both ECRI and the EU Council Framework Decision cover the three. We call for the inclusion of war crimes and crimes against humanity.

50. The definition of “gross trivialisation” should be clarified.

51. In light of the nature of the offence, if amended in line with the above, the Coalition suggests moving this Head under Part 1 – Incitement to hatred.

²⁰ ECRI, ECRI report on Ireland (fifth monitoring cycle), adopted on 2 April 2019, published on 4 June 2019, p. 12. Available at: <https://rm.coe.int/fifth-report-on-ireland/168094c575>.

Head 10 Repeal

52. The Coalition has no comment.

Head 11 Consequential Amendments to other Acts

53. The Coalition has no comment.

Annex 1 – The impact of hate crime and extreme hate speech on different groups and communities and the importance of hate crime legislation for the stakeholders represented by the different members of the Coalition

- European Centre for the Study of Hate, University of Limerick: Hate crime produces both direct and indirect victims; its impacts are felt by the communities who share the identity for which the victim was targeted. There is a cost to the national community also, where hate crimes erode social cohesion and prevent the full and equal participation of all members of society. The introduction of hate crime legislation is important for ensuring consistency in the recognition and treatment of the hate element of crimes, victims and offenders.
- Irish Network Against Racism (INAR): INAR's iReport system has logged thousands of hate crimes and hate incidents, and their impacts, since 2013. Our data consistently shows that hate crimes can have devastating physical, financial and psychological impacts on the private, family, social, educational and professional lives of minorities and their families and communities. Hate crimes hurt more than their 'ordinary' corollary; they can ruin lives and tear communities apart.
- Nasc - the Migrant and Refugee Rights Centre: We are actively engaged in anti-racism work and provide support to people who have experienced racially motivated hate crime or hate incidents. Through our work, we have seen how these incidents can shatter people's sense of safety, identity and belonging in

Ireland.

- Inclusion Ireland: People with intellectual disabilities, particularly those in congregated settings, are more likely to experience abuse, violence and neglect because they are often isolated, in vulnerable situations and without the possibility to report hate crime or incidents. These forms of violence can particularly impact on their well-being: trauma, depression, violent behaviours. It would often lead to more isolation and overprotection which is an added punishment for the victims. The introduction of hate crime legislation will enable a more systematic protection of minorities who are more at risk than others.
- National Youth Council of Ireland (NYCI): Through our Equality and Intercultural Programme we work to prevent hate crime and hate speech through our training programme on transformative practice, diversity awareness, racial justice, and intercultural youth work. However, the impact of hate crime on young people from minority identities is deeply felt. They describe experiencing personal attacks on themselves, their families, and on members of their communities resulting in responses ranging from serious mental well-being concerns to living with hypervigilance, anxiety, anger, despair and it often impacts on their self-exclusion from social opportunities.
- Doras: We provides support to more than 1,200 people each year, including people who have experienced racism and hate crime. The people we support have experienced physical and mental health difficulties, loss of employment, breakdown of relationships and increased social isolation as a consequence of experiencing racially motivated hate crimes.
- Pavee Point Traveller and Roma Centre: as minority ethnic groups, Travellers and Roma experience persistent racism and discrimination, in intersection with discrimination on the basis of gender and other equality grounds. Due to this widespread racism and discrimination, both Roma and Travellers are subjected to hate crime and hate speech on a daily basis by

private and public actors. In 2020, the EU Fundamental Rights Agency (FRA) found that among all surveyed Traveller and Roma groups, Irish Travellers (52%) have the third highest rate of hate-motivated harassment (such as offensive comments on the street or online). Pavee Point believes that the new legislation must be one tool within a wider, holistic approach to tackling institutional and structural racism and other prejudices within Irish society.

- BeLonG To Youth Services: central to our theory of change is the belief that systemic problems and underlying causes such as societal attitudes result in the challenges LGBTI+ young people face. We deal with the effects of these challenges through our support services, and are dedicated to solving the root causes of these challenges through training and education. However, through our youth work, our advocacy and our research we have witnessed a rise in both physical and verbal hate towards members of the LGBTI+ community, often with those who are the most vulnerable being the most likely to suffer victimisation.